NORTH CAROLINA COURT OF APPEALS REPORTS

VOLUME 57

4 MAY 1982

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15 JUNE 1982

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1983

CITE THIS VOLUME
57 N.C. App.

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THE COURT OF APPEALS
OF
NORTH CAROLINA

Chief Judge

EARL W. VAUGHN[1]

Judges

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GERALD ARNOLD
JOHN WEBB
HUGH A. WELLS
CECIL J. HILL
WILLIS P. WHICHARD
CHARLES L. BECTON
CLIFTON E. JOHNSON
E. MAURICE BRASWELL[2]
EUGENE H. PHILLIPS[3]
SIDNEY S. EAGLES, JR.[4]

Retired Chief Judge

NAOMI E. MORRIS[5]

Retired Judges

HUGH B. CAMPBELL
FRANK M. PARKER
EDWARD B. CLARK
ROBERT M. MARTIN[6]

Clerk

FRANCIS E. DAIL

ADMINISTRATIVE OFFICE OF THE COURTS

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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 Chief Judge by Chief Justice Joseph Branch and took office 3 January 1983.
2. Elected Judge 2 November 1982 and took office 1 December 1982.
3. Elected Judge 2 November 1982 and took office 4 January 1983.
4. Elected Judge 2 November 1982 and took office 3 January 1983.
5. Retired 31 December 1982.
6. Retired 31 December 1982.

TRIAL JUDGES OF THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

First Division

DISTRICT	JUDGES	ADDRESS
1	J. HERBERT SMALL	Elizabeth City
2	ELBERT S. PEEL, JR.	Williamston
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	HERBERT O. PHILLIPS III	Morehead City
4	HENRY L. STEVENS III	Kenansville
	JAMES R. STRICKLAND	Jacksonville
5	BRADFORD TILLERY	Wilmington
	N. B. BAREFOOT	Wilmington
6	RICHARD B. ALLSBROOK	Roanoke Rapids
7	FRANKLIN R. BROWN	Tarboro
	CHARLES WINBERRY	Rocky Mount
8	R. MICHAEL BRUCE	Mount Olive
	JAMES D. LLEWELLYN	Kinston

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	ROBERT L. FARMER	Raleigh
	HENRY V. BARNETTE, JR.[1]	Raleigh
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12	D. B. HERRING, JR.	Fayetteville
	COY E. BREWER, JR.	Fayetteville
	E. LYNN JOHNSON[2]	Fayetteville
13	GILES R. CLARK	Elizabethtown
14	THOMAS H. LEE	Durham
	ANTHONY M. BRANNON	Bahama
	JOHN C. MARTIN	Durham
15A	D. MARSH MCLELLAND	Burlington
15B	F. GORDON BATTLE	Chapel Hill
16	SAMUEL E. BRITT	Lumberton

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17B	JAMES M. LONG	Pilot Mountain
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	W. DOUGLAS ALBRIGHT	Greensboro
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	JAMES C. DAVIS	Concord
19B	HAL HAMMER WALKER	Asheboro
20	F. FETZER MILLS	Wadesboro
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	WILLIAM H. FREEMAN	Winston-Salem
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	PETER W. HAIRSTON	Advance
23	JULIUS A. ROUSSEAU	North Wilkesboro
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25	FORREST A. FERRELL	Hickory
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	WILLIAM T. GRIST	Charlotte
	KENNETH A. GRIFFIN	Charlotte
	ROBERT M. BURROUGHS	Charlotte
	CHASE BOONE SAUNDERS	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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ARTHUR L. LANE	Fayetteville
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PRESTON CORNELIUS	Mooresville
JAMES ARTHUR BEATY, JR.	Winston-Salem
RUSSELL G. WALKER, JR.	Asheboro
THOMAS S. WATTS	Elizabeth City
JOHN B. LEWIS	Farmville

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HENRY A. MCKINNON, JR.	Lumberton
GEORGE M. FOUNTAIN	Tarboro
ROBERT D. ROUSE, JR.[3]	Farmville

1. Appointed Resident Judge 1 January 1983 to succeed A. Pilston Godwin, Jr. who retired 30 December 1982.

2. Appointed Resident Judge 17 January 1983 to succeed E. Maurice Braswell who was appointed to the Court of Appeals 1 December 1982.

3. Retired 31 July 1982.

DISTRICT COURT DIVISION

DISTRICT	JUDGES	ADDRESS
1	JOHN T. CHAFFIN (Chief)	Elizabeth City
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2	HALLETT S. WARD (Chief)	Washington
	JAMES HARDISON	Williamston
3	ROBERT D. WHEELER (Chief)	Grifton
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10	GEORGE F. BASON (Chief)	Raleigh
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DISTRICT	JUDGES	ADDRESS
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	W. POPE LYON	Smithfield
	WILLIAM A. CHRISTIAN	Sanford
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	B. CRAIG ELLIS	Laurinburg
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	ROBERT R. BLACKWELL[5]	Reidsville
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	THOMAS G. FOSTER, JR.	Greensboro
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	KENNETH W. HONEYCUTT	Monroe
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	MICHAEL EARLE BEAL	Southern Pines
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	GARY B. TASH	Winston-Salem
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	R. KASON KEIGER	Winston-Salem
	DAVID R. TANIS	Winston-Salem
22	LESTER P. MARTIN, JR. (Chief)	Mocksville
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	SAMUEL ALLEN CATHEY	Statesville
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30	ROBERT J. LEATHERWOOD III (Chief)	Bryson City
	J. CHARLES MCDARRIS	Waynesville
	JOHN J. SNOW, JR.	Murphy

1. Appointed Judge 1 January 1983 to succeed John M. Walker who retired 30 December 1982.
2. Appointed Judge 2 December 1982 to succeed Henry M. Barnette, Jr. who was appointed to the Superior Court 1 January 1983.
3. Elected Judge 2 November 1982 and took office 6 December 1982.
4. Appointed Chief Judge 6 December 1982 to succeed Leonard H. van Noppen who retired 30 November 1982.
5. Appointed Judge 6 December 1982.
6. Appointed Chief Judge 6 December 1982.
7. Appointed Judge 6 October 1982.

ATTORNEY GENERAL OF NORTH CAROLINA

Attorney General

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Administrative Deputy Attorney General

CHARLES H. SMITH

Deputy Attorney General For Legal Affairs

JAMES M. WALLACE, JR.

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JOHN F. MADDREY
WILSON HAYMAN
BLACKWELL BROGDEN, JR.
EVELYN M. COMAN

DISTRICT ATTORNEYS

DISTRICT	DISTRICT ATTORNEY	ADDRESS
1	H. P. WILLIAMS	Elizabeth City
2	WILLIAM C. GRIFFIN, JR.	Williamston
3A	THOMAS D. HAIGWOOD[1]	Greenville
3B	W. DAVID MCFADYEN, JR.	New Bern
4	WILLIAM H. ANDREWS	Jacksonville
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16	JOE FREEMAN BRITT	Lumberton
17A	PHILIP W. ALLEN	Wentworth
17B	H. DEAN BOWMAN[7]	Westfield
18	LAMAR DOWDA[8]	Greensboro

1. Elected 2 November 1982 and took office 1 January 1983 to succeed Eli Bloom whose term expired 31 December 1982.
2. Elected 2 November 1982 and took office 1 January 1983 to succeed William Allen Cobb whose term expired 31 December 1982.
3. Elected 2 November 1982 and took office 1 January 1983 to succeed Willis E. Murphrey III whose term expired 31 December 1982.
4. Elected 2 November 1982 and took office 1 January 1983 to succeed Lee J. Greer whose term expired 31 December 1982.
5. Elected 2 November 1982 and took office 1 January 1983 to succeed Dan K. Edwards, Jr. whose term expired 31 December 1982.
6. Elected 2 November 1982 and took office 1 January 1983 to succeed Herbert F. Pierce whose term expired 31 December 1982.
7. Elected 2 November 1982 and took office 1 January 1983 to succeed Terry L. Collins whose term expired 31 December 1982.
8. Elected 2 November 1982 and took office 1 January 1983 to succeed Michael A. Schlosser whose term expired 31 December 1982.

DISTRICT ATTORNEYS

DISTRICT	DISTRICT ATTORNEY	ADDRESS
19A	JAMES E. ROBERTS	Kannapolis
19B	GARLAND N. YATES	Asheboro
20	CARROLL R. LOWDER	Monroe
21	DONALD K. TISDALE	Clemmons
22	H. W. ZIMMERMAN, JR.	Lexington
23	MICHAEL A. ASHBURN	Wilkesboro
24	JAMES T. RUSHER[9]	Marshall
25	ROBERT E. THOMAS[10]	Hickory
26	PETER S. GILCHRIST III	Charlotte
27A	JOSEPH G. BROWN	Gastonia
27B	W. HAMPTON CHILDS, JR.	Lincolnton
28	RONALD C. BROWN	Asheville
29	ALAN C. LEONARD[11]	Rutherfordton
30	MARCELLUS BUCHANAN III	Sylva

---

9. Elected 2 November 1982 and took office 1 January 1983 to succeed Clyde M. Roberts whose term expired 31 December 1982.

10. Elected 2 November 1982 and took office 1 January 1983 to succeed Donald E. Greene whose term expired 31 December 1982.

11. Elected 2 November 1982 and took office 1 January 1983 to succeed M. Leonard Lowe whose term expired 31 December 1982.

PUBLIC DEFENDERS

DISTRICT	PUBLIC DEFENDER	ADDRESS
3	DONALD C. HICKS III	Greenville
12	MARY ANN TALLY	Fayetteville
18	WALLACE C. HARRELSON	Greensboro
26	FRITZ Y. MERCER, JR.	Charlotte
27	CURTIS O. HARRIS	Gastonia
28	J. ROBERT HUFSTADER	Asheville

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Selby v. Taylor	57 N.C. App. 119	Denied, 306 N.C. 387
Sheets v. Sheets	57 N.C. App. 336	Denied, 306 N.C. 559
Shepherd v. Connestee	57 N.C. App. 371	Denied, 306 N.C. 559
Shepherd v. Oliver	57 N.C. App. 188	Denied, 306 N.C. 387
State v. Anderson	57 N.C. App. 602	Denied, 306 N.C. 559
State v. Bailey	56 N.C. App. 642	Allowed, 305 N.C. 760
State v. Beasley	57 N.C. App. 208	Denied, 306 N.C. 559 Appeal Dismissed
State v. Brown	56 N.C. App. 323	Denied, 305 N.C. 761 Appeal Dismissed
State v. Bryant	57 N.C. App. 600	Denied, 306 N.C. 560 Appeal Dismissed
State v. Carter	56 N.C. App. 435	Denied, 305 N.C. 761
State v. Copeland	56 N.C. App. 467	Denied, 305 N.C. 761
State v. Crawford	57 N.C. App. 371	Denied, 306 N.C. 745

Case	*Reported*	*Disposition in Supreme Court*
State v. Downes	57 N.C. App. 102	Denied, 306 N.C. 388 Appeal Dismissed
State v. Dunlap	57 N.C. App. 175	Denied, 306 N.C. 388
State v. Elam	56 N.C. App. 590	Denied, 305 N.C. 761
State v. Grant	57 N.C. App. 589	Denied, 306 N.C. 560
State v. Griffin	57 N.C. App. 684	Denied, 306 N.C. 560
State v. Griffin	57 N.C. App. 709	Denied, 306 N.C. 560
State v. Hall	57 N.C. App. 544	Denied, 305 N.C. 761
State v. Handy	57 N.C. App. 215	Denied, 306 N.C. 388
State v. Hanson	57 N.C. App. 595	Allowed, 306 N.C. 561
State v. Harris	47 N.C. App. 121	Denied, 305 N.C. 762
State v. Henry	57 N.C. App. 168	Denied, 306 N.C. 561
State v. Hinnant	57 N.C. App. 600	Denied, 306 N.C. 389
State v. Hoyle	57 N.C. App. 288	Denied, 306 N.C. 388
State v. Hudson	56 N.C. App. 172	Denied, 305 N.C. 762
State v. Jackson & Marshall	57 N.C. App. 71	Denied, 306 N.C. 389
State v. Jeffries	57 N.C. App. 416	Denied, 306 N.C. 561 Appeal Dismissed
State v. Jones	56 N.C. App. 259	Denied, 305 N.C. 762 Appeal Dismissed
State v. Kee	57 N.C. App. 372	Denied, 306 N.C. 561 Appeal Dismissed
State v. Kimbrell	57 N.C. App. 372	Denied, 306 N.C. 561
State v. Loye	56 N.C. App. 501	Appeal Dismissed 306 N.C. 748
State v. Mavrogianis	57 N.C. App. 178	Denied, 306 N.C. 562
State v. Melvin	53 N.C. App. 421	Denied, 305 N.C. 762
State v. Melvin	57 N.C. App. 503	Denied, 306 N.C. 748
State v. Morrow	57 N.C. App. 709	Denied, 305 N.C. 762
State v. Neeley	57 N.C. App. 211	Allowed, 305 N.C. 763
State v. Perry	57 N.C. App. 710	Denied, 306 N.C. 748 Appeal Dismissed
State v. Pinnix	56 N.C. App. 643	Denied, 305 N.C. 763
State v. Pisciotta	57 N.C. App. 710	Denied, 306 N.C. 749

Case	*Reported*	*Disposition in Supreme Court*
State v. Poplin	56 N.C. App. 304	Denied, 305 N.C. 763
State v. Riddle	56 N.C. App. 701	Denied, 305 N.C. 763 Appeal Dismissed
State v. Robertson	57 N.C. App. 294	Appeal Dismissed Denied, 305 N.C. 763
State v. Sherrill	57 N.C. App. 601	Denied, 306 N.C. 562
State v. Smith	57 N.C. App. 372	Denied, 305 N.C. 764
State v. Souhrada	57 N.C. App. 710	Denied, 306 N.C. 750
State v. Thomason	57 N.C. App. 601	Denied, 306 N.C. 562
State v. Washington	57 N.C. App. 309	Denied, 306 N.C. 563
State v. Washington	57 N.C. App. 666	Denied, 306 N.C. 750 Appeal Dismissed
State v. Williams	57 N.C. App. 372	Denied, 305 N.C. 764
State v. Wilson	57 N.C. App. 444	Denied, 306 N.C. 563
Taylor v. Greensboro News Co.	57 N.C. App. 426	Allowed, 306 N.C. 751
Tech Land Development v. Insurance Co.	57 N.C. App. 566	Denied, 306 N.C. 563
Texaco, Inc. v. Creel	57 N.C. App. 611	Allowed, 306 N.C. 564
Triangle Air Cond. v. Board of Education	57 N.C. App. 482	Denied, 306 N.C. 564
Turner v. Epes Transport Systems	57 N.C. App. 197	Denied, 306 N.C. 564
Williams v. Bethany Fire Dept.	57 N.C. App. 114	Allowed, 306 N.C. 564
Wright v. O'Neal Motors	57 N.C. App. 49	Denied, 306 N.C. 393

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

DAVID E. FULLER AND REID M. BOST, JR., D/B/A FULLER & BOST, A GENERAL PARTNERSHIP v. THE SOUTHLAND CORPORATION, D/B/A THE SOUTHLAND CORPORATION OF TEXAS, A CORPORATION

No. 8126SC530

(Filed 4 May 1982)

1. **Rules of Civil Procedure § 56.3— summary judgment—consideration of affidavit—requirement of personal knowledge**

An affidavit is not required to state specifically that it is made on personal knowledge in order to be considered upon a motion for summary judgment, it being sufficient if the affidavit can be interpreted so as to comply upon its face with the requirements of G.S. 1A-1, Rule 56(e).

2. **Rules of Civil Procedure § 56.3— summary judgment—affidavit statement not based on personal knowledge**

A statement in an affidavit that the affiant "believes" that a lease was signed by one plaintiff's secretary when he was in plaintiff's office was not based on personal knowledge and could not be considered upon a motion for summary judgment.

3. **Frauds, Statute of § 2— memorandum of lease—unconnected writings—internal reference to writings**

In order for separate writings which are not physically connected to constitute a sufficient memorandum of the terms of a lease to satisfy the statute of frauds, G.S. 22-2, the unconnected writings must contain a reference to the other writings and not merely a reference to the same subject matter.

4. **Frauds, Statute of § 2.1— memorandum of lease—genuine issue of material fact**

Although exhibits presented by plaintiffs had to be considered singly because they contained no internal references to each other, the exhibits, an affidavit by defendant's real estate manager, and a letter from the manager to

plaintiffs were sufficient to present a genuine issue of material fact as to the existence of a sufficient memorandum of the terms of a lease of space for a liquor store to satisfy the statute of frauds.

5. Frauds, Statute of § 2.1— sufficiency of memorandum of lease—parol evidence—apparent authority to sign lease

A letter from defendant's real estate manager to plaintiffs stating that defendant "will lease a 40 x 40 building adjacent to the 7-Eleven store at Tega Cay, South Carolina" and that the "monthly rental will be $400.00 and the term of lease will be 20 years" constituted a sufficient memorandum of the terms of the lease to satisfy the statute of frauds, G.S. 22-2, when considered with certain parol evidence, including a blank lease, two "Acceptance of Building" forms for a 7-Eleven store at Tega Cay, and a legal description of the property sent by one plaintiff to defendant's real estate manager. Furthermore, although the evidence showed that defendant's real estate manager had no actual authority to bind defendant in a lease or memorandum of lease, there was sufficient evidence from which the jury could find that defendant's manager had the apparent authority to bind defendant by his signature on the letter to plaintiffs.

Judge HEDRICK concurs in result.

APPEAL by defendant from *Griffin, Judge*. Judgment entered 4 December 1980 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 14 January 1982.

This is an action to recover rent due to plaintiffs from defendant on a building intended for use as a liquor store. Plaintiffs allege that the parties agreed to lease the liquor store and that a series of writings constitutes a sufficient memorandum of lease which memorializes the terms of their agreement. Defendant denies the existence of a valid lease.

Plaintiffs and defendant moved for a summary judgment with supporting affidavits; both motions were denied by the judge. At trial, the jury found that the parties entered into a valid lease agreement and that defendant breached such agreement by its failure to pay the rent as specified. From a money judgment for plaintiffs, defendant appeals.

Hamel, Hamel, Pearce & Weaver, by Reginald S. Hamel and Hugo A. Pearce III, for plaintiff-appellees.

C. Eugene McCartha for defendant-appellant.

HILL, Judge.

Plaintiffs, doing business as Fuller & Bost, a general partnership, acquired sites, built, and leased 7-Eleven stores to defendant. The course of business established by the parties required defendant to inspect and formally accept the buildings. Plaintiff Fuller testified that defendant "then prepare[s] this form setting forth the terms of the lease and when the lease is to commence. This is signed, in this particular instance, by Mr. Bost and myself as lessor and I think Mr. Jack Dold, who was the Division Manager for the lessor [sic] and this triggered the rent payments."

Pursuant to this course of business, on 30 March 1972, defendant approved plaintiffs' acquisition of a site in Tega Cay, South Carolina, for the construction of a 7-Eleven store. According to their instructions from defendant, plaintiffs "were to duplicate what we had done in Kings Grant [in Charleston, South Carolina], that is, a 7-Eleven store, and additional space beside it to be used as a liquor store and to be leased by The Southland Corporation. This we did."

A lease for the 7-Eleven store was fully executed on 24 May 1972. Defendant accepted the 7-Eleven store, occupied it, and began to pay the rent due. J. L. "Pete" Overton, then defendant's real estate manager for the southern division, testified that he signed a blank lease for the liquor store because "Mr. Fuller told me he needed something to show to his finance people and asked me if I would sign a lease, that's all he needed it for, it was for finance purposes and I told him I would." Plaintiff Fuller described the signatures on that document:

> . . . [I]t says executed by the lessor on April 24, 1972, David E. Fuller and Reid M. Bost. Executed by the lessee on May 24, 1972. The Southland Corporation, by J. L. Overton, Vice President, attested by Penny Hawkins, Assistant Secretary. As to how I received this, it was delivered to me by Mr. Overton.
>
> That is not Penny Hawkins' signature on the lease agreement. I was aware of that at the time I received it. I was almost finished with construction when we received the lease agreement and we were trying to close out our permanent loan and we needed the executed lease for the loan.

The lease given to plaintiffs for loan purposes had a term of 20 years with two five-year options. The rent was $400 per month. However, no description of the property was attached. Overton stated, "I do not see any difference in that document from what I understood the terms of the lease agreement to be."

Plaintiff Fuller wrote a note to Overton on 7 July 1972, stating, "Attached are legal discriptions [sic] for the Liquor Stores that we are proposing for Kings Grant in Charleston and Tega Cay in York County, S. C. As a matter of information, the same discriptions [sic] apply for the 7/11 stores. Give my regards to Claudia. Hope to see you soon." Attached to the note was a metes and bounds description entitled "LEGAL DESCRIPTION: LIQUOR STORE/TEGA CAY/YORK COUNTY, S.C." and a boundary survey of the Tega Cay property.

On 26 February 1973, Overton sent the following letter to plaintiff Fuller: "This will verify that the Southland Corporation will lease a 40 x 40 building adjacent to the 7-Eleven store at Tega Cay, South Carolina. The monthly rental will be $400.00 and the term of lease will be 20 years." However, plaintiffs never received any rent on the liquor store from defendant. Plaintiffs received a letter dated 18 December 1974 from defendant's real estate representative, David Laffitte, stating, in part, as follows:

> It has long been a policy of The Southland Corporation that new store sites are not finally approved unless and until the lease agreement or contract of sale has been properly executed by an authorized corporate officer. These documents should bear our corporate seal. Terms of these instruments must be met, or waived by the corporate officer. If you purpose [sic] to sell, lease or build and lease for us, any funds you may spend prior to proper execution of an appropriate instrument are expended at your own risk and expenses.

Plaintiff Fuller testified that this letter first informed him "about the limited authority of a real estate representative and about the need for an officer to sign a lease, I had never been informed of that, not prior to that letter."

Plaintiff's first notification that defendant did not intend to honor the terms of the 26 February 1973 letter was a letter to plaintiff Fuller on 6 January 1975, in which Dold wrote, "We are

not interested in the extra space at Tega Cay at this time. The area has not developed as projected and our 7-Eleven store there is marginal. Without the rent abatement clause, we would be losing a considerable amount of money."

Plaintiffs attempted to rent the liquor store to others; a lease was entered into for one year, April 1979 through March 1980, but it was not renewed. Plaintiff Fuller testified that defendant owes Fuller & Bost $27,200 in rent for the liquor store at Tega Cay.

In its first argument, defendant assigns error to the judge's failure to grant its motion for summary judgment. Defendant argues that the judge erroneously considered certain affidavits and exhibits filed in support of plaintiff's summary judgment motion which, if excluded, would have compelled the granting of its motion.

[1] Initially, defendant challenges the affidavit of Overton on the grounds that it "fails to state that it is made on personal knowledge, it sets forth facts that would not be admissible into evidence, and it fails to show affirmatively that he [Overton] would be competent to testify to the material matters stated therein." Although G.S. 1A-1, Rule 56(e) states that affidavits in support of a motion for summary judgment must have these elements, we do not interpret the rule to require that such affidavits specifically state the elements as defendant suggests; it is sufficient that the affidavits can be interpreted so as to comply upon their faces. *Middleton v. Myers*, 41 N.C. App. 543, 255 S.E. 2d 255 (1979).

[2] Here, paragraph 16 of Overton's affidavit states the following, in part:

> He executed the aforementioned LEASE AGREEMENT regarding the liquor store, in behalf of the defendant, over the blank beneath which appears the title "Vice President." He was not a vice president of the defendant at that time. He did not sign Penny Hawkins' name thereto; *however, he believes that it was signed by Mr. Fuller's secretary when he was in Mr. Fuller's office.*

(Emphasis added.) Upon our review of the entire affidavit, that which is emphasized above is the only portion that does not com-

ply with the requirements of Rule 56(e). "What an affiant thinks are facts, unless it is a situation proper for opinion evidence, is not information made on personal knowledge proper for consideration on a summary judgment motion." *Faulk v. Dellinger*, 44 N.C. App. 39, 42, 259 S.E. 2d 782, 784 (1979). *Accord Peterson v. Winn-Dixie of Raleigh, Inc.*, 14 N.C. App. 29, 187 S.E. 2d 487 (1972). Thus, the remainder of Overton's affidavit was properly considered by the judge at the summary judgment hearing.

Defendant also challenges the use of the blank lease given to plaintiffs by Overton for loan purposes because the signature of "Penny Hawkins" thereon was not hers and was made by another without her authorization. Likewise, defendant objects to the use of this and other exhibits which contain no "internal reference" to the liquor store. Plaintiffs offered these exhibits to support their contention that together, the exhibits constitute a sufficient memorandum of lease under G.S. 22-2, the statute of frauds, by which defendant is bound.

G.S. 22-2 states the following:

> All contracts to sell or convey any lands, tenements or hereditaments, or any interest in or concerning them, . . . *and all other leases and contracts for leasing lands exceeding in duration three years from the making thereof, shall be void unless* said contract, or *some memorandum or note thereof, be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized.*

(Emphasis added.) However,

> [t]o comply with the statute it is not necessary that all of the provisions of a contract be set out in a single instrument. "The memorandum required by the statute is sufficient if the contract provisions can be determined from separate but related writings." *Hines v. Tripp*, 263 N.C. 470, 474, 139 S.E. 2d 545, 548. "The writings must disclose, at least with sufficient definiteness to be aided by parol, the terms of the contract, the names of the parties, and a description of the property." 4 Strong, N.C. Index 2d, Frauds, Statute of, § 2, p. 62.

Greenburg v. Bailey, 14 N.C. App. 34, 37, 187 S.E. 2d 505, 507 (1972). *See* 6 Strong's N.C. Index 3d, Frauds, Statute of § 2, p.

345. The writings need not be physically connected if they contain internal reference to other writings. *Smith v. Joyce*, 214 N.C. 602, 200 S.E. 431 (1939); *Mezzanotte v. Freeland*, 20 N.C. App. 11, 200 S.E. 2d 410 (1973), *cert. denied*, 284 N.C. 616, 201 S.E. 2d 689 (1974).

Our review of the challenged exhibits—a letter from defendant's real estate representative authorizing the acquisition of store sites, including one at Tega Cay; two "Acceptance of Building" forms for "7-Eleven Store #1201-16262" at Tega Cay; and the blank lease—reveals no reference to the liquor store, as defendants contend. More importantly, the exhibits contain no internal references to one another to permit our consideration of them as a part of a memorandum of lease for the liquor store. Additional exhibits upon which plaintiff relies to constitute a sufficient memorandum—the lease executed for the 7-Eleven store at Tega Cay, a legal description for the 7-Eleven store site at Tega Cay and a "Memorandum of Lease" referring to the lease executed for the 7-Eleven store at Tega Cay—evidence the same deficiencies.

[3] We are compelled to note, however, that plaintiff Fuller's 7 July 1972 note to Overton does contain a reference to the liquor store. Nevertheless, we interpret the requirement that "the writings need not be physically connected if they contain internal reference to other writings" to mean that unconnected writings must contain a reference to the other *writings*, not merely a reference to the same subject matter. This interpretation is supported by *Mezzanotte v. Freeland, supra* at 13, 200 S.E. 2d at 412, wherein the subject contract stated, " 'said parcel of real estate being more particularly described in Attachment hereof.' " The "Attachment" consisted of photocopies of deeds which were never physically attached to the contract. This Court referred to the "Attachment" language quoted above and the fact that the unconnected "Attachment" was delivered contemporaneously with the execution of the contract, and found that these writings may be taken together to constitute a memorandum sufficient to satisfy the statute of frauds. *Id.* Since the 7 July 1972 note in the present case contains no reference to any other writings, it, too, has the deficiency of the challenged exhibits.

[4] Thus, in determining whether a sufficient memorandum of lease existed in the present case, the exhibits discussed above

must be considered singly, not in combination with each other. However, those exhibits considered singly, along with the portion of Overton's affidavit not stricken and Overton's 26 February 1973 letter to plaintiff Fuller, present genuine issues of material fact regarding the existence of a sufficient memorandum of lease. *See* G.S. 1A-1, Rule 56(c). The judge therefore did not err in allowing this matter to proceed to trial.

[5] Having decided that the judge did not err in denying defendant's motion for summary judgment, we now consider defendant's fifth argument, in which it contends that the trial judge erred in denying its motions for directed verdict on the ground that plaintiffs presented insufficient evidence at trial to show that there was a memorandum of lease in compliance with G.S. 22-2. 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. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971). In passing upon such a motion, the trial judge must consider the evidence in the light most favorable to the nonmovant, resolving all conflicts and giving to him the benefit of every inference reasonably drawn in his favor. *Rappaport v. Days Inn of America, Inc., supra; Summey v. Cauthen*, 283 N.C. 640, 197 S.E. 2d 549 (1973). A directed verdict motion by defendant may be granted only if the evidence is insufficient as a matter of law to justify a verdict for plaintiff. *Husketh v. Convenient Systems, Inc.*, 295 N.C. 459, 245 S.E. 2d 507 (1978); *Dickinson v. Pake*, 284 N.C. 576, 201 S.E. 2d 897 (1974).

The essentials of a lease, which must be disclosed in the memorandum with sufficient definiteness to be aided by parol evidence are (1) the parties' names (lessor and lessee), (2) a description of the realty demised, (3) a statement of the term of the lease, and (4) the rent or other consideration. *Carolina Helicopter Corp. v. Cutter Realty Co.*, 263 N.C. 139, 139 S.E. 2d 362 (1964); *Stallings v. Purvis*, 42 N.C. App. 690, 257 S.E. 2d 664 (1979). As noted above, G.S. 22-2 additionally requires that a memorandum of lease be "put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized." Taken singly, only Overton's letter to plaintiff Fuller of 26 February 1973 can be evaluated seriously to determine the existence therein of the essentials of a lease and

the requirements of the statute of frauds. The remaining exhibits discussed above fail this test in one or more essentials without contest. We now must determine whether the 26 February 1973 letter is a sufficient memorandum of lease for the liquor store upon which defendant is bound.

We find that the essentials of a lease are sufficiently definite in the 26 February 1973 letter to be aided by parol evidence. In *Root v. Allstate Insurance Co.*, 272 N.C. 580, 158 S.E. 2d 829 (1968), where an ambiguity in the subject lease was discussed, our Supreme Court stated the parol evidence rule as the following:

> ". . . The legal effect of a final instrument which defines and declares the intentions and rights of the parties cannot be modified or corrected by proof of any preliminary negotiations or agreement, nor is it permissible to show how the parties understood the transaction in order to explain or qualify what is in the final writing, in the absence of an allegation of fraud or mistake or *unless the terms of the instrument itself are ambiguous and require explanation. . . .*"

Id. at 587, 158 S.E. 2d at 835, *quoting Knitting Mills v. Guaranty Co.*, 137 N.C. 565, 569, 50 S.E. 304, 305 (1905) (emphasis original). Thus, although certain of plaintiff's exhibits in the present case have been found to be insufficiently related to one another by "internal reference" for consideration as a portion of a memorandum of lease under G.S. 22-2, they may be considered as parol evidence of the parties' intentions where the terms of the memorandum are ambiguous. For this reason, the trial judge did not err in admitting, among other exhibits, the 26 February 1973 letter, the blank lease, and the "Acceptance of Building" form for "7-Eleven Store #1201-16262" at Tega Cay as substantive evidence. Defendant's fourth and eighth arguments are therefore without merit.

Defendant cites three ways in which the 26 February 1973 letter must "fail" as an insufficient memorial of the terms of a lease. First, defendant states that the letter does not designate which party is the lessor and lessee. Nevertheless, this term does not fail because the blank lease explains the ambiguity by stating, "David E. Fuller and Reid M. Bost, Jr. herein referred to as LESSOR, and THE SOUTHLAND CORPORATION, . . . herein referred to as LESSEE." Plaintiff Fuller's testimony in this regard further explains and resolves this ambiguity. Second, defendant states

that the letter lacks a sufficient description of the demised premises. This term also does not fail since plaintiff Fuller's 7 July 1972 note and attachment to Overton specifically described the liquor store property. Further, plaintiff's testimony reveals the existence of only one 7-Eleven store at Tega Cay. The statement in the 26 February 1973 letter that defendant "will lease a 40 x 40 building adjacent to *the* 7-Eleven store at Tega Cay, South Carolina," together with this parol evidence, is sufficient to explain and resolve this ambiguity. (Emphasis added.) Third, defendant states that the letter contains no designation of the beginning of the stated 20 year term of the lease. As in the first instance, this term does not fail because the blank lease states the following:

> 4. TERM. The primary term of this lease shall commence on the first day of the first calendar month following (1) 15 days after the acceptance by LESSEE'S architect of the building and other improvements to be constructed on the demised premises, or (2) the date that LESSEE or its assigns shall first be open for business to the public, whichever event first occurs; and shall continue for a period of 20 years thereafter, ...

The statement in the 26 February 1973 letter that "[t]he monthly rental will be $400" is sufficient to show the rent without the aid of parol evidence. Again, we note that both parties understood that the terms of this blank lease would govern the liquor store transaction.

Thus, the 26 February 1973 letter, aided by the parol evidence recounted above, sufficiently states the essentials of a lease. For the letter to be a memorandum of lease to satisfy the statute of frauds, however, it must be determined whether Overton's signature may bind defendant as "the party to be charged."

The requirement of the statute of frauds that "the party to be charged" must sign the writing has been interpreted to mean that such a party is "the one against whom relief is sought . . .." *Lewis v. Murray*, 177 N.C. 17, 19, 97 S.E. 750, 751 (1919). *See* G.S. 22-2.

> If there be a written memorial of so much of the contract as is binding on the party to be charged therewith, so expressed

> that its terms can be understood, and *it be signed by one who is proved or admitted by the principal to have been authorized as agent to act for him, it is a sufficient compliance with the statute if the agent sign his own name instead of that of his principal by him.* [Citations omitted.] The authority of the agent . . . may be shown *aliunde* and by parol . . ..

Hargrove v. Adcock, 111 N.C. 166, 171, 16 S.E. 16, 17 (1892), *quoted in Rose v. Vulcan Materials Co.*, 282 N.C. 643, 670, 194 S.E. 2d 521, 539 (1973) (emphasis added). *See generally Reichler v. Tillman*, 21 N.C. App. 38, 203 S.E. 2d 68 (1974); *Yaggy v. The B.V.D. Co.*, 7 N.C. App. 590, 173 S.E. 2d 496 (1970).

> A principal is liable upon a contract duly made by his agent with a third person (1) when the agent acts within the scope of his actual authority; (2) when the contract, although unauthorized, has been ratified; (3) when the agent acts within the scope of his apparent authority, unless the third person has notice that the agent is exceeding his actual authority. [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." *Texas Co. v. Stone*, 232 N.C. 489, 491, 61 S.E. 2d 348, 349 (1950).

Investment Properties of Asheville, Inc. v. Allen, 283 N.C. 277, 285-86, 196 S.E. 2d 262, 267 (1973). *See also Rumbough v. Southern Improvement Co.*, 112 N.C. 751, 17 S.E. 536 (1893). Furthermore, the agent's power to bind the corporation may be " 'inferred from the conduct of the corporation in the transaction of its business and the power which the corporation has customarily permitted the . . . agent to exercise.' " *Yaggy v. The B.V.D. Co.*, *supra* at 601, 173 S.E. 2d at 504, *quoting* 19 Am. Jur. 2d, Corporations § 1227, p. 640.

In the present case, Overton testified that his duties as real estate manager included finding prospective locations for 7-Eleven stores, doing market surveys, working with landowners and developers, negotiating leases, and coordinating real estate representatives in their efforts to acquire store sites. The division manager was Overton's immediate supervisor and "would give ap-

proval." There is no evidence that Overton's authority extended to signing lease agreements on behalf of defendant. In fact, the lease executed by the parties for the 7-Eleven store at Tega Cay was signed for defendant by a vice president, and attested by an assistant secretary. Thus, there is no evidence that Overton had the actual authority to bind defendant through his signature on a lease or memorandum of lease.

There is no evidence that defendant in any way ratified the terms of a lease among it and plaintiffs as evidenced by the 26 February 1973 letter.

However, there is conflicting evidence concerning whether plaintiffs knew that signing a lease, or a memorandum of lease, was beyond the scope of Overton's actual authority. Plaintiff Fuller testified that in the course of his business with defendant, leases are signed "by Mr. Bost and myself or lessor and I think Mr. Jack Dold, who was the Division Manager for the lessor [sic] and this triggered the rent payments." He also testified that he is familiar with lease agreements generally, and stated, "I am aware of the fact that a corporate lease agreement must be signed by the President or Vice President and countersigned by the Secretary or Assistant Secretary," but whether this is required for a valid lease, "I cannot say from a legal standpoint." Plaintiff Fuller also knew that Overton "had the title of Real Estate Representative," and that defendant's lease agreements were executed in Dallas, Texas, the home office. But he testified that until Laffitte's letter to him of 18 December 1974, he did not know "about the limited authority of a real estate representative and about the need for an officer to sign a lease . . .." The evidence therefore is conflicting upon the issue of whether Overton had, in plaintiff's eyes, the *apparent authority* to bind defendant in a lease or in a memorandum of lease.

We find that upon this evidence, defendant's motions for directed verdict properly were denied. "On a motion for a directed verdict the evidence must be interpreted most favorably to plaintiff, and if it is of such character that reasonable men may form divergent opinions of its import, the issue is for the jury." *State Automobile Mutual Insurance Co. v. Smith Dry Cleaners, Inc.*, 285 N.C. 583, 587, 206 S.E. 2d 210, 213 (1974). There is sufficient evidence from which the jury could find that Overton had

the *apparent authority* to bind defendant by his signature on the 26 February 1973 letter. Therefore, we find that the 26 February 1973 letter is a sufficient memorandum of lease for the liquor store under G.S. 22-2 upon which defendant is bound since it states the essentials of a lease with the aid of parol evidence and it complies with the requirements of the statute of frauds. Defendant's fifth argument has no merit.

Defendant brings forward other arguments which have been addressed in the foregoing discussion. Its remaining assignments of error are also without merit, not warranting further discussion in this opinion.

For these reasons, the judgment below is

Affirmed.

Judge BECTON concurs.

Judge HEDRICK concurs in result.

HARRIET LEE MORROW, APPELLANT v. KINGS DEPARTMENT STORES, INC., AND BURNS INTERNATIONAL SECURITY SERVICES, INC., APPELLEES

No. 8115SC643

(Filed 4 May 1982)

1. **Rules of Civil Procedure §§ 8.1, 12— dismissal of less than all claims in complaint**

   Under G.S. 1A-1, Rule 8(e)(2) and 12(b), dismissal of some claims in a complaint does not require dismissal of them all.

2. **Trover and Conversion § 4— recovery for emotional distress—aggravating circumstances necessary**

   Plaintiff could not recover for mental anguish in connection with an action for conversion of personal property where her complaint neither contained nor implied allegations of malice, wantonness, or other aggravating circumstances.

3. **Assault and Battery § 1— failure to allege facts sufficient to constitute an assault**

   The bare allegation that defendant's agent stopped plaintiff and removed a shirt from her shopping bag does not allege an offensive and nonconsensual contact or an apprehension thereof sufficient to allege a claim for damages for emotional distress as a result of an assault or a battery.

4. Libel and Slander § 1— failure to state sufficient claim for slander

Where plaintiff alleged that defendant's agent stopped plaintiff and, in the presence of onlookers, removed a shirt from her shopping bag, she failed to allege a claim for damages for emotional distress as a result of slander. Absent allegations of defamatory matter which is actionable *per se*, the injurious character of the matter, and special damages deriving therefrom, must be alleged, and no such allegations appeared in her complaint.

5. Damages § 3.4— damages for intentional infliction of emotional distress—inadequate claim

Where plaintiff alleged that defendant's agent stopped plaintiff and removed a shirt from her shopping bag, and that she suffered severe emotional distress and great embarrassment because of the agent's actions, her allegations were insufficient to state a claim for damages for intentional infliction of emotional distress.

6. Privacy § 1— invasion of privacy—failure to state claim

Where plaintiff alleged that defendant's agent removed a shirt from a bag of items which she had just purchased, she failed to allege facts sufficient to support a claim for damages for emotional distress as a result of invasion of privacy.

7. Damages § 11.2— conversion—punitive damages inappropriate

The trial court did not err in dismissing plaintiff's prayer for punitive damages while finding that her complaint stated a claim for conversion since the complaint was devoid of allegations of aggravating circumstances and conversion is not a tort which by its very nature contains elements of aggravation.

APPEAL by plaintiff from *Martin, Judge*. Order entered 29 April 1981 in Superior Court, ORANGE County. Heard in the Court of Appeals 12 February 1982.

Graham & Cheshire, by Lucius M. Cheshire and D. Michael Parker, for plaintiff appellant.

Johnson, Patterson, Dilthey & Clay, by Robert W. Sumner, for defendant appellee, Kings Department Stores, Inc.

Young, Moore, Henderson & Alvis, by Beth R. Fleishman and Robert C. Paschal, for defendant appellee, Burns International Security Services, Inc.

WHICHARD, Judge.

I.

Plaintiff sought compensatory and punitive damages from defendants on the basis of the following allegations:

4.

That on or about May 3, 1980, plaintiff entered the Kings Department Store located on Hillsborough Road, Durham, North Carolina. Plaintiff purchased several items from said department store, including two shirts, a pair of shoes and a housecoat. After paying for said items, plaintiff proceeded to leave said department store. Upon approaching the exit door, plaintiff was stopped by a man dressed in the uniform of a security guard. Said man removed a shirt from the bag being carried by the plaintiff which contained the items plaintiff had purchased from said department store.

5.

Plaintiff is informed and believes, and upon such information and belief alleges that the man who removed the shirt from the bag being carried by the plaintiff as alleged above was an employee of defendant, Burns International Security Services, Inc.

6.

That plaintiff is informed and believes, and upon such information and belief alleges that at the time the acts complained of above occurred, the man who stopped the plaintiff and removed the shirt from her bag was acting as an agent of and under the supervision and control of the defendant, Kings Department Store, Inc.

7.

That as a result of the acts complained of above, plaintiff suffered severe emotional distress and great embarrassment in that the acts complained of above occurred before numerous onlookers, including a friend of the plaintiff's.

8.

That plaintiff never recovered the shirt taken from her by the man dressed as a security guard as alleged above.

Defendants moved to dismiss under G.S. 1A-1, Rule 12(b)(6), for failure to state a claim upon which relief can be granted. The trial court ruled that the complaint stated a claim "for conversion of one shirt," but failed to state a claim "for severe emotional

distress and great embarrassment" or for punitive damages. It ordered "that the . . . prayer for punitive damages and damages for severe emotional distress and great embarrassment be dismissed."

Plaintiff appeals, and we affirm.

II.

[1] Plaintiff contends G.S. 1A-1, Rule 12(b)(6), does not allow dismissal of some claims if other claims in the complaint are not similarly subject to dismissal. The contention is without merit. A party may state in one pleading "as many separate claims . . . as he has . . . ." G.S. 1A-1, Rule 8(e)(2). G.S. 1A-1, Rule 12(b), permits assertion by motion of a defense to "*a claim* for relief in any pleading." (Emphasis supplied.) It does not require that the assertion be to "*the claims* for relief." It appears the clear intent of the rule to permit dismissal of some claims without requiring dismissal of all. Our Supreme Court implicitly approved such partial dismissals in *Stanback v. Stanback*, 297 N.C. 181, 254 S.E. 2d 611 (1979), and *Newton v. Insurance Co.*, 291 N.C. 105, 229 S.E. 2d 297 (1976).

III.

Plaintiff further contends her complaint suffices to allow recovery for emotional distress under one or more of the following "legal theories": assault, battery, slander, intentional infliction of mental suffering, and invasion of privacy. The contention requires examination of the complaint in light of the standard for determining a Rule 12(b)(6) motion to dismiss for failure to state a claim.

Our Supreme Court has stated:

> " 'A [complaint] may be dismissed on motion if clearly without any merit; and this want of merit may consist in an absence of law to support a claim of the sort made, or a fact sufficient to make a good claim, or in the disclosure of some fact which will necessarily defeat the claim,' [b]ut a complaint should not be dismissed for insufficiency *unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.*" *Sutton v. Duke*, 277 N.C. 94, [102-03], 176 S.E. 2d 161, 166

(1970), *quoting* Moore, Federal Practice, § 12.08 (1968). (Emphasis original.)

Snyder v. Freeman, 300 N.C. 204, 208-09, 266 S.E. 2d 593, 597 (1980). *See also Presnell v. Pell*, 298 N.C. 715, 719, 260 S.E. 2d 611, 613 (1979); *Advertising Co. v. City of Charlotte*, 50 N.C. App. 150, 152, 272 S.E. 2d 920, 922 (1980); *Cassels v. Motor Co.*, 10 N.C. App. 51, 55, 178 S.E. 2d 12, 15 (1970). "[D]espite the liberal nature of the concept of notice pleading, [however,] a complaint must nonetheless state enough to give the substantive elements of at least some legally recognized claim or it is subject to dismissal under Rule 12(b)(6)." *Stanback v. Stanback*, 297 N.C. 181, 204, 254 S.E. 2d 611, 626 (1979), *citing Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970). *Accord, RGK, Inc. v. Guaranty Co.*, 292 N.C. 668, 674-75, 235 S.E. 2d 234, 238 (1977). "A claim for relief must still satisfy the requirements of the substantive laws which gave rise to the pleadings, and no amount of liberalization should seduce the pleader into failing to state enough to give the substantive elements of his claim." *Leasing Corp. v. Miller*, 45 N.C. App. 400, 405, 263 S.E. 2d 313, 317, *disc. review denied*, 300 N.C. 374, 267 S.E. 2d 685 (1980). While an incorrect choice of theory should not result in dismissal of the claim, the allegations must suffice to state a claim under some legal theory. *Stanback*, 297 N.C. at 202, 254 S.E. 2d at 625.

The essential allegations of the complaint here were as follows: Plaintiff purchased several items from defendant Stores. As she was departing the store following payment for these items, she was detained by a uniformed security guard, an employee of defendant Security Services acting as an agent of defendant Stores. The guard, in the presence of "numerous onlookers," including a friend of plaintiff's, removed a shirt from the bag in which plaintiff was carrying the items purchased. Plaintiff, as a result, suffered severe emotional distress and great embarrassment.

[2] The trial court ruled that the complaint stated a claim for conversion. Defendants did not cross appeal from that ruling, and it thus is not before us. For purposes of this appeal we assume the complaint suffices to state a claim for conversion; and although plaintiff makes no argument in this regard, we consider whether plaintiff can recover for emotional distress in an action

for conversion. If so, the trial court erred in dismissing her prayer for damages therefor insofar as it related to the conversion claim.

> The observation is frequently made that damages for mental suffering may be recovered parasitic to a cause of action in tort that exists independently of the mental harm. Yet, neither the rule nor the extent of its application is clearly stated in the cases. The rule is usually applied in cases in which an invasion of the person, reputation or other dignitary interest has occurred. In these cases recovery extends to any mental harm reasonably related to the defendant's conduct. . . .
>
> The greatest uncertainty in North Carolina and elsewhere in relation to application of the parasitic damages rule arises in connection with actions that primarily involve invasions of property interests. In many of the cases upholding recovery in such actions from other jurisdictions, the defendant's conduct has involved a significant element of abuse, threat or intimidation. Courts have characterized this conduct as wilfull or malicious and on that basis have allowed recovery for emotional distress. When an element of aggravation is not present, broad generalizations about the law in other jurisdictions become difficult.

Byrd, *Recovery for Mental Anguish in North Carolina*, 58 N.C.L. Rev. 435, 443-44 (1980). Cases involving recovery for mental anguish in connection with an action for conversion of personal property are collected in Annot., 28 A.L.R. 2d 1070, § 7 (1953). Several jurisdictions allow such recovery, especially when the conversion involves malice or insult.

It appears that absent malice, wantonness, or other aggravating circumstances, this jurisdiction does not allow recovery for mental anguish in such actions. *Chappell v. Ellis*, 123 N.C. 259, 31 S.E. 709 (1898), though of great age, is controlling. The court there, in an action to recover damages for the unlawful seizure and detention of personal property, granted defendants a new trial because of admission of evidence tending to show plaintiff's mental suffering "disconnected with any allegation of malice or wantonness on the part of the defendants." *Id.* at 264, 31 S.E. at 711. The court stated: "The doctrine of mental suffering or 'men-

tal anguish,' . . . contemplates purely compensatory damages, and, as far as we are aware, has never been applied to cases like that at bar." *Id.* at 261, 31 S.E. at 710.

The complaint here neither contains nor implies allegations of malice, wantonness, or other aggravating circumstances. It thus fails "to state enough to give the substantive elements of [a] claim" for recovery for emotional distress grounded on an alleged act of conversion, *Leasing Corp.*, 45 N.C. App. at 405, 263 S.E. 2d at 317; and the court did not err in dismissing the prayer for damages for emotional distress insofar as it related to the conversion claim.

Plaintiff's contention that the complaint suffices to allow recovery for emotional distress under the "legal theories" of assault, battery, slander, intentional infliction of mental suffering, and invasion of privacy, necessitates examination of "the requirements of the substantive laws" relating to those torts. *Leasing Corp.*, 45 N.C. App. at 405, 263 S.E. 2d at 317. That examination reveals the following:

Assault and Battery

[3] "An assault is an offer to show violence to a person without actually striking him, and a battery is the actual infliction of the blow without the consent of the person who receives it." *Shugar v. Guill*, 51 N.C. App. 466, 475, 277 S.E. 2d 126, 133 (1981), *citing Hayes v. Lancaster*, 200 N.C. 293, 156 S.E. 530 (1931). "The interest in freedom from apprehension of a harmful or offensive contact with the person is protected by the action for assault. The interest in freedom from intentional and unpermitted contacts with the plaintiff's person is protected by the action for battery." *McCracken v. Sloan*, 40 N.C. App. 214, 216, 252 S.E. 2d 250, 252 (1979). The gist of an action for assault is apprehension of harmful or offensive contact. *McCraney v. Flanagan*, 47 N.C. App. 498, 267 S.E. 2d 404 (1980). The gist of an action for battery is "the absence of consent to the contact on the part of the plaintiff." *McCracken*, 40 N.C. App. at 216-17, 252 S.E. 2d at 252.

Plaintiff contends the contact required for a battery need not be to the body, but may be to anything connected with the person. *See* 6A CJS, Assault and Battery § 8 (1975 & Supp. 1981). An offensive and nonconsensual contact is nevertheless prerequisite

to an action for battery, and apprehension of such contact is prerequisite to an action for assault. The bare allegation that defendants' agent stopped plaintiff and removed a shirt from her shopping bag does not allege such contact or apprehension thereof.

The complaint thus fails to "satisfy the requirements of the substantive laws" as to assault and battery, and "[i]t leaves to conjecture that which must be stated." *Leasing Corp.*, 45 N.C. App. at 405-06, 263 S.E. 2d at 317. It fails, then, to allege a claim for damages for emotional distress as a result of an assault or a battery.

Slander

[4] Slander is the speaking of base or defamatory words which tend to prejudice another in his reputation, office, trade, business, or means of livelihood. *Beane v. Weiman Co., Inc.*, 5 N.C. App. 276, 277, 168 S.E. 2d 236, 237 (1969). A defamatory statement, to be actionable, must be false, *Parker v. Edwards*, 222 N.C. 75, 78, 21 S.E. 2d 876, 879 (1942), and must be communicated to some person or persons other than the person defamed, *Taylor v. Bakery*, 234 N.C. 660, 662, 68 S.E. 2d 313, 314 (1951), *overruled on other grounds, Hinson v. Dawson*, 244 N.C. 23, 92 S.E. 2d 393 (1956).

> Slander may be actionable *per se* or only *per quod.*
>
> That is, the false remarks in themselves (*per se*) may form the basis of an action for damages, in which case both malice and damage are, as a matter of law, presumed; or the false utterance may be such as to sustain an action only when causing some special damage (*per quod*), in which case both the malice and the special damage must be alleged and proved. (Citations omitted.)
>
> . . . .
>
> Where the injurious character of the words do not appear on their face as a matter of general acceptance, but only in consequence of extrinsic, explanatory facts showing their injurious effect, such utterance is actionable only *per quod.* Where the words spoken or written are actionable only *per quod*, the injurious character of the words and some special damage must be pleaded and proved. (Citations omitted.)

Beane, 5 N.C. App. at 277-78, 168 S.E. 2d at 237-38. The words attributed to defendant must be alleged " 'substantially' *in haec verba*, or with sufficient particularity to enable the court to determine whether the statement was defamatory." *Stutts v. Power Co.*, 47 N.C. App. 76, 84, 266 S.E. 2d 861, 866 (1980).

Plaintiff has not alleged any words spoken by defendants' agent. She argues, though, that acts alone, without words, may constitute slander, *see* Annot., 71 A.L.R. 2d 808 §§ 4-5, and that the acts of defendants' agent were in effect an accusation of theft. Assuming, *arguendo*, that in this jurisdiction acts alone may constitute slander, the complaint here nevertheless fails to state a claim on that theory in that the allegedly defamatory acts have not been set forth "with sufficient particularity to enable the court to determine whether the acts were defamatory." *Stutts*, 47 N.C. App. at 84, 266 S.E. 2d at 866.

Plaintiff simply alleges that defendants' agent, in the presence of onlookers, took and retained the shirt. This allegation is wholly consistent with interpretations other than an accusation of theft—*e.g.*, that the shirt was, and was understood to have been, placed in plaintiff's bag by mistake. It is thus impossible to deduce from the allegations that the acts of defendants' agent were "as a matter of general acceptance" so injurious to plaintiff as to be actionable *per se*. Absent allegations of defamatory matter which is actionable *per se*, the injurious character of the matter, and special damages deriving therefrom, must be alleged. *Beane*, 5 N.C. App. at 277-78, 168 S.E. 2d at 237-38. No such allegations appear.

The complaint thus fails to "satisfy the requirements of the substantive laws" as to slander and "leaves to conjecture that which must be stated." *Leasing Corp.*, 45 N.C. App. at 405-06, 263 S.E. 2d at 317. It fails, then, to allege a claim for damages for emotional distress as a result of slander.

Intentional Infliction of Mental Suffering

[5] This jurisdiction recognizes "a claim for what has become essentially the tort of intentional infliction of serious emotional distress." *Stanback v. Stanback*, 297 N.C. 181, 196, 254 S.E. 2d 611, 621-22 (1979). "[L]iability arises under this tort when a defendant's 'conduct exceeds all bounds usually tolerated by decent

society' and the conduct 'causes mental distress of a very serious kind.' " *Id.* at 196, 254 S.E. 2d at 622. *See also* Byrd, *supra*, at 461-63.

Our Supreme Court held the complaint in *Stanback* sufficient to state a claim for this tort even though plaintiff cast her allegations in terms of breach of contract. *Stanback*, 297 N.C. at 198, 254 S.E. 2d at 623. Plaintiff there alleged that defendant's conduct in breaching a contract (separation agreement) was wilful, malicious, calculated, deliberate, and purposeful; that defendant acted recklessly and irresponsibly with full knowledge of the consequences which would result; and that plaintiff suffered great mental anguish and anxiety as a result of the breach. *Id.* at 198, 254 S.E. 2d at 622-23.

Here, by contrast, no such allegations appear. Plaintiff alleged only that she suffered severe emotional distress and great embarrassment. She alleged nothing regarding the intent of defendants' agent or his knowledge of consequences resultant upon his conduct.

Absent such allegations, the complaint fails to "satisfy the requirements of the substantive laws" as to intentional infliction of emotional distress, and "leaves to conjecture that which must be stated." *Leasing Corp.*, 45 N.C. App. at 405-06, 263 S.E. 2d at 317. It fails, then, to allege a claim for damages for intentional infliction of emotional distress.

Invasion of Privacy

[6] "North Carolina has recognized, as have most states, a cause of action for an invasion of an individual's right of privacy, and has recognized in such instances a right to nominal damages where special damages cannot be shown." *Barr v. Telephone Co.*, 13 N.C. App. 388, 392, 185 S.E. 2d 714, 717 (1972), *citing Flake v. News Co.*, 212 N.C. 780, 195 S.E. 55 (1938). "The question of the existence of this right is a relatively new field in legal jurisprudence. In respect to it the courts are plowing new ground and before the field is fully developed unquestionably perplexing and harassing stumps and runners will be encountered." *Flake*, 212 N.C. at 790, 195 S.E. at 62-63.

We plow new ground in this case, in that our courts have not held a fact situation such as that here to constitute the tort of in-

vasion of privacy. *Flake* and *Barr* are the only North Carolina decisions holding certain acts to constitute that tort. The pertinent facts in those cases were unauthorized use of plaintiff's photograph in a newspaper advertisement (*Flake*) and publication over plaintiff's name of a picture of someone other than plaintiff (*Barr*).

While other states have recognized an action for invasion of privacy based on an illegal search by a private individual, *see Sutherland v. Kroger Co.*, 144 W.Va. 673, 684, 110 S.E. 2d 716, 723-24 (1959); *Bennett v. Norban*, 396 Pa. 94, 98-100, 151 A. 2d 476, 478-79 (1959), North Carolina has not. It has, by statute, given merchants who, upon probable cause, detain suspected shoplifters, immunity from certain designated tort actions. G.S. 14-72.1(c); *see generally* 50 N.C.L. Rev. 188 (1971). Invasion of privacy, however, is not among them.

Assuming, *arguendo*, that an illegal search by a private individual may constitute an invasion of privacy in this jurisdiction, the complaint here is nevertheless fatally deficient. It makes the bare allegation that defendants' agent took a shirt from plaintiff. It does not allege that the shirt was taken pursuant to a search, illegal or otherwise. It does not allege that the shirt taken was one of those plaintiff had purchased or that it was otherwise rightfully possessed by plaintiff. It does not so much as allege that the shirt was taken wrongfully or without consent.

Under these circumstances, even absent controlling precedent, we have no difficulty in holding that the complaint fails to "satisfy the requirements of the substantive laws" as to the tort of invasion of privacy and "leaves to conjecture that which must be stated." *Leasing Corp.*, 45 N.C. App. at 405-06, 263 S.E. 2d at 317. It fails, then, to allege a claim for damages for emotional distress as a result of invasion of privacy.

IV.

[7] Plaintiff finally contends the court erred in dismissing her prayer for punitive damages while finding that the complaint stated a claim for conversion, in that she may be entitled to punitive damages on the conversion claim. We find no error.

> Even where sufficient facts are alleged to make out an identifiable tort, . . . , tortious conduct must be accompanied

> by or partake of some element of aggravation before punitive damages will be allowed. (Citations omitted.) Such aggravated conduct was early defined to include "fraud, malice, such a degree of negligence as indicates a reckless indifference to consequences, oppression, insult, rudeness, caprice, wilfullness . . . ." (Citation omitted.)
>
> The aggravated conduct which supports an award for punitive damages when an identifiable tort is alleged may be established by allegations of behavior extrinsic to the tort itself, as in slander cases. (Citations omitted.) Or it may be established by allegations sufficient to allege a tort where that tort, *by its very nature*, encompasses any of the elements of aggravation. Such a tort is fraud, since fraud is, itself, one of the elements of aggravation which will permit punitive damages to be awarded.

Newton, 291 N.C. at 112, 229 S.E. 2d at 301. When a plaintiff "alleges torts other than those excepted in *Newton*," *i.e.*, those "other than fraud or torts that, by their very nature, encompass any of the elements of aggravation," the complaint "must allege sufficient facts to place his opponent on notice of the aggravating factors extrinsic to the tort itself from which he derives his claim for punitive damages." *Shugar*, 51 N.C. App. at 475, 277 S.E. 2d at 133.

Conversion is not a tort which by its very nature contains elements of aggravation. *See Gallimore v. Sink*, 27 N.C. App. 65, 67, 218 S.E. 2d 181, 183 (1975). The complaint is devoid of allegations of aggravating circumstances. No claim has been stated, then, entitling plaintiff to an award of punitive damages.

V.

For the foregoing reasons, the order pursuant to G.S. 1A-1, Rule 12(b)(6), dismissing the prayer for punitive damages and damages for "severe emotional distress and great embarrassment," was proper.

Affirmed.

Judges CLARK and ARNOLD concur.

Powers v. Lady's Funeral Home

NORWOOD GLENN POWERS, EMPLOYEE, PLAINTIFF v. LADY'S FUNERAL HOME, EMPLOYER AND AMERICAN EMPLOYERS INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8110IC502

(Filed 4 May 1982)

Master and Servant §§ 55.6, 62— workers' compensation—journey to and from work—special errand—completion upon return to own property

Plaintiff mortician's trip to and from his employer's funeral home when he went there at night to embalm a body constituted a special errand for his employer and therefore was in the course of his employment; however, plaintiff's special errand ended at the time he left the public street and was again physically on his own property, and injuries received by plaintiff when his car rolled down an incline and struck him as he walked toward the back door of his residence did not occur in the course of his employment, notwithstanding the funeral home did not have shower facilities for plaintiff's use and he was compelled to change clothes and wash the embalming chemical odor from his body at home.

Judge MARTIN (Harry C.) dissenting.

APPEAL by plaintiff from opinion and award of the North Carolina Industrial Commission filed 22 January 1981. Heard in the Court of Appeals 11 January 1982.

Plaintiff, on 30 July 1978, was employed by defendant, Lady's Funeral Home, as a mortician. His duties included embalming, directing funerals, meeting families, and purchasing equipment and materials. Normal operating hours of the funeral home were from 8:20 a.m. to 5:00 p.m. Plaintiff was one of two qualified embalmers, and worked in a shift arrangement with his fellow worker by which each man was in charge of alternate 24-hour shifts. In addition to his regular duties, plaintiff was to be on call during his shift from the time when a night man, who stayed at the funeral home overnight, came on duty, until 8:00 a.m. Plaintiff was to be available in case of an emergency or death. He was required to stay at his home within hearing and reach of the telephone. After completing his emergency duties, plaintiff always returned directly home, changed clothes and showered to remove the embalming chemical odor from his body. He then awaited other calls. The funeral home did not have sleeping or shower facilities for plaintiff's use.

Plaintiff was on call the night of 29 July and the morning of 30 July 1978. Having been advised of an emergency situation,

plaintiff went to the funeral home where he embalmed a body. He returned home at approximately 2:30 a.m. in his own vehicle. He parked his car in his backyard on an incline above and facing the rear entrance of his residence. As he walked toward the back door, the car rolled down the incline and struck him, knocking him through the storm door of the house. Both of his legs were broken and one ankle was crushed.

Deputy Commissioner Lawrence B. Shupin, Jr. entered an opinion and award containing findings of fact and the conclusion that although plaintiff suffered an injury by accident, the accident did not arise out of and in the course of his employment. Plaintiff's claim was denied. The Full Commission, with one dissent, affirmed the award. Plaintiff gave notice of appeal.

Williams, Willeford, Boger, Grady and Davis, by Brice J. Willeford, Jr., for plaintiff appellant.

Hedrick, Feerick, Eatman, Gardner and Kincheloe, by Hatcher Kincheloe, for defendant appellees.

MORRIS, Chief Judge.

The sole question presented for review is whether the injury by accident sustained by plaintiff arose out of and in the course of employment. It is undisputed that plaintiff had been called from his house on the night he was injured to embalm a body. The Commission found that plaintiff's injury occurred after he left the funeral home to return to his residence. The general rule is that injuries received by an employee while travelling to or from the work place are usually not covered by this State's Workmen's Compensation Act. *Strickland v. King and Sellers v. King*, 293 N.C. 731, 239 S.E. 2d 243 (1977); *Humphrey v. Laundry*, 251 N.C. 47, 110 S.E. 2d 467 (1959). All parties accede, however, to the deputy commissioner's conclusion, supported by the facts, that the journey to and from the funeral home rose to the level of a special errand. Therefore, "[t]he 'come and go' rule, as laid down in *Hunt v. State*, 201 N.C. 707, is not applicable under the facts in this case. (Citations omitted.)" *Massey v. Board of Education*, 204 N.C. 193, 196, 167 S.E. 695, 697 (1933). Plaintiff's travel was, therefore, properly considered to have been incident to and in the course of his employment. The denial of compensation turned on the subtle determination that plaintiff's journey from his place of

employment to his home ended when "he actually left the public street or highway located adjacent to his residence and was again physically present on his property." Plaintiff was at his doorstep when injured by the runaway automobile, hence the deputy commissioner's determination and denial of compensation.

The effect of the special errand rule is to confer "portal to portal" coverage on the employee. 1 Larson, Workmen's Compensation Law § 16.10 (1978). The deputy commissioner adopted the reasoning of *Charak v. Leddy*, 23 App. Div. 2d 437, 261 N.Y. Supp. 2d 486 (1965), in which it was determined that a claimant who fell and was injured on the steps in the lobby of her apartment building as she left her apartment on a special errand for her employer had not entered the course of employment. The Court said:

> A fall in her apartment would not have given rise to any claim. If, however, in the performance of a special errand, she had fallen in the street, barely beyond the outer door of the building, the accident would have been compensable, . . .
>
> . . . [T]he locked inner lobby seems more nearly an adjunct of claimant's home and within its precincts than a public place or an adjunct of the street.

Id. at ---, 261 N.Y. Supp. 2d 487-88. Plaintiff had left the street and was on his own property when injured.

Plaintiff argues that the special errand upon which he had been dispatched did not abruptly terminate upon his return because he was compelled to change clothes and wash the embalming chemical odor from his body at home. We note the deputy commissioner's finding that "the funeral home did not have sleeping facilities available in order for the claimant to remain there at the balance of the evening following an emergency call nor did it have shower facilities for the claimant's use. . . ." Plaintiff's argument does not persuade us that the conclusion of the deputy commissioner, as upheld by the Full Commission, that claimant's accident did not arise out of and in the course of his employment, was incorrect.

For an injury to be compensable under our Workmen's Compensation Act, the claimant must prove:

(1) that the injury was caused by an accident, (2) that the injury arose out of the employment, and (3) that the injury was sustained in the course of employment, G.S. 97-2(6). Whether the claimant sustained an injury by accident is not at issue; indeed, the circumstances plainly show that an "accident", as that word is variously defined in *Gabriel v. Newton*, 227 N.C. 314, 42 S.E. 2d 96 (1947), occurred. Whether an injury arises out of the employment refers to the origin or cause of the accident. *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 233 S.E. 2d 529 (1977). It is generally said that an injury arises out of the employment "when it is a natural and probable consequence or incident of the employment and a natural result of one of its risks, so there is some causal relation between the injury and the performance of some service of the employment." *Perry v. Bakeries Co.*, 262 N.C. 272, 274, 136 S.E. 2d 643, 645 (1964). It is unnecessary, however, to make a determination as to whether any reasonable relationship to the employment exists here, because we hold that the accident did not occur in the course of plaintiff's employment. "[T]he phrases 'arising out of' and 'in the course of' are not synonymous but involve two ideas and impose a double condition, both of which must be satisfied in order to bring a case within the Act. (Citations omitted.)" *Sweatt v. Board of Education*, 237 N.C. 653, 657, 75 S.E. 2d 738, 742 (1953).

Whether an injury occurs in the course of the employment depends upon the time, place and circumstances of the accident. *Bartlett v. Duke University*, 284 N.C. 230, 200 S.E. 2d 193 (1973). Plaintiff's travel from his home to his place of employment would normally be covered under the going and coming rule; yet, because of the unusual hour and urgency of his mission, the special errand rule compels us to regard the travel as an integral part of the service performed. See *Massey v. Board of Education*, supra. The journey ended when plaintiff returned to his property, however, and the deputy commissioner, with proper regard for the "portal to portal" nature of the special errand rule, accurately found plaintiff to be outside the scope of his employment when misfortune befell him. *Charak v. Leddy*, supra. As defendant points out in his brief, the time of the accident and the circumstances surrounding it would tend to put the accident within the course of employment by virtue of the special nature of the trip to the funeral home. Plaintiff was not, however, injured at a

place of employment, even as that aspect of "course of employment" is viewed under the special errand rule. Our search of the authority in this and other jurisdictions convinces us that the special errand exception to the "coming and going" rule is no more than that— an exception to the general rule that accidents occurring while the employee is in transit to and from work is not compensable. Plaintiff crossed the threshold of his own domain when he left the roadway and entered the driveway behind his house. The special errand doctrine does not transform all employees covered by the Workmen's Compensation Act into absolute insurers of the safety of employees called away on some special mission.

Abundant authority has been promulgated under the personal comfort doctrine to the effect that the course of employment embraces activities such as changing clothes, washing, bathing, and caring for one's appearance generally. Yet injury on the way to or while engaged in such activity has only been compensated when the distress suffered occurred on the employer's premises. Plaintiff argues, however, not that a shower and change of clothes was for his personal comfort and wellbeing, but that its purpose was to comply with one of the conditions of his employment, i.e., that he be presentable to an aggrieved family when needed. We hold that plaintiff's appearance in this case was not so intimately related to his employment as to be a part of it. Were we to hold otherwise, any employee in covered employment whose occupation requires that he deal with the public could claim compensation if he suffered an injury at home while bathing or grooming for work.

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 award is, therefore,

Affirmed.

Judge VAUGHN concurs.

Judge MARTIN (Harry C.) dissents.

Judge MARTIN (Harry C.) dissenting.

The majority concludes that claimant's injury did not occur in the course of his employment. The majority concedes that claimant was on a special errand for his employer in the journey to and from the funeral home, and therefore the usual "come and go" rule is not applicable to this case. It is also conceded that the special errand of claimant in this case was "an integral part of the service performed." The requirement that the injury arise out of the employment is thereby satisfied, there being a causal relation between the injury and the performance of a service of the employment, *i.e.*, the special errand for the employer. *Perry v. Bakeries Co.*, 262 N.C. 272, 136 S.E. 2d 643 (1964).

The decision of the Commission is upheld upon the simple determination that the special errand ended when claimant left the public street and was again physically upon his own property. This holding defeats the purpose of the special errand rule, which is to allow coverage of the employee from "portal to portal." 1 A. Larson, The Law of Workmen's Compensation § 16.10 (1978). I find the special errand did not end until claimant left the area of the risk created by the special errand. In any journey by automobile, two of its most dangerous aspects are entering the vehicle and exiting from it. I find *Charak v. Leddy*, 23 A.D. 2d 437, 261 N.Y.S. 2d 486 (1965), entirely distinguishable from this case. In *Charak*, claimant was still within her apartment building when she was injured. She had not entered into the area of risk arising out of her employment. She was injured while doing what any other resident of the building might have done. Our claimant, to the contrary, was exiting the car and returning to his doorway, still performing an integral part of the special errand for his employer.

Jurisdictions as diverse as California and New Hampshire have allowed recovery under analogous circumstances. In *Heinz v. Concord U. Sch. Dist.*, 117 N.H. 214, 371 A. 2d 1161 (1977), claimant was a teacher. On his way home to change clothes in order to return to school to chaperone an authorized school dance, he was killed in a motorcycle accident. He was not obligated to chaperone the dance, but was expected to give fully of his services and participate to a reasonable extent in school activities. The New Hampshire court held the death arose out of and in the course of

claimant's employment. The chaperoning duties were in the nature of a special duty or errand and subjected claimant to special travel risks. The cause of the death could properly be considered a hazard of the employment.

Safeway Stores, Inc. v. Workers' Comp. A. Bd., 104 Cal. App. 3d 528, 163 Cal. Rptr. 750 (1980), involved a special errand or mission case with facts closely resembling those in the case sub judice. In *Safeway*, claimant was required to work well beyond his ordinary hours to aid in the preparation of an inventory. He returned to his home about 5:30 a.m. and was injured when he was attacked by an unknown assailant as he got out of his car to enter his house. The employer argued that the injury did not arise out of or in the course of the employment. The California court held that claimant was on a special errand for his employer in his return home from the extended workday. Claimant's entire duty was at the employer's request and satisfied an important and out-of-the-ordinary business need. The journey home was an essential part of the special service claimant was called upon to perform for the benefit of his employer. Safeway further contended that the return journey was completed before the assault. The court concluded that the reasoning in *Charak* supported recovery for claimant, who had not entered the safety of his house, as the claimant in *Charak* had not left the safety and security of her apartment building when she was injured.

Claimant Powers was engaged in a "special errand" and had not entered the safety and security of his house when he was injured. He was still exposed to the risks arising out of his employment. Further, it is to be noted that his injury was the result of his being struck by the automobile he had just left and which he was required to use in order to perform the services for his employer. No outside element participated in causing the injury, as occurred in *Safeway.*

The majority's rule, that a special errand ends when the employee is again physically present upon his property, does have the attribute of certainty. But, it is feared that certainty is achieved at the expense of justice. Many fact situations are conceivable where a claimant is still subject to risks from his employment after he is on his own property while on a special errand. It could be several miles from the beginning of his property to his

house, for example. It is submitted that a "bright line" rule should not be adopted to determine when all special errands end, but rather, each should be determined upon its particular fact situation. *See Berry v. Furniture Co.*, 232 N.C. 303, 60 S.E. 2d 97 (1950); *Harden v. Furniture Co.*, 199 N.C. 733, 155 S.E. 728 (1930); *Gallimore v. Marilyn's Shoes*, 30 N.C. App. 628, 228 S.E. 2d 39 (1976), *rev'd on other grounds*, 292 N.C. 399, 233 S.E. 2d 529 (1977).

When it is established that a claimant is on a special errand for his employer, the declared policy of the state requires a liberal construction in favor of the employee in determining whether the accident arises out of and in the course of the employment. *Stevenson v. City of Durham*, 281 N.C. 300, 188 S.E. 2d 281 (1972); *Petty v. Transport, Inc.*, 276 N.C. 417, 173 S.E. 2d 321 (1970); *Gallimore, supra.* The narrow, restrictive rule adopted by the majority contravenes this policy.

The proper rule of law to apply to the discrete fact situations is not "did the accident occur on the claimant's own premises." Rather, an accident arises out of employment when it occurs in the course of the employment and the conditions or obligations of the employment put the claimant in the position or at the place where the accident occurs. *Larson, supra*, § 6.50. Claimant was struck by the car near his door because the obligations of his employment, the special errand, required him to be at that place when the accident occurred. Where the employment requires travel, the hazards of the route become the hazards of the employment. *Hinkle v. Lexington*, 239 N.C. 105, 79 S.E. 2d 220 (1953). Such is the case here. I vote to reverse the order of the Commission and remand for the determination of an appropriate award for claimant.

Felton v. Hospital Guild

ELLEN D. FELTON, EMPLOYEE, PLAINTIFF v. HOSPITAL GUILD OF THOMASVILLE, INC., EMPLOYER; PENNSYLVANIA NATIONAL MUTUAL INSURANCE CO., CARRIER, DEFENDANTS

No. 8110IC757

(Filed 4 May 1982)

Master and Servant § 55.6— workers' compensation—injury on way to work—in the course of employment

The Industrial Commission erred in denying plaintiff's claim for workers' compensation for injuries she sustained when she slipped on a thin layer of ice as she was approaching her car parked in her driveway where the evidence tended to show that plaintiff was the manager of defendant employer's hospitality shop; that her duties included responsibility for purchasing food and other items sold in the shop; that on the morning of the accident she telephoned a local bakery before leaving her house as was her customary procedure; that shortly thereafter she left her house intending to drive to the bakery and then to the hospital; and that she fell hurting her hip when she was approaching her car. When plaintiff was injured she had entered into a special errand on behalf of her employer, and under the dual purpose rule, plaintiff's injury arose out of and in the course of her employment entitling her to compensation.

Judge WHICHARD dissenting.

APPEAL by plaintiff from the opinion and award of the North Carolina Industrial Commission filed 22 January 1981. Heard in the Court of Appeals 30 March 1982.

Plaintiff appeals from a decision of the Industrial Commission denying her compensation for injuries she sustained when she slipped on a thin layer of ice as she was approaching her car parked in a driveway which was located adjacent to her home. At the time of the accident, plaintiff was the manager of defendant employer's hospitality shop. Her duties included responsibility for purchasing food and other items sold in the shop, some of which were delivered directly to the shop, while items such as eggs and bakery goods were not.

On the morning of 13 February 1979, as was her customary procedure, plaintiff telephoned a local bakery at 7:30. Shortly thereafter, she left home, intending, as usual, to drive a less direct route to the hospitality shop so that she might stop by the bakery to pick up the items she had ordered. She was approximately thirty feet from her front door and had not quite reached her car when she fell, sustaining a transcervical fracture of the left hip.

The deputy commissioner found that:

> Plaintiff sustained an injury by accident on 2-13-79, however, the same did not arise out of and in the course of her employment. Although the making of the journey to the bakery became an incident to and a part of her contract of employment, the journey occupying the status of a special mission due to its nature, the journey itself only begins from the time plaintiff physically leaves her property or premises, in this case from the time she actually enters the public street located adjacent to her residence and property.

Plaintiff appealed the denial of her claim to the full Commission, which affirmed, one commissioner dissenting.

Boyan and Nix, by Clarence C. Boyan, and William B. Mills for plaintiff appellant.

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

MARTIN (Harry C.), Judge.

This case can be analyzed upon two theories, each supporting recovery for plaintiff.

SPECIAL ERRAND RULE

In order for an employee to be entitled to an award under the North Carolina Workers' Compensation Act, there must be injury by accident which arose out of and in the course of the employment. *See* N.C. Gen. Stat. § 97-2(6) (1979) (and annotations thereunder). Ordinarily, an injury suffered by an employee while going to or coming from work is not an injury arising out of and in the course of employment. *Hardy v. Small*, 246 N.C. 581, 99 S.E. 2d 862 (1959); *Hunt v. State*, 201 N.C. 707, 161 S.E. 203 (1931). There are, however, exceptions to this general rule.

The Commission found plaintiff, in making the journey to the bakery, was on a special mission for her employer and thus not within the general "coming and going" rule. Nevertheless, liability was denied upon the finding by the Commission that the special mission or errand only begins "from the time plaintiff physically leaves her property or premises, in this case from the time she actually enters the public street."

We cannot agree to the "bright line" rule adopted by the Commission in determining when a special errand commences. Although such rule does have the attribute of certainty, it cannot be attained at the expense of justice. In deciding questions about when a special errand begins or ends, each case must be determined upon its particular fact situation. " 'No exact formula can be laid down which will automatically solve every case.' " *Massey v. Board of Education*, 204 N.C. 193, 197-98, 167 S.E. 695, 698 (1933). *See Berry v. Furniture Co.*, 232 N.C. 303, 60 S.E. 2d 97 (1950); *Harden v Furniture Co.*, 199 N.C. 733, 155 S.E. 728 (1930); *Gallimore v. Marilyn's Shoes*, 30 N.C. App. 628, 228 S.E. 2d 39 (1976), *rev'd on other grounds*, 292 N.C. 399, 233 S.E. 2d 529 (1977).

When it is established that an employee is on a special errand for her employer, the declared policy of the state requires a liberal construction in favor of the employee in determining whether the accident arises out of and in the course of the employment. *Stevenson v. City of Durham*, 281 N.C. 300, 188 S.E. 2d 281 (1972); *Petty v. Transport, Inc.*, 276 N.C. 417, 173 S.E. 2d 321 (1970); *Gallimore, supra.* The narrow, restrictive rule adopted by the Commission contravenes this policy.

The proper rule of law to apply to the discrete fact situations is not "did the accident occur on the employee's own premises." Rather, an accident arises out of employment when it occurs in the course of the employment and the conditions or obligations of the employment put the employee in the position or at the place where the accident occurs. 1 A. Larson, The Law of Workmen's Compensation § 6.50 (1978). Plaintiff was injured near her car because the obligations of her employment, the special errand, required her to be at that place when the accident occurred. Where the employment requires travel, the hazards of the route become the hazards of the employment. *Hinkle v. Lexington*, 239 N.C. 105, 79 S.E. 2d 220 (1953). Such is the case here.

Under the facts of this case, we hold that plaintiff had begun her special errand on behalf of her employer. She had left the safety of her house and had entered into the hazards of her journey. *Massey, supra.* Our holding is supported by *Charak v. Leddy*, 23 A.D. 2d 437, 261 N.Y.S. 2d 486 (1965). In *Charak*, claimant had not left the safety of her apartment building when she

was injured, and compensation was denied. She had not entered into the area of risk arising out of her employment, and was injured while doing what any other resident of the building might have done. Here, Mrs. Felton was in a diametrically opposing fact situation.

Jurisdictions as diverse as California and New Hampshire have allowed recovery under analogous circumstances. In *Heinz v. Concord U. Sch. Dist.*, 117 N.H. 214, 371 A.2d 1161 (1977), claimant was a teacher. On his way home to change clothes in order to return to school to chaperone an authorized school dance, he was killed in a motorcycle accident. He was not obligated to chaperone the dance, but was expected to give fully of his services and to participate to a reasonable extent in school activities. The New Hampshire court held the death arose out of and in the course of claimant's employment. The chaperoning duties were in the nature of a special duty or errand and subjected claimant to special travel risks. The cause of the death could properly be considered a hazard of the employment.

Safeway Stores, Inc. v. Workers' Comp. A. Bd., 104 Cal. App. 3d 528, 163 Cal. Rptr. 750 (1980), involved a special errand or mission case with facts closely resembling those in the case sub judice. In *Safeway*, claimant was required to work well beyond his ordinary hours to aid in the preparation of an inventory. He returned to his home about 5:30 a.m. and was injured when he was attacked by an unknown assailant as he got out of his car to enter his house. The employer argued that the injury did not arise out of or in the course of the employment. The California court held that claimant was on a special errand for his employer in his return home from the extended workday. Claimant's entire duty was at the employer's request and satisfied an important and out-of-the-ordinary business need. The journey home was an essential part of the special service claimant was called upon to perform for the benefit of his employer. Safeway further contended that the return journey was completed before the assault. The court concluded that the reasoning in *Charak* supported recovery for claimant, who had not entered the safety of his house, as the claimant in *Charak* had not left the safety and security of her apartment building when she was injured.

We hold that when Mrs. Felton was injured she had entered upon a special errand on behalf of her employer.

DUAL PURPOSE RULE

> The basic dual-purpose rule, accepted by the great majority of jurisdictions, may be summarized as follows: when a trip serves both business and personal purposes, it is a personal trip if the trip would have been made in spite of the failure or absence of the business purpose and would have been dropped in the event of failure of the private purpose, though the business errand remained undone; it is a business trip if a trip of this kind would have been made in spite of the failure or absence of the private purpose, because the service to be performed for the employer would have caused the journey to be made by someone even if it had not coincided with the employee's personal journey.

Larson, *supra*, § 18.12 (citing to *Ridout v. Rose's Stores*, 205 N.C. 423, 171 S.E. 642 (1933)).

In *Humphrey v. Laundry*, 251 N.C. 47, 110 S.E. 2d 467 (1959), our Court applied the dual purpose rule. In so doing, it adopted the reasoning of Chief Justice Cardozo in *Marks v. Gray*, 251 N.Y. 90, 167 N.E. 181 (1920).

> [A] plumber's helper, who was going to drive to a neighboring town to meet his wife, was asked by his employer to fix some faucets there—a trifling job which in itself would not have occasioned the trip. While on his way to this town, he was injured in a wreck and died. On the identical question now before us, Cardozo, C. J., speaking for the Court, said: "If word had come to him before starting that the defective faucets were in order, he would have made the journey just the same. If word had come, on the other hand, that his wife had already returned, he would not have made the trip at all. * * * In such circumstances we think the perils of the highway were unrelated to the service. We do not say that the service to the employer must be the sole cause of the journey, but at least it must be a concurrent cause. To establish liability, the inference must be permissible that the trip would have been made though the private errand had been canceled. * * * The test in brief is this: If the work of the employee creates the necessity for travel, such is in the course of his employment, though he is serving at the same time some purpose of his own. * * * If however, the work has

> had no part in creating the necessity for travel, if the journey would have gone forward though the business errand had been dropped, and would have been canceled upon failure of the private purpose, though the business errand was undone, the travel was then personal, and personal the risk."

251 N.C. at 51, 110 S.E. 2d at 470.

The dual purpose rule applies when, concurrently with an employee's usual trip to or from work, she performs some service for her employer which would otherwise necessitate a separate trip. Larson, *supra*, § 18.21; *Marks, supra; Massey v. Board of Education*, 204 N.C. 193, 167 S.E. 695 (1933).

An accident arises out of the employment when it occurs in the course of the employment and the conditions or obligations of the employment put the claimant in the position where she was injured. Larson, *supra*, § 6.50. Where the employment necessitates travel, it has been held that the hazards of the route become the hazards of employment. *Hinkle, supra; Massey, supra; Williams v. Board of Education*, 1 N.C. App. 89, 160 S.E. 2d 102 (1968).

Applying the dual purpose rule to the record before us, we find that the facts support an award of compensation. The purpose of Mrs. Felton's journey on the morning of the accident was two-fold: she intended to proceed to work and she intended to proceed to the bakery to pick up the order for the day. Had she not stopped by the bakery on her way to work, she or another employee would have been required to leave the shop and go to the bakery for this purpose. The work of the employee created the necessity for the travel. The business purpose of the trip was calculated to further the employer's business. *Massey, supra.* At the time of the accident, Mrs. Felton had embarked on her dual purpose trip. Thus, the hazards of the trip became the hazards of the employment. *Id.*

We hold that under the facts of this case, Mrs. Felton's injury arose out of and in the course of her employment and she is therefore entitled to compensation.

Reversed and remanded to the Industrial Commission for the entry of an appropriate award.

Judge MARTIN (Robert M.) concurs.

Judge WHICHARD dissents.

Judge WHICHARD dissenting.

To permit compensation to employees injured subsequent to leaving their dwelling to go to work, and prior to returning thereto, would be a legitimate policy decision. Employees so situated can with reason be regarded as furthering the interests of the employer, in that such travel is a necessary incident to the employment itself.

As the majority opinion notes, however, it is well-established in this jurisdiction that ordinarily an injury suffered by an employee while going to and from work is not an injury arising out of and in the course of the employment. *See* the cases cited by the majority, and the following: *Humphrey v. Laundry*, 251 N.C. 47, 110 S.E. 2d 467 (1959); *Harris v. Farrell, Inc.*, 31 N.C. App. 204, 229 S.E. 2d 45 (1976); *Franklin v. Board of Education*, 29 N.C. App. 491, 224 S.E. 2d 657 (1976); *Williams v. Board of Education*, 1 N.C. App. 89, 160 S.E. 2d 102 (1968); 38 N.C.L. Rev. 508, 511 (1960). In my view that principle is dispositive here, and application of the exceptions relied on by the majority is inappropriate.

The majority opinion correctly states that "[p]laintiff was injured near her car because the obligations of her employment, the special errand, required her to be at that place when the accident occurred." That was equally the case, however, with every other employee who approached a car for the purpose of going to work that morning. Generally, to be compensable, an injury cannot arise from "a hazard common to others." *Bryan v. T. A. Loving Co.*, 222 N.C. 724, 728, 24 S.E. 2d 751, 754 (1943). "The causitive danger must be peculiar to the work and not common to the neighborhood." *Id.* Such is not the case here. Plaintiff was simply subjected to the identical hazard encountered by every other employee who went to work on the morning in question within the area affected by the same weather pattern.

Consider the following hypothetical: Plaintiff and her next door neighbor are employed as co-managers of the hospitality shop. They are thus employed in the identical capacity by the

same employer. It is plaintiff's duty to go by the bakery on the way to work one morning, and the neighbor's duty the next, on a continuously alternating basis. On the morning in question plaintiff and the neighbor, while proceeding simultaneously toward their respective cars to depart, plaintiff for the bakery, and the neighbor directly for the hospital, fall simultaneously on the ice and sustain identical injuries. Under the majority's reasoning, plaintiff recovers, and the neighbor does not. I find neither logic nor justice in such a result.

I would thus hold that until plaintiff departed from her accustomed route of travel to the place of employment, she remained in the ordinary process of going to work; and her "special errand" to the bakery had not commenced. I would also find the dual purpose doctrine inapplicable on the ground that when plaintiff was injured she had not entered the scope and course of the employment for any business purpose.

My vote is to affirm.

STATE OF NORTH CAROLINA v. EUGENE WILBURN

No. 8114SC1024

(Filed 4 May 1982)

1. Criminal Law § 91.4— newly retained counsel—denial of continuance

The denial of defendant's motion for continuance to permit his attorney, who was retained on the day before the trial began, to prepare for trial did not violate defendant's constitutional right to the effective assistance of counsel where defendant had signed a written waiver of assigned counsel; defendant never moved to withdraw his waiver of assigned counsel; and defendant was given an adequate opportunity to retain counsel in that he was granted two continuances for the purpose of obtaining counsel after he signed the written waiver.

2. Criminal Law § 34.8— evidence of other crimes—competency to show common plan and intent

In a prosecution for attempting and conspiracy to obtain property by false pretenses by falsely promising to sell a grocery store owner cigarettes and canned goods from a Thomas and Howard warehouse at below cost, testimony by two other store owners that they were approached by defendant and asked if they were interested in buying items such as cigarettes at below

cost, that they were instructed to pick up the goods at a Thomas and Howard warehouse, that they dealt with other men as well as with defendant when they went to the warehouse, and that they gave defendant and another man money for the goods ordered but never received any goods *is held* competent to establish a common plan or scheme and to establish an intent to deceive.

3. **False Pretense § 1— attempt to obtain property by false pretenses—actual deception not necessary element**

In a prosecution for attempting to obtain property by false pretenses, it was not necessary for the State to prove that the victim was actually deceived by any alleged misrepresentation of the defendant.

4. **False Pretense § 3.1— conspiracy to obtain property by false pretenses—sufficiency of evidence**

The State's evidence was sufficient for the jury to find that defendant and another conspired to obtain property by false pretenses by misrepresenting to a grocery store owner that they would sell goods to him from a Thomas and Howard warehouse at below cost.

5. **Criminal Law § 142.4— condition of probation—restitution to person not victim of crimes charged**

The trial court erred in requiring defendant, as a condition of probation, to pay restitution to a victim not involved in the charges against defendant. G.S. 15A-1343(d).

APPEAL by defendant from *Bailey, Judge*. Judgment entered 11 March 1981 in Superior Court, DURHAM County. Heard in the Court of Appeals 2 March 1982.

Defendant was tried for and found guilty of attempting to obtain property by false pretenses and conspiracy to obtain property by false pretenses. Defendant appeals from the imposition of a sentence of not less than five nor more than seven years.

The State's evidence tends to show that in April 1980 defendant began visiting Johnny Andrews' grocery store located in Durham, North Carolina. During one of these visits, defendant asked Andrews if he would be interested in buying goods below cost. Defendant indicated he would talk to his boss, after Andrews expressed interest. After this conversation with defendant, Andrews became suspicious and contacted the Durham Police Chief and Robert Zack Long, Assistant Sales Manager of Thomas and Howard Wholesale Grocery Company, Inc. (hereinafter Thomas and Howard). The police then began a surveillance of Andrews' store and observed defendant enter the store on subsequent occasions in April and May. On one occasion defendant was

accompanied by Quillie Smith. During his visits to Andrews' store, defendant would park his green Pontiac nearby but never in the parking lot located in front of the store. After Andrews had expressed interest in defendant's offer and had provided defendant with a list of goods, defendant's "boss man" telephoned him. The "boss man" informed Andrews that the cases of cigarettes and canned goods would cost $17,450. These items normally were valued at $40,000. They were to be delivered to Andrews on 20 May 1980 at one of Thomas and Howard's warehouses in Greensboro. Andrews was told to look for a man known as "Big Freddy," later identified as Quillie Smith. On 20 May 1980 Andrews and an S.B.I. agent, posing as Andrews' partner, drove a rented truck to the Greensboro warehouse and parked near the cash-and-carry window. Smith had arrived at the warehouse in a green Pontiac just minutes prior to Andrews' and Agent Black's arrival. When Andrews approached him, Smith called him by name and introduced him to a Mr. Rosemond, later identified as Steven Price. Price handed Andrews a bill of lading and then told him to drive around the block because too many people were present. After Andrews and Agent Black left, defendant and Kenneth Caudle arrived at the warehouse and parked near the cash-and-carry window. When Andrews and Black returned, Andrews initialed the bill of lading and asked to see the goods. Price refused and demanded the money. Law enforcement personnel, who had been observing this activity, then moved in to arrest Price, Smith, Caudle and defendant. At the time none of these men were employed at the Thomas and Howard warehouse in Greensboro.

Defendant presented no evidence.

Attorney General Edmisten, by Assistant Attorney General Robert G. Webb, for the State.

Loflin & Loflin, by Thomas F. Loflin, III, and Shirley L. Fulton for defendant appellant.

CLARK, Judge.

[1] On 9 March 1981, one day prior to the trial, defendant's attorney filed a motion for continuance until 11 May 1981. He also filed a notice informing the court that he represented defendant for the limited purpose of moving for the continuance. The court denied the motion and ordered defendant to proceed to trial.

Defendant has assigned error to the court's denial of this motion for continuance.

The record on appeal reveals that on 4 August 1980 defendant was indicted for attempting to obtain property by false pretenses. He was indicted on the conspiracy charge approximately three months later. He was formally arraigned on 25 September 1980. Defendant thereafter moved for a continuance of the trial from 1 December 1980 until 12 January 1981. The court granted his motion noting that defendant's attorney, Linwood Peoples, had suffered a stroke. Apparently defendant was granted a second continuance on 15 January 1981 to run until 9 February 1981. The trial court dismissed Peoples as defendant's attorney on 10 February 1981. On the same date defendant waived in writing his right to counsel. Judge Maurice Braswell granted defendant another continuance running from 9 February 1981 to 5 March 1981 and told defendant to obtain an attorney. When he appeared before Judge Braswell on 5 March 1981, defendant still was without legal representation. Judge Braswell then set the trial date for 10 March 1981. On 9 March 1981 defendant retained Sydenham B. Alexander, Jr., as his attorney. Mr. Alexander immediately filed the notice of limited representation and motion for continuance. In his motion he requested an extension of sixty days for the purpose of preparing for trial.

Defendant argues that the court's denial of this motion for continuance violated his constitutional right to the effective assistance of counsel. We disagree. This Court has emphasized that a signed waiver of right to have assigned counsel was " 'good and sufficient until the proceeding finally terminated, unless the defendant himself makes known to the court that he desires to withdraw the waiver and have counsel assigned to him.' " *State v. Smith*, 27 N.C. App. 379, 380-81, 219 S.E. 2d 277, 279 (1975), *quoting State v. Watson*, 21 N.C. App. 374, 379, 204 S.E. 2d 537, 540 (1974). In *Smith, supra*, the defendant waived his right to counsel on 10 June 1974. On 22 July 1974, the date of his trial, defendant moved to withdraw the waiver and have counsel assigned. We noted:

> If this tactic is employed successfully, defendants will be permitted to control the course of litigation and sidetrack the trial. At this stage of the proceeding, the burden is on the

> defendant not only to move for withdrawal of the waiver, but also to show good cause for the delay. Upon his failure to do so, the signed waiver of counsel remains valid and effective during trial.

Id. at 381, 219 S.E. 2d at 279. In the case *sub judice*, there is no evidence that defendant ever moved to withdraw his waiver of assigned counsel. At the hearing on this motion, defendant informed the court that he wanted a lawyer to represent him. He never indicated, however, that he was indigent and desired appointment of counsel. It is obvious from the record that defendant was merely seeking a continuance in order for his recently retained counsel to prepare for trial. Defendant had been granted two continuances for the purpose of obtaining counsel after he signed the written waiver on 10 February 1981. The court gave defendant an adequate opportunity for this purpose, and he should not be permitted to delay litigation any longer. This assignment of error is overruled.

[2] Defendant has also assigned error to the admission of evidence "of other alleged criminal offenses committed by him at other times and other places not charged in the indictments." Defendant contends that this evidence was irrelevant and deprived him of his constitutional right to due process of law. Over defendant's objection, the trial court allowed Donald Thomas to testify that he owned a convenience store in Shelby; that defendant approached him over a year before the trial about buying goods below cost and that he later entered into a deal with defendant and Caudle to buy 950 cases of cigarettes for $25,000. Thomas emphasized that the cases normally sold for $135,000. Defendant and Caudle told Thomas to pick the cigarettes up at the Thomas and Howard warehouse in Butner. After Thomas arrived at the warehouse, he was told to drive to a nearby restaurant and wait before loading his truck. While Thomas was at the restaurant a man drove up and asked to count the $25,000. Thomas gave him the money and never received any of the cigarettes.

Claude Puckett testified that defendant came to his grocery store in Mount Airy in 1979. He asked if Puckett would be interested in buying items from the Thomas and Howard warehouse in Hickory which was closing. Puckett was later in-

formed that he could purchase $27,000 worth of merchandise, which included cigarettes, from the warehouse for the price of $10,000. He later drove to the warehouse and talked to defendant and another man. Puckett gave the men $10,000 but never received any merchandise in return.

It is well established in North Carolina that in a prosecution for a particular crime, the State cannot offer evidence which tends to show that the accused committed another distinct, separate or independent offense. This rule, however, is subject to eight well known exceptions including the following:

> 6. 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. (Citations omitted.)

State v. McClain, 240 N.C. 171, 176, 81 S.E. 2d 364, 367 (1954). In a more recent decision the North Carolina Supreme Court has emphasized that before testimony can be admitted under this exception, it must first be examined carefully to assure that it does more than merely show character or a disposition to commit the offense charged. *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510 (1979), *cert. denied*, 448 U.S. 907, 65 L.Ed. 2d 1137, 100 S.Ct. 3050, *reh. denied*, 448 U.S. 918, 65 L.Ed. 2d 1181, 101 S.Ct. 41 (1980).

> A mere similarity in results is not a sufficient basis upon which to receive evidence of other offenses. Instead, there must be such a concurrence of common features that the assorted offenses are naturally explained as being caused by a general plan.

Id. at 329, 259 S.E. 2d at 530. The testimony of Thomas and Puckett meets these requirements. These two men, like Andrews, were approached by defendant and asked if they were interested in buying such items as cigarettes below cost. They were instructed to pick the goods up at a Thomas and Howard warehouse. Once at the warehouse, they dealt with men, other than defendant, who appeared to be involved in defendant's plan to sell goods below cost. The only major difference between Thomas' and Puckett's dealings with defendant and Andrews' dealings with him is that Andrews never gave defendant any

money. Because of this difference, the testimony of Puckett and Thomas was also admissible under the following exception to the general rule excluding evidence of the commission of other offenses by the accused:

> 2. Where a specific mental intent or state is an essential element of the crime charged, evidence may be offered of such acts or declarations of the accused as tend to establish the requisite mental intent or state, even though the evidence discloses the commission of another offense by the accused. (Citations omitted.)

State v. McClain, supra, at 175, 81 S.E. 2d at 366. One of the elements of obtaining property by false pretenses is the intent to deceive. *State v. Cronin,* 299 N.C. 229, 262 S.E. 2d 277 (1980). Since defendant in the case *sub judice* raised the issue as to whether or not Andrews would have received the cigarettes if he had paid Price the $25,000 agreed upon, the testimony of Puckett and Thomas was admissible for the purpose of establishing the requisite intent to deceive Andrews. For the foregoing reasons, this assignment of error is overruled.

[3] Defendant assigns error to the failure of the court to dismiss the case against him for insufficiency of the evidence. He first contends that since the State failed to present evidence of the essential element, that Andrews was actually deceived by any alleged misrepresentation of the defendant, there was insufficient evidence for the jury to find him guilty of attempting to obtain property by false pretenses. Defendant is incorrect in his belief that this is an essential element of an attempt to obtain property by false pretenses.

> It is not necessary, in order to establish an intent, that the prosecutor should have been deceived, or should have relied on the false pretenses and have parted with his property; indeed, if property is actually obtained in consequence of the prosecutor's reliance on the false pretenses, the offense is complete and an indictment for an attempt will not lie. (Citations omitted.)

35 C.J.S. *False Pretenses* § 36 at 861 (1960); *State v. Cronin, supra.*

[4] Defendant also erroneously argues that there was insufficient evidence to convict him of the offense of conspiracy to obtain property by false pretenses. Defendant was indicted for feloniously conspiring with Steven Wesley Price, Kenneth Larry Caudle, William Logan and Quillie Smith, Jr., to commit the crime of obtaining property by false pretenses. A criminal conspiracy, which is the agreement between at least two persons to commit an unlawful act, may be proven by circumstantial evidence. *State v. Butler*, 269 N.C. 733, 153 S.E. 2d 477 (1967). In the case before us there was clearly sufficient evidence to show that defendant had entered into an agreement with Quillie Smith to commit the offense of obtaining property by false pretenses. The actions of these two men support such a conclusion. This assignment of error is therefore overruled.

[5] Defendant further assigns error to the judgment against him for the reasons that neither indictment was sufficient to charge a criminal offense; that the State presented insufficient evidence of each alleged crime and that the court erroneously required defendant to pay restitution to a victim not involved in the charges against defendant. We find merit to his last reason. In the judgment and commitment against defendant, Judge Bailey sentenced him to a maximum of seven years and a minimum of five years. He then agreed to suspend the term of imprisonment upon the following condition:

> Commitment shall not issue at this time if the defendant by 4:00 p.m. on April 27, 1981 has paid into the office of the Clerk of Superior Court of Durham County the sum of $25,000.00 for the use and benefit of Don Thomas, 300 N. Washington Street, Shelby, N.C., and has paid the cost of court, and the sentence is suspended for five years and the defendant is placed on probation for five years under the usual terms and conditions of probation.
>
> In the event said restitution and cost are not paid in full by 4:00 p.m. on April 27, 1981, commitment shall issue forthwith.

It appears from the record that defendant failed to meet this condition and began serving his sentence on 27 April 1981. This portion of Judge Bailey's order is invalid. G.S. 15A-1343, in effect on the date defendant was sentenced, provided in pertinent part:

> (d) Restitution as a Condition of Probation.—As a condition of probation, a defendant may be required to make restitution or reparation to an aggrieved party or parties who shall be named by the court for the damage or loss caused by the defendant arising out of the offense or offenses for which the *defendant has been convicted.* (Emphasis added.)

In the case *sub judice* defendant was convicted of attempting and conspiring to obtain property by false pretenses from Johnny Andrews. There is no evidence in the record that defendant was ever convicted of obtaining property by false pretenses from Don Thomas. This Court has recently emphasized:

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

State v. Bass, 53 N.C. App. 40, 42, 280 S.E. 2d 7, 9 (1981). The judgment is therefore vacated and the case remanded for resentencing.

Defendant's remaining assignments of error involve allegations of prejudicial error in comments made and instructions given to the jury by the trial judge. We have carefully reviewed each of these assignments of error and find no evidence of prejudicial error entitling defendant to a new trial.

No error in the trial. Judgment and commitment vacated and case remanded for resentencing.

Judges ARNOLD and WEBB concur.

W. REID WRIGHT v. O'NEAL MOTORS, INC. AND CHRYSLER CORPORATION

No. 8110DC715

(Filed 4 May 1982)

1. **Uniform Commercial Code § 23— revocation of acceptance of automobile— summary judgment for dealer improper**

Where plaintiff instituted an action to revoke his acceptance, pursuant to G.S. 25-2-608, of a new automobile which he purchased from defendant car dealer, the trial court erred in entering summary judgment for the dealer since plaintiff's allegations in his complaint raised genuine issues of material fact as to substantial impairment of value and defendant failed to meet its burden of (1) proving that an essential element of plaintiff's claim was nonexistent, or (2) showing through discovery that plaintiff cannot produce evidence to support an essential element of his claim.

2. **Uniform Commercial Code § 23— revocation of acceptance of automobile— summary judgment for manufacturer proper**

Under G.S. 25-2-608, revocation of acceptance is a remedy available to the buyer only against the seller; therefore, where plaintiff bought an automobile of which he intended to revoke acceptance from a dealer, summary judgment for the manufacturer was proper.

APPEAL by plaintiff from *Barnett, Judge.* Judgment entered 21 April 1981 in District Court, WAKE County. Heard in the Court of Appeals 10 March 1982.

Plaintiff instituted this action to revoke his acceptance, pursuant to G.S. 25-2-608, of a new Reliant K automobile which he purchased from defendant O'Neal Motors, Inc., (hereinafter O'Neal) a dealer for defendant Chrysler Corporation (hereinafter Chrysler). Plaintiff alleged that the automobile had such defects as to substantially impair its value to plaintiff; he gave timely notice of revocation to defendant; and that O'Neal refused to revoke the sale. Defendant O'Neal denied that the defects in plaintiff's automobile substantially impaired the car's value, asserted that the defects had been removed, and counterclaimed against plaintiff for storage costs and the rental value of the car. Defendant O'Neal also cross-claimed against defendant Chrysler, alleging that Chrysler was responsible for any defects or breaches of warranties as to plaintiff's car. Both defendants moved for summary judgment on plaintiff's claim against them. After reviewing plaintiff's verified complaint and affidavits submitted by each party, Judge Barnett granted defendants' G.S. 1A-1, Rule

56 motions for summary judgment. Plaintiff has appealed from those judgments. Additional facts will be discussed in the body of the opinion.

Law Offices of Thomas J. Bolch, by S. Allen Patterson, II, for plaintiff-appellant.

Johnson, Gamble & Shearon, by Richard J. Vinegar, for defendant-appellee, O'Neal Motors, Inc.

Johnson, Patterson, Dilthey & Clay, by Robert W. Sumner, for defendant-appellee, Chrysler Corporation.

WELLS, Judge.

The question presented by this appeal is whether the trial court properly allowed defendants' motions for summary judgment.

I. SUMMARY JUDGMENT AS TO DEFENDANT O'NEAL MOTORS, INC.

In plaintiff's verified complaint, he alleged that on 15 November 1980, he purchased, for cash, a new Plymouth "Reliant K" automobile from O'Neal Motors, and that:

. . .

II. Plaintiff accepted the automobile in the belief that the automobile conformed to the contract of sale. On November 16, 1980, plaintiff discovered that the automobile did not conform to the contract inasmuch as plaintiff experienced a roaring noise while driving as well as excessive vibration, fluid leaks, poor gas mileage, a dead battery, the car would pull to the right and other serious defects. Plaintiff could not have known of such defects before that time because of the difficulty of discovering such defects in a brand new automobile.

III. The defects in the automobile severely and substantially impaired its value to plaintiff inasmuch as plaintiff intended to use the "Reliant K" automobile as a means of reliable transportation and since the automobile has spent twelve days since the purchase date in defendant's garage, plaintiff can not use the automobile in its present condition.

IV. On December 19, 1980, plaintiff notified defendant that the automobile was not acceptable to him and that he was

revoking his said acceptance thereof. Plaintiff returned the automobile the [sic] defendant's lot on the same day and demanded that defendant return the purchase price of the "Reliant K" and pay plaintiff all incidental costs.

V. At the time plaintiff gave notice of revocation to defendant, the automobile was in substantially the same condition as when it was delivered to plaintiff, and it has not been harmed in any manner by plaintiff.

. . .

Plaintiff's right to revoke his purchase of the new Reliant K automobile must be determined according to the pertinent provisions of the Uniform Commercial Code contained in Chapter 25 of the General Statutes. G.S. 25-2-608 provides as follows:

§ 25-2-608. Revocation of acceptance in whole or in part.—(1) The buyer may revoke his acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to him if he has accepted it

(a) on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured; or

(b) without discovery of such nonconformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

(2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.

(3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them.

[1] The threshold question in this appeal is whether there is a clearly recognizable level or degree of nonconformity which plaintiff must experience in order to establish that the nonconformities he has alleged would substantially impair the value of the car to him. Our review of pertinent authorities and cases discloses a generally recognized two-fold test on the question of substantiality of impairment: one, a subjective standard measured by the

buyer's needs, circumstances, and reaction to the nonconformity, and two: an objective standard measured by such considerations as market or commercial value, reliability, safety, and usefulness for purposes for which similar goods are generally used, including efficiency of operation, cost of repair of nonconformities, and the seller's ability or willingness to seasonably cure the nonconformity. *See* Annot., 98 A.L.R. 3d 1183; White & Summers, *Uniform Commercial Code*, Sec. 8-3 (2nd ed. 1980); Phillips, "Revocation of Acceptance and the Consumer Buyer," 75 Com. L.J. 354 (1970); Priest, "Breach and Remedy for the Tender of Nonconforming Goods Under the UCC: An Economic Approach," 91 Harvard L. Rev. 960 (1978); 2 Anderson, *Uniform Commercial Code*, Sec. 2-608:13 (2nd ed. 1971).

Case law decisions from other jurisdictions disclose a wide variety of factual situations involving attempted revocation of new automobile purchases for nonconformity. There is simply no majority view of what constitutes substantial impairment of value. We have found scant North Carolina authority bearing on the central issue in this case. In *Imports, Inc. v. Credit Union*, 37 N.C. App. 121, 245 S.E. 2d 798 (1978), defendant buyer attempted to revoke on evidence which showed that defendant negotiated with the dealer for a new, 1975 Fiat equipped with air conditioning and luggage rack at a price of $6,591.00. When defendant accepted delivery for a price of $5,995.80, the car was not equipped with air conditioning or a luggage rack. After using the car for two days, defendant returned it to plaintiff seller because it overheated and the speedometer and odometer malfunctioned. Plaintiff seller towed the car to its garage, replaced a broken fan belt and tightened a nut on the speedometer—odometer. After these repairs were made, defendant buyer told seller she wanted a new car and left the Fiat on seller's premises. The trial court instructed the jury that defendant buyer had offered no evidence which would constitute a defense in the action, and directed a verdict on the issue of revocation. This court's opinion seems to emphasize the question of misrepresentation and in that respect is helpful in the resolution of the case now before us. We quote:

> McQueen also contends that her evidence raised questions both of fraud and of proper revocation of acceptance. It is clear that the evidence does not show any material misrepresentation on the part of plaintiff which might

reasonably have been calculated to deceive McQueen. The mileage figure was clearly on the odometer, and plaintiff never represented that the car had fewer miles on it. In the absence of a misrepresentation, there can be no actionable fraud. *Ragsdale v. Kennedy*, 286 N.C. 130, 209 S.E. 2d 494 (1974). Nor does G.S. 25-2-608 give McQueen a right to revoke her earlier acceptance. The right to revoke acceptance of the car arises only if it was accepted.

"(a) on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured; or

(b) without discovery of such nonconformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance *or* by the seller's assurances." G.S. 25-2-608(1).

There was no evidence that the car was accepted with any knowledge of a nonconformity. There is no evidence that the mileage as shown on the odometer was not the actual mileage or that she was prevented from discovery by the seller. *See Performance Motors, Inc. v. Allen*, 280 N.C. 385, 186 S.E. 2d 161 (1972). That two days after the sale the fan belt broke is insufficient to show such nonconformity as would allow her to revoke her acceptance. Nor can plaintiff show that she did not discover the mileage of the car due to the difficulty of discovery or due to the seller's assurances. She does not, therefore, qualify for relief under G.S. 25-2-608.

In *Motors, Inc. v. Allen, supra*, cited by this court in *Imports, supra*, our Supreme Court held that defendant buyer's overwhelming evidence of nonconformity would permit a jury to find that defendant initially accepted the mobile home on the reasonable assumption that plaintiff seller would correct the nonconforming defects and subsequently revoked her acceptance by reason of plaintiff's failure to do so. For a case of similar import, *see Davis v. Enterprises and Davis v. Mobile Homes*, 23 N.C. App. 581, 209 S.E. 2d 824 (1974), *later app.* 28 N.C. App. 13, 220 S.E. 2d 802 (1975), *disc. rev. denied*, 289 N.C. 613, 223 S.E. 2d 391 (1976). Although not involving precisely the question of substantial impairment of value, *Manufacturing Co. v. Logan Tontz Co.*, 40 N.C. App. 496, 253 S.E. 2d 282 (1979), *disc. rev. denied*, 297 N.C. 454, 256 S.E. 2d 806 (1979), contains an excellent discussion

of general principles of commercial law as they apply to attempted revocation under G.S. 25-2-608.

In the light of the authorities and cases we have discussed, we are persuaded that plaintiff's allegations in his complaint raise genuine issues of material fact as to substantial impairment of value. Plaintiff's complaint having stated a cause of action for revocation, defendant O'Neal, by its motion for summary judgment, assumed the burden of (1) proving that an essential element of plaintiff's claim is nonexistent, or (2) showing through discovery that plaintiff cannot produce evidence to support an essential element of his claim, *Lowe v. Bradford*, 305 N.C. 366, 289 S.E. 2d 363 (1982); i.e., that there were no genuine issues of material fact remaining to be tried and that it was therefore entitled to judgment as a matter of law. *Lowe*, supra. An issue is "genuine" if it can be proven by substantial evidence and a fact is "material" if it would constitute or irrevocably establish any material element of a claim or defense. *Lowe*, supra. The next question to be addressed, therefore, is whether defendant O'Neal has met its burden, for if it has not, summary judgment was not properly entered for it. *Lowe*, supra.

First, we note that O'Neal did not resort to discovery in this case, and hence did not attempt to explore the subjective effect of the alleged nonconformities on this plaintiff. While this is a burden plaintiff will have at trial, i.e., to show how the alleged nonconformities substantially impaired the value of the car *to him*, as measured by his needs, circumstances, etc., on O'Neal's motion for summary judgment, this was O'Neal's burden. O'Neal instead relied entirely on the affidavits of its employees, who thereby stated their version of the events and circumstances leading to plaintiff's attempted revocation. It would appear, therefore, that O'Neal has attacked plaintiff's cause on only one front, i.e., the objective standards we discussed previously.

In one affidavit, defendant O'Neal's General Manager, William R. O'Neal, stated that when plaintiff bought the car, plaintiff was notified prior to accepting delivery that plaintiff could test drive the car and otherwise inspect it to his satisfaction; that plaintiff stated that it would not be necessary for him to test drive the car and insisted that he be allowed to take the car "right out of the showroom", and that no representation was

made to plaintiff as to the gasoline mileage he could expect to obtain from the car. Defendant O'Neal argues that plaintiff's failure to inspect the car before purchase is a complete defense on the issue of defects which might have been discovered by a reasonable inspection at time of delivery. We do not agree. The provisions of the statute make it clear that acceptance of goods without discovery of nonconformities must be judged in the light of whether such acceptance "was *reasonably* induced either by the difficulty of discovery before acceptance *or* by the seller's assurances." G.S. 25-2-608(1)(b). By his own affidavit, plaintiff stated that "at no time was I told that I could test drive the car nor was I given the opportunity to test drive the car before I took delivery." These divergent versions of what took place at the time of sale and delivery show disputed issues of fact as to plaintiff's opportunity to inspect and his response to such opportunity. In addition, plaintiff's affidavit states that defendant O'Neal's salesman represented to plaintiff that he could expect to get gas mileage of 26 miles per gallon in the city and 36 miles per gallon on the highway, whereas O'Neal stated in his affidavit that no expected mileage representation was made to plaintiff, except that his mileage would differ from the E.P.A. rating, according to driving conditions, etc. When defendant O'Neal later tested the car, it averaged only 14 miles per gallon overall. These disputed facts leave an issue as to whether plaintiff could have reasonably discovered the gas mileage nonconformity before acceptance.

Through the affidavit of its service manager, Norman H. Braxton, defendant O'Neal asserted that it seasonably cured all of the defects brought to its attention by plaintiff, a defense to attempted revocation pursuant to G.S. 25-2-608(1)(a). *See* G.S. 25-2-508; G.S. 25-2-608(3); *Anderson*, supra, Sec. 2-608:14. While Braxton's affidavit does assert seasonable cure, it admits that between 15 November 1980, the date of purchase, and 19 December 1980, the date of attempted revocation, a total of approximately 34 days, plaintiff possessed the car for only twenty days. As previously noted, plaintiff asserted that during this time period, the car was in O'Neal's garage for twelve days. Such significant nonavailability of the car for plaintiff's use relates not only to the question of substantial impairment of value, but also to the question of whether defendant seasonably cured such nonconformities as substantially impaired the value of the car to plaintiff.

The materials before the trial court show that there are issues in this case which must be resolved by the trier of facts and that defendant O'Neal has not met its burden of showing that it is entitled to judgment as a matter of law. *See Lowe*, supra, *Easter v. Hospital*, 303 N.C. 303, 278 S.E. 2d 253 (1981); *Vassey v. Burch*, 301 N.C. 68, 269 S.E. 2d 137 (1980). Summary judgment for defendant O'Neal was thus improperly granted, and the judgment is reversed.

II. SUMMARY JUDGMENT AS TO DEFENDANT CHRYSLER CORPORATION.

[2] G.S. 25-2-608, quoted *infra*, refers to the parties to a revocation of acceptance action as "buyer" and "seller". Plaintiff did not allege that he purchased his car from defendant Chrysler Corp., nor that defendant O'Neal was Chrysler's agent. Since plaintiff purchased the Reliant K for cash, neither was there a financing agreement between plaintiff and Chrysler. Finally, plaintiff did not allege that he purchased the car because of advertising or warranties flowing directly from Chrysler to plaintiff.

The majority rule is that revocation of acceptance is a remedy available to the buyer only against the seller, and that the manufacturer, in the absence of a contractual relationship with the ultimate consumer, is not a seller. *See Voytovich v. Bangor Punta Operations, Inc.*, 494 F. 2d 1208, 15 U.C.C. Rep. 45 (6th Cir. 1974); *Conte v. Dwan Lincoln - Mercury, Inc.*, 172 Ct. 112, 374 A. 2d 144, 20 U.C.C. Rep. 899 (1976); *but see Durfee v. Rod Baxter Imports, Inc.*, 262 N.W. 2d 349, 22 U.C.C. Rep. 945 (Minn. 1977); *note*, 63 Minn. L.Rev. 665 (1979). We hold with the majority, that Chrysler Corp., having no privity of contract with plaintiff in plaintiff's purchase from O'Neal, is not a "seller" under G.S. 25-2-608, and that plaintiff cannot revoke his acceptance of the car as to defendant Chrysler Corporation. We further hold that since an essential element of plaintiff's cause of action is lacking, *Lowe*, supra, defendant Chrysler was entitled to judgment as a matter of law. This grant of summary judgment is therefore affirmed.

It is obvious from the result reached below that the trial court considered defendant O'Neal's cross-action against defendant Chrysler to be moot. We note that the decision we have reached will have the effect of reinstituting defendant O'Neal's cross-action against defendant Chrysler.

Summary judgment as to defendant O'Neal Motors, Inc. is Reversed.

Summary judgment as to defendant Chrysler Corporation is Affirmed.

Judges HILL and BECTON concur.

ROSA WYATT v. HENRY HARRISON GILMORE, III AND LINDA JEAN BECKER GILMORE

No. 8114SC706

(Filed 4 May 1982)

Damages § 3.4— damages for physical injury from mental distress

Recovery will be permitted for physical injury resulting from the negligent infliction of emotional distress in the absence of contemporaneous physical impact even though the plaintiff suffered physical consequences from the emotional distress only because of his or her own special susceptibility. Therefore, the trial court erred in entering summary judgment for defendants in plaintiff's action to recover damages for a heart attack suffered by plaintiff as a result of fright induced when an automobile driven by one defendant struck a tree in plaintiff's front yard.

APPEAL by plaintiff from *Braswell, Judge.* Judgment entered 9 March 1981 in Superior Court, DURHAM County. Heard in the Court of Appeals 9 March 1982.

Plaintiff appeals from a summary judgment in favor of defendants, the sole issue being whether recovery should be permitted for physical injury resulting from mental distress in the absence of contemporaneous physical impact.

Plaintiff allegedly suffered a heart attack as the result of fright induced when the automobile defendant Henry Gilmore was driving struck a tree in plaintiff's front yard. Defendant Linda Gilmore was a co-owner of the automobile, but was not in the car when the accident occurred.

Charles Darsie for plaintiff appellant.

Robert F. Baker for defendant appellees.

MARTIN (Harry C.), Judge.

The sole issue raised on this appeal is whether summary judgment was appropriate. This in turn involves the question of defendants' liability for the mental distress and consequent physical injuries plaintiff suffered as a result of defendants' negligence. Defendants focus their argument upon a single element of actionable negligence—foreseeability, and we are thus drawn into this most basic, yet amorphous and complex, area of tort law in order to resolve the issue presented.

Our analysis will be two-fold. By way of foundation, it will be necessary to review the position our courts have taken in deciding cases which have turned on this issue. The second stage in our analysis will lead us to a consideration of the special rules which have evolved from emotional distress cases, particularly those involving emotional distress resulting in physical injury. Our review of emotional distress cases and commentary thereupon leads us to agree that the law in this area "is in an almost unparalleled state of confusion and any attempt at a consistent exegesis of the authorities is likely to break down in embarrassed perplexity." 64 A.L.R. 2d 103 (1959). We hasten to add, however, that our courts have "decided cases in this category strictly upon the facts as presented without adopting inflexible rules." *Williamson v. Bennett*, 251 N.C. 498, 506, 112 S.E. 2d 48, 54 (1960).

Under our general rules of negligence, a tort-feasor is liable if, by the exercise of reasonable care, he might have foreseen that some injury would result from his conduct or that consequences of a generally injurious nature might have been expected. *Slaughter v. Slaughter*, 264 N.C. 732, 142 S.E. 2d 683 (1965). "A tort-feasor is liable to the injured party for all of the consequences which are the natural and direct result of his conduct although he was not able to have anticipated the peculiar consequence that did ensue." *Lockwood v. McCaskill*, 262 N.C. 663, 670, 138 S.E. 2d 541, 547 (1964). "It does not matter that [the particular consequences] are unusual, unexpected, unforeseen, and unforeseeable." *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 351, 162 N.E. 99, 103 (1928) (Andrews, J., dissenting).

A tort-feasor's liability, however, is further governed by the element of causation. "The damages must be so connected with

the negligence that the latter may be said to be the proximate cause of the former." *Id.* In his dissenting opinion in *Palsgraf*, Judge Andrews speaks of proximate cause in the following terms: "[B]ecause of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point." *Id.* at 352, 162 N.E. at 103.

Foreseeability is only one element of proximate cause, which includes other equally important considerations: whether the cause is, in the usual judgment of mankind, likely to produce the result; whether the relationship between cause and effect is too attenuated; whether there is a direct connection without intervening causes; whether the cause was a substantial factor in bringing about the result; and whether there was a natural and continuous sequence between the cause and the result. *See id.*

The causation element in any negligence action raises questions of fact and is thus most appropriately reserved for jury determination. Summary judgment can only be granted in those cases where reasonable men cannot differ on the issues of negligence and proximate cause. It is usually for the jury to say what was the proximate cause of the aggrieved party's injuries. *Robinson v. McMahan*, 11 N.C. App. 275, 181 S.E. 2d 147, *cert. denied*, 279 N.C. 395 (1971).

Defendants in the case sub judice have offered, however, a convincing argument in support of their position that, as a matter of law, they are not liable for plaintiff's injuries. We are cited to special rules applicable to cases involving the negligent infliction of emotional distress. Whereas "[t]here is almost universal agreement upon liability beyond the risk, for quite unforeseeable consequences, when they follow an impact upon the person of the plaintiff," in the absence of contemporaneous injury, recovery has been less certain. W. Prosser, Handbook of the Law of Torts § 50 at 300 (3d ed. 1964).

We are not here concerned with an effort to recover for mere fright caused by ordinary negligence. *McDowell v. Davis*, 33 N.C. App. 529, 235 S.E. 2d 896, *cert. denied*, 293 N.C. 360 (1977); nor are we concerned with the issue of whether plaintiff's subsequent injuries might properly be viewed as "physical," *Craven v. Chambers*, 56 N.C. App. 151, 287 S.E. 2d 905 (1982). We also distinguish that line of cases in which the tort-feasor's conduct

risks direct physical injury to the plaintiff but causes only emotional distress and consequential physical injury. In these cases liability is imposed although neither the distress nor the resulting injury is foreseeable. *See* Restatement (Second) of Torts § 436 (1965); *Lockwood, supra; Kimberly v. Howland,* 143 N.C. 398, 55 S.E. 778 (1906).

Our Supreme Court has held that "[w]here actual physical injury immediately, naturally and proximately results from fright caused by defendant's negligence, recovery is allowed." *Williamson, supra,* at 504, 112 S.E. 2d at 52. However, some courts have qualified this general rule by holding that if the plaintiff suffered physical consequences from emotional stress only because of her own special susceptibility, recovery is generally denied on the ground that defendant is under a duty only to avoid conduct which can injure ordinarily susceptible persons. The special susceptibility rule is in accord with the restatement position. *See* Restatement (Second) of Torts § 313(1)(b) (1965). The effect of the special susceptibility rule is to limit liability by modifying the "thin skull" or "eggshell skull" rule. What is more important, it appears to place the issue of foreseeability within the scope of duty, reminiscent of the Cardozo position in *Palsgraf. See Leannais v. Cincinnati, Inc.,* 480 F. Supp. 286 (E.D. Wis. 1979); *Colla v. Mandella,* 1 Wis. (2d) 594, 85 N.W. 2d 345 (1957). We choose to reject this approach.

Our holding appears to be consistent with other North Carolina cases involving the negligent infliction of emotional distress resulting in physical injury. For example, in *Kimberly, supra,* the defendant was negligent in blasting rock with dynamite in close proximity to plaintiff's house. A rock from one of the blasts crashed through a portion of the house. Plaintiff was pregnant and, as a result of the shock and fear, nearly suffered a miscarriage. In allowing recovery, the Court wrote:

> It is true defendant did not know at the time he fired the blast that the *feme* plaintiff was lying in bed in her home in a pregnant condition, but he or his agents knew it was a dwellinghouse and that in well-regulated families such conditions occasionally exist. While the defendant could not foresee the exact consequences of his act, he ought in the exercise of ordinary care to have known that he was subjecting plaintiff

> and his family to danger, and to have taken proper precautions to guard against it.

143 N.C. at 402, 55 S.E. at 780. Defendant appealed from a jury verdict in favor of the plaintiff and the Court found that defendant should have reasonably foreseen the result of his negligence. There are features of this case which are readily distinguishable from the case sub judice (blasting is an ultrahazardous activity risking direct physical injury), yet implicit in the holding is that the particular facts of both cases raise questions of causation for jury determination.

In *Williamson, supra*, recovery was denied, not because of plaintiff's special physical susceptibility to emotion, but because of her peculiar susceptibility to the fright itself. Plaintiff's fright and anxiety were occasioned by an unreasonable belief that, upon collision with defendant's car, she had struck a child on a bicycle. We find *Williamson* distinguishable on its facts. Plaintiff, in the case sub judice, had what appeared to be a normal reaction to the loud crashing noise she heard when defendants' vehicle struck the tree in her yard. She was understandably startled and frightened. She had no peculiar susceptibility to fright. It has been observed that "[e]xcept for *Williamson*, no North Carolina case has involved the situation in which a defendant is unaware of plaintiff's susceptibility, and a projection of the position the Supreme Court might take in this situation is difficult." Byrd, *Recovery for Mental Anguish in North Carolina*, 58 N.C.L. Rev. 435, 465 (1980). It is significant, however, that the Court in *Williamson* cited as authority the Wisconsin case of *Colla, supra*, to which we turn for guidance.

The defendant in *Colla* left his truck parked, unattended, on a hill. The car rolled down an alley and crashed into the side of plaintiff's house, causing a loud noise. Plaintiff, a sixty-three-year-old man suffering from high blood pressure and a mild heart condition, was resting in his bedroom at the time of the collision and died of heart failure ten days later. There was no evidence that the noise or shock would have caused harm to one in good health. Medical testimony indicated that the accident did precipitate the heart failure. Defendant's motion for summary judgment was denied. On appeal, the Wisconsin court affirmed, stating that:

> It is recognized by this and other courts that even where the chain of causation is complete and direct, recovery against the negligent tort-feasor may sometimes be denied on grounds of public policy because the injury is too remote from the negligence or too "wholly out of proportion to the culpability of the negligent tort-feasor", or in retrospect it appears too highly extraordinary that the negligence should have brought about the harm, or because allowance of recovery would place too unreasonable a burden upon users of the highway, or be too likely to open the way to fraudulent claims, or would "enter a field that has no sensible or just stopping point."

1 Wis. (2d) at 598-99, 85 N.W. 2d at 348.

"The determination to deny liability is essentially one of public policy rather than of duty or causation." *Id.* at 599, 85 N.W. 2d at 348. We are in agreement with the reasoning of the *Colla* court in finding no grounds of public policy on which recovery in this case should be denied, assuming the jury determines, from the various questions relating to proximate cause, that defendants should be held liable for their negligence. In accord is *Dulieu v. White & Sons*, 2 K.B. 669 (1901), holding that where medical evidence indicated that physical injury followed shock as a direct and natural effect, there was no legal reason for saying that damage was less proximate in a legal sense than damage arising contemporaneously. *See also Barrera v. E. I. Du Pont De Nemours & Co., Inc.*, 653 F. 2d 915 (5th Cir. 1981). With respect to the special susceptibility rule, we note that in *Colla* the court stated that "[i]t may be observed that heart disease is not a rare ailment." 1 Wis. (2d) at 600, 85 N.W. 2d at 349.

We adopt this more commonsense approach because we see no reason to distinguish one kind of physical injury from another based on special susceptibility. It seems no more "foreseeable" that a victim of fright should tear a cartilage, *Langford v. Shu*, 258 N.C. 135, 128 S.E. 2d 210 (1962), than suffer amnesia, *Lockwood, supra;* suffer danger of a miscarriage, *Kimberly, supra;* or have a heart attack, *Colla, supra.*

Defendant Henry Gilmore did not exercise due care in the operation of a motor vehicle. In fact, by pleading guilty to reckless driving, a violation of N.C.G.S. 20-140(a), defendant ad-

mitted he was operating his car in a criminally negligent manner. He acted unreasonably and in doing so exposed those travelling on the road, as well as those situated adjacent to it, to unnecessary danger. It was foreseeable that some harm would result. In order to recover, however, plaintiff is required to show that her injuries were proximately caused by defendants' wrongful act. Foreseeability is one, but not the sole, consideration in finding proximate cause. The summary judgment was improvidently entered.

Reversed.

Judges MARTIN (Robert M.) and WHICHARD concur.

IN THE MATTER OF: CALVIN WILKERSON, A MINOR

No. 8114DC598

(Filed 4 May 1982)

1. **Parent and Child § 1— termination of parental rights—"willfully" leaving child in foster care for two years—evidence sufficient**

By failing, for more than six years, to take steps to become responsible so as to be able to remove their child from foster care, respondents clearly fulfilled the willfulness requirement of G.S. 7A-289.32(3).

2. **Parent and Child § 1— termination of parental rights—failure of parents to show improvement of conditions**

Petitioner provided clear and convincing evidence to support the finding and conclusion that respondents left their child in foster care for more than two consecutive years without showing that substantial progress had been made in correcting those conditions which led to the removal of their child for neglect even where shortly before trial respondents moved into a neat apartment since this late occurrence, in the wake of over six years of total absence of progress, did not compel a finding that substantial progress had been made.

3. **Parent and Child § 1— termination of parental rights—"diligent efforts" to strengthen parental relationship**

The record fully supported a finding that petitioner made diligent efforts to encourage and strengthen the parental relationship as required by G.S. 7A-289.32(3) where the evidence showed over six and one-half years of continuous contact with respondents by petitioner through four social workers, attempts to counsel respondents on the steps to be taken to merit return of custody, and petitioner's continuous attempt to seek a positive response from respondents.

4. Parent and Child § 1— termination of parental rights—previous orders binding on termination hearing—collateral estoppel properly applied

In a hearing concerning the termination of parental rights, the court properly ruled that all previous orders in the case were binding on it as to what those custody orders found to exist when they were entered. The conclusion in a previous custody order that the elements of G.S. 7A-289.32(3) had been met involved an issue which, under G.S. 7A-657, was essential to the court's judgment in the termination hearing, and collateral estoppel was therefore properly applied.

APPEAL by respondents from *LaBarre, Judge.* Judgment entered 16 February 1981 in District Court, DURHAM County. Heard in the Court of Appeals 5 February 1982.

Calvin Wilkerson was initially removed from the custody of respondents, Minnie and Jerry Wilkerson, and placed in the custody of petitioner, the Durham County Department of Social Services, in 1974, when he was two years and four months old. Respondents' four older minor children also were removed from their custody at that time. The order granting custody to petitioner found all of the children to be neglected because of (1) poor sanitation, food, clothing, and housekeeping in the home provided by respondents, and (2) excessive absences from school by the three school age children.

In May 1980 a hearing was held on petitioner's motion for review of the custodial status of the children. In an order dated 11 June 1980 the court made findings of fact and concluded that the factors set forth in G.S. 7A-289.32(3) existed as to the four youngest children. It ordered that the children remain in the custody of petitioner and that respondents cooperate with petitioner in arranging visits, refrain from threatening, assaulting, or verbally abusing any person from whom they received supportive services, and attend and participate in parent training programs offered by petitioner or by Parents Anonymous. Respondent Jerry Wilkerson was ordered to participate in alcoholic counseling, and respondent Minnie Wilkerson was ordered to participate in psychological therapy.

In September 1980, petitioner filed a petition for termination of parental rights as to Calvin. Following a hearing at which respondents were represented by court-appointed counsel, the court ordered respondents' parental rights to Calvin terminated pursuant to G.S. 7A-289.32(3).

Respondents appeal.

Lester W. Owen, Durham County Attorney, by Assistant County Attorney James W. Swindell, for petitioner appellee.

Samuel Roberti, Guardian Ad Litem, appellee.

Lipton & Mills, by Stuart S. Lipton, for respondent appellants.

WHICHARD, Judge.

Respondents' primary contention is that the evidence was insufficient to support termination of parental rights pursuant to G.S. 7A-289.32(3), and that their motions to dismiss at the close of petitioner's evidence and of all the evidence thus should have been allowed. We disagree, and thus affirm.

G.S. 7A-289.32(3) permits termination of parental rights upon a finding that:

> The parent has willfully left the child in foster care for more than two consecutive years without showing to the satisfaction of the court that substantial progress has been made within two years in correcting those conditions which led to the removal of the child for neglect, or without showing positive response within two years to the diligent efforts of a county department of social services . . . to encourage the parent to strengthen the parental relationship to the child or to make and follow through with constructive planning for the future of the child.

The court made such a finding, and respondents excepted to it. They did not except, however, to any of the court's other forty-one findings of fact which set forth in detail the evidence presented at the termination hearing. Those findings are thus deemed to be supported by competent evidence and are conclusive on appeal. *Schloss v. Jamison*, 258 N.C. 271, 128 S.E. 2d 590 (1962); *In re Smith*, 56 N.C. App. 142, 287 S.E. 2d 440 (1982); *Ply-Marts, Inc. v. Phileman*, 40 N.C. App. 767, 253 S.E. 2d 494 (1979).

The findings showed, in pertinent part, the following:

All respondents' minor children except the oldest, Gregory, have remained in foster care since their removal from respond-

ents in May 1974. Gregory was returned to respondents in 1976 and has continued to reside with them since that date. Petitioner made extensive efforts to get Gregory enrolled in school after his return to respondents, but Gregory has attended school only six days since that time despite respondents' agreement to keep him in school.

Calvin has been in four foster homes since 1974 and has lived 71% of his life in foster care. He is presently nine years old and is experiencing psychological problems as a result of his multiple placements. He is in need of one to two years of psychotherapy. His current foster parents would like to adopt him, and Calvin has expressed a desire to be adopted by them.

When petitioner filed for termination of parental rights in September 1980, respondents were living in a trailer which was rat infested and without minimum toilet facilities. Prior to living in the trailer, respondents resided in public housing from which they were evicted because of poor sanitation and health maintenance of their living unit. Respondents would have continued to live in the rat infested trailer had they not been evicted because of its unsanitary conditions. They have since moved into an apartment which petitioner observed in December 1980 to be neat and partially furnished.

During the first six months respondents' children were in foster care respondents made regular visits, but thereafter their contacts with petitioner and with their children began to decrease. Petitioner's representative Paul Kommell worked with respondents from January to October 1978 attempting to have Gregory enrolled in school. Petitioner's representative George Lipscomb was assigned to the case from November 1978 to February 1979. Lipscomb telephoned respondents and arranged two home visits with them. On the first visit Lipscomb did not find anyone home, but heard music coming from the house. The second visit was cancelled by respondent Jerry Wilkerson because he was "too drunk to talk." Lipscomb invited respondents to come to his office for a visit, but respondents failed to keep the appointment. Lipscomb did meet respondent Minnie Wilkerson when she came to his office seeking emergency assistance. At no time during Lipscomb's assignment to the case did respondents ask to visit with Calvin.

Nancy Berson was assigned to the case from March 1979 through October 1980. Each time she met with respondents, she was threatened and verbally abused by Mrs. Wilkerson. She was therefore unable to establish any meaningful communication with respondents. She did continue to encourage respondents to visit with their children, but could not get them to agree to a scheduled visit until 12 October 1979. Respondents failed to attend the visit and failed to attend another scheduled visit on 15 February 1980. Mrs. Wilkerson did keep three appointments to visit with her children between December 1979 and July 1980. Mr. Wilkerson attended one of those visits but did not attend the May 1980 hearing or the termination hearing.

Cathy Brock was assigned to the case in October 1980 and went to great lengths to have respondents visit with their children on 30 December 1980, Calvin's birthday. Respondents failed to attend the visit. After entry of the June 1980 order Mr. Wilkerson enrolled in an alcoholic rehabilitation program, but he left without finishing it and failed to keep an appointment to establish a post-treatment plan. Mr. Wilkerson appeared to Ms. Brock to have been drinking in November 1980 when he came to her office requesting emergency assistance. Mrs. Wilkerson did not participate in psychological therapy and parent training programs as ordered by the court in June 1980.

Due to Mr. Wilkerson's alcoholism, he is not employed. Mrs. Wilkerson is employable, but has been employed only intermittently during the past six years. She did obtain employment in October 1980 and has been employed since that time. During the various periods of her employment, she failed to pay any support for the benefit of Calvin or any of her other children in foster care.

Petitioner made diligent efforts arranging visits between the minors and respondents, but respondents showed lack of interest in their children and lack of appreciation for petitioner's efforts.

As noted above, these findings are deemed supported by competent evidence. Respondents do not contend otherwise. They argue, instead, that the evidence failed to establish three of the requirements for termination of parental rights pursuant to G.S. 7A-289.32(3), *viz.*: (1) willfulness by the parents in leaving their child in foster care for more than two consecutive years; (2) lack

of substantial progress within two years in correcting the conditions which led to the removal of the child for neglect; and (3) diligent efforts by a county department of social services to encourage the parent to strengthen the parental relationship with the child.

[1] As to (1), the alleged absence of willfulness, respondents contend that because of their uneducated, illiterate, unemployed, and alcoholic states, and because petitioner never communicated to them a plan for Calvin's return, they never possessed the ability to remove Calvin from foster care and thus cannot be said to have left him there willfully. This argument has no merit. Although the factors recited may have rendered respondents unable to remove Calvin from foster care, the evidence shows nothing which prevented them from overcoming those factors and acquiring the ability to remove him. The court found that Mrs. Wilkerson was employable, yet had failed to obtain regular employment since Calvin was removed from her custody. It further found that Mr. Wilkerson was afforded the opportunity to participate in alcoholic counseling, but did not follow through on it. By failing, for more than six years, to take steps to become responsible so as to be able to remove Calvin from foster care, respondents clearly fulfilled the willfulness requirement of G.S. 7A-289.32(3). Further, any attempt by petitioner to develop and communicate to respondents a plan for Calvin's return would have been futile in light of the findings that meaningful communication with respondents could not be established and that respondents had consistently refused to cooperate with petitioner.

[2] As to (2), the contention that substantial progress had been made in correcting the conditions which led to Calvin's removal for neglect, respondents cite evidence indicating that at the time of the termination hearing they were no longer living in the rat infested trailer, but in a clean five room apartment containing adequate furniture. Respondents ignore the preponderance of the evidence, however, showing that they continued to live in filthy and unsanitary conditions from the time Calvin was taken from them until shortly before the termination hearing when they were forced to find new living quarters after being evicted from the trailer because of its unsanitary conditions. This late occurrence, in the wake of over six years of total absence of progress, did not compel a finding that substantial progress had been made.

Respondents total failure even to attempt improvement in their living conditions and solution of Mr. Wilkerson's drinking problems, coupled with their failure to maintain meaningful contact with Calvin despite over six years of efforts in that regard by petitioner, provided clear and convincing evidence to support the finding and conclusion that respondents "willfully left [Calvin] in foster care for more than two consecutive years without showing . . . that substantial progress [had] been made within two years in correcting those conditions which led to the removal of [Calvin] for neglect . . . ." G.S. 7A-289.32(3); *see In re Smith, supra.*

[3] As to (3), the contention that petitioner's efforts were not the "diligent efforts" required by the statute, the evidence deprives this argument, too, of merit. It shows over six and one-half years of continuous contact with respondents by petitioner through four social workers, and frequent efforts to arrange home visits with respondents and visits by respondents with Calvin and the other children. It further shows petitioner's attempts to counsel respondents on the steps to be taken to merit return of custody. Respondents refused to cooperate with any of the social workers, and they threatened and verbally abused one of them. Yet, despite respondents' total failure to respond to its efforts, petitioner continued to seek a positive response from them even after this termination proceeding was filed. It arranged, for example, a visit by respondents with their children in December 1980. Respondents, however, failed to attend.

The mere fact that no written or oral plan was formalized is not determinative of the issue of "diligent efforts of a county department of social services . . . to encourage the parent to strengthen the parental relationship to the child." G.S. 7A-289.32(3). The record is replete with evidence of "diligent efforts" by petitioner to strengthen respondents' relationships with their children. Petitioner's efforts were thwarted in every instance, however, by respondents. In sum, the record fully supports the finding that petitioner made diligent efforts to encourage and strengthen the parental relationship as required by G.S. 7A-289.32(3).

[4] Finally, the court ruled, on motion by petitioner, that all previous orders in the case were binding on it as to what those orders found to exist when they were entered. Respondents

argue that the court misapplied the doctrine of collateral estoppel and thereby predetermined the outcome of the termination hearing in view of the conclusion of law in the June 1980 order that the G.S. 7A-289.32(3) conditions for termination existed as to the four youngest children.

Collateral estoppel applies "where the second action between the same parties is upon a different claim or demand, [and] the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered." *King v. Grindstaff*, 284 N.C. 348, 356, 200 S.E. 2d 799, 805 (1973) (quoting *Cromwell v. County of Sac*, 94 U.S. 351, 353, 24 L.Ed. 195, 198 (1877)). The hearing to review the custody order and the hearing to terminate parental rights involved "different claim[s] or demand[s]" and the same parties. The June 1980 order continued custody in petitioner following a G.S. 7A-657 "review of custody order." G.S. 7A-657 requires that the court consider, *inter alia*, "when and if termination of parental rights should be considered." Thus, the conclusion in the June 1980 order that the elements of G.S. 7A-289.32(3) had been met involved an issue which, by statutory mandate, was essential to the court's judgment. Collateral estoppel was therefore properly applied with respect to the June 1980 conclusion that the G.S. 7A-289.32(3) conditions existed at that time.

Further, the ruling could not have prejudiced respondents because (1) they were allowed to present evidence regarding events which took place prior to entry of the June 1980 order, and (2) the court did not rely on the conclusion of law in the June 1980 order to support its termination of respondents' parental rights, but on evidence presented at the termination hearing which covered the entire period after Calvin's removal from respondents' custody.

Affirmed.

Judges CLARK and ARNOLD concur.

State v. Jackson and State v. Marshall

STATE OF NORTH CAROLINA v. PRESTON JACKSON

STATE OF NORTH CAROLINA v. JESSE BRYAN MARSHALL

No. 813SC1025

(Filed 4 May 1982)

1. Criminal Law § 113.7— aiding and abetting—instruction on shared intent

Although the trial court did not specifically instruct the jury that it must find that the defendant shared the criminal intent of the perpetrator in order to convict defendant as an aider and abettor, the trial court's instructions clearly conveyed the concept of a shared felonious intent where the court charged that, to be guilty, defendant "must aid or actively encourage the person committing the crime or in some way communicate to this person his intentions to assist in its commission," and that in order to convict defendant the jury must find that defendant "knowingly advised, instigated, encouraged, or aided [the perpetrator] to commit the embezzlement."

2. Conspiracy § 6; Embezzlement § 6— conspiracy to embezzle—sufficiency of evidence

The evidence was sufficient to support defendant's conviction of conspiracy to embezzle meat from a hospital where it showed that the codefendant solicited a meat company employee to divert from the hospital meat which he was supposed to deliver to the hospital, that defendant on at least one occasion received meat from the employee, and that the employee was paid $100, either by defendant or by the codefendant, for each shipment of meat which he diverted from the hospital.

3. Embezzlement § 1— elements of the crime—actual or constructive possession of property

As used in the embezzlement statute, G.S. 14-90, the words "which shall have come into his possession or under his care" contemplate both actual and constructive possession of the employer's property.

4. Embezzlement § 6— embezzlement of hospital's meat—constructive possession—sufficiency of evidence

The State's evidence was sufficient for the jury to find that defendant had constructive possession of meats belonging to a hospital and that he was guilty of embezzling the meats, although the meats never left the delivery truck which brought them to the hospital, where it tended to show that defendant, while acting as an agent of the hospital and during the course of his employment there, took deliveries of meat intended for the hospital and signed the invoices therefor; defendant arranged with the meat company's truck driver to divert a portion of the meat ordered and intended for the hospital; the driver delivered the entire shipment of meats to the hospital; and defendant signed the invoices for the orders but directed the driver to leave approximately half of the meats on the truck and to take them to a prearranged location.

State v. Jackson and State v. Marshall

APPEAL by defendants from *Brown, Judge.* Judgments entered 23 April 1981 in Superior Court, CRAVEN County. Heard in the Court of Appeals 3 March 1982.

Each defendant was charged with one count of embezzlement and conspiracy to embezzle. The jury found them guilty as charged, and defendants appeal from judgments of imprisonment.

Attorney General Edmisten, by Assistant Attorney General Thomas F. Moffitt, for the State (defendant Jackson's appeal).

Appellate Defender Adam Stein, by Assistant Appellate Defender Malcolm R. Hunter, Jr., for defendant-appellant Jackson.

Attorney General Edmisten, by Assistant Attorney General Barry S. McNeill, for the State (defendant Marshall's appeal).

John H. Harmon for defendant-appellant Marshall.

HILL, Judge.

The State's evidence tends to show that Richard Dale Long, a former employee of the Rusher Meat Company, first delivered meat to the Craven County Hospital in July 1979. Defendant Marshall was employed by the hospital and, as a part of his job, took the deliveries of meat and signed the invoices. Long testified that "during the summer of 1980 [defendant Marshall] asked me if I would like to pick up some extra money . . . holding back some meat . . . at the hospital." Long didn't agree to do this until ten or eleven months later. On about fifteen occasions, Long "held back" approximately one-half of the meat intended for the hospital and delivered it to various places in the Rusher truck. Long testified, "[defendant Marshall] come up and told me what he wanted and he took part of it off the truck and then what he didn't want he put in the corner of the truck and give me a hundred dollars. Then [defendant Marshall] would sign the invoice." The first time, outside the hospital, defendant Marshall introduced defendant Jackson to Long as "the guy that would be getting the meat each week." Long, in the Rusher truck, then followed defendant Jackson up a dirt road where the latter put the meat in his car. He saw defendant Jackson about ten times after this first delivery. Long further testified that he was paid $100, either by defendant Marshall or by defendant Jackson, for

each shipment of meat that he "took somewhere other than the hospital."

Louis William Hanson, also a former employee of the Rusher Meat Company, testified that he diverted meat intended for Craven County Hospital about eight times between August 1977 and August 1978. He stated, "[defendant Marshall] would give me a $100 to do what he wanted me to do with it. He wanted me to take some of it to the hospital and the other part went somewhere else. . . . I used basically the same routine that Ricky Long testified about."

A special agent with the State Bureau of Investigation, Melinda Kaufin, testified that from October 1977 through December 1980, 31,126 pounds of rib eye steaks valued at $119,820.35 were missing from the Craven County Hospital. Defendants presented no evidence.

DEFENDANT JACKSON'S APPEAL

[1] In his first argument, defendant Jackson argues that the trial judge erred by failing to instruct the jury "that it must find that the defendant shared the criminal intent of the perpetrator in order to convict the defendant as an aider and abettor."

> To constitute one a principal in the second degree, he must not only be actually or constructively present when the crime is committed, but he must aid or abet the actual perpetrator in its commission. (Citations omitted.) A person aids or abets in the commission of a crime within the meaning of this rule when he shares in the criminal intent of the actual perpetrator (citations omitted), and renders assistance or encouragement to him in the perpetration of the crime. (Citations omitted.) While mere presence cannot constitute aiding and abetting in legal contemplation, a bystander does become a principal in the second degree by his presence at the time and place of a crime where he is present to the knowledge of the actual perpetrator for the purpose of assisting, if necessary, in the commission of the crime, and his presence and purpose do, in fact, encourage the actual perpetrator to commit the crime. (Citations omitted.)

State v. Kendrick, 9 N.C. App. 688, 690, 177 S.E. 2d 345, 347 (1970), *quoting State v. Birchfield*, 235 N.C. 410, 413-14, 70 S.E. 2d

5, 7-8 (1952). The intent to aid the perpetrator "does not have to be shown by express words of the defendant but may be inferred from his actions and from his relation to the actual perpetrator[s]." *State v. Sanders*, 288 N.C. 285, 291, 218 S.E. 2d 352, 357 (1975), *cert. denied*, 423 U.S. 1091, 96 S.Ct. 886, 47 L.Ed. 2d 102 (1976). *See also State v. Moses*, 52 N.C. App. 412, 279 S.E. 2d 59 (1981).

The trial judge in the present case charged, in part, as follows:

> However, a person is not guilty of a crime merely because he is present at the scene, even though he may silently approve of the crime or secretly intends to assist in the commission. *To be guilty he must aid or actively encourage the person committing the crime or in some way communicate to this person his intentions to assist in its commission.*
>
> So, I charge that if you find from the evidence and beyond a reasonable doubt that at [sic] the time . . . [defendant Marshall] committed embezzlement, and that [defendant Jackson] was present at the time the crime was committed and directed Richard Dale Long to locations other than the Craven County Hospital where the rib eye loins were off loaded, that *in so doing, [defendant Jackson] knowingly advised, instigated, encouraged, or aided [defendant Marshall] to commit the embezzlement, it would be your duty to return a verdict of guilty as charged.*

(Emphasis added.) We agree with this Court's statement in *State v. Lankford*, 28 N.C. App. 521, 526, 221 S.E. 2d 913, 916 (1976), while addressing the same argument, that "[t]he instructions clearly conveyed the concept of a shared felonious intent although those exact words were not used." Moreover, the evidence shows that defendant Jackson was at the hospital for Long's first diverted delivery and was introduced to Long by defendant Marshall as "the guy that would be getting the meat each week." Long followed defendant Jackson down a dirt road where the latter loaded the meat into his car. Long testified that he saw defendant Jackson about ten times after this first delivery; and, when defendant Marshall didn't pay him, defendant Jackson did pay him for delivering the diverted meat. This evidence is suffi-

cient from which a jury may infer that defendant Jackson shared the criminal intent of defendant Marshall. The trial judge's instructions being adequate, this argument has no merit.

[2] Defendant Jackson's second argument states that there is insufficient evidence of a conspiracy between defendant Marshall and him to embezzle meat from the hospital to sustain a verdict of guilty on that charge.

> A criminal conspiracy is an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means. [Citation omitted.] To 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: " 'A mutual, implied understanding is sufficient, so far as the combination or conspiracy is concerned, to constitute the offense.' " [Citations omitted.] . . . As soon as the union of wills for the unlawful purpose is perfected, the offense of conspiracy is completed.

State v. Bindyke, 288 N.C. 608, 615-16, 220 S.E. 2d 521, 526 (1975) (emphasis original). *Accord State v. Abernathy*, 295 N.C. 147, 244 S.E. 2d 373 (1978).

The evidence in the present case as recounted for defendant Jackson's first argument is sufficient for the jury to infer "a mutual, implied understanding" between defendant Marshall and him to constitute a conspiracy. Specifically, the offense may be shown by the fact that defendant Marshall solicited Long to divert the meat from the hospital while defendant Jackson, on at least one occasion, received it from Long. Defendant Jackson also was partly responsible for Long's payment. The evidence is not insufficient as a matter of law, as defendant Jackson contends. Therefore, this argument has no merit.

In his final argument, defendant Jackson contends that there is insufficient evidence for the jury to find that he is guilty of embezzlement to sustain a verdict on that charge. As the State notes, the thrust of this argument is that there is insufficient evidence to prove that defendant Jackson shared the criminal intent of defendant Marshall. Based upon our disposition of the foregoing arguments, this contention has no merit.

DEFENDANT MARSHALL'S APPEAL

In his first argument, defendant Marshall contends that the trial judge should have dismissed the charges against him because there is no evidence that he "actually received the meats which were diverted . . .." He argues that "receive," as an element of the offense of embezzlement, must be construed to mean actual, not constructive, receipt. Thus, because the diverted meat never left the Rusher truck, defendant Marshall contends that he never had actual possession.

G.S. 14-90 provides, in part, as follows:

> If . . . any agent, consignee, clerk, bailee or servant, . . . shall embezzle or fraudulently or knowingly and willfully misapply or convert to his own use, or shall take, make away with or secrete, with intent to embezzle or fraudulently or knowingly and willfully misapply or convert to his own use any . . . goods . . . *which shall have come into his possession or under his care*, he shall be [guilty of a felony]. . . .

(Emphasis added.) Under this statute, four elements must be established: (1) that defendant Marshall was an agent of the hospital; (2) that he had *received* the hospital's property by the terms of his employment; (3) that he *received* the property in the course of his employment; and (4) " 'knowing it was not his own, converted it to his own use.' " *State v. Block*, 245 N.C. 661, 663, 97 S.E. 2d 243, 244 (1957), *quoting State v. Blackley*, 138 N.C. 620, 625-26, 50 S.E. 310, 312 (1905). *Accord State v. McCaskill*, 47 N.C. App. 289, 267 S.E. 2d 331, *disc. rev. denied*, 301 N.C. 101, 273 S.E. 2d 306 (1980).

[3] We agree with the State that in the present case, we must determine whether the statutory language "which shall have come into his possession or under his care" contemplates constructive possession; not whether "receive," as an element of the offense of embezzlement, so contemplates.

Constructive possession of goods exists without actual personal dominion over them, but "with an intent and capability to maintain control and dominion" over them. *State v. Spencer*, 281 N.C. 121, 129, 187 S.E. 2d 779, 784 (1972). *Accord State v. Wells*, 27 N.C. App. 144, 218 S.E. 2d 225 (1975). We construe "which shall have come into his possession or under his care" to contemplate

actual *and* constructive possession. Clearly, "which shall have come into his possession" is actual possession. The phrase "or under his care" indicates the "intent and capability to maintain control and dominion," which is constructive possession. Thus, the possession required by G.S. 14-90 to make out a *prima facie* case of embezzlement may be actual or constructive possession. *See also* 26 Am. Jur. 2d Embezzlement § 15, p. 565 (1966); 29A C.J.S. Embezzlement § 9, p. 19 (1965).

[4] The evidence in the present case shows that defendant Marshall, while acting as an agent of the hospital and during the course of his employment there, took the deliveries of meat intended for the hospital and signed the invoices. He then arranged for the diversion of a portion of the meat to various places. Under these circumstances, defendant Marshall had constructive possession of the meat as it has been defined above, even though none of the diverted meat left the Rusher truck. The remaining elements of the offense of embezzlement clearly are established. Therefore, we find that the evidence was sufficient to withstand defendant Marshall's motion to dismiss this charge. This argument has no merit.

Based upon our disposition of defendant Marshall's first argument, his remaining arguments, alleging the trial judge's failure to define "receive" as an element of the offense of embezzlement and alleging error in the trial judge's instructions to the jury upon actual and constructive possession, likewise are without merit.

For these reasons, in defendants' trial, we find

No error.

Judges WELLS and BECTON concur.

Bowens v. Board of Law Examiners

LARRY DEAN BOWENS, D. LESTER DIGGS, WILLIAM R. FEWELL, JR., CLIFTON EDWARD GRAVES, JR., FRED HARRISON, KAREN IANTHA JACKSON, MICHELLE JACKSON, EARL FREDERICK JONES, NAY L. MALLOY, EMERY L. RANN, III, AND DENISE MAJETTE WELCH v. THE BOARD OF LAW EXAMINERS OF THE STATE OF NORTH CAROLINA; ROBERT C. HOWISON, JR., INDIVIDUALLY AND IN HIS REPRESENTATIVE CAPACITY AS CHAIRMAN OF THE BOARD OF LAW EXAMINERS OF THE STATE OF NORTH CAROLINA, HORACE E. STACY, JR., W. H. McELWEE, WALTER R. McGUIRE, FRANCES I. PARKER, ERIC C. MICHAUX, JAMES MULLEN, C. EDWIN ALLMAN, JOHN T. ALLRED, JOHN D. WARLICK, JR., AND JAMES L. NELSON, INDIVIDUALLY AND IN THEIR REPRESENTATIVE CAPACITIES AS MEMBERS OF THE BOARD OF LAW EXAMINERS OF THE STATE OF NORTH CAROLINA, AND FRED P. PARKER, III, INDIVIDUALLY AND IN HIS REPRESENTATIVE CAPACITY AS EXECUTIVE SECRETARY TO THE BOARD OF LAW EXAMINERS OF THE STATE OF NORTH CAROLINA

No. 8110SC544

(Filed 4 May 1982)

1. Attorneys at Law § 2— right to practice law

There is no unqualified natural or constitutional right to practice law; rather, the right to practice law is an earned right, and a state may require a showing of proficiency in its law before it admits an applicant to the Bar.

2. Attorneys at Law § 2— law examinations—no delegation of legislative power to Board of Law Examiners

The statute giving the Board of Law Examiners the duty of examining applicants for the Bar of this State, G.S. 84-24, does not constitute an unlawful delegation of legislative authority in violation of Art. II, § 1 of the N.C. Constitution.

3. Attorneys at Law § 2— Bar examination—absence of ascertainable grading standards—no violation of due process and equal protection

The rules and regulations of the Board of Law Examiners do not violate due process and equal protection because they contain no ascertainable grading standards for the largely essay Bar examination since (1) essay examinations are rationally related to an applicant's fitness to practice law, and (2) the Board has no constitutional obligation to adopt ascertainable standards for evaluation and grading.

4. Attorneys at Law § 2— unsuccessful Bar applicants—allegations that answers same as those of successful candidates

Plaintiffs' bare assertion that answers submitted by them on a Bar examination which they failed were in substance the same as those written by successful candidates was inadequate to state a claim for relief against the Board of Law Examiners.

5. Attorneys at Law § 2— failure of Bar examination—absence of hearing—due process

There is no merit to the contention of plaintiffs who twice failed the Bar examination that their rights to due process were violated because there was no opportunity under G.S. 84-24 for an aggrieved applicant to be heard regarding the actions of the Board of Law Examiners since (1) due process is afforded by the opportunity for failing applicants to be reexamined, and (2) the Supreme Court has otherwise approved, pursuant to G.S. 84-21, rules for appeals from the Board as appear in the Rules Governing Admission to the Practice of Law in the State of North Carolina.

APPEAL by plaintiffs from *Hobgood, Judge.* Judgment entered 26 February 1981 in Superior Court, WAKE County. Heard in the Court of Appeals 1 February 1982.

The eleven named plaintiffs were twice denied licenses to practice law in North Carolina, all having failed the North Carolina Bar Examination in 1979 and 1980. They brought a declaratory judgment action seeking a declaration of the unconstitutionality of G.S. 84-24, to have all rules and regulations promulgated by the Board of Law Examiners pursuant to G.S. 84-24 for the admission to the practice of law in this State declared void, and to enjoin the Board of Law Examiners from enforcing the rules and regulations.

Plaintiffs alleged that the Board of Law Examiners, pursuant to its power under G.S. 84-24, has conducted examinations without benefit of guidelines or direction from the legislature or any agency thereof, and that G.S. 84-24 sets forth no model under which the Board must act. They contend that the statute is an unlawful delegation of legislative authority and that it is violative of Article II, Section 1 of the North Carolina Constitution. Plaintiffs maintain that the Board's rules and regulations belie their rights of due process and equal protection of the laws because said rules are "arbitrary, unreasonable, discriminatory and capricious in failing to provide ascertainable standards for evaluation and grading." Plaintiffs alleged that they wrote responses to the questions posed in the 1979 and 1980 bar examinations "which were in substance the same as answers written by successful bar candidates," but that they were denied a passing grade and their rights violated by the Examiners' "arbitrary, unreasonable, discriminatory and capricious evaluation and grading" of their exam papers. Plaintiffs also averred that the rules governing ad-

mission to the Bar provide no opportunity for an aggrieved party to be heard concerning actions resulting from the exercise of the Board's discretion.

Defendants moved to dismiss pursuant to Rules 12(b)(1), 12(b)(6), and 12(b)(7). The court entered summary judgment under Rule 12(b)(6), for failure to state a claim upon which relief could be granted, and plaintiffs appeal.

Attorney General Edmisten, by Special Deputy Attorney General and Special Assistant to the Attorney General David S. Crump, for the State.

Malone, Johnson, DeJarmon and Spaulding, by C. C. Malone, Jr., for plaintiff appellants.

MORRIS, Chief Judge.

Plaintiffs allege that G.S. 84-24 affects their fundamental human right to practice their chosen profession and that the statute is an unconstitutional delegation of legislative authority; therefore, they have stated a cause of action for declaratory judgment under G.S. 1-253 and defendants' Rule 12(b)(6) motion was improvidently granted. We disagree and hold that dismissal was proper.

[1] The complaint is couched partly in terms of an alleged denial of plaintiffs' rights under the Fourteenth Amendment to the United States Constitution. Plaintiffs' memorandum in opposition of the motion to dismiss describes the prerogative to practice one's chosen profession as a "fundamental human right," said to be, in the case at hand, the privilege of practicing law. The right to practice law is an earned right, however, *Baker v. Varser*, 240 N.C. 260, 82 S.E. 2d 90 (1954), and it has been acknowledged by this land's highest court that a state may require a showing of proficiency in its law before it admits an applicant to the Bar. *Schware v. Board of Bar Examiners*, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed. 2d 796 (1957). We are otherwise unaware of any unqualified natural or constitutional right to pursue a given calling, and turn immediately to plaintiffs' argument, grounded on Article II, Section 1 of the North Carolina Constitution, that G.S. 84-24 is an unlawful delegation of legislative authority.

[2] G.S. 84-24 establishes the Board of Law Examiners as an administrative agency of the State, with the duty of examining applicants and providing rules and regulations for admission to the Bar. *In re Willis*, 288 N.C. 1, 215 S.E. 2d 771, *appeal dismissed*, 423 U.S. 976, 96 S.Ct. 389, 46 L.Ed. 2d 300 (1975).

> It is well established that the constitutional power to establish the qualifications for admission to the Bar of this State rests in the Legislature. *In Re Applicants for License*, 143 N.C. 1, 55 S.E. 635 (1906); *accord, Baker v. Varser*, 240 N.C. 260, 82 S.E. 2d 90 (1954); *State v. Ballance*, 229 N.C. 764, 51 S.E. 2d 731 (1949); *State v. Harris*, 216 N.C. 746, 6 S.E. 2d 854 (1940); *Seawell, Attorney-General v. Motor Club*, 209 N.C. 624, 184 S.E. 540 (1936); *State v. Lockey*, 198 N.C. 551, 152 S.E. 693 (1930). It is equally well settled that the Legislature may delegate a limited portion of its power as to some specific subject matter if it prescribes the standards under which the agency is to exercise the delegated authority. *Turnpike Authority v. Pine Island*, 265 N.C. 109, 143 S.E. 2d 319 (1965).

Id. at 14-15, 215 S.E. 2d at 779. The Legislature, however, "may confer upon executive officers or bodies the power of granting or refusing to license persons to enter . . . trades or professions only when it has prescribed a sufficient standard for their guidance." *State v. Harris*, supra at 754, 6 S.E. 2d at 860. The subjective touchstone of "character and general fitness" to which the Board of Law Examiners must refer has been deemed a constitutional standard by the North Carolina Supreme Court. *In re Willis*, supra. Plaintiffs in the present action attack the other inquiry authorized by G.S. 84-24, i.e., examination of applicants to the Bar, as an unlawful delegation of legislative authority.

G.S. 84-24 stipulates that "[t]he examination shall be held in such manner and at such times as the Board of Law Examiners may determine." The requirement to conduct examinations is, in itself, a guideline, and any stricter

> . . . adherence to ideal notions of the non-delegation doctrine would unduly hamper the General Assembly in the exercise of its constitutionally vested powers. . . . A modern legislature must be able to delegate . . . "a *limited* portion of its legislative powers" to administrative bodies which are

> equipped to adapt legislation "to complex conditions involving numerous details with which the Legislature cannot deal directly." (Citations omitted.)

Adams v. Department of Natural and Economic Resources and Everett v. Department of Natural and Economic Resources, 295 N.C. 683, 696-97, 249 S.E. 2d 402, 410 (1978). The law is complex, protean, and ever-growing. We can think of no more appropriate delegation of authority than that of testing to determine a capability to practice within its seamless fabric. The legislative goal being the protection of the public interest by the maintenance of a competent Bar, the determination of proficiency becomes a ministerial function, not a matter of managing public affairs. The Board of Law Examiners is, therefore, not required " '. . . to make important policy choices which might just as easily be made by the elected representatives in the legislature,' " *id.* at 697-98, 249 S.E. 2d at 411, but merely to compile and administer examinations. Form, grading and logistics only are left to the Board, which does no violence to constitutional principle.

[3] Plaintiffs' complaint alleges that the rules and regulations of the Board of Law Examiners are a violation of the Fourteenth Amendment to the United States Constitution because they contain no ascertainable grading standards. By challenging the subjective criteria required to grade the exam, which is largely essay in form, plaintiffs indirectly attack the form of the examination itself. *Tyler v. Vickery*, 517 F. 2d 1089 (5th Cir. 1975), *cert. denied*, 426 U.S. 940, 96 S.Ct. 2660, 49 L.Ed. 2d 393 (1976). Essay examinations utilized in testing are rationally related to applicants' fitness to practice law, *Chaney v. State Bar of California*, 386 F. 2d 962 (9th Cir. 1967), *cert. denied*, 390 U.S. 1011, 88 S.Ct. 1262, 20 L.Ed. 2d 162, *reh. denied*, 391 U.S. 929, 88 S.Ct. 1803, 20 L.Ed. 2d 670 (1968); *Tyler v. Vickery*, supra. Moreover, the Board has no obligation to adopt ascertainable standards for evaluation and grading.

> Insofar as the plaintiffs attack the lack of 'objective' criteria for grading essay examinations, we note that this challenge has been rejected by virtually every court which has considered it. *Tyler v. Vickery*, 5 Cir. 1975, 517 F. 2d 1089, 1102-03; *Whitfield v. Illinois Board of Law Examiners*, 7 Cir. 1974, 504 F. 2d 474, 476-77 n. 5; *Feldman v. State Board of*

> *Law Examiners*, 8 Cir. 1971, 438 F. 2d 699, 705; *Chaney v. State Bar of California*, 9 Cir. 1967, 386 F. 2d 962, 964-65, cert. denied 390 U.S. 1011, 88 S.Ct. 1262, 20 L.Ed. 2d 162.

Singleton v. Louisiana State Bar Association, 413 F. Supp. 1092, 1097 (E.D. La. 1976). The subjective grading procedures utilized by the Board are not, therefore, unconstitutional.

[4] Plaintiffs, by their complaint, also allege that each of them wrote answers to the 1979 and 1980 bar examinations "which were in substance the same as answers written by successful bar candidates," but that they were denied a passing grade on the examinations by arbitrary and discriminatory grading, again in violation of their Fourteenth Amendment rights. Plaintiffs do not buttress the allegation with any assertion of fact or forecast of offer of proof.

> We will not embark on an investigation to ascertain the integrity of the examination results in the absence of clear unequivocal allegations of probative facts that would establish fraud, imposition, discrimination or manifest unfairness on the part of the examiners.

Petition of DeOrsey, 112 R.I. 536, 543, 312 A. 2d 720, 724 (1973). The mere assertion of a grievance is insufficient to state a claim. *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970). Besides the bare assertion that the answers submitted by plaintiffs were the same as those written by successful candidates, there is no allegation whatsoever indicating in what manner the Board's evaluations were unreasonable, discriminatory, or capricious. Plaintiffs' allegation is, therefore, inadequate to state a claim on which relief can be granted.

[5] Plaintiffs' allegation that there is no opportunity under G.S. 84-24 for an aggrieved applicant to be heard regarding the Board's actions is not accompanied by any assertion of a right to a hearing. We note, nonetheless, that although a state cannot exclude a person from the practice of law for reasons that contravene the Due Process Clause of the Fourteenth Amendment, *Schware v. Board of Law Examiners*, supra, "entitlement to a hearing does not automatically flow from a finding that procedural due process is applicable." *Tyler v. Vickery*, supra at 1103. Indeed, due process is afforded by the opportunity for fail-

ing applicants to be reexamined. *Tyler v. Vickery*, supra. The Supreme Court has otherwise approved, pursuant to G.S. 84-21, rules for appeals from the Board as appear in the Rules Governing Admission to the Practice of Law in the State of North Carolina.

Plaintiffs are entitled to no relief under any state of facts which could be proved in support of their pleading. The motion to dismiss under Rule 12(b)(6) was properly granted. The judgment is, therefore,

Affirmed.

Judges VAUGHN and MARTIN (Harry C.) concur.

E. I. DU PONT DE NEMOURS & COMPANY v. ALLISON L. MOORE AND MYRON R. MOORE

No. 8129SC663

(Filed 4 May 1982)

Adverse Possession § 24— limiting surveyor's testimony—error

Plaintiff's surveyor, in an action to quiet title among other things, should have been allowed to describe the distance errors in the complaint description and to explain that a deed referred to in plaintiff's deed and the complaint contained correct descriptions of the tract claimed and used by the surveyor in making his survey and plat.

APPEAL by plaintiff from *Howell (Ronald), Judge.* Judgment entered 31 July 1980 in Superior Court, TRANSYLVANIA County. Heard in the Court of Appeals 2 March 1982.

Plaintiff alleged ownership of a particularly described tract of land, containing 267.68 acres, and located on top of Rich Mountain. Plaintiff alleged trespass, action to remove cloud from title, and slander of title.

Defendants in their answer admitted entry upon the described lands and claimed a majority interest; in their prayer for relief defendants prayed that plaintiff be adjudicated the owner of a one-eighth interest in the tract.

At trial without a jury the plaintiff introduced in evidence various deeds, which took its chain of title back to 1956. Several witnesses testified as to possession of the tract by plaintiff and its predecessors in title. Perry Raxter, a licensed land surveyor, testified that he made a survey of the lands for the plaintiff in 1977, that the description in the complaint was erroneous in that several distance calls were excessive but that deeds in the claim of title to plaintiff referred to the described tract as being the same land described in a deed from J. H. Cagle to M. S. Thomas, dated 17 November 1968, and that the Cagle deed described the same land as that described in State Grants Nos. 123 and 181, made to Clinton Moore in 1846, and that he based his survey on these two grants, which was the same land as that described in the complaint.

At the end of Raxter's testimony plaintiff moved to amend its complaint to allege a Fourth Cause of Action to remove cloud from title to its tract as described on the plat made by Raxter based on his 1977 survey. The motion was denied at that time but was allowed at the close of plaintiff's evidence.

Defendants' motion for directed verdict was denied. Defendants rested and renewed their motion, which was denied. Judgment was thereafter entered in which the trial court made extensive findings of fact and conclusions of law and then dismissed the action. Plaintiff's motions to amend the findings and for a new trial were denied.

Ramsey, Smart, Ramsey & Hunt by Ralph H. Ramsey, Jr., for plaintiff appellant.

Paul B. Welch, III, for defendant appellees.

CLARK, Judge.

The trial court's judgment dismissing plaintiff's claims was based on the conclusion that plaintiff had failed by proof to fit the description in its complaint and deed to the land it covers and had failed to prove title by adverse possession. Plaintiff excepted to this conclusion and the various findings of fact tending to support it and assigned error.

Plaintiff offered in evidence two duly recorded State Grants to Clinton Moore, as follows: first, Grant No. 123, dated 6

December 1844; and, second, Grant No. 181, dated 31 December 1846. The various deeds, wills and other muniments of title offered into evidence by plaintiff failed to show a connected chain of title from the two Moore grants to plaintiff, but plaintiff did offer competent evidence that the land described in its complaint and deed was the same land described in the two Moore grants. Plaintiff's connected chain of title began in deeds dated in September 1956. Having failed to prove a connected chain of title from the State, plaintiff attempted to show title by adverse possession, by methods (2), (3), and (4), as listed in *Mobley v. Griffin*, 104 N.C. 112, 10 S.E. 142 (1889).

To show title the adverse possession must be under known and visible lines and boundaries. *McDaris v. "T" Corporation*, 265 N.C. 298, 144 S.E. 2d 59 (1965); *Scott v. Lewis*, 246 N.C. 298, 98 S.E. 2d 294 (1957); *Lindsay v. Carswell*, 240 N.C. 45, 81 S.E. 2d 168 (1954). In *McDaris*, where the plaintiff's claim of ownership was based on adverse possession, the court stated: ". . . he must by proof fit the description in the deed to the land it covers—in accordance with appropriate law relating to course and distance, and natural objects and other monuments called for in the deed." *McDaris, supra*, at 301, 144 S.E. 2d at 61. The court found that the burden of fitting the description to the land, sufficient to take the case to the jury, was carried by plaintiff's evidence that a surveyor had owned the land and been on it a number of times, that the surveyor had pointed out the corners to the plaintiff, and that plaintiff was familiar with the property described in his deed and the complaint.

Plaintiff in its original complaint alleged three causes of action: trespass, action to quiet title, and slander of title. At the close of plaintiff's evidence the trial court allowed plaintiff to file an "Amendment to Complaint," which was in effect a restatement of and substitution for its original action to quiet title, differing from the original in that the land claimed by plaintiff was described in accordance with the map based on the survey made by Perry R. Raxter, licensed surveyor, in 1977.

There were marked differences in the description contained in the original complaint and the description based on the 1977 map. The complaint description was the same as that in the deed to plaintiff from Frank Coxe and others in 1956. Raxter testified

that there were errors in the deed (and complaint) description, primarily as to distances, but that if these distances were controlled by natural or artificial monuments which he found at the corners, the deed (and complaint) description would be substantially the same as his map description, and that the tract described in the original complaint and the tract as shown on his 1977 map were in fact the same.

Raxter attempted to testify that there were errors in the complaint description in that the distance calls for several lines were too long. The trial court stated: "There is no showing here that this description is erroneous. You are trying to impeach your own description." If Raxter had been permitted to answer he would have testified that the distance errors were obvious and that a survey according to the complaint description would have resulted in encroachment upon the lands of adjoining owners; that following the complaint and deed description was the provision that the land was "the same property described in a deed from Cagle to Thomas, dated November 17, 1868, and recorded in Book 1, page 452 . . ."; that the Cagle deed described the same two tracts of land described in the two State grants, Nos. 123 and 181, to Clinton Moore; that he surveyed the lands by the descriptions of the adjoining tracts in these two State grants; and that the amended description based on his survey and map was the same land as that described in the complaint if natural objects and monuments controlled the distances.

Plaintiff moved to be allowed to amend the complaint to set up an additional cause of action alleging that plaintiff was the owner of lands as shown on the Raxter plat. The motion was denied with leave to make it at the close of all the evidence.

It is difficult to determine from the record on appeal what part of the testimony of Raxter was admitted and considered by the trial court, but it does appear that plaintiff was restricted, if not prohibited, in offering evidence by its surveyor or tending to connect the description in the complaint and fit it to the land it covers. First, Raxter should have been allowed to describe the distance errors in the complaint description and to explain that the Cagle deed, referred to in plaintiff's deed and the complaint, and the two State grants contained correct descriptions of the tract claimed and were used by him in making his survey and plat.

A reference to another deed may control a particular description. *Quelch v. Futch*, 172 N.C. 316, 90 S.E. 259 (1916). The fact that the descriptions in deeds forming the chain of title are not identical is not material if the differing language may in fact fit the same body of land, and if it is apparent from an examination of the descriptions in the several deeds that the respective grantors intended to convey the identical land, effect will be given to the intent. *Skipper v. Yow*, 249 N.C. 49, 105 S.E. 2d 205 (1958); 2 Strong's N.C. Index 3d, *Boundaries*, § 1 (1976).

Too, in making his survey Raxter correctly followed accepted boundary law in recognizing as inaccurate some of the distances called for in the complaint description, also the identical description in the deed to plaintiff, and in basing his survey on the control of natural and artificial monuments, [*Cutts v. Casey*, 275 N.C. 599, 170 S.E. 2d 598 (1969)], and the control of definite or established corners. *Tice v. Winchester*, 225 N.C. 673, 36 S.E. 2d 257 (1945).

This case does not involve a boundary dispute. Defendants in their answer admitted that plaintiff owned an interest in the lands described in the complaint. In attempting to establish title by adverse possession under color of title for seven years or twenty years under known and visible lines and boundaries, plaintiff had the burden of fitting the description of the land it claimed to the land it covered. The trial court should have allowed plaintiff's witness Raxter, a licensed land surveyor, to testify for this purpose.

The judgment must be reversed and the action remanded for a new trial on both the trespass claim and the claim to remove cloud from title. Plaintiff having failed to offer proof of malicious defamation of title by defendants, the third claim for slander of title was properly dismissed. *See Texas Co. v. Holton*, 223 N.C. 497, 27 S.E. 2d 293 (1943); *Cardon v. McConnell*, 120 N.C. 461, 27 S.E. 109 (1897).

We note that the claim to remove cloud from title in the case *sub judice* is similar to *Development Co., Inc. v. Phillips*, 278 N.C. 69, 178 S.E. 2d 813 (1971), in that in both cases defendants asserted that the parties were tenants-in-common, and the court in *Development Co., Inc.* found that the defendants' admission of plaintiff's interest in the land was sufficient to give plaintiffs

standing in court to challenge defendants' claim as a cloud upon title.

We also note that in its judgment the trial court found that the court ". . . allowed Plaintiff to substitute the description as illustrated or depicted on Plaintiff's Exhibit No. 4 in lieu of the description set forth in Paragraph III of the Complaint." The record reveals, however, that the amendment stated a Fourth Claim which was the same as the Second Claim for removal of cloud on title except that description was the same as shown on the plat (Plaintiff's Exhibit No. 4) rather than the description contained in Paragraph 3 of the Complaint. It now appears from the record that plaintiff alleges a (First) claim for trespass and a (Second) claim to remove cloud from title, both using the description in the deeds to plaintiff, and a (Fourth) claim to remove cloud from title using the survey and plat description. It appears that plaintiff is claiming ownership of the tract of land described in the deeds made to it, that plaintiff has the burden of fitting the description in its deeds to the land it covers, that plaintiff carried this burden by offering evidence that the complaint (and deed) description contained distance errors which were corrected by the survey and shown on the plat (Plaintiff's Exhibit No. 4), and that the land described in the complaint was the same land shown on the survey plat. The amendment to the complaint alleging the Fourth Claim and using the survey description is neither necessary nor appropriate.

The judgment is reversed, except for the dismissal of the Third Claim for slander of title, and the cause is remanded for a new trial.

Affirmed in part; reversed in part and remanded for a new trial.

Judges ARNOLD and WEBB concur.

Harris v. Henry's Auto Parts

DONNIE MARIE HARRIS, WIDOW; DONNIE MARIE HARRIS, GUARDIAN *AD LITEM* OF KENA DENISE HARRIS AND SONYA HARRIS, DAUGHTERS OF RODNEY GEORGE HARRIS, DECEASED, PLAINTIFFS v. HENRY'S AUTO PARTS, INC., EMPLOYER AND NATIONWIDE MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8110IC802

(Filed 4 May 1982)

Master and Servant § 55.5— workers' compensation—shooting death of service station attendant—motive not established—presumption that death arose out of employment

There was a presumption or inference that the death of a night attendant at a self-service gas station who was shot to death during his work hours on the station premises arose out of his employment where all of the station's money and inventory were accounted for and no motive for the killing was established, and evidence that two rifle casings were found outside a fence which surrounded the station premises, thus suggesting that decedent may have been ambushed, and evidence that decedent had previously been shot by a girlfriend did not rebut such presumption.

APPEAL by defendants from North Carolina Industrial Commission. Opinion and Award entered 7 May 1981. Heard in the Court of Appeals 31 March 1982.

Defendants appeal from Commission's award of Workers' Compensation benefits to the widow and children of an employee who was shot and killed on company premises while he was at work.

Tuggle, Duggins, Meschan, Thornton & Elrod, P.A., by Joseph E. Elrod, III and Arthur A. Vreeland, for defendant appellants.

Nathaniel Currie, for plaintiff appellee.

BECTON, Judge.

This claim for Workers' Compensation benefits arises from the following facts. Until his death, Rodney George Harris was employed by Henry's Auto Parts, Inc. as a service station attendant on the 10:00 p.m.-7:00 a.m. shift. His duties included collecting money from persons purchasing gasoline and selling convenience items. Harris' workplace was a keyhouse which was located within the middle of the self-service gas pump islands. The back of the property was enclosed by a six-foot fence. Adjacent to the

fence was a building which housed bathrooms, vending machines and storage places. There was a six-inch gap between the point where the roof and the fence met.

An inventory of goods was taken at 10:00 p.m. on 10 March 1979 when Harris reported for work. A customer found Harris lying in a pool of blood halfway between the keyhouse and the vending building around 11:00 p.m. An investigation later produced two rifle casings which were found in the grassy area behind the wooden fence. Harris died as a result of a bullet wound. No motive for the shooting could be gleaned from the circumstances. There was no evidence of a robbery; all of the inventory and money was accounted for. At best, the police could opine that Harris was ambushed.

The Commission awarded benefits to the deceased's widow and children. It concluded that:

> On March 10, 1979, Rodney George Harris sustained an injury by accident arising out of and in the course of his employment with defendant employer resulting in his death on the same date. When an employee is found dead under circumstances indicating that death took place within the time and space limits of the employment, in the absence of any evidence of what caused the death, most Courts will indulge a presumption or inference that death arose out of the employment.

On this appeal, defendant contends that (1) "the record does not contain evidence sufficient to sustain the finding and conclusion of the Industrial Commission . . . ;" and (2) that "in the absence of evidence sufficient to sustain a finding and conclusion by the Industrial Commission that the injury to the employee 'arose out of' the employment, a 'presumption' or 'inference' [does not] exist which is sufficient to carry plaintiff's burden of proof on that issue." We disagree.

In order for a claimant to recover Workers' Compensation benefits, he must prove that his injury was (1) by accident; (2) arising out of his employment; and (3) in the course of the employment. G.S. 97-2(6). The claimant has the burden of proving each of these elements. *Henry v. Leather Co.*, 231 N.C. 477, 479, 57 S.E. 2d 760, 761 (1950). This case requires resolution of a dispute regarding only one of the elements, the "arising out of" element.

Our courts have allowed recovery to employees' families when it has been shown that the death of the employee was either related to the employment or that the employment was of the nature which would subject the employee to peril. *See Taylor v. Twin City Club*, 260 N.C. 435, 132 S.E. 2d 865 (1963); *Goodwin v. Bright*, 202 N.C. 481, 163 S.E. 576 (1932).

> An injury is said to arise out of the employment when it occurs in the course of the employment and is a natural and probable consequence or incident of it, so that there is some causal relation between the accident and the performance of some service of the employment. [Citation omitted.] An injury arises out of the employment when it comes from the work the employee is to do, or out of the service he is to perform, or as a *natural result of one of the risks of the employment*; the injury must spring from the employment or have its origin therein. [Citation omitted.] There must be some causal relation between the employment and the injury; but if the injury is one which, after the event, may be seen to have had its origin in the employment, it need not be shown that it is one which ought to have been foreseen or expected.

260 N.C. at 438, 132 S.E. 2d at 868 (emphasis added).

> [I]t is suggested that the term "arising out of the employment" is perhaps not capable of precise definition; and *In re Employers' Liability Assurance Corporation*, 102 N.E., 697, the Supreme Judicial Court of Massachusetts remarked that it is not easy to give a definition of the words accurately including all cases within the act and precisely excluding those outside its terms. In the latter case it is said: "It (the injury) arises 'out of' the employment, when there is apparent to the rational mind upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes

> from a hazard to which the workmen would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence."

Harden v. Furniture Co., 199 N.C. 733, 735, 155 S.E. 728, 729-30 (1930). *See also Bartlett v. Duke University*, 284 N.C. 230, 233, 200 S.E. 2d 193, 195 (1973); *Robbins v. Nicholson*, 281 N.C. 234, 239, 188 S.E. 2d 350, 354 (1972).

> [However,] when the moving cause of an assault upon an employee by a third person is personal, or the circumstances surrounding the assault furnish no basis for a reasonable inference that the nature of the employment created the risk of such an attack, the injury is not compensable. This is true even though the employee was engaged in the performance of his duties at the time, for even though the employment may have provided a convenient opportunity for the attack it was not the cause.

Id. at 240, 188 S.E. 2d at 354.

In this case, the answer to the question—whether the employee's death arose out of his employment—is made more difficult by the fact that the employee's death was unexplained. He was shot from the rear and was found halfway between the keyhouse and the vending machines. No motive for the killing has been discovered. While there is evidence that the employee was killed by ambush, this is basically a case of an unexplained violent death.

> When an employee is found dead under circumstances indicating that death took place within the time and space limits of employment, in the absence of any evidence of what caused the death, most courts will *indulge a presumption* or inference *that death arose out of the employment.* The theoretical justification is similar to that for unexplained falls and other neutral harms: The occurrence of the death within

> the course of employment at least indicates that employment brought deceased within range of the harm, and the cause of harm being unknown, is neutral and not personal. The practical justification lies in the realization that, when the death itself has removed the only possible witness who could prove causal connection, fairness to the dependents suggests some softening of the rule requiring claimant to provide affirmative proof of each requisite element of compensability.

1 Larson, Workmen's Compensation, § 10.32.

The presumption or inference of which Larson speaks is a rebuttable one, arising only if there is no evidence of what caused the death. *State Compensation Fund v. Delgadillo*, 14 Ariz. App. 242, 243, 482 P. 2d 491, 492 (1971). It is clearly established in this case that the employee's death was caused by wounds inflicted by gunshot from a third party. What is not established is the motive for the shooting. There is no evidence relating to a motive. It is most likely that the employee was shot by a person standing behind the wooden fence.

Our Supreme Court has held that death by violence raises the presumption that the death arose out of the employment when the employee is found at his place of employment during the time which he was to be working. In *McGill v. Lumberton*, 215 N.C. 752, 3 S.E. 2d 324 (1939), it was held that a town's police chief's death was accidental, rather than suicidal, and compensable under the Workmen's Compensation Statute. The police chief was found shot to death by his own gun, in a manner which suggested that the wound was self-inflicted, in a small room in the town building with its door and windows locked. There the Court stated:

> While the burden of proof is upon those claiming compensation throughout to prove death of employee resulting from injury by accident arising out of and in the course of his employment, when evidence of violent death is shown, they are entitled at least to the benefit of the inference of accident from which, nothing else appearing, the Commission may find, but is not compelled to find, the fact of death resulting from injury by accident, a constituent part of the condition antecedent to compensation, injury by accident arising out of and in the course of employment. In other words, this in-

> ference is sufficient to raise a *prima facie* case as to accident only. Then if employer claims death of employee is by suicide, the statute places the burden on him to go forward with proof negativing the factual inference of death by accident.

Id. at 754, 3 S.E. 2d at 326.

In *Goodwin v. Bright,* 202 N.C. 481, 163 S.E. 576 (1932), the Court awarded benefits to the dependents of an employee who was required to report to work earlier than other employees in order to fire up the machinery. The employee was killed by an unknown person or persons who stole his money and his automobile but did not steal or injure the employer's property. The Commission found that the death arose out of the employment. The Court agreed and stated that: " 'The mere fact that the injury is the result of the wilful or criminal assault of a third person does not prevent the injury from being accidental. *Conrad v. Foundry Co.,* 198 N.C. 723, 153 S.E. 266.' " 202 N.C. at 484, 163 S.E. at 577 *quoting Harden v. Furniture Co.,* 199 N.C. 733, 734, 155 S.E. 728, 729. In affirming the award, the Court noted that: "Here the deceased employee . . . was exposed by the terms of his employment to a hazard which might have been contemplated by a reasonable person as incidental to the service required of him by his employer." 202 N.C. at 484, 163 S.E. at 577-78.

Similarly, in *West v. Fertilizer Co.,* 201 N.C. 556, 160 S.E. 765 (1931), the Court upheld an award to the dependents of a night watchman who died from a wound received when he was hit in the head with a piece of iron by an unknown assailant who also robbed him. The Court stated that "there was evidence that the injury complained of was directly traceable to and connected with the employment." *Id.* at 558, 160 S.E. at 766. The Court emphasized the nature of the night watchman position and stated that the job brought him "within the special zone of danger." *Id.* at 559, 160 S.E. at 766.

Mr. Harris' death was unexplained. Because he was found dead on the premises of his employment at a time when he should have been there, we indulge a presumption or inference that his death arose out of the employment. We do so even though there is evidence that he was shot by ambush and that he had been shot in the past by a girlfriend. Officer Weldon was asked

whether this girlfriend was implicated; he responded, "[w]e have no proof." It appears to us, therefore, that any evidence introduced by the defendant regarding a personal motive for the shooting was eviscerated by the testimony by Officer Weldon.

The deceased's job was of a nature which would subject him to peril. Personal injury to the employee during his work hours was a "natural result of one of the risks of the employment." 260 N.C. at 438, 132 S.E. 2d at 868. Mr. Harris worked the night shift at the self service gas station. He was the sole employee on duty in, what the record shows was, a high crime area. We are unable, as was the Commission, to determine that the motive for the shooting was personal and not job related. There simply is no explanation for the death. Absent a confession by the assailant or the emergence of an eye witness, any reason given for the death of Mr. Harris would be based on conjecture and speculation.

The case *sub judice* is distinguishable from *Robbins v. Nicholson, Harden v. Furniture Co.* and *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 233 S.E. 2d 529 (1977), which were cited by appellants. In each of the above cases, the cause of death, as well as the motivation for the killing, was well established by the evidence. If anything, the facts of those cases made it clear that the place of employment only provided a convenient place for the murder of the employees. In each of the cases "[t]he motive which inspired the assault was unrelated to the employment of the deceased and was likely to assert itself at any time and in any place." 199 N.C. at 736, 155 S.E. at 730. We cannot say as much for the shooting in the present case, however, as the Commission was unable to determine the motive for the killing.

For the foregoing reasons the judgment below is

Affirmed.

Judge WELLS and Judge HILL concur.

FRED H. POORE v. SWAN QUARTER FARMS, INC.; AND A. H. VAN DORP AND WIFE, MARY H. VAN DORP

No. 812SC526

(Filed 4 May 1982)

Fraud § 9, Judgments § 5.1 — summary judgment on fraud claim proper — previous final determination of rights

The trial judge properly granted summary judgment on a fraud claim for defendants where plaintiff initiated a civil action against defendants in 1969 in which plaintiff prayed for a writ of mandamus requiring the issuance of stock, the election of officers, and an accounting concerning a corporation in which both parties had an interest; the parties waived trial by jury and a consent order was drawn on 18 May 1970 requiring that the stockholders meet and elect directors, that the directors elect officers, that stock certificates be issued and the corporate affairs be put in order; the cause was retained by the superior court "for such further orders" as would be "necessary to the proper determination of the rights of the parties" should conditions thereafter warrant; and on 1 August 1973, plaintiff filed a motion in the cause alleging, among other allegations, fraud in the acquisition of the corporation's property by defendants. The court's order of 18 May 1970 was a final determination of the case as circumscribed by the complaint, answer and counterclaim, and the facts adduced in support of the fraud charge were inapposite to any issue determined by the court or to any directive included in its order of 18 May 1970. Further, even were the 18 May 1970 order determined to be interlocutory, the three year statute of limitations, G.S. 1-52(9), would have nevertheless compelled entry of summary judgment.

APPEAL by plaintiff from *Brown, Judge.* Judgment entered 21 November 1980 in Superior Court, BEAUFORT County. Heard in the Court of Appeals 13 January 1982.

Plaintiff, an incorporator of defendant Swan Quarter Farms, Inc., initiated a civil action against defendants in 1969. His complaint, verified 18 June, alleged that defendant corporation was chartered 11 June 1962. Its four incorporators were to receive equal shares of the authorized stock, but during July of 1962, Fred C. Adair, one of the principals, transferred his rights to the other three equally and severed his connection with the corporation. On 20 January 1967, defendant A. H. Van Dorp, also a principal, purchased the interest of William H. Page. No stock was ever issued, however, so no transfers took place.

The complaint further alleged that on 2 June 1962, defendant corporation acquired valuable farm and timberland in Hyde

County by deed from plaintiff and wife and defendant A. H. Van Dorp and Mary H. Van Dorp, the deed being subject to a prior deed of trust. The value of the land was alleged to exceed substantially the amount of the indebtedness which the deed of trust secured.

The complaint alleged that A. H. Van Dorp had, since acquiring Page's interest, assumed de facto control of the corporation and its assets, ignoring proper corporate procedures and duties by reason of his failure to have stock issued and his failure to hold meetings of the stockholders or directors. It was alleged that defendant A. H. Van Dorp managed and worked the corporation's land and retained all the proceeds therefrom without making a proper accounting, and that he neglected to pay certain obligations arising out of the farming operation or to pay the obligation secured by the deed of trust as it became due.

It was alleged further that defendant Van Dorp, on 8 April 1969, demanded from plaintiff $3220.97, or one third of the amount due on the deed of trust, but that plaintiff refused to make the payment and demanded that the corporate affairs be put in order, that proper procedures be followed, that the corporate records be brought up to date, and that other measures be taken to comply with North Carolina law. Defendant A. H. Van Dorp then indicated that he and his wife intended to meet the debt and acquire all the assets of the corporation. Plaintiff prayed for a writ of mandamus requiring the issuance of stock, the election of officers, and an accounting.

Defendants, by their answer of 7 August 1969, denied the material allegations of the complaint and averred that the corporation's land had been improved, that meetings had been held, and that obligations had been met as they arose. They averred that defendant Mary H. Van Dorp had advanced $10,570 to the corporate defendant to save its property from foreclosure and that plaintiff's interest in the corporation was subject to that indebtedness. Defendants prayed that plaintiff have no relief and counterclaimed for an accounting of all income, expenses and profits for the years 1964 through 1966 when plaintiff farmed the corporate lands and for a lien on the corporate assets in favor of Mary H. Van Dorp for the amount she had advanced to the corporation.

The parties waived trial by jury and a consent order was drawn on 18 May 1970 requiring that the stockholders meet and elect directors, that the directors elect officers, that stock certificates be issued and that the corporate affairs be put in order. The cause was retained by the Superior Court "for such further orders" as would be "necessary to the proper determination of the rights of the parties" should conditions thereafter warrant.

Plaintiff alleged on 22 February 1971 that defendant had not cooperated in holding meetings and putting the corporate affairs in order, and an order was entered requiring defendant A. H. Van Dorp to appear and show cause why he should not be held in contempt, but no hearing was ever held.

On 1 August 1973, plaintiff filed a motion in the cause alleging that a meeting of the stockholders was held and directors elected, that a directors' meeting was held and officers elected, that stock had been issued, but that no further meetings of the directors or stockholders had taken place. It was alleged that defendants, who continued to operate the corporate farm, had refused to advise plaintiff as to the affairs of the corporation despite his repeated requests. Plaintiff indicated that he had by chance recently discovered that the individual defendants on 25 March 1969, acting in the name of the corporation, conveyed all of the corporation's property to Mary H. Van Dorp. Plaintiff alleged in the motion that defendants had not disclosed the fact of the sale to their attorney and that they made no reference to the transaction in their answer of 7 August 1969, stating, on the other hand, that the corporation was indebted to Mary H. Van Dorp. He further alleged that defendants' failure to disclose the true facts to the court and the filing of the answer were a deliberate fraud. He prayed for full relief and requested that the deed from the corporation to Mary H. Van Dorp be stricken as a fraudulent transaction and an illegal attempt to deprive the corporation of its property. An order was entered on 6 August 1973 granting plaintiff access to all corporate records made since 18 May 1970 and to the records relating to the purported deed.

On 25 July 1980, the matter was placed on the calendar for the 17 November Civil Session of Superior Court in Beaufort County. Defendants moved for summary judgment, accompanied by the affidavit of defendant A. H. Van Dorp. Plaintiff filed a

responsive affidavit. Plaintiff appeals from an entry of summary judgment.

Samuel G. Grimes for plaintiff appellant.

McMullan and Knott, by Lee E. Knott, Jr., for defendant appellees.

MORRIS, Chief Judge.

Rule 12(a) of the Rules of Appellate Procedure requires that appellant file the record on appeal with the Clerk of this Court no later than 150 days after giving notice of appeal. Notice of appeal in this case was given on 21 November 1980, and the record was filed 180 days later on 20 May 1981. Defendants moved pursuant to Rule 25 to dismiss the appeal for failure to take action within the time allowed by the rules. No extension had been granted. The appeal is subject to dismissal. We choose to treat the appeal as a petition for a writ of certiorari, allow the writ and discuss the matter on its merits.

Plaintiff argues that the trial judge erred in finding that there was no genuine issue of material fact and that defendants were entitled to a judgment as a matter of law. He points out that the affidavits embrace conflicting facts, that his affidavit contains facts which, if true, constitute grounds for relief, and that the facts as presented by defendants do not entitle them to a judgment as a matter of law. The only material facts said to be in issue pertain to the allegation of fraud. Yet plaintiff by his motion of 1 August 1973 for the first time alleged fraud in the conveyance of corporate property to Mary H. Van Dorp. He thus raised a matter not addressed in the pleadings and therefore not adjudicated. We hold that the court's order of 18 May 1970 was a final determination of this case as circumscribed by the complaint, answer and counterclaim, and that Judge Brown properly granted summary judgment in favor of defendants.

Plaintiff contends that the order of 18 May 1970 was merely interlocutory because it specifically retained the cause for "such further orders as may be necessary to the proper determination of the rights of the parties." He argues that the order envisioned more than the possibility that the court would have to give effect to its instructions to hold meetings of the shareholders and direc-

tors, issue stock, and put the affairs of the corporation in order. Indeed, he urges upon us the view that the order was drawn to allow some future determination of the rights of the parties. We cannot subscribe to this notion in light of the fact that the issues raised were considered, and that plaintiff received by the order of 18 May all he prayed for in his complaint.

> An interlocutory judgment is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy; a final judgment is one which disposes of the cause as to all parties, *leaving nothing to be judicially determined between them in the trial court. Veasey v. City of Durham,* 231 N.C. 357, 57 S.E. 2d 377 (1950).

(Emphasis added.) *Hinson v. Hinson,* 17 N.C. App. 505, 508-509, 195 S.E. 2d 98, 100 (1973).

> An interlocutory order or judgment differs from a final judgment in that an interlocutory order or judgment is "subject to change by the court during the pendency of the action to meet the exigencies of the case" (citations).

Russ v. Woodward, 232 N.C. 36, 41, 59 S.E. 2d 351, 355 (1950).

The order of 18 May 1970 put to rest the main purpose of the action and completely determined the rights of the parties. None of the questions raised was retained. "[T]here was nothing further to be done; there were no further questions or directions reserved for the future action of the court, . . ." *Flemming v. Roberts,* 84 N.C. 532, 539 (1881). The order was therefore final, and except for the court's reservation of the power to encourage compliance, was "consigned to the shelves of finished business." *Id.* By way of contrast, "[a]n interlocutory order or decree is provisional or preliminary only. *It does not determine the issues joined in the suit,* but merely directs some further proceedings preparatory to the final decree." (Emphasis added.) *Johnson v. Roberson,* 171 N.C. 194, 196, 88 S.E. 231, 231-32 (1916).

Plaintiff apparently learned of the suspected fraudulent conveyance just prior to 1 August 1973, when he filed a motion in the cause outlining the sale of corporate property to Mary H. Van Dorp. It would have been appropriate at that time to file an ac-

tion alleging fraud rather than attempt to raise the question by a motion in the cause. The facts adduced in support of the charge as set forth in the motion were, unfortunately, inapposite to any issue determined by the court or to any directive included in its order of 18 May 1970.

Even were we to deem the 18 May 1970 order interlocutory, the three-year statute of limitations, G.S. 1-52(9), would have nevertheless compelled entry of summary judgment. A cause of action to set aside an instrument for fraud accrues and the statute of limitations begins to run when the aggrieved party discovers or should have discovered the facts constituting the fraud. *Wilson v. Development Company,* 276 N.C. 198, 171 S.E. 2d 873 (1970). There can be no recovery except on the case made by the pleadings, of course, *Moody v. Kersey,* 270 N.C. 614, 155 S.E. 2d 215 (1967); *Collas v. Regan,* 240 N.C. 472, 82 S.E. 2d 215 (1954), and claim of fraud must be stated with particularity. Rule 9(b), N.C. Rules of Civil Procedure. Had plaintiff discovered the alleged fraud as late as 1 August 1973, he would have had only three years from that time to amend his complaint to state properly a cause of action for fraud. See *Roberts v. Coca Cola Bottling Co.,* 257 N.C. 656, 127 S.E. 2d 236 (1962).

For the reasons stated above, we find that the order of summary judgment was appropriately entered. The court's judgment is, therefore,

Affirmed.

Judges VAUGHN and MARTIN (Harry C.) concur.

STATE OF NORTH CAROLINA v. WILLIAM CARTER DOWNES

No. 811SC1115

(Filed 4 May 1982)

1. Criminal Law § 68; Searches and Seizures § 4— hair samples seized pursuant to warrants—constitutionality—evidence concerning admissible

In a prosecution for murder and armed robbery, the trial court properly admitted expert testimony concerning the comparison of hair samples from rubber gloves found close to the crime scene and hair samples from

defendant's arm. The Fourth Amendment's protection against unreasonable searches and seizures does not extend to an individual's personal traits. Therefore, the fact that the trial court found an affidavit attached to an application for a search warrant established no probable cause to believe that defendant committed the armed robbery and homicide, did not mean that the hair sample evidence was inadmissible.

2. **Criminal Law § 46— evidence of flight—instructions proper**

In a prosecution for murder and armed robbery, the trial court did not err in instructing the jury on the evidence of flight where the evidence tended to show that police followed defendant from an apartment where he was staying but lost him; that the tenant leasing the apartment came out of it with a bag of clothes and then drove to a parking lot where he picked up defendant; that when a marked police car and several unmarked cars stopped the car in which defendant was riding, he ran from the car until halted by police and that there was a toothbrush in defendant's pocket and a bag of clothes in the car.

3. **Homicide § 21.7; Robbery § 4.3— second degree murder—armed robbery—sufficiency of evidence**

The trial court properly submitted the issue of armed robbery and second degree murder to the jury where the State's evidence tended to show that defendant had been employed by the motel robbed; that the shotgun found on the floor near the victim's body had the same serial number as the gun given defendant by his mother for Christmas in 1978; that a ballistics expert testified that a spent shell from the shotgun killed the victim; that comparisons done on two rubber gloves found outside the motel lobby revealed marks on the shotgun and safe door matched marks on the gloves; and that an examination of hairs in one of the gloves showed them to be miscroscopically consistent with hair samples taken from the defendant.

APPEAL by defendant from *Smith (Donald L., Jr.), Judge.* Judgment entered 9 April 1981 in Superior Court, DARE County. Heard in the Court of Appeals 11 March 1982.

Defendant was indicted for first-degree murder and armed robbery and found guilty of second-degree murder and armed robbery. From the imposition of a sentence of a maximum of life imprisonment to a minimum of fifty years' imprisonment, defendant appeals.

The State presented evidence that on 2 September 1980 between 4:00 and 5:30 a.m. Charles Edgar Mann, IV, a night auditor at the Armada Inn Motel in Nags Head, North Carolina, was killed during a robbery of the motel office. The police found a 12-gauge shotgun near Mann's body behind the front desk in the lobby of the motel. Further investigation revealed that this shotgun had been purchased by defendant's mother and given to

him as a Christmas present in 1978. Two rubber gloves were found outside the lobby. It was later discovered that latent fabric marks, consistent with the type of marks left by rubber gloves such as were found at the crime scene, were on the shotgun. Two hairs were found in one of the gloves; these hairs were compared to defendant's hair and found to be microscopically consistent with defendant's hair samples. Prior to the admission of the evidence concerning the hair comparisons, the defendant moved to suppress it on the ground that the hair samples from defendant had been obtained illegally. This motion was denied.

In July 1980 defendant and his wife, who had been living in Wanchese, North Carolina, moved to Maryland. Defendant's wife returned to Wanchese in August, 1980, while defendant remained in Maryland. After the Commission of the robbery and shooting in the early hours of 2 September 1980, defendant went to his wife's house in Wanchese and picked up some of his belongings before returning to Maryland. On 10 September 1980 the car in which defendant was riding was stopped by Maryland law enforcement officers. Defendant ran from the car for about fifty feet until ordered to stop by the officers.

Defendant presented no evidence.

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

Appellate Defender Adam Stein by Assistant Appellate Defender Malcolm R. Hunter, Jr., for defendant appellant.

CLARK, Judge.

[1] Defendant first argues that the trial court erred in admitting evidence concerning his hair samples which he contends were seized in violation of his constitutional rights under the Fourth and Fourteenth Amendments. The search warrant which authorized the plucking of hairs from defendant's scalp and arms was issued upon two affidavits. After *voir dire* on defendant's motion to suppress, the court found that the second affidavit attached to the application for the search warrant established no probable cause to believe that defendant committed the armed robbery and homicide on 2 September 1980. However, the court found that the first affidavit concerning an armed robbery on 2 July 1980 at the

Sea Ranch Motel in Kill Devil Hills was sufficient to establish probable cause to believe that the defendant had committed that crime and that the head and arm hairs of defendant would probably constitute evidence of that robbery. The court held that the warrant was valid as to the offense on 2 July 1980, and that after obtaining defendant's hair samples pursuant to the warrant, the State could use the evidence in the prosecution of defendant for the armed robbery and homicide on 2 September 1980. While we agree with the court's decision concerning the validity of the two affidavits, we do not believe that the warrant authorized the plucking of hairs from defendant's arms. In the Sea Ranch robbery on 2 July 1980, head hairs were found in pantyhose which were worn over the robber's head. The affidavit certainly presented probable cause to believe that head hairs from defendant would constitute evidence of the Sea Ranch robbery. But there was no justification in the Sea Ranch affidavit for the plucking of hairs from the defendant's arms. Therefore, the warrant was only sufficient to allow the seizure of the head hairs from defendant and not his arm hairs.

This does not, however, mean that the hair sample evidence was inadmissible. In his order denying defendant's motion to suppress, Judge Smith stated:

> "5. That even if the search warrant issued on or about the first day of January, 1981 were invalid, which it is not, such search warrant would not be necessary to obtain hairs either from the head or arm of the defendant or both, for the reason that the seizure of said hairs are not protected by the Fourth and Fourteenth Amendments to the Constitution of the United States nor the Law of the Land Clause of the Constitution of North Carolina for the reason that they are individual personal traits such to view by any person, and defendant had no reasonable expectations of privacy in these features, since they are exposed to view as a matter of course.
>
> 6. That the methods used by the State of North Carolina in obtaining the hair from the head and left arm of the defendant were reasonable and just in all respects and went beyond the statutory and constitutional requirements that were applicable.

7. That the manner of obtaining said hair samples as aforesaid was valid, legal and constitutional in all respects and were not invalid, illegal or unconstitutional in any respect."

We agree with the trial judge that the seizure of hair samples from defendant's arms and head did not violate his Fourth and Fourteenth Amendment rights against unreasonable searches and seizures. The defendant was in custody at the time of the taking of the hair samples, and there is no evidence that the means used to obtain the samples was unreasonable. The seizure of hair samples from a defendant without a warrant after a lawful arrest is not an unreasonable seizure since it is a minor intrusion into and upon an individual's person. *Grimes v. United States*, 405 F. 2d 477 (5th Cir. 1968); *State v. Reynolds*, 298 N.C. 380, 259 S.E. 2d 843 (1979), *cert. denied*, 446 U.S. 941, 64 L.Ed. 2d 795, 100 S.Ct. 2164 (1980); *State v. Sharpe*, 284 N.C. 157, 200 S.E. 2d 44 (1973). The Fourth Amendment's protection against unreasonable searches and seizures does not extend to an individual's personal traits. "One does not have a reasonable expectation of privacy in those features which serve to distinguish one individual from another and which are exposed to the view of others as a matter of course. *United States v. Dionisio*, 410 U.S. 1, 35 L.Ed. 2d 67, 93 S.Ct. 764 (1973); *Davis v. Mississippi*, 394 U.S. 721, 22 L.Ed. 2d 676, 89 S.Ct. 1394 (1969); *State v. Sharpe*, [supra]." *State v. McDowell*, 301 N.C. 279, 289-90, 271 S.E. 2d 286, 293 (1980), *cert. denied*, 450 U.S. 1025, 68 L.Ed. 2d 220, 101 S.Ct. 1731 (1981). We hold that the expert testimony concerning the comparison of the hair samples from the rubber gloves and from defendant's arm was properly admitted and overrule this assignment of error.

[2] Defendant next argues that the trial court erred in instructing the jury on the evidence of flight. He contends that the fact that defendant was found in Maryland and that he ran from the car after it was stopped by police is not evidence of flight. We disagree. State's evidence tended to show that defendant had moved to Maryland; he returned to pick up some belongings at his wife's house in Wanchese shortly after the robbery and shooting occurred; that after his return to Maryland, local police, upon a fugitive warrant for defendant's arrest, began a stakeout of the apartment where defendant was staying; that they followed

defendant from the apartment but lost him; that the tenant leasing the apartment came out of it with a bag of clothes and then drove to a parking lot where he picked up defendant; that when a marked police car and several unmarked cars stopped the car in which defendant was riding, he ran from the car until halted by police; that there was a toothbrush in defendant's pocket and a bag of his clothes in the car. We hold that this evidence was sufficient to support an instruction on flight. An instruction on flight is properly given when there is some evidence in the record to reasonably support the theory that defendant fled after commission of the crime charged. *State v. Irick*, 291 N.C. 480, 231 S.E. 2d 833 (1977). The court properly instructed the jury that evidence of flight is not in itself proof of guilt but merely one circumstance to be considered by the jury in passing upon the question of defendant's guilt. *State v. Lampkins*, 283 N.C. 520, 196 S.E. 2d 697 (1973).

[3] Defendant's last assignment of error concerns the denial of defendant's motion to dismiss at the close of State's evidence on the ground that the evidence was insufficient to support a guilty verdict. A motion for nonsuit requires consideration of all the evidence in the light most favorable to the State. All of the State's evidence must be taken as true, and there must be substantial evidence of all material elements of the offense in order to overcome the motion to dismiss. *State v. Witherspoon*, 293 N.C. 321, 237 S.E. 2d 822 (1977); *State v. Stephens*, 244 N.C. 380, 93 S.E. 2d 431 (1956). The test of the sufficiency of the evidence to withstand a motion to dismiss is the same for either direct or circumstantial evidence. *State v. Stephens, supra.*

> "When a motion for nonsuit questions the sufficiency of circumstantial evidence, the question for the court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances. (Citation omitted.) If so, it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that defendant is guilty. (Citation omitted.)"

State v. Snead, 295 N.C. 615, 618, 247 S.E. 2d 893, 895 (1978).

The evidence establishes that in the early morning hours of 2 September 1980 money was unlawfully taken from the Armada Inn; that the robbery was accomplished by the use or threatened

use of a dangerous weapon, a shotgun; and that the victim was shot in the forehead and killed during the course of the robbery. Therefore, there was substantial evidence of all material elements of armed robbery, *State v. Joyner*, 295 N.C. 55, 243 S.E. 2d 367 (1978), and of murder in the second degree, *State v. Hodges*, 296 N.C. 66, 249 S.E. 2d 371 (1978).

State's evidence also tended to show that defendant had committed the crimes charged. Defendant had been employed by the Armada Inn and had been trained by the deceased as a substitute night auditor. He was familiar with the location of the safe, the key which opened the safe, the safety deposit boxes and their keys. The shotgun found on the floor near the victim's body had the same serial number as the gun given defendant by his mother for Christmas in 1978. A ballistics expert testifed that the spent shell from the shotgun killed Mr. Mann. There was evidence that defendant had a shotgun in July 1980 when he lived in Wanchese and that after he moved to Maryland, the gun was no longer in the house in Wanchese. Two rubber gloves were found outside the motel lobby, and comparisons of fabric marks on the gloves with marks on the shotgun and safe door showed that they matched. An examination of hairs found in one of the gloves showed them to be microscopically consistent with hair samples taken from defendant. The evidence also tended to show that defendant ran when stopped by Maryland police.

When viewed in the light most favorable to the State, State's evidence was sufficient to create a reasonable inference of defendant's guilt, requiring the court to submit the issue to the jury. We hold that defendant's motion to dismiss was properly denied.

We find that defendant received a fair trial, free of prejudicial error.

No error.

Judges ARNOLD and WEBB concur.

DIXIE LANE HOCKADAY v. WILLIAM B. MORSE, T/A PLANTATION INN

No. 8111SC892

(Filed 4 May 1982)

1. **Negligence § 52.1— visitor to registered motel guest—invitee**

A visitor to a registered guest in a motel was an invitee of the motel at the time she fell on an outdoor stairway leading to upstairs motel rooms where she was on the premises at a reasonable hour, for a lawful purpose, and at the express invitation of the guest, and where the stairway was the nearest means of egress from the guest's room to the parking lot and was thus within the scope of her invitation to use the motel's premises.

2. **Negligence §§ 57.4, 58— invitee's fall on unlighted stairs—negligence of motel owner**

Plaintiff invitee's forecast of evidence was sufficient to present a genuine issue of material fact as to the negligence of defendant motel owner in permitting unlighted outside stairs to remain on the premises and did not establish her contributory negligence as a matter of law where plaintiff's evidence tended to show that she was visiting a registered guest of the motel; plaintiff had never been to defendant's motel before; plaintiff used the stairs to reach the guest's room during the daylight and did not notice anything defective about the stairs; it was dark when plaintiff left the guest's room; the stairway used by plaintiff was the most direct route from the guest's room to her automobile; and the reason plaintiff fell was that the stairway was so dark that she could not see the final step.

APPEAL by plaintiff from *Farmer, Judge.* Order entered 22 April 1981 in Superior Court, LEE County. Heard in the Court of Appeals 7 April 1982.

Plaintiff instituted this personal injury action, alleging that defendant-innkeeper was negligent in failing to maintain and light outdoor steps used for access to upstairs motel rooms, on which plaintiff fell and injured herself. On defendant's G.S. 1A-1, Rule 56 motion for summary judgment, defendant, through the depositions of plaintiff and her husband, produced a forecast of evidence showing the following. On 9 October 1978, plaintiff and her husband went to an 8:00 p.m. appointment at the Plantation Inn, to meet with Mr. Thomas McKoon, a registered guest of the motel. Neither plaintiff nor her husband had ever been to the motel before. The purpose of the meeting was to negotiate a possible business deal between plaintiff, who planned to open a sporting goods store, and Mr. McKoon, a representative of Nike Shoes. Mr.

McKoon was registered in Room 133, which is elevated from the parking lot by several steps. These steps are configured in such a way that the first step up leads to a platform or ramp area which is approximately 52" deep, and then two or three more steps lead to the porch area in front of the motel rooms. Plaintiff's husband parked their car as close as possible to the steps which lead directly up to Room 133. It was daylight when they ascended the steps and they did not notice anything wrong with them at that time. After meeting with Mr. McKoon for more than an hour, plaintiff left room 133 to return to her car. It was then after dark. Plaintiff started down the steps, ahead of her husband. There was no loose debris on the steps, and the weather was dry, but the final step was "deteriorated," and there were no handrails on the stairs. There were no lights on the steps, and only two lights on either side of the door to Room 134, an upstairs room adjacent to Mr. McKoon's. Shrubbery over four feet high bordered the steps, further cutting off the light cast by the upstairs lights. Plaintiff descended two or three steps until she came to a "platform" or "ramp" area, which she believed was on a level with the parking lot, and then "[t]here was another step there that I could not see and this was the step that was very jagged and worn and the one which I fell over." Plaintiff fell forward, twisted her feet, and incurred serious personal injury. Plaintiff stated that "I am saying that the reason I fell was because I did not see the bottom step."

Judge Farmer granted defendant's motion for summary judgment, and from entry of this judgment, plaintiff appeals.

Kenneth R. Hoyle, for plaintiff-appellant.

Maupin, Taylor & Ellis, P.A., by Thomas W. H. Alexander and M. Keith Kapp, for defendant-appellee.

WELLS, Judge.

Plaintiff's sole assignment of error is that the trial court erred in granting summary judgment for defendant. We agree with plaintiff's argument and reverse.

Defendant contends that plaintiff was a licensee, to whom the only duty owed was to avoid wilful or wanton negligence, of which there was no evidence, or, in the alternative, that if plain-

tiff was an invitee, the evidence shows no negligence of defendant, but does show contributory negligence on the part of plaintiff, entitling defendant to summary judgment as a matter of law.

[1] The threshold issue before us is plaintiff's legal status as a visitor to a registered guest in defendant's motel. The traditional view, which is held by a majority of jurisdictions, is that a visitor to a registered guest at an inn who is there for a lawful purpose, at a proper time, by the guest's express or implied invitation, and who remains within the boundaries of the invitation, is an invitee, to whom the innkeeper owes the duty of exercising reasonable care, the same duty owed to registered guests. Sherry, The Laws of Innkeepers, § 9:2 (Rev. ed. 1981); Annot., 58 A.L.R. 2d 1202; 40 Am. Jur. 2d, Hotels, § 84; 43A C.J.S., Inns, § 21.

North Carolina adheres to this view, although the relevant cases tend to illustrate exceptions to the general rule rather than the rule itself. In *Money v. Hotel Co.*, 174 N.C. 508, 93 S.E. 964 (1917), plaintiff, a social visitor to a registered guest, wandered down an employees' hallway into a freight elevator shaft where he was killed. Because he had entered an area outside the bounds of his express or implied invitation to use the hotel's facilities, he was classified as a licensee, to whom defendant owed no duty of ordinary care. Plaintiff in *Jones v. Bland*, 182 N.C. 70, 108 S.E. 344 (1921), also fell down an elevator shaft and was injured. After enunciating the general rule that visitors to hotel guests are invitees, the Court disqualified plaintiff from that status for two reasons: plaintiff was in a remote area of the hotel, outside the scope of his invitation, and he was there to gamble, an illegal purpose. Finally, in *Coston v. Hotel*, 231 N.C. 546, 57 S.E. 2d 793 (1950), plaintiff showed that she intended to meet a friend for dinner at a hotel but was injured while using the hotel's telephone to call her friend. In reversing a judgment of nonsuit for defendant, our Supreme Court held that plaintiff's evidence had raised sufficient inferences that she was an invitee, to whom the hotel owed a duty to keep the premises in a reasonably safe condition.

In the case before us, plaintiff was on the premises at a reasonable hour, at the express invitation of Mr. McKoon, a reg-

istered guest, for a lawful purpose. The stairway on which she fell was the nearest means of egress from Mr. McKoon's room to the parking lot, and was thus within the scope of her invitation to use defendant's facilities. We hold that plaintiff was an invitee at the time of her injury.

[2] The next issue is whether the forecast of evidence entitled defendant to summary judgment. 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. *Lowe v. Bradford*, 305 N.C. 366, 289 S.E. 2d 363 (1982); *Easter v. Hospital*, 303 N.C. 303, 278 S.E. 2d 253 (1981); *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.

While an innkeeper is not an insurer of the personal safety of his guests, he is required "to exercise due care to keep his premises in a reasonably safe condition and to warn his guests of any hidden peril." *Rappaport v. Days Inn*, 296 N.C. 382, 250 S.E. 2d 245 (1978); *Page v. Sloan*, 281 N.C. 697, 190 S.E. 2d 189 (1972); *see Sherry*, supra, § 9:16. This duty extends not only to defendant's motel building, but to its common means of access as well. *Rappaport*, supra.

The forecast of evidence, viewed in the light most favorable to plaintiff, *Dickinson v. Pake*, 284 N.C. 576, 201 S.E. 2d 897 (1973), shows that plaintiff had never been to defendant's motel before; she used the nearest and most convenient steps to reach Mr. McKoon's room; she had not noticed, in the daylight, anything defective about the steps; and the reason that she fell was that the stairway was so dark that she could not see the final step.

We find that the forecast of evidence raises material facts from which a jury could find that defendant reasonably could an-

ticipate that outside stairs to motel rooms may be used at all times of the day or night, and that when such stairs are used at night, the absence of lighting may render them unsafe; that defendant allowed unlighted, outside stairs to remain on the premises; that these unlighted stairs constituted an unsafe condition; that defendant knew, or in the exercise of ordinary care should have known that the stairs were unlighted; that defendant failed to use ordinary care to remedy this unsafe condition; and that such failure proximately caused plaintiff's injury. *See O'Neal v. Kellett*, 55 N.C. App. 225, 284 S.E. 2d 707 (1981); *Lenz v. Ridgewood Associates*, 55 N.C. App. 115, 284 S.E. 2d 702 (1981). Thus, defendant has not shown that he is entitled to summary judgment on the issue of his negligence.

Defendant's final contention is that the evidence shows plaintiff to have been contributorily negligent as a matter of law. We cannot agree. At the time of her injury, plaintiff was in an unfamiliar place where she had a right to be, on an outside stairway, using the most direct route available from Room 133 to her automobile. While plaintiff had the obligation to use ordinary care to protect herself from injury and to avoid a known danger, *Smith v. Fiber Controls Corp.*, 300 N.C. 669, 268 S.E. 2d 504 (1980); *Williams v. Power & Light Co.*, 296 N.C. 400, 250 S.E. 2d 255 (1978); *Clark v. Roberts*, 263 N.C. 336, 139 S.E. 2d 593 (1965), this standard of care differs according to the exigencies of the particular situation. *Smith*, supra, *Clark*, 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." *Clark v. Roberts*, supra.

Smith, supra.

We cannot say that reasonable minds could not differ as to whether the unlighted steps constituted a known danger, or whether plaintiff's failure to anticipate the presence of the unlighted step on which she fell, or to see it, constituted contributory negligence on her part. *Williams*, supra. The evidence

that plaintiff had used the steps one time previously in the daytime does not conclusively establish that she knew, or in the exercise of due care, should have known in the dark that she would encounter it at the point where it was, in her journey back to her car. The forecast of evidence raises material issues of fact for a jury to decide. Accordingly, we hold that the trial court erred in granting summary judgment for defendant. The judgment is

Reversed.

Judges WEBB and WHICHARD concur.

J. FLOYD WILLIAMS AND WIFE, VARA BULLARD WILLIAMS v. BETHANY VOLUNTEER FIRE DEPARTMENT AND BENNY PLATO BULLARD

No. 8112SC743

(Filed 4 May 1982)

Automobiles and Other Vehicles § 45— accident between automobile and fire truck —error to allow a jury "hearing" of fire truck's siren

In a negligence action arising out of a collision between an automobile owned by plaintiff and a fire truck owned by defendant, the trial court erred in allowing a jury "hearing" of a fire truck's siren where the conditions under which the demonstration was conducted were substantially different from the conditions which existed at the place of the collision.

APPEAL by plaintiffs from *Clark, Judge*. Judgment entered 6 February 1981 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 12 March 1982.

This is a negligence action arising out of a collision between an automobile owned and operated by plaintiff J. Floyd Williams [hereinafter referred to as plaintiff] and a fire truck owned by defendant Bethany Volunteer Fire Department [hereinafter referred to as defendant fire department] and operated by defendant Benny Plato Bullard [hereinafter referred to as defendant Bullard]. In his complaint, plaintiff alleged that defendant Bullard was negligent in failing to keep a proper lookout, failing to keep the fire truck under proper control, failing to stop at a stop sign

and failing to yield the right-of-way to plaintiff's vehicle on the dominant highway, and speeding; such negligence being imputed to defendant fire department. Plaintiff prayed to recover for damages to the automobile and for his injuries. Defendants denied negligence and alleged that plaintiff was contributorily negligent in driving at an excessive speed under the circumstances and in failing to yield the right-of-way to an approaching fire department vehicle. Defendants also counterclaimed to recover for damages to the fire truck.

Vara Bullard Williams, plaintiff's wife, later filed a separate action in which she alleged loss of consortium and upon motion, was joined as a party plaintiff. Defendants denied her allegations.

The jury found that defendants were not negligent and that defendant fire department was not damaged by plaintiff's negligence. Vara Bullard Williams and plaintiff appeal from the judgment entered on this verdict.

Anderson, Broadfoot, Anderson, Johnson & Anderson, by Henry L. Anderson, Jr., for plaintiff-appellants.

Johnson, Patterson, Dilthey & Clay, by Robert M. Clay and Robert W. Sumner, for defendant-appellees.

HILL, Judge.

Plaintiff's evidence tends to show that on the morning of 29 January 1980, he got a haircut, and on his way home intended to see a friend who lives beyond the intersection of Rural Paved Road 1006 and Rural Paved Road 1826. Rural Paved Road 1006 runs North and South; Rural Paved Road 1826 runs East and West. A stop sign is located at the intersection on Rural Paved Road 1826. Visibility from the South down Rural Paved Road 1006 is obstructed by a house, trees, and shrubs. Plaintiff testified as follows:

> As I approached the intersection, I was probably 75 foot from the intersection, and I saw the fire truck coming from the right, probably 60 foot down the road from the intersection. The speed of my car approaching the intersection was somewheres from 42 or 3 miles per hour. I was decreasing my speed as I approached the intersection because I was going to stop at my friend's house. When I first saw the fire

> truck, it was in 50 foot of me. I mean, you know, he was coming into the intersection. When I first saw the fire engine it was actually coming into the intersection.

Plaintiff stated that the fire truck did not slow down for the stop sign. He estimated its speed upon entering the intersection at "25, 30 miles per hour." He did not hear a siren on the truck nor did he see flashing lights. Plaintiff testified, "When I first saw [the fire truck] it was coming into my lane of traveling. . . . It was in the intersection. . . . After I saw the fire truck coming into my lane of travel, I applied brakes. My brakes took hold and the truck kept a-going and then I struck the side of the truck." Plaintiff did not see the fire truck sooner because his view was obstructed; "it's a blind intersection." He had no recollection of exactly where the collision occurred.

Defendants' evidence tends to show that on 29 January 1980, defendant Bullard was employed by defendant fire department as its driver. He was called out on a dumpster fire that morning and pulled the fire truck out of the station. Defendant Bullard testified, "There I turned on the lights, turned on the siren, and sat there [about] 60 seconds waiting to see if any of the volunteers were coming." He set the truck's siren on the "high-low frequency." Another siren on top of the station already was operating; "[i]t's just a roaring sound . . . that . . . can be heard at least three miles. . .."

Defendant Bullard further testified that as he traveled from the station to the intersection of Rural Paved Road 1006 and Rural Paved Road 1826, his top speed was 15 miles per hour. He stated,

> When I got to a reasonable distance from the stop sign, I slowed down to look if anything was coming. . . . I reduced my speed to 10 miles an hour right there adjoining the stop sign. . . . I looked left at that point as I reached the stop sign. I looked right to make sure there was not nothing coming. And when I did not see anything, I proceeded on.

As he crossed the intersection, the collision occurred. The impact was the rear end of the truck, knocking it "sideways."

Richard Allen Strickland, then a volunteer fireman for defendant fire department, also testified for defendants. He stated

that he heard the siren on top of the station and "went to the wreck" where he saw "the red light flashing on top of the truck." Donna Nunnery was in her yard at the corner of the intersection when the collision occurred. She testified that she heard the fire truck's siren "coming down the road toward my house, heard it go by my house, heard it going toward the intersection, I heard a loud bang, after that I heard the siren for another few seconds." David Royal, who was at the Bethany Grocery Store located at the intersection, saw the fire truck come up to the intersection with the lights flashing and the siren operating.

Plaintiff's second argument assigns as error the trial judge's decision to allow a jury "hearing" of a fire truck's siren at defendant's request. The judge described the "hearing" to the jury as follows:

> . . . [A]t this [time] the defendant is going to introduce into evidence . . . the sound of the siren on a fire truck. . . . The jury is going to be taken as a whole in a body to a location out here beside the courthouse on Person Street where you will stand on the sidewalk. The siren on the vehicle will be activated and the vehicle will proceed from the location where it is to a point equal—or to your location.
>
> Now, during this time, you are simply to listen, to observe the truck. This is not in any way intended to duplicate the conditions that existed at the time on—as they were on the 29th of January of 1980, but is simply to allow you the opportunity to hear the siren under the circumstances and the conditions that it will be presented here on Person Street.

The evidence was offered to show the audibility of a "high-low frequency" siren from a distance of not less than 1000 feet since, under G.S. 20-156(b) & -157(a), the driver of a vehicle on a highway must yield the right-of-way and clear any intersection by driving as near as possible to the curb when approached by "any police or fire department vehicles . . . giving a warning signal by appropriate light and by bell, siren, or exhaust whistle *audible under normal conditions from a distance not less than 1,000 feet.*" (Emphasis added.) The jury "hearing" occurred as the judge described it, and plaintiff objected to it repeatedly.

> To be admissible in evidence, an experiment must satisfy this twofold requirement: (1) The experiment must be made under conditions substantially similar to those prevailing at the time of the occurrence involved in the action; and (2) the result of the experiment must have a legitimate tendency to prove or disprove an issue arising out of such occurrence.

Mintz v. Atlantic Coast Line Railroad Co., 236 N.C. 109, 114-15, 72 S.E. 2d 38, 43 (1952). *See* 1 Stansbury's N.C. Evidence (Brandis rev. 1973) § 94, p. 304.

As the record in the present case shows, the jurors were left standing on a sidewalk for several minutes, anticipating seeing and hearing the fire truck as it proceeded down the street. The sounds of the truck were channeled along the street by the buildings thereon, and there were no obstructions between the fire truck and the jurors as it proceeded toward them. It is apparent that the conditions under which this demonstration was conducted were so different from the "blind intersection" of Rural Paved Road 1006 and Rural Paved Road 1826 that no "substantially similar" conditions existed.

Although the trial judge instructed the jury that the demonstration was not intended to duplicate the conditions at the time of the collision but was intended to demonstrate the audibility of a "high-low frequency" siren on Person Street, the demonstration nevertheless was highly prejudicial to plaintiff under these circumstances. Thus, the relevancy of the jury "hearing" of the "high-low frequency" siren was not established, and the trial judge erred in permitting it to occur. *See* 1 Stansbury's N.C. Evidence (Brandis rev. 1973) § 94, pp. 304-05.

We have carefully examined plaintiff's remaining arguments and find that they either are unlikely to recur at the new trial, or are without merit and do not warrant further discussion in this opinion.

For the reasons stated above, plaintiff is entitled to a

New trial.

Judges WELLS and BECTON concur.

BERNICE SELBY v. J. T. TAYLOR AND ZACHARY TAYLOR

No. 812SC380

(Filed 4 May 1982)

1. Slander of Title § 1— sufficiency of complaint

Plaintiff's complaint was sufficient to allege a claim for relief for slander of title where it alleged that defendants, in a writing, advised that one defendant owned lands claimed by plaintiff which were to be sold at public auction; the statement in the paper writing was known by defendants to be false and was made maliciously; the paper writing was read at the sale of the property; as a result thereof, potential buyers, including a paper company, were discouraged from bidding, and the sale was chilled; and as a result of the chilling of the sale, plaintiff suffered a loss of $20,000.

2. Slander of Title § 1— applicable statute of limitations

The thrust of the tort action of slander of title is the interference with a prospect of sale of real property or interference with a proprietary right. Therefore, the three-year statute of limitations of G.S. 1-52(3) "for trespass upon real property" applies to such an action rather than the one-year limitation period of G.S. 1-54(3) applicable to actions for personal slander and libel.

APPEAL by plaintiff and defendants from *Reid, Judge.* Order entered 4 February 1981, Superior Court, HYDE County. Heard in the Court of Appeals 18 November 1981.

Plaintiff instituted this action on 12 January 1979. The complaint alleged that plaintiff formerly owned a tract of land in Hyde County, but lost title to the land by virtue of foreclosure by the trustee under a deed of trust given by plaintiff to secure an indebtedness to Work Production Credit Association. Further, defendant Zachary Taylor, acting as agent for defendant J. T. Taylor, had "published a paper writing" dated 16 April 1976, stating that he, Zachary Taylor, was the owner of the land and any person bidding on the land would do so at their peril. Copies of the paper writing were sent to the clerk, to the trustee, and to the holder of the indebtedness. Plaintiff alleged that the contention made in the paper writing was false, that defendant knew it was false and made the statement maliciously and fraudulently. The statement was read by the trustee to potential buyers at the sales of the land. Buyers, including Weyerhaeuser Corporation, were discouraged from bidding, and the sale was chilled. Plaintiff seeks $20,000 damages as result of the chilling of the sale and $100,000 punitive damages.

Defendants answered, denying the material allegations, and pleading the statute of limitations.

Defendants moved, under Rule 12(b)(6), for dismissal of the complaint for failure to state a cause of action based on their defense of the statute of limitations. The court denied that motion on the ground that the complaint did not sound in libel or slander within the purview of G.S. 1-54(3). The court allowed the motion of defendants to dismiss under Rule 12(b)(6) on the ground that the complaint did not state a cause of action upon which relief could be granted.

Plaintiff appeals from the order dismissing the action and defendants have excepted to and cross assigned as error the court's action in denying their motion based upon the statute of limitations.

Wilkinson and Vosburgh, by John A. Wilkinson and Steven P. Rader, for plaintiff appellant.

Henderson and Baxter, by David S. Henderson and Carl D. Lee, for defendant appellees.

MARTIN (Harry C.), Judge.

Plaintiff's Appeal

[1] The court, in allowing defendants' Rule 12(b)(6) motion for dismissal, ruled that plaintiff's complaint did not state a cause of action. We disagree. The complaint sufficiently alleges a cause of action for slander of title.

> The nature of the action for slander of title is peculiar, being based upon a defamatory attack upon property. It has little in common with the ordinary action for slander. Its gist is the special pecuniary loss sustained by reason of malicious utterances or publications by the slanderer. Three elements are necessary for the maintenance of such a suit, the words must be: (1) False; (2) maliciously published; and (3) result in some special pecuniary loss. These requisites must not only be proved but under the fundamental law of pleading must be averred. (Citations omitted.)

International Visible Systems Corp. v. Remington-Rand, Inc., 65 F. 2d 540, 542 (6th Cir. 1933).

This succinct discussion of the cause of action followed *Cardon v. McConnell*, 120 N.C. 461, 27 S.E. 109 (1897), where Chief Justice Faircloth set out the elements of the action as follows:

> Slander of title of property may be committed and published orally or by writing, printing or otherwise, and the gist of the action is the special damage sustained, and unless the plaintiff shows the falsity of the words published, the malicious intent with which they were uttered, and a pecuniary loss or injury to himself, he cannot maintain the action. If the alleged infirmity of the title exists, the action will not lie, however malicious the intent to injure may have been, because no one can be punished in damages for speaking the truth. It is essential to the action that the words be maliciously uttered and with intent to injure, and the burden of proving such malice, express or implied, rests upon the plaintiff. If he can show that the utterances were not made in good faith to assert a real claim of title, or facts and circumstances that warrant such an inference, then malice may be fairly implied.

Id. at 462. See also *Whyburn v. Norwood*, 47 N.C. App. 310, 267 S.E. 2d 374 (1980); *Texas Co. v. Holton*, 223 N.C. 497, 27 S.E. 2d 293 (1943); *Conway v. Skelly Oil Co.*, 54 F. 2d 11 (10th Cir. 1931); *Davis v. Keen*, 142 N.C. 496, 55 S.E. 359 (1906).

Here the complaint alleges that defendants, in a writing, a copy of which was attached to the complaint, advised that Zachary Taylor owned the lands claimed by plaintiff and which were to be sold at public auction. The statement in the paper writing was known by defendants to be false and was made maliciously. The paper writing was read at the sales of the property. As a result, potential buyers, including Weyerhaeuser, were discouraged from bidding, and the sale was chilled. As the result of the chilling of the sale, plaintiff suffered a loss of $20,000.

Clearly plaintiff has alleged a malicious uttering of a slander of his title. Indeed defendants concede this in their argument in their brief on this question. They contend, however, that the plaintiff has not sufficiently alleged special damages. In their argument on their own exceptions 1 and 3, they argue forcefully that the complaint states a cause of action and sufficiently alleges special damages. We agree. Plaintiff alleges that because of the

reading of the paper writing published by defendants, Weyerhaeuser and others did not bid on the property and plaintiff, as a result of that suffered a $20,000 loss. This sufficiently alleges a "pecuniary loss of injury to himself" as required by *Cardon v. McConnell*, supra. Clearly special damages may result from the preventing of prospective purchasers' bidding at a public sale. See annotation 150 A.L.R. 716 (1943).

Defendants' Cross Assignment of Error

[2] Defendants argue that the trial court should have dismissed the action because it was barred by the statute of limitations, taking the position that the limitation of time within which the action can be brought should be the one-year limitation applicable to actions "[f]or libel, slander, assault, battery, or false imprisonment." G.S. 1-54(3). We disagree.

Our research does not disclose a case in this State in which the precise question has been presented to the courts. However, the real nature of the action and the better reasoned cases from other jurisdictions lead us to the conclusion that the one-year statute of limitation for personal slander and libel has no application.

The thrust of the tort action of slander of title is the interference with a prospect of sale of real property or interference with a proprietary right.

> . . . [T]he term "slander of title" includes both spoken and written means by which the right of property may be invaded and a right of action exists, irrespective of the means by which the title is traduced. This is so because a property right has been invaded—*an injury to real property has been sustained.* (Emphasis added.)

Coley v. Hecker, 206 Cal. 22, 27, 272 P. 1045, 1047 (1928).

The Circuit Court of Appeals, in *Howard v. Hudson*, 259 F. 2d 29 (9th Cir. 1958), in an action for slander of title held that the California rule was that the action was "within the three year limitation applicable to 'an action for trespass or injury to real property' rather than the one year limitation provision," *id.* at 32, dealing with personal injuries such as libel, slander, assault, battery, or false imprisonment—the same actions listed in our G.S.

1-54(3) which defendant contends is applicable here. Indeed the California Court, in *Smith v. Stuthman*, 79 Cal. App. 2d 708, 181 P. 2d 123 (1947), pointed out that today trespass to real property has a broadened meaning and would now include "consequential injuries, such as actions for slander of title, as well as direct physical injuries." *Id.* at 710, 181 P. 2d at 125.

A similar result was reached by the Court in *Lase Co. v. Wein Products, Inc.*, 357 F. Supp. 210 (N.D. Ill. 1973), applying the law of Illinois. See also *Conway v. Skelley Oil Co.*, supra; *King v. Miller*, 35 Ga. App. 427, 133 S.E. 302 (1926); *Law v. Harwood*, 79 Eng. Rep. 724 (K.B. 1628); *Reliable Mfg. Co. v. Vaughn Novelty Mfg. Co.*, 294 Ill. App. 601, 13 N.E. 2d 518 (1938).

We are aware that there are cases apparently reaching a contrary conclusion. Some are cited in 53 C.J.S., Libel and Slander, § 278 to which defendants call our attention. The Oregon case, *Woodward v. Pacific Fruit and Produce Co.*, 165 Or. 250, 106 P. 2d 1043 (1940), dealt with an interference in a business relationship. The court chose to call it slander of title, but the case before the Oregon Court was not similar to the slander of title to realty now before us. *Buehrer v. Provident Mutual Life Ins. Co.*, 123 Ohio St. 264, 175 N.E. 25 (1931), involves a distinction limiting a suit for trespass to those cases which involve a physical injury. In *Bush v. McMann*, 12 Colo. App. 504, 55 P. 956 (1899), and *Carroll v. Warner Bros.*, 20 F. Supp. 405 (D.C.N.Y. 1937), the injury was to personal property or business relationship, not title to land. The two Florida cases cited, *Old Plantation Corp. v. Maule Industries*, 68 So. 2d 180 (1953), and *Carey v. Beyer*, 75 So. 2d 217 (1954), appear to reach a contrary result to the result we reach but the applicable Florida statutes do not specify a special statute of limitations for injuries to real property as is done in this jurisdiction. *Walley v. Hunt*, 212 Miss. 294, 54 So. 2d 393 (1951), turns on a particular statute including "all actions for slanderous words concerning the person or title . . ." *Id.* at 397.

The Massachusetts Court, in *McDonald v. Green*, 176 Mass. 113, 57 N.E. 211 (1900), classified slander of title with personal slander. This is a position which we reject. We are of the opinion that the real nature of the action prohibits the application of the law of personal slander and requires that the applicable statute of limitations is G.S. 1-52(3) which provides for a limitation of three

years "for trespass upon real property". The court correctly concluded that "the complaint filed herein did not sound in libel or slander within the perimeters of North Carolina General Statute 1-54(3)."

Plaintiff's appeal—reversed.

Defendants' appeal—affirmed.

Judges HEDRICK and MARTIN (Robert M.) concur.

CYNTHIA W. GOODHOUSE (FORMERLY DEFRAVIO) v. DAVID DEFRAVIO

No. 8126DC765

(Filed 4 May 1982)

Divorce and Alimony § 24.4— willful failure to support child—evidence of changed circumstances inadequate

In a support action in which defendant was found to be in civil contempt, there was sufficient evidence to support the trial court's conclusion "that defendant has deliberately attempted to avoid his financial responsibilities to his daughter and that he has not acted in good faith" where he sold the total assets of his company, worth about one million dollars, for $10,000, and returned to school.

APPEAL by defendant from *Saunders, Judge*. Order entered 13 February 1981 in District Court, MECKLENBURG County. Heard in the Court of Appeals 30 March 1982.

The history of this case spans a period of over ten years and reflects an effort on the part of the plaintiff to secure reasonable child support for the parties' minor child.

On 8 February 1971, the parties were granted an absolute divorce. No arrangement was made for custody or child support. By mutual agreement plaintiff has retained custody, and from 1974 until 1978 defendant voluntarily supported his child with payments ranging from $80 to $200 per month.

In November of 1977, plaintiff sought the assistance of counsel in an effort to have the child support payments increased.

Negotiations were unsuccessful, and on 17 January 1978, plaintiff filed a motion seeking an award of back child support, future child support, and attorney's fees. Based on defendant's substantial income at the time and the needs of his child, the court ordered defendant to pay $500 a month towards her support. Defendant was also ordered to pay a specified amount of back child support and attorney's fees.

Defendant moved for a decrease in the monthly support payments on 5 March 1979. He had elected to leave his job and go into business for himself. Plaintiff agreed, and the court ordered, that for a twelve-month period beginning June 1979 defendant would pay $300 per month, the additional $200 per month being allowed to accumulate and produce an arrearage of $2,400. Defendant was ordered to liquidate the arrearage in full, on or before 1 June 1980, and, at that time, resume the $500 monthly payments. The court added that "[i]n the event Defendant does not pay the $2,400, then Plaintiff may move this Court for a hearing to ascertain whether or not Defendant is capable of paying the $2,400.00." The court further noted that "[i]t is the intent of both Plaintiff and Defendant with respect to permitting a temporary reduction in monthly support payments while accruing the arrearage for payment by June of 1980, to aid Defendant in establishing the new business to the end that future payments for child support shall be made promptly and in the amounts as set in the Order entered April 14, 1978."

Defendant's new business prospered. Nevertheless, he chose to sell his equity interest in the business, worth $61,000, for $10,000. In addition, the purchaser agreed to liquidate $50,000 in loans defendant had made to the company by paying $10,000 at closing and $40,000 payable at a rate of $10,000 per year plus 8 percent interest over four years. Of the $20,000 defendant received at closing, $17,000 was given to his grandfather in repayment of a loan, although there was an understanding between the two that the loan could be paid at a rate of $500 a month. Defendant believed "that the obligation to my grandfather was at least as important if not superior to the obligation of providing support for my daughter in the amount of $500.00 per month."

In May of 1980 defendant elected to become a full-time student, at which time he moved the court for a modification of

"child support, both as to periodic payments, and accumulated arrearages, commensurate with the defendant's earning and ability to make payments." Plaintiff moved that defendant's motion to reduce support be denied, that she be awarded attorney's fees, and that defendant be found in civil contempt for failure to pay support and arrearages pursuant to the June 1979 order.

A hearing was held on the cross-motions in early January 1981. The court made extensive findings of fact based on defendant's testimony and affidavit of financial standing and concluded that defendant's voluntary choice to reduce income, return to college, and not provide child support was insufficient evidence to support a reduction in his court-ordered obligations. "Defendant has the earning capacity and ability to make substantial amounts of money. If he elects not to do so, while that is an alternative he may wish to follow, it is not one that justifies nonpayment of child support." The court also concluded that defendant "has had at all times, and presently has the ability and capability of liquidating the outstanding child support arrearage of $4,000.00 and in paying Plaintiff's attorney." Defendant was found in civil contempt.

James, McElroy & Diehl, by William K. Diehl, Jr., for plaintiff appellee.

Cannon and Basinger, by Thomas R. Cannon, for defendant appellant.

MARTIN (Harry C.), Judge.

Defendant contends that the trial court erred in denying his motion to reduce child support payments, in holding defendant in contempt, and in awarding plaintiff counsel fees.

It is established law in North Carolina that the court's findings of fact are conclusive if supported by any competent evidence and the judgment will be affirmed if the findings support the conclusions and judgment entered thereon. *In re Williamson*, 32 N.C. App. 616, 233 S.E. 2d 677 (1977). A careful reading of the record discloses that the evidence fully supports the findings of fact recited in the 13 February 1981 order.

The court based its conclusions of law upon a two-part inquiry: defendant's voluntary choice to reduce income and his

deliberate attempt to avoid responsibilities to his daughter which was not done in good faith.

Whether the court's findings of fact support its conclusions of law requires a reading of the applicable statutes. N.C.G.S. 50-13.7 (a) (Supp. 1981) provides the procedural mechanism permitting modification, as follows: "An order of a court of this State for support of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested." In *Gilmore v. Gilmore*, 42 N.C. App. 560, 257 S.E. 2d 116 (1979), it was held that the changed circumstances with which the courts are concerned are those which relate to child-oriented expenses. In *Daniels v. Hatcher*, 46 N.C. App. 481, 265 S.E. 2d 429, *cert. denied*, 301 N.C. 87 (1980), it was held that the court must make findings as to the relative abilities of the parties to provide support before ordering a change in the amount of support payments. *See also Ebron v. Ebron*, 40 N.C. App. 270, 252 S.E. 2d 235 (1979). Inevitably we are led to those considerations which gave rise to the award of child support in the first instance, as set forth in N.C.G.S. 50-13.4(c) (Supp. 1981):

> Payments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case.

Thus, it has been held under both N.C.G.S. 50-13.4 and 50-13.7 that a husband's ability to pay child support is normally determined by his actual income at the time the award is made or modified. If, however, there is a finding that the husband is deliberately depressing his income or otherwise acting in deliberate disregard of his obligation to provide reasonable support for his child, his capacity to earn may be made the basis of the award. Under these circumstances, his motion to reduce the amount of child support will be denied. *See Beall v. Beall*, 290 N.C. 669, 228 S.E. 2d 407 (1976); *Whitley v. Whitley*, 46 N.C. App. 810, 266 S.E. 2d 23 (1980); *Wachacha v. Wachacha*, 38 N.C. App. 504, 248 S.E. 2d 375 (1978). The "imposition of the earnings capaci-

ty rule must be based on evidence that tends to show the husband's actions resulting in reduction of his income were not taken in 'good faith.'" 38 N.C. App. at 509, 248 S.E. 2d at 378.

On the record before us, we find sufficient evidence to support the trial court's conclusion "that Defendant has deliberately attempted to avoid his financial responsibilities to his daughter and that he has not acted in good faith." Defendant is apparently an astute businessman. It was within his means, even upon his decision to forego all employment and become a full-time student, to provide adequately for his daughter under the terms of the April 1978 order. This he chose not to do. The trial court acted within its discretion in denying defendant's motion to reduce the support payments.

We agree with the trial court's conclusion that "Defendant has had at all times, and presently has the ability and capability of liquidating the outstanding child support arrearage of $4,000 and in paying Plaintiff's attorney." Defendant testified that in June of 1980 his net worth was almost $65,000. Defendant has $2,500 in an IRA account, owns furniture and other assets worth $17,500, and is the holder of notes totalling an amount of $40,000. In February of 1980, when defendant was paying reduced child support, the total assets of his company (his interest in which he sold shortly thereafter for $10,000) amounted to over one million dollars. Defendant's failure to pay the arrearage was willful. *Mauney v. Mauney*, 268 N.C. 254, 150 S.E. 2d 391 (1966).

Affirmed.

Judges MARTIN (Robert M.) and WHICHARD concur.

BARBARA FOY v. JACK FOY

No. 8126DC804

(Filed 4 May 1982)

1. Parent and Child § 1— agreement to relinquish parental rights—voidness as against public policy

Defendant's agreement to relinquish his parental rights in a child which he adopted after he married the child's mother was void as being against

public policy since it removed from the court its power to assert objectives set forth in G.S. 7A-289.22.

2. Rules of Civil Procedure § 15.1— denial of motion to file supplemental pleading—abuse of discretion

In an action to recover sums allegedly due under a separation agreement, the trial court abused its discretion in the denial of plaintiff's motion to supplement her pleadings to ask for payments under the separation agreement which have accrued since the filing of this action where the granting of the motion would result in no unfairness to defendant and would facilitate the litigation of related issues in a single action. G.S. 1A-1, Rule 15(b).

APPEAL by plaintiff and defendant from *Brown, Judge.* Judgment entered 28 May 1981 in District Court, MECKLENBURG County. Heard in the Court of Appeals 31 March 1982.

Plaintiff brought suit against defendant alleging his default under their 5 December 1977 separation agreement. She alleged that defendant agreed to pay to her $10,000 in one $500 installment and in subsequent $200 per month installments, and that defendant paid the $500 installment, but no more. Defendant answered, admitting the agreement, but stating that the parties "agreed, for valuable consideration, to rescind said agreement and that the same was rescinded by these parties."

Plaintiff moved for summary judgment and asked to amend her complaint to seek recovery for the monthly payments which have accrued, but were not paid, since the filing of this action, in addition to the payments which had accrued up to the filing of this action. The court denied plaintiff's motion to amend her complaint and allowed her motion for summary judgment, ordering defendant to pay "$2,570.92 plus costs due through the date the action was instituted without prejudice to claims for amount due thereafter." Plaintiff and defendant gave notice of appeal.

Ronald Williams for plaintiff-appellee-appellant.

Thomas D. Windsor for defendant-appellant-appellee.

HILL, Judge.

Plaintiff and defendant were married on 15 September 1976. Plaintiff had a son, Blaine Ashton Foy, by her first husband, who was adopted by defendant following the marriage. Upon their separation, the parties executed the 5 December 1977 separation

agreement which in addition to the provisions stated above, provided as follows:

> 9. WIFE agrees to and does hereby release husband from any claim for child support for Blaine Foy and as between themselves wire [sic] agrees to indemnify Husband for any liability for child support which the HUSBAND may incur as a result of his obligation to support the above name child under the laws of the State of North Carolina.

On 2 January 1980, plaintiff filed a petition praying the court to terminate defendant's parental rights in Blaine. On 1 May 1981, petitioner filed an amendment to her 2 January 1980 petition, dated 6 February 1980, in which she asked the court to grant custody of Blaine to her in the event that defendant's parental rights are not terminated. On 8 February 1980, plaintiff signed a statement on the 1 May amendment saying, "Separation agreement is null & void and as of Feb. 8th, 1980 no money is owed by Jack Foy to Barbara Foy." Defendant also signed a statement on 8 February saying, "I give up all legal and parental rights of Bland [sic] Foy from this day forth."

By deposition, defendant testified that "[t]he separation agreement provides in it for me to pay Barbara Foy $10,000.00; that took care of Blaine. I am saying that our agreement in the contract was for child support."

[1] We first address defendant's assignment of error by which he contends that the trial judge erred in granting plaintiff's motion for summary judgment against him. Of course, summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." G.S. 1A-1, Rule 56(c).

In the present case, defendant contends that the 5 December 1977 separation agreement is null and void by virtue of plaintiff's 8 February 1980 statement. However, the only apparent consideration for that agreement is defendant's statement of the same date that he will thenceforth give up his parental rights in Blaine.

> We are advertent to the fact that no agreement or contract between husband and wife will serve to deprive the courts of their inherent as well as their statutory authority to protect the interests and provide for the welfare of infants. They may bind themselves by a separation agreement or by a consent judgment, but they cannot thus withdraw children of the marriage from the protective custody of the court.

Fuchs v. Fuchs, 260 N.C. 635, 639, 133 S.E. 2d 487, 491 (1963). *Accord Wyatt v. Wyatt*, 27 N.C. App. 134, 218 S.E. 2d 194 (1975). This rule of law has developed because of the great importance the State ascribes to the custody and maintenance of children. "The interests of the State in the welfare of the child transcends any agreement of the parties." 2 Lee, North Carolina Family Law (4th ed. 1980) § 151, p. 229.

Based upon these principles, we conclude that defendant's agreement to relinquish his parental rights is void as against public policy because it removes from the court its power to assert the following objectives:

> (1) The general purpose of [the procedure to terminate parental rights] is to provide judicial procedures for terminating the legal relationship between a child and his or her biological or legal parents when such parents have demonstrated that they will not provide the degree of care which promotes the healthy and orderly physical and emotional well-being of the child.
>
> (2) It is the further purpose of this [procedure] to recognize the necessity for any child to have a permanent plan of care at the earliest possible age, while at the same time recognizing the need to protect all children from the unnecessary severance of a relationship with biological or legal parents.
>
> (3) Action which is in the best interests of the child should be taken in all cases where the interests of the child and those of his or her parents or other persons are in conflict.

G.S. 7A-289.22. In essence, the parental rights of a parent in his child are not to be bartered away at the parent's whim. Thus,

there being no valid consideration to support the declaration that the 5 December 1977 separation agreement is null and void, the agreement stands. There is no genuine issue of material fact regarding defendant's obligation under this agreement, so plaintiff's summary judgment is affirmed.

[2] In plaintiff's assignment of error, she argues that the trial judge erred in denying her motion to amend her complaint to ask for the payments under the 5 December 1977 separation agreement which have accrued, but were not paid, since the filing of this action.

We agree with plaintiff that although her motion was to "amend" her complaint, it was in substance a motion to file a supplemental pleading under G.S. 1A-1, Rule 15(d), which provides, in part, as follows:

> Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which may have happened since the date of the pleading sought to be supplemented, whether or not the original pleading is defective in its statement of a claim for relief or defense.

We find the following language determinative of this issue:

> Although the ruling on a motion to allow supplemental pleadings is within the trial judge's discretion, that discretion is not unlimited. Generally, the motion should be allowed unless its allowance would impose a substantial injustice upon the opposing party, "for it is the essence of the Rules of Civil Procedure that decisions be had on the merits and not avoided on the basis of mere technicalities." *Mangum v. Surles*, 281 N.C. 91, 99, 187 S.E. 2d 697, 702 (1972). The rule that a motion to allow supplemental pleadings should ordinarily be granted is based upon the policy that a party should be protected from the harm which may occur if he is prevented from litigating certain issues merely by virtue of the court's denial of such a motion. In ruling on such a motion, the trial court should focus on any resulting unfairness which might occur to the party opposing the motion. In the absence of any apparent or declared reason for its denial, the

> motion should be granted. In order to facilitate litigation of related issues in a single action, the court may impose terms or conditions upon the allowance of the motion whenever the terms appear to be required by considerations of fairness. *New Amsterdam Casualty Co. v. Waller*, 323 F. 2d 20 (4th Cir. 1963).

vanDooren v. vanDooren, 37 N.C. App. 333, 337-38, 246 S.E. 2d 20, 23-24, *disc. rev. denied*, 295 N.C. 653, 248 S.E. 2d 258 (1978).

In the present case, the trial judge should have allowed plaintiff's motion to supplement her pleadings. We perceive no unfairness that would result to defendant if the motion is granted. Further, we find no apparent or declared reason for its denial. Since granting the motion would facilitate the litigation of related issues in a single action, the trial judge abused his discretion by denying plaintiff's motion.

Thus, although summary judgment for plaintiff was appropriate, the cause must be remanded to the district court for reconsideration of whether the judgment should include the payments owed to plaintiff by defendant under the 5 December 1977 separation agreement which have accrued since the filing of this action.

Affirmed in part, reversed in part, and remanded.

Judges WELLS and BECTON concur.

OLLIE ALLEN v. INVESTORS HERITAGE LIFE INSURANCE COMPANY

No. 818DC844

(Filed 4 May 1982)

Insurance §§ 12, 29.1— life insurance policy—change of beneficiary—no insurable interest—summary judgment proper

The trial court properly granted summary judgment in favor of defendant life insurance company where plaintiff purchased an insurance policy, payable to himself, for the purpose of paying funeral expenses upon the death of his uncle, where plaintiff's estranged wife executed a form changing the beneficiary of the policy to herself without plaintiff's knowledge and where plaintiff's wife may have lacked an interest in the life of the insured upon

which the original issuance of the policy could have been based. Plaintiff knew his wife had changed the beneficiary, plaintiff failed to make allegations of fact in his affidavit which would support a finding that his uncle lacked legal capacity to change the beneficiary of the policy on his life, and once a policy has been lawfully issued, it will not be rendered unlawful because the insurer designates a beneficiary who could not have procured the policy himself.

APPEAL by plaintiff from *Ellis, Judge*. Judgment entered 9 June 1981 in District Court, WAYNE County. Heard in the Court of Appeals 1 April 1982.

This action arose when plaintiff sought to recover the benefits of a life insurance policy on the life of plaintiff's uncle. Plaintiff had purchased the policy, payable to himself, in 1975 for the purpose of paying funeral expenses upon the death of his uncle, an incompetent, whose only living relative was plaintiff. In 1976, without plaintiff's knowledge, plaintiff's estranged wife executed a form changing the beneficiary of the policy to herself, signing her name and that of the insured. When plaintiff's uncle died in 1978, defendant paid the policy proceeds to plaintiff's wife. Plaintiff paid all of his uncle's burial expenses.

From summary judgment for defendant, plaintiff appeals.

Duke and Brown, by John E. Duke, for plaintiff appellant.

John W. Dees for defendant appellee.

ARNOLD, Judge.

Plaintiff's only assignment of error is that the trial court erred in granting summary judgment for defendant. Plaintiff contends that he, rather than defendant, was entitled to summary judgment in his favor.

It is not disputed that in 1976 defendant insurance company received a signed and witnessed change of beneficiary form designating plaintiff's wife as beneficiary of the insurance policy. The signature on the form purported to be that of the insured.

Plaintiff argues, however, that receipt of this form did not excuse defendant from liability for its allegedly wrongful payout to plaintiff's estranged wife because:

1. The insured did not sign the form;

2. Even if the insured did sign, the signature was ineffective because of the insured's incompetence;

3. Plaintiff's wife had no insurable interest in the insured's life.

While we are not unsympathetic to the wrong allegedly suffered by plaintiff at the hand of his former wife, we can find nothing in the record to support his claim against the insurance company. The change of beneficiary form appeared in all respects to have been properly executed and contained nothing which might have placed defendant on notice of forgery or undue influence. Indeed, we must reluctantly conclude that plaintiff himself was in a far better position to foresee his wife's action and to protect his interests therefrom than was defendant. By his own admission, plaintiff had demanded that his wife surrender the policy to him after their separation and she had refused. Following the death of the insured, more than one month passed before defendant issued a check to plaintiff's wife as beneficiary. Yet, at no time before or after the death of the insured did plaintiff notify the insurance company of his wife's wrongful possession of the policy, or of his continuing claim thereto. We must conclude, therefore, that defendant reasonably relied on the apparent validity of the change of beneficiary form and had no notice, actual or constructive, of the alleged disability of the insured to make such a change, or of unlawfulness due to the purported beneficiary's alleged lack of an insurable interest.

With regard to the issue of competency, we find that plaintiff has failed to make allegations of fact in his affidavit which would support a finding in his favor. Absent some forecast of evidence which would support plaintiff's claim, the court could not consider his allegation that the insured lacked legal capacity to change the beneficiary of the policy on his life.

Finally, as to the question of insurable interest, we agree that plaintiff's wife may have lacked an interest in the life of the insured upon which the original issuance of the policy could have been based. However, once a policy has been lawfully issued, it will not be rendered unlawful because the insured designates a beneficiary who could not have procured the policy himself. *Flintall v. Charlotte Mutual Insurance Co.*, 259 N.C. 666, 131 S.E. 2d 312 (1963).

In view of the foregoing, we hold that summary judgment was properly granted.

Affirmed.

Judge WEBB concurs.

Judge CLARK dissents.

Judge CLARK dissenting.

Plaintiff applied to the insurer's authorized agent for the life insurance policy, explaining to the agent at the time that he was assuming responsibility for the care and maintenance of the insured. The agent knew that insured could not sign his name, and the agent requested plaintiff's wife to sign the policy application for the insured. The agent was informed that plaintiff would pay the premiums and that plaintiff would need the policy proceeds to defray the funeral expenses of the insured upon his death. All these facts were known to the insurer's agent.

It further appears from the pleadings and supporting material that plaintiff's estranged wife, the third-party defendant, signed the name of the insured on the change of beneficiary form, either fraudulently or without knowledge or authority of the insured or the plaintiff, and that insured was mentally incompetent at the time.

In my opinion, plaintiff was more than a beneficiary with a contingent interest. And insurer, through its agent, had notice of insured's disability. There are unanswered questions of fact and law which make summary judgment for the defendant improper. I vote to reverse the judgment.

Coleman v. City of Winston-Salem

BUD COLEMAN, FATHER; DORA COLEMAN, MOTHER; SHIRLEY JEAN ROBINSON, GUARDIAN AD LITEM FOR CHRISTOPHER D. FULLER, MINOR SON; COLEBLES COLEMAN, JR. DECEASED v. CITY OF WINSTON-SALEM, SELF-INSURED

No. 8110IC922

(Filed 4 May 1982)

1. **Master and Servant § 58— workers' compensation—intoxication as proximate cause of death—remand for findings**

Where there was ample evidence which would have permitted, but not compelled, a finding that an employee's intoxication proximately caused his death, the Industrial Commission erred in finding that there was "no evidence that the death was caused by intoxication," and the cause must be remanded to the Industrial Commission for findings as to whether the employee's death was proximately caused by intoxication.

2. **Master and Servant § 79.1— presumption that child is wholly dependent—constitutionality**

The provision of G.S. 97-39 stating that "a child shall be conclusively presumed to be wholly dependent for support upon the deceased employee" is not unconstitutional.

APPEAL by defendant and plaintiffs Bud Coleman and Dora Coleman from the North Carolina Industrial Commission opinion and award of 5 March 1981. Heard in the Court of Appeals 8 April 1982.

Colebles Coleman, Jr., an employee on a sanitation crew, was killed when a sanitation truck rolled over his body. The Deputy Commissioner found that intoxication was the proximate cause of the accident and denied compensation. G.S. 97-12. Upon appeal, the Full Commission granted compensation.

Colebles Coleman, Jr., died on 2 October 1978 from massive head and facial injuries received when a sanitation truck rolled over his body. A medical examiner arrived on the scene shortly thereafter around 12:50 p.m. He ordered Coleman's body transferred to Forsyth Memorial Hospital. The following day, a pathologist performed an autopsy on the body. He obtained a blood sample from decedent's heart. Toxicology tests revealed the blood was 230 milligrams percent ethanol. It was the pathologist's opinion that such an alcohol content would have rendered Coleman "under the influence" at the time of his death, and was sufficient to cause impairment of his judgment and coordination.

Dr. McBay, with the office of the Chief Medical Examiner, testified as an expert witness and gave his opinion as to the effect a .23 blood alcohol level would have had on decedent at the time of his death. He testified:

> "In my own best judgment and opinion, at .23, Coleman would have been drunk. His face might have been flushed and his pupils dilated. His mood could or would be unstable or exaggerated; he would have loss of restraint; his thinking, or intellect, would be confused or clouded. He might have thickness of speech and may show staggering; he would have incoordination. He would lack judgment. He would have a slowing of response to stimuli or his reaction time would be slowed down. In my opinion, a .23 percent blood alcohol level would have definitely rendered Mr. Coleman intoxicated at the time of his death. I make no distinction between intoxicated and drunk. The difference between the two is hazy. Mr. Coleman was definitely under the influence of alcohol beyond any doubt.
>
> In my opinion, a person with Mr. Coleman's physical characteristics and a .23 blood alcohol level would definitely be heavily impaired with respect to judgment and coordination.
>
> In my opinion, Mr. Coleman would have to have consumed a minimum of 10 ounces (or 10 drinks) of a 100 proof liquor (50% alcohol) within an hour or two of the time he died to reach the concentration of blood alcohol (.23) found in Mr. Coleman's blood. If Mr. Coleman drank over a six hour period, one would have to add at least a drink every other hour if not more to get that concentration. Ten ounces of 100 proof liquor would be the minimum to get that concentration. In my opinion, a person with a .23 percent blood alcohol level could be impaired to the extent that he could or might stagger and fall under the wheels of a slowly backing garbage truck and thereafter be unable to extricate himself from a position of danger. A person with a .23 blood alcohol level might not have perceived the danger or be able to pull his mind to a point that he would decide to get out of danger."

Coleman's fellow employees testified that Coleman was not intoxicated when he arrived at work on 2 October at 6:45 a.m.

During the morning, Coleman worked alone on one side of the street, following the truck. At the time of the accident, co-workers saw the truck backing up and Coleman on the ground, underneath the tire of the truck. There was no testimony as to Coleman's actions immediately preceding the accident.

After hearing evidence, the Deputy Commission made the following pertinent findings of fact:

. . .

"7. Decedent consumed ethyl alcohol after starting the collection route on the morning of 2 October 1978. It was not supplied by defendant employer or a supervisory agent thereof.

8. Decedent's control of his mental and bodily faculties was substantially, appreciably, and perceptibly impaired at the time of the accident causing the injuries that resulted in his death. This impairment was caused by alcohol consumption. He was intoxicated at the time of the accident. The injuries suffered by him were proximately caused by intoxication because the accident was caused by his intoxication."

The Deputy Commissioner denied compensation on the basis that accidental death was caused by decedent's intoxication. G.S. 97-12(1).

Plaintiffs appealed to the Full Commission. After reviewing the record, the Full Commission set aside the opinion and award filed by the Deputy Commissioner. It made the following pertinent findings and conclusions of law:

"1. . . . Decedent was not intoxicated at the beginning of the working day.

. . .

6. A blood sample was taken from decedent's heart during autopsy. . . . The blood sample was noted to be slightly decomposed during chemical analysis. The blood sample taken from the heart of decedent was determined to contain 230 milligrams percent of ethyl alcohol.

7. The decedent was judicially declared to be the father of Christopher Dennard Fuller, now a minor, on 9 September

1966. . . . The deceased's father and mother were partially dependent upon the deceased.

8. Decedent's death was the result of an injury by accident arising out of and in the course of his employment by the defendant-employer.

COMMENT

In the opinion of the undersigned, there is no evidence that the death of the employee was proximately caused by intoxication. *Lassiter v. Town of Chapel Hill*, 15 N.C. App. 98, 189 S.E. 2d 769 (1972).

It is the opinion of the undersigned that the deceased's minor child, being an acknowledged illegitimate under age 18, was legally wholly dependent upon the deceased employee and takes to the exclusion of those parties partially dependent. G.S. 97-39. . . ."

The Full Commission awarded compensation to decedent's minor son.

R. Lewis Ray and Associates, by R. Lewis Ray, for plaintiff appellants and plaintiff appellees, Bud Coleman and Dora Coleman.

Womble, Carlyle, Sandridge and Rice, by Allan R. Gitter and James M. Stanley, Jr., for defendant appellant.

Morrow and Reavis, by John F. Morrow, for appellee, Shirley Jean Robinson.

VAUGHN, Judge.

[1] The primary question for resolution by the Commission was whether the death of the employee was proximately caused by intoxication. The Commission made no findings on that issue. Instead, it found that there was "no *evidence* that the death was caused by intoxication." (Emphasis added.) We conclude there was ample evidence which would have permitted, but not compelled, a finder of the facts to find that the employee's drunkenness proximately caused his death, and we reverse the decision. It was the duty of the Commission to resolve the issues on the evidence before it. It is the responsibility of the Commission, of course, to

weigh the evidence, direct as well as circumstantial, and the reasonable inferences arising therefrom. It cannot, however, ignore any of the evidence. It must consider *all* the evidence, make definitive findings and proper conclusions therefrom and enter an appropriate order. *Harrell v. Stevens & Co.*, 45 N.C. App. 197, 262 S.E. 2d 830 (1980).

The Commission, as well as the employee, appears to rely heavily on the decision of this Court in *Lassiter v. Town of Chapel Hill*, 15 N.C. App. 98, 189 S.E. 2d 769 (1972). In that case, the Commission specifically found "that even though deceased had sufficient alcohol in his blood at the time of his death to be intoxicated, the death of deceased was not occasioned by intoxication." In that case, therefore, the Commission made a finding on the question of proximate cause. It is elementary that findings of the Commission are binding on appeal if supported by competent evidence. Although not set out in the Court's opinion in *Lassiter*, the record on appeal in that case discloses that the Commission found, in substance, that the operator of a garbage truck failed to see that deceased was leaning inside the compactor to empty his collection barrel. The driver's attention was diverted by some children near the truck. He "started operating the compacting devices inside the truck which caught the upper portion of deceased's body and crushed him." All that *Lassiter* stands for, therefore, is that since the Commission obviously concluded that the truck driver's oversight was the proximate cause of the death, it was not error for the Commission to fail to make a specific finding on decedent's intoxication.

[2] Plaintiffs Bud Coleman and Dora Coleman appeal from that part of the Commission's order awarding plaintiff minor son compensation benefits. G.S. 97-39 states that "a child shall be conclusively presumed to be wholly dependent for support upon the deceased employee." The Colemans contend that Christopher Fuller was only partially dependent upon the deceased employee and that the conclusive presumption of G.S. 97-39 violates the Fourteenth Amendment. Plaintiffs' brief fails to set forth either assignments of error or exceptions as required by Rule 28(b)(3) of the Rules of Appellate Procedure. The appeal is, consequently, subject to dismissal. *State v. Shelton*, 53 N.C. App. 632, 281 S.E. 2d 684 (1981). Nevertheless, it is clear that the argument is without merit for the reasons, among others, set out in *Carpenter*

v. Tony E. Hawley Contractors, 53 N.C. App. 715, 281 S.E. 2d 783, *cert. denied*, 304 N.C. 587, --- S.E. 2d --- (1981).

The award is vacated, and the case is remanded for findings based on the present record and proceedings not inconsistent with this opinion.

Vacated and remanded.

Judges MARTIN (Robert M.) and ARNOLD concur.

STATE OF NORTH CAROLINA v. JOSEPH EMANUEL THOMPSON

No. 8115SC556

(Filed 4 May 1982)

1. **Criminal Law § 114.4— jury instructions—prejudicial expression of opinion of judge**

In a prosecution for armed robbery, the trial judge violated G.S. 15A-1232 which prohibits him from expressing an opinion as to whether a fact has been proved where he recounted testimony of three defense witnesses who testified they heard a State's witness who was charged for the same robbery say to the defendant that he had told the officers that the defendant was involved in the robbery because he thought the defendant was in California and where the trial judge then made the following statement: "In that connection you're entitled to know that only the presiding judge had the lawful authority to enter a judgment and that no plea bargain or plea arrangement has been mentioned to this presiding judge."

2. **Robbery § 2.2— indictment charging property taken from presence of accomplice**

There was sufficient proof of lack of consent, an essential element of armed robbery, where an indictment charged that money was taken from the presence of Ivory Barbee, even if Ivory Barbee was an accomplice in the robbery, as there were other employees in the store when it was robbed and the evidence showed they did not consent to the taking of the property.

3. **Robbery § 5.4— failure to instruct on lesser offenses proper**

In a prosecution for armed robbery, the trial court properly failed to submit common law robbery and larceny to the jury where the evidence showed that, while one of the employees may have been an accomplice, the other two employees did not consent to the taking of property from a store.

4. Robbery § 4.3— armed robbery—evidence that guns not loaded

Where the evidence showed that defendant took money from a restaurant by the use or threatened use of a gun, evidence by a defense witness that the guns were not loaded did not make the crime common law robbery rather than armed robbery. G.S. 14-87.

5. Robbery § 5.2— armed robbery—instructions concerning property taken—no error

In a prosecution for armed robbery, by instructing the jury that they could find the defendant guilty if they found the property was taken from any of several employees of a restaurant, the court did not deprive the defendant of a unanimous verdict since the gravamen of the offense was the taking of the property of the restaurant by the use or threatened use of a firearm and was not which of the employees was threatened.

APPEAL by defendant from *Godwin, Judge.* Judgment entered 19 November 1980 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 11 November 1981.

The defendant was tried for armed robbery of the Burger King restaurant in Burlington, North Carolina. Allen Daniel Trotter, Jr., who was charged for the same robbery, testified for the State. Mr. Trotter testified that the defendant planned the robbery and asked him to participate. Mr. Trotter testified further that the defendant told him not to worry "that he had talked to his man Ivory and that 'Everything was going to be all right.'" According to Mr. Trotter's testimony, he and the defendant went to the Burger King on 13 July 1980 shortly after 2:00 a.m. Mr. Trotter was armed with a .357 magnum pistol and the defendant had a sawed-off shotgun. Three employees of the restaurant were on the premises. The two men bound the employees and waited until Ivory Barbee, the manager, arrived at 6:25 a.m. Mr. Barbee opened the safe and the two men removed the money from it. Mr. Barbee was then bound and the two men left the restaurant. Two employees of the restaurant testified as to the occurrence and identified Mr. Trotter as one of the two men who had been in the restaurant in the early morning hours of 13 July 1980.

The defendant testified he did not go to the Burger King with Mr. Trotter.

The defendant was found guilty of armed robbery and sentenced to 40 years in prison. He appealed.

Attorney General Edmisten, by Assistant Attorney General Robert L. Hillman, for the State.

Appellate Defender Adam Stein for defendant appellant.

WEBB, Judge.

[1] The defendant has made seven assignments of error. We shall discuss some of them. In an effort to impeach the testimony of Mr. Trotter, the defendant put on three witnesses who were in jail with the defendant and Mr. Trotter. Each of them testified that he had heard Mr. Trotter say to the defendant that he had told the officers that the defendant was involved in the robbery because he thought the defendant was in California and he had been able to make an arrangement whereby he would receive no more than three years in prison on a guilty plea by "taking down" the defendant. In the charge the court recounted this testimony and then made the following statement: "In that connection you're entitled to know that only the presiding judge has the lawful authority to enter a judgment and that no plea bargain or plea arrangement has been mentioned to this presiding judge." We believe this statement by the presiding judge violated G.S. 15A-1232 which prohibits him from expressing an opinion as to whether a fact has been proved. *See State v. Owenby*, 226 N.C. 521, 39 S.E. 2d 378 (1946). By telling the jury that only the judge has the authority to enter a judgment and no plea bargain had been mentioned to him, we believe the judge could have created a serious doubt in the minds of the jury as to the testimony of three of the defense witnesses who had testified they heard Mr. Trotter say he had made a plea bargain. We hold this was error which requires a new trial.

[2] The indictment charges that the property was taken from the presence of Ivory Barbee. In one assignment of error the defendant contends it would be a violation of his due process right under *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed. 2d 560 (1979) to affirm his conviction because there is not sufficient evidence for a rational trier of fact to be satisfied beyond a reasonable doubt of his guilt. He argues that this is so because all the evidence shows that Ivory Barbee was an accomplice to the crime which means the defendant did not take the money without Barbee's consent. The defendant concludes there

is not sufficient proof of lack of consent which is an essential element of armed robbery. *See State v. Perry*, 38 N.C. App. 735, 248 S.E. 2d 755 (1978).

Conceding for purposes of argument that the evidence shows Ivory Barbee consented to the taking of the money, we do not think the defendant's conviction violates *Jackson*. In *State v. Martin*, 29 N.C. App. 17, 222 S.E. 2d 718 (1976) this Court held that it was not error to charge the jury that they could find the defendant guilty of armed robbery if they were satisfied beyond a reasonable doubt that defendant robbed Mr. Adams or Mrs. Plott. The indictment referred only to Mr. Adams. The evidence showed that Mr. Adams and Mrs. Plott were working in a Big Star store which was robbed by the defendant in that case. In the instant case the indictment charges that the money was taken from the presence of Ivory Barbee. There were other employees in the Burger King when it was robbed and the evidence showed they did not consent to the taking of the property. Under *Martin* this would supply the element of lack of consent.

[3] In another assignment of error the defendant contends it was error not to submit common law robbery and larceny to the jury. He bases this argument on what he contends is the evidence of Mr. Barbee's consent to the taking of the money which would remove the element of taking without the consent of the person present and would make the crime larceny at most. As we have said, if the evidence shows that Barbee consented to the taking, it also shows the other employees did not consent. If the others did not, the crime could not be larceny.

[4] There was testimony by Mr. Trotter that the guns used in the robbery were not loaded, and the defendant argues that this was evidence from which the jury could conclude that a dangerous weapon was not used, making the crime common law robbery at most. All the evidence for the State shows that Mr. Trotter and the defendant entered the restaurant and pointed weapons at the employees of the restaurant before Mr. Barbee arrived. The other employees were then bound and held until Mr. Barbee came to the restaurant. The defendant relied on an alibi. We believe this evidence shows that if the defendant committed the crime with which he was charged, he was guilty of taking money from the restaurant by the use or threatened use of a

dangerous weapon. If he was guilty of anything, he was guilty of armed robbery. *See* G.S. 14-87. This assignment of error is overruled.

[5] In another assignment of error the defendant contends that by instructing the jury that they could find the defendant guilty if they found the property was taken from any of the employees, the court deprived the defendant of a unanimous verdict. He says this is so because some of the jurors could have found certain employees did not consent and other jurors could have found other employees did not consent. The gravamen of the offense is the taking of the property of Burger King by the use or threatened use of a firearm. *State v. Ballard*, 280 N.C. 479, 186 S.E. 2d 372 (1972). It is not which of the employees was threatened. If some jurors concluded the property was taken from the presence of one employee by the use or threatened use of a firearm and the other jurors concluded that in the same incident the property was taken from the presence of another employee by the use or threatened use of a firearm, this would be a unanimous verdict. *See State v. Martin, supra.*

We do not discuss the defendant's other assignments of error as the questions they raise may not recur at a new trial.

New trial.

Judge WELLS concurs.

Judge MARTIN (Robert M.) dissents.

OVERNITE TRANSPORTATION COMPANY v. A. R. STYER, D/B/A AUTOMATED COMPUTER SYSTEMS

No. 8121SC799

(Filed 4 May 1982)

1. **Rules of Civil Procedure § 60.2; Judgments § 25.1— relief from summary judgment—name misspelled on calendar—no excusable neglect**

Defendant failed to show "excusable neglect" within the purview of G.S. 1A-1, Rule 60(b) so as to entitle him to relief from a summary judgment entered against him where defendant showed only that a calendar which

notified him of the date, time and place of the hearing on the motion for summary judgment listed his name as "A.R. Styler" rather than "A.R. Styer," and where other evidence showed that defendant assumed that the calendared case was his and that he made no appearance through counsel at the hearing and did not request a continuance.

2. **Corporations § 1; Judgments § 29.1; Rules of Civil Procedure § 60.2— motion to set aside judgment—absence of meritorious defense**

The trial court properly found that defendant had no meritorious defense to plaintiff's action on the ground that a corporation rather than defendant was responsible for the obligation to plaintiff where the corporation's nonexistence was established by defendant's failure to respond to plaintiff's request for an admission that defendant was doing business as a company which "is not a corporation, nor has ever been, properly organized or operating as a lawful corporation under the laws of the State of North Carolina." G.S. 1A-1, Rule 36.

APPEAL by defendant from *Mills, Judge.* Judgment entered 5 May 1980 in Superior Court, FORSYTH County. Heard in the Court of Appeals 31 March 1982.

White & Crumpler, by William E. West, Jr., for plaintiff-appellee.

A. R. Styer, defendant, pro se.

HILL, Judge.

In its complaint, plaintiff alleges that defendant bought data processing equipment from Data General Corporation for $18,021.85 in June 1979, such goods being delivered to defendant by plaintiff. The delivery was shipped "C.O.D." to defendant's office, and defendant was required to pay freight charges, the purchase price, and "C.O.D." fees totaling $18,318.42. Plaintiff collected only the freight charges, and it alleges that defendant now owes $18,296.86. Defendant denied doing business as Automated Computer Systems during June 1979, and further denied that the goods were delivered "C.O.D.", as plaintiff alleged.

Following its complaint, plaintiff requested admission of the following matters by defendant:

(1) Defendant did business as either Automated Computer Systems or Automated Computer Systems, Incorporated in Guilford County, North Carolina.

(2) Defendant is the owner of Automated Computer Systems.

(3) On or about June 5, 1979 and June 15, 1979, defendant bought nine (9) cartons of machine systems, devices and processing equipment from Data General Corporation for the sum of Eighteen Thousand Twenty-One Dollars and 85/100 ($18,021.85).

(4) Said goods were delivered by plaintiff to defendant, and defendant accepted said goods.

(5) That said goods were shipped to defendant by Data General Corporation pursuant to contract, said goods were shipped "COD".

(6) That said goods were delivered to defendant by plaintiff without collection of the sum of Eighteen Thousand Twenty-One Dollars and 85/100 ($18,021.85).

(7) Defendant has never been an officer, shareholder, employee or director of Automated Computer Systems, Incorporated.

(8) The attached Exhibit "A" is a true copy of a paper signed by the defendant.

(9) Defendant has held himself out as Automated Computer Systems, Inc.

(10) Automated Computer Systems failed to comply with the laws of the State of North Carolina and therefore has never existed as a separate entity.

No response was made by defendant to plaintiff's request, and plaintiff moved for summary judgment. *See* G.S. 1A-1, Rule 36(a). The motion was granted. Defendant later filed a motion to set aside judgment and subsequent proceedings alleging, in part, as follows:

2. . . . The defendant, A. R. Styer was not notified of the motion for summary judgment or the hearing on the said motion and further the certificate of service shows that a copy was sent to an attorney for the defendant even though the defendant did not have an attorney. The defendant, A. R. Styer received only a copy of a calendar which did not state

his name but stated the name of "A. R. Styler" which did not properly inform him of the date, time or place for hearing in order that he might protect his rights.

. . . .

4. . . . The defendant has a meritorious defense to the claim and if said judgment is stricken and he is properly notified as to the time and place of the hearing, he is prepared to show to the Court that any and all purported obligations which the plaintiff might claim in this action are obligations of a corporation and not the individual defendant.

The trial judge found facts and concluded, in part, as follows:

2. The defendant, A. R. Styer, has failed to prove "excusable neglect" pursuant to Rule 60(b) of the North Carolina Rules of Civil Procedure in that he has properly been served with the complaint, Request for Admissions pursuant to Rule 36, and Notice for Motion of Summary Judgment.

3. The defendant, A. R. Styer, has failed to prove that he has a "meritorious defense" to the claim failed [sic] against him in that the corporation whom he alleges is the responsible party in this action is not a corporation organized or operating under the laws of the State of North Carolina.

Defendant's motion thereby was denied, and he appeals to this Court.

Rule 60(b) of the North Carolina Rules of Civil Procedure 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) Mistake, inadvertence, surprise, or *excusable neglect* . . .." (Emphasis added.) Whether "excusable neglect" has been shown is a question of law, not a question of fact. *Texas Western Financial Corp. v. Mann*, 36 N.C. App. 346, 243 S.E. 2d 904 (1978); *Engines & Equipment, Inc. v. Lipscomb*, 15 N.C. App. 120, 189 S.E. 2d 498 (1972). "What constitutes 'excusable neglect' depends on what may be reasonably expected of a party in paying proper attention to his case under all the surrounding circumstances." *Dishman v. Dishman*, 37 N.C. App. 543, 547, 246 S.E. 2d 819, 822 (1978).

[1] In the present case, the only finding of fact excepted to by defendant is Finding of Fact No. 6, which states that "[t]he defendant, A. R. Styer, was notified of the Motion for Summary Judgment and received a copy of the calendar which properly informed him of the date, time, and place for hearing in order that he might protect his rights." The evidence shows that although defendant's name was misspelled in the caption of his case on the calendar, he assumed that the case calendared was his case. Defendant made no appearance in person or through counsel at the hearing on the motion and did not ask for a continuance, such actions being what may reasonably be expected of a party in paying proper attention to his case. His failure to take these actions was neglect, and it is not excusable. Therefore, the trial judge properly concluded that defendant failed to prove "excusable neglect" to relieve him from the judgment under G.S. 1A-1, Rule 60(b).

[2] Defendant also contends that he has a meritorious defense to plaintiff's action against him in that the obligation to pay plaintiff, which plaintiff alleges, is the corporation's obligation, not his personal obligation. However, the court cannot set aside a judgment unless there is a conclusion that the neglect was excusable *and* that there is a meritorious defense. *Moore v. WOOW, Inc.*, 250 N.C. 695, 110 S.E. 2d 311 (1959); *Wynnewood Corp. v. Soderquist*, 27 N.C. App. 611, 219 S.E. 2d 787 (1975); *Doxol Gas of Angier, Inc. v. Barefoot*, 10 N.C. App. 703, 179 S.E. 2d 890 (1971). Since we have concluded that defendant has failed to prove "excusable neglect," the court did not err in denying defendant's motion to set aside judgment and subsequent proceedings. Assuming, *arguendo*, that defendant's inaction was "excusable neglect," and we conclude that it is not, he has failed to prove a meritorious defense.

In the present case, defendant received plaintiff's request for admissions but did not respond within 30 days after its service upon him. "We understand G.S. 1A-1, Rule 36 to mean precisely what it says. A party, to avoid having the requests deemed admitted, must respond within the period of the rule if there is any objection whatsoever to the request." *Rutherford v. Bass Air Conditioning Co.*, 38 N.C. App. 630, 636, 248 S.E. 2d 887, 892 (1978), *disc. rev. denied*, 296 N.C. 586, 254 S.E. 2d 34 (1979). By failing to respond to the request for admissions, defendant has

placed the obvious answer to the questions in the record as uncontroverted evidence. Thus, the trial judge found as facts that defendant was doing business as "Automated Computer Systems or Automated Computer Systems, Inc." and that "Automated Computer Systems or Automated Computer Systems, Inc. is not a corporation, nor has ever been, properly organized or operating as a lawful corporation under the laws of the State of North Carolina." The judge's conclusion, that defendant failed to prove a meritorious defense because the corporation which he alleges is the responsible party is nonexistent, is supported by the facts.

The summary judgment for plaintiff is affirmed; no genuine issue as to any material fact exists in this case. G.S. 1A-1, Rule 56(c).

Affirmed.

Judges WELLS and BECTON concur.

A. E. GENTRY T/A A. E. GENTRY CONSTRUCTION v. DAULTON H. HILL AND WIFE, MRS. DAULTON H. HILL, T/A BIG D LOUNGE

No. 8121DC834

(Filed 4 May 1982)

Rules of Civil Procedure § 60— motion to have judgments against one defendant satisfied—properly granted

In an action by a contractor for materials and labor furnished defendants, the evidence supported the trial court's findings of fact and conclusions that the feme defendant was entitled to relief on summary judgment against her since neither her husband nor his attorney were agents of her and since her husband's attorney did not have her consent to enter summary judgment against her.

APPEAL by plaintiff from *Tanis, Judge.* Order entered 1 June 1981 in District Court, FORSYTH County. Heard in the Court of Appeals 1 April 1982.

On 30 January 1981, plaintiff filed suit against defendants, alleging, *inter alia,* that:

(1) defendants are engaged in the tavern business;

(2) plaintiff furnished materials and labor for the construction and renovation of the defendants' premises and business on or about December 1977;

(3) by a memorandum agreement signed by defendant Daulton Hill, dated 19 April 1979, defendants acknowledged a debt of $2,763.27 plus interest and agreed to pay on this account a 1½ percent service charge per month;

(4) defendants had made no payment on this account and owed plaintiff the sum of $3,951.39.

Defendants filed an answer through counsel, R. Lewis Ray, essentially denying their individual liability, alleging that any indebtedness was that of the Big D Lounge, Inc. Defendants further answered:

> That the defendant, Mrs. Daulton H. Hill has had no connection with the Big D Lounge, Inc. and has not participated in any of its affairs, however, the plaintiff dealt with Daulton H. Hill in his representative capacity as agent of the lounge while he was acting within the scope of his employment and authority as manager.

Based on the pleadings, together with the memorandum agreement, the articles of incorporation of the Big D Lounge, affidavit of revocation of the charter of the Big D Lounge, and plaintiff's affidavit, the court granted summary judgment in favor of the plaintiff against both defendants. Shortly thereafter, defendant Mrs. Daulton H. Hill, also known as Precious Hill, moved the court pursuant to Rule 60 of the North Carolina Rules of Civil Procedure to have the judgment against her set aside and that summary judgment be granted in her favor or in the alternative for a new trial. In support of her motion, defendant filed an affidavit in which she denied any association with her husband's business, denied any association with plaintiff, and denied signing any contract or making any oral agreement with the plaintiff. In her motion defendant admitted that articles of incorporation had been filed on behalf of the Big D Lounge, Inc. on 15 February 1975 with defendant Precious Hill listed as an incorporator and a member of the initial board of directors. The charter of the corporation was suspended in 1977 for failure to pay taxes and to file proper papers. Precious Hill's only connection with the business

consisted of her signature on the incorporation papers. R. Lewis Ray, the attorney who filed the answer on behalf of defendants, stated by affidavit that at no time was he authorized by Precious Hill to permit entry of summary judgment against her.

Based on the above information, the court concluded that neither Mr. Hill nor attorney Ray were agents of defendant Precious Hill; that attorney Ray did not have Precious Hill's consent to enter summary judgment against her; and that Precious Hill was entitled to a new trial in the matter. From this judgment, plaintiff appeals.

Pettyjohn & Molitoris, by Theodore M. Molitoris, for plaintiff appellant.

Hutchins, Tyndall, Doughton & Moore, by Thomas W. Moore, Jr. and H. Lee Davis, Jr., for defendant appellee.

MARTIN (Harry C.), Judge.

Plaintiff offers the following arguments in support of his position:

1. Defendant Precious Hill failed to show that counsel of record lacked the requisite authority to consent to the entry of summary judgment against her.

2. Precious Hill failed to show excusable neglect in that she did not give her defense the attention which a person of ordinary prudence usually gives important business.

3. Precious Hill did not have a meritorious defense.

N.C.R. Civ. P. 60 states in pertinent part:

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) Mistake, inadvertence, surprise, or excusable neglect;
>
> . . . .
>
> (6) Any other reason justifying relief from the operation of the judgment.

Upon hearing of a Rule 60 motion, the findings of fact by the trial court are conclusive on appeal if supported by any competent evidence. *Schloss v. Jamison*, 258 N.C. 271, 128 S.E. 2d 590 (1962). The granting of the motion is within the sound discretion of the trial court. *Greenhill v. Crabtree*, 45 N.C. App. 49, 262 S.E. 2d 315, *aff'd praesumitur pro negante*, 301 N.C. 520, 271 S.E. 2d 908 (1980); *Trucks, Inc. v. Greene*, 34 N.C. App. 279, 237 S.E. 2d 862 (1977). Appellate review is limited to a determination of whether the court abused its discretion; that is, whether the facts found support the legal conclusion that the party is entitled to relief from judgment for one of the enumerated reasons set out under the rule. *In re Snipes*, 45 N.C. App. 79, 262 S.E. 2d 292 (1980).

Upon the record before us, we find that the evidence amply supports the trial court's findings of fact. Nor has plaintiff excepted to the findings. Therefore, they are conclusive on appeal. *Durland v. Peters, Comr. of Motor Vehicles*, 42 N.C. App. 25, 255 S.E. 2d 650 (1979).

The trial court found as a fact that neither Mr. Daulton nor attorney R. Lewis Ray were agents of Precious Hill and that she never consented to the entry of summary judgment against her. No presumption arises from the mere fact of the marital relationship that a husband is acting as the agent of his wife. *Air Conditioning Co. v. Douglass*, 241 N.C. 170, 84 S.E. 2d 828 (1954). There is, in North Carolina, a presumption in favor of an attorney's authority to act for the client he professes to represent. *Greenhill, supra.* The burden is on the "client" to rebut the presumption, and if successful, she is entitled to relief from judgment so entered. *Bank v. Penland*, 206 N.C. 323, 173 S.E. 345 (1934). In *Penland*, defendant offered evidence tending to show that she had not employed counsel to represent her in the matter of a consent judgment rendered against her; that the attorneys who signed the judgment had not been authorized to do so; that she was not present at the hearing; and that although she had filed an answer denying liability, she neither agreed nor authorized anyone to agree to the judgment. In the case sub judice, defendant's evidence, specifically her affidavit and that of attorney Ray, compel the conclusion that Mr. Ray was not authorized to consent to entry of summary judgment against Precious Hill. By so holding, we are not required to rule on the merits of Precious

Hill's defense. *See Howard v. Boyce*, 254 N.C. 255, 118 S.E. 2d 897 (1961).

Affirmed.

Judges MARTIN (Robert M.) and WHICHARD concur.

LANTY L. SMITH AND MARGARET C. SMITH v. GERALD M. DICKINSON v. MARY LOUISE DICKINSON

No. 8118SC859

(Filed 4 May 1982)

Contracts § 16— contract to purchase house—condition precedent—summary judgment improper

Summary judgment was improperly entered for plaintiff sellers in an action to recover for breach of a contract to purchase a house where the offer to purchase provided that it was "conditioned upon: Buyer securing a conventional loan," and where the forecast of evidence showed that, at the time of his loan application, defendant was informed by the loan officer that his wife was also required to sign the deed of trust; defendant was unable to close the loan because his wife thereafter filed for a divorce and refused to sign the deed of trust; and defendant was aware of his marital problems at the time of the loan application.

APPEAL by defendant and third-party plaintiff from *Collier, Judge*. Judgment entered 13 May 1981 in Superior Court, GUILFORD County. Heard in the Court of Appeals 2 April 1982.

Brooks, Pierce, McLendon, Humphrey & Leonard, by C. T. Leonard, Jr., and John H. Small, for plaintiff-appellees.

Falk, Carruthers & Roth, by Allen Holt Gwyn, Jr., and Sally C. Erwin, for defendant and third-party plaintiff-appellant.

HILL, Judge.

On 29 May 1980, defendant and third-party plaintiff [hereinafter referred to as husband] learned that he was going to move to Greensboro from his home in Lititz, Pennsylvania. He and third-party defendant [hereinafter referred to as wife] began looking for a house in Greensboro on approximately 7 July.

Together they selected a house owned by plaintiffs at 3100 St. Regis Road, and wife returned to Pennsylvania on 9 July.

On 11 July 1980, husband applied for a conventional residential mortgage loan in the principal amount of $150,000 at Gate City Savings and Loan Association. The loan application shows that title to the property at 3100 St. Regis Road would be held in husband's name only, but husband and wife were listed as co-borrowers. While completing the loan application, husband was informed by the loan officer that although he could hold title individually, his wife also must sign the deed of trust. Husband did not indicate at that time that he would have any problem securing his wife's signature on the deed of trust.

Husband and plaintiffs executed an offer to purchase the property on 14 July, and husband paid $15,000 as earnest money to be held in escrow. The following provisions of the offer pertinent to this appeal are as follows:

> This offer is conditioned upon: Buyer securing a conventional loan. . . . Buyer agrees to use his best efforts to secure subject loan and to pay the usual costs in connection therewith. However, in the event Buyer is unable to obtain a loan commitment as herein described on or before July 18, 1980 this agreement (at the option of the seller) shall be considered null and void and earnest money returned to buyer.
>
> . . . .
>
> . . . I agree to make final settlement and to execute the necessary papers in connection therewith on or before the 29th day of August, 1980, and if I fail to do so the earnest money above will be retained by you as liquidated damages for my failure to comply.
>
> . . . .
>
> The deed to the Property shall be made to Gerald Milton Dickinson.

Gate City Savings and Loan Association approved husband's loan application on 18 July 1980 and began preparing the appropriate papers. Meanwhile, husband's family, assisted by wife, prepared to move to Greensboro. On 15 August, the loan papers were delivered to husband with an attached memo requesting

wife's signature where indicated so that closing could occur on 28 August.

However, on 25 August, without warning or notice to husband, wife filed for divorce in Pennsylvania and sought to enjoin husband from removing any personal property from their home in Lititz. Wife then informed husband that she did not intend to sign the loan papers. Late on 27 August, Gate City Savings and Loan Association was informed of wife's refusal to sign the papers, and various financing alternatives did not materialize.

Prior to 25 August, husband and wife had marital difficulties; in fact, before he knew he was going to move to Greensboro, husband returned to Pennsylvania from business trips to visit his family and did not live with wife. At the time of wife's trip to Greensboro to assist husband in looking for a house, husband and wife had not reconciled.

Plaintiffs filed suit against husband on 15 October 1980, and in Count I of their complaint, sought an order from the court "declaring plaintiffs to be entitled to the earnest money of $15,000.00" because husband "breached the contract of July 14, 1980, and refused and failed to make final settlement on or before August 29, 1980 . . .." Husband answered, alleging as a defense that his offer to purchase "was conditioned upon his being able to secure a conventional loan . . . and was a condition precedent to the existence of a contract and to any obligation or liability on [his] behalf . . .. The defendant made a good faith effort to obtain such a loan, but through no fault of his own was not able to do so."

Upon affidavits and husband's deposition that stated facts in accord with those set out above, plaintiffs and husband moved for summary judgment. Plaintiffs' motion was granted, and husband appeals.

We consolidate for disposition the two questions raised by husband and now determine whether the trial judge erred in granting summary judgment for plaintiffs where the forecast evidence shows that the offer to purchase contains a condition that husband obtain a "conventional loan" that he did not fulfill because of the refusal of wife to sign the deed of trust.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." G.S. 1A-1, Rule 56(c).

> "A condition precedent is a fact or event, 'occurring subsequently to the making of a valid contract, that must exist or occur before there is a right to immediate performance, before there is a breach of contract duty, before the usual judicial remedies are available.' " (Citations omitted.) *Parrish Tire Co. v. Morefield*, 35 N.C. App. 385, 387, 241 S.E. 2d 353 (1978).
>
> In entering into a contract, the parties may agree to any condition precedent, the performance of which is mandatory before they become bound by the contract. *Federal Reserve Bank v. Manufacturing Co.*, 213 N.C. 489, 196 S.E. 2d 848 (1938). The contract "may be conditioned upon the act or will of a third person." *Federal Reserve Bank v. Manufacturing Co., supra*, at 493. Conditions precedent are not favored by the law and a provision will not be construed as such in the absence of language clearly requiring such construction. *Price v. Horn*, 30 N.C. App. 10, 226 S.E. 2d 165, *cert. den.*, 290 N.C. 663, 228 S.E. 2d 450 (1976).

Cox v. Funk, 42 N.C. App. 32, 34-35, 255 S.E. 2d 600, 601-02 (1979).

It is unquestionable that the provision in the offer to purchase *sub judice*, "[t]his offer is conditioned upon: Buyer securing a conventional loan," is a condition precedent as defined above. In North Carolina, such a condition precedent "includes the implied promise that the purchaser will act in good faith and make a reasonable effort to secure the financing." *Smith v. Currie*, 40 N.C. App. 739, 742, 253 S.E. 2d 645, 647, *disc. rev. denied*, 297 N.C. 612, 257 S.E. 2d 219 (1979). *See also Mezzanotte v. Freeland*, 20 N.C. App. 11, 200 S.E. 2d 410 (1973), *cert. denied*, 284 N.C. 616, 201 S.E. 2d 689 (1974). Thus, in the case *sub judice*, we perceive that our inquiry is more specifically to determine whether plaintiffs have met their burden to show that husband failed "to use his best efforts to secure subject loan" and did not act in good faith, as a matter of law.

We conclude that plaintiffs have not met their burden. Although nothing in the record indicates that husband suspected that wife would refuse to sign the deed of trust, he was aware of their marital problems. At the time of his loan application, husband was informed by the loan officer that wife also must sign the deed of trust, but he did not indicate at that time that he would have any problem securing her signature. Since reasonable minds may differ as to the conclusion to be drawn on this issue from the forecast evidence, summary judgment for plaintiffs is inappropriate.

For these reasons, the summary judgment is reversed and the cause is remanded.

Reversed and remanded.

Judges WELLS and BECTON concur.

ERIC P. PLOW v. BUG MAN EXTERMINATORS, INC.

No. 8114DC738

(Filed 4 May 1982)

1. Professions and Occupations § 1— negligent termite inspection—sufficiency of evidence

The evidence was sufficient for the court to find that defendant was negligent in failing to discover termite infestation where in June 1977, defendant conducted a termite inspection of the home plaintiff was to buy, when plaintiff closed on the house in November 1977 he received a termite inspection certificate reporting no evidence of termites and a one-year inspection warranty, in December 1977, plaintiff went under the house and observed termites and termite damage, defendant's agent was called and treated the house for termites, and where a state pest control inspector testified that he inspected plaintiff's home in March 1978 at which time he observed termite infestation which was probably present at the time defendant issued the inspection certificate in July 1977.

2. Damages § 5— damages based on cost of repairs proper

While the difference in market value before and after injury to property is one permissible measure of damages, the trial court did not err in assessing damages based on the cost of repair since such measure of damages is equally acceptable.

3. Costs § 3.1— award of attorney's fees proper

In an action upon a small claim, the trial court properly awarded attorney's fees pursuant to G.S. 6-21.1.

APPEAL by defendant from *Read, Judge.* Judgment entered 23 March 1981 in District Court, DURHAM County. Heard in the Court of Appeals 11 March 1982.

This action first arose when plaintiff filed a claim in small claims court for $500 damages allegedly resulting from an improper termite inspection. From a ruling that he had failed to prove his case, plaintiff appealed to district court for trial de novo.

At district court, plaintiff's evidence tended to show that in June, 1977, defendant conducted a termite inspection of the Chapel Hill house plaintiff was to buy. Closing on the house was delayed until November, 1977, at which time plaintiff received the termite inspection certificate reporting no evidence of termites and a one-year inspection warranty. In December, 1977, plaintiff went under the house and observed termites and termite damage. He called defendant and defendant's agent inspected and treated the house for termites.

In March, 1978, a state pest control inspector inspected plaintiff's home at his request. The state inspector required defendant to return and perform additional treatments of the house before issuing a compliance letter in August, 1978.

The state inspector testified at trial that the termite infestation he observed in March, 1978, was probably present at the time defendant issued the inspection certificate in July, 1977, but that he could not be certain.

Plaintiff testified that when defendant's agent reinspected his home in January, 1978, he pointed out and removed a wooden floor support which was touching the ground. The state inspector said this was the likely entry point for the termites and, if then present, it should have been removed or reported by defendant when the first inspection was conducted.

Plaintiff's evidence indicated that he had repaired structural damage caused by the termites at a cost of $250, allowing compensation for his labor at minimum wage, and that additional repairs costing at least the same amount were needed.

The court awarded plaintiff damages and attorney's fees based on defendant's negligence in failing to discover termite infestation in 1977. Defendant appeals.

Donald M. Stanford, Jr., for plaintiff appellee.

Powe, Porter & Alphin, by Charles R. Holton and William E. Freeman, for defendant appellant.

ARNOLD, Judge.

I.

[1] Defendant's first assignment of error is that the trial court's finding with regard to existence of termite infestation in July, 1977, was not supported by the evidence. Defendant relies heavily on the holding of our Supreme Court in *Childress v. Nordman*, 238 N.C. 708, 78 S.E. 2d 757 (1953), a case factually similar to the one before us. In *Childress*, Justice Ervin, writing for the Court, stated:

> When all is said, the testimony . . . merely shows the presence of termites in the dwelling during the last week of October, 1951. This being true, the case falls within the purview of the general rule that mere proof of the existence of a condition or state of facts at a given time does not raise an inference or presumption that the same condition or state of facts existed on a former occasion. This general rule is based on the sound concept that inferences or presumptions of fact do not ordinarily run backward. [Citations omitted.] *Id.* at 712.

The plaintiff in *Childress*, like the plaintiff here, had relied on evidence of termite infestation a short time after defendant's representation to the contrary as proof that the representation was untrue. The plaintiff in *Childress* also presented the testimony of a pest-control professional that, in his opinion, the infestation had pre-dated the representation. In these respects, the present case is indistinguishable from *Childress*. We are of the opinion, however, that *Childress* is not controlling here despite the facial similarities between the cases.

The critical distinction between *Childress* and the case now before us is that *Childress* involved a purchaser's reliance upon

representations of the vendor. At the time *Childress* was decided, courts generally adhered to the rule of *caveat emptor*, admonishing vendees to beware of vendors' representations regarding discoverable conditions. *See Calloway v. Wyatt*, 246 N.C. 129, 97 S.E. 2d 881 (1957). Although not articulated by the *Childress* court, this underlying policy undoubtedly was a factor in the outcome of that case.

The defendant here, however, is not the vendor, but an extermination company engaged for the sole purpose of providing the buyer with assurance that the house he planned to purchase was free of termites. Clearly, this distinction goes to the reasonableness of the buyer's reliance upon the accuracy of the representation. Where, as here, the buyer has relied to his detriment on representations made by an independent pest-control inspector who was paid for his inspection report and unquestionably could foresee the buyer's reliance upon the accuracy of the report, we find *Childress* distinguishable.

We note further that the *Childress* "rule" that inferences do not run backward has been riddled with exceptions. *See Jenkins v. Hawthorne*, 269 N.C. 672, 153 S.E. 2d 339 (1967); *Miller v. Lucas*, 267 N.C. 1, 147 S.E. 2d 537 (1966); *May v. Mitchell*, 9 N.C. App. 298, 176 S.E. 2d 3 (1970). The trend is toward permitting the fact finder to consider the subsequent condition or fact along with all of the surrounding circumstances in arriving at its conclusion as to the existence of the condition or fact at the relevant time. Applying this standard to the evidence before the trial judge, we find his conclusion that termite infestation existed at the time of defendant's report to have been reasonable. Where there is some evidence to support the court's findings of fact, they are conclusive on appeal although the evidence might also have supported contrary findings. *Henderson County v. Osteen*, 297 N.C. 113, 254 S.E. 2d 160 (1979). We find no error.

II.

[2] Defendant next argues that the trial court erred in awarding damages based on the cost of repairs, alleging that the only proper measure of damages for negligent injury to real property is diminution in value. We find this argument to be wholly without merit. While the difference in market value before and after injury is one permissible measure of damages, it is by no means the

only one. Damages based on cost of repair are equally acceptable. *See Huff v. Thornton*, 23 N.C. App. 388, 209 S.E. 2d 401 (1974).

III.

[3] Defendant's final assignment of error is that the trial court erred in awarding attorney's fees where there was no evidence in the record to support the award. We disagree. It has been held that the trial judge must make findings of fact to support an award of counsel fees pursuant to G.S. 6-21.1. *Hill v. Jones*, 26 N.C. App. 168, 215 S.E. 2d 168 (1975). This was done.

Given the court's broad discretion in fixing the amount of attorney's fees, we hold that the court's direct observation of plaintiff's attorney's efforts support its findings with regard to his services. Moreover, the court could correctly consider a written statement of his hours prepared by the attorney himself in arriving at a reasonable award.

Affirmed.

Judges CLARK and WEBB concur.

STATE OF NORTH CAROLINA v. ROBERT LEE MACK

No. 8126SC1186

(Filed 4 May 1982)

1. **Criminal Law § 148.1 — denial of motion to suppress — allowance of belated appeal not "appropriate relief"**

The right to perfect an appeal from an order denying a motion to suppress seized evidence for which the time allowed had long since expired was not "appropriate relief" within the power of the trial court to grant. G.S. 15A-1414; G.S. 15A-1415(b)(3); G.S. 15A-1448(a)(3).

2. **Searches and Seizures § 36 — arrest pursuant to valid warrant — search of defendant's pants pockets**

Where there was an outstanding valid warrant for defendant's arrest for uttering a forged check, his arrest thereunder was thus lawful, a search of defendant's pants pockets was within the scope of a reasonable search incident to the lawful arrest, and bags of cocaine found in defendant's front pants pocket were seized as a result of a search incident to a lawful arrest and were admissible in evidence against defendant.

State v. Mack

APPEAL by defendant from *Snepp, Judge.* Judgment entered 28 May 1980 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 9 April 1982.

Attorney General Edmisten, by Assistant Attorney General Reginald L. Watkins, for the State.

William D. Acton, Jr., Assistant Public Defender, for defendant appellant.

WHICHARD, Judge.

Judge Snepp denied defendant's motion to suppress introduction of seventeen bags of cocaine which had been seized from defendant's person when he was arrested pursuant to a warrant charging him with uttering a forged check. Defendant then pled guilty to possession of cocaine with intent to sell and deliver. On 28 May 1980 he was sentenced to imprisonment.

Defendant did not timely appeal pursuant to G.S. 15A-979(b) (1978), which provides that an order finally denying a motion to suppress evidence may be reviewed upon an appeal from a judgment of conviction, including a judgment entered upon a plea of guilty. On 20 July 1981 defendant filed a "Motion for Appropriate Relief" seeking "a new trial, or . . . any other appropriate relief." On 3 August 1981 Judge Burroughs entered an order which stated that upon hearing defendant's motion he had ruled that defendant be allowed to perfect his appeal of the order denying his motion to suppress. Judge Burroughs' order set the time for filing and serving the proposed record on appeal and directed that defendant receive, at public expense, a copy of the transcript of the suppression hearing.

[1] A motion for appropriate relief on the ground that "[t]he court's ruling was contrary to law with regard to motions made before or during the trial, or with regard to the admission or exclusion of evidence" must be made "not more than 10 days after entry of judgment." G.S. 15A-1414. The motion here was made well beyond the requisite ten day period. G.S. 15A-1415 enumerates "the only grounds which [a] defendant may assert by a motion for appropriate relief made more than 10 days after entry of judgment." All grounds set forth therein, with one exception, are inapplicable here. Defendant apparently filed his motion

pursuant to that one exception, G.S. 15A-1415(b)(3), which prescribes, as a ground for appropriate relief, that "[t]he conviction was obtained in violation of the Constitution of the United States or the Constitution of North Carolina." While the motion would be proper on that ground, the trial court lacked jurisdiction to pass on it, because defendant had given notice of appeal and more than ten days had expired since entry of judgment. G.S. 15A-1448(a)(3); *see State v. Thompson*, 50 N.C. App. 484, 490, 274 S.E. 2d 381, 385-386, *disc. rev. denied*, 302 N.C. 633, 280 S.E. 2d 448 (1981). The right to perfect an appeal for which the time allowed had long since expired thus was not "appropriate relief" within the power of the trial court to grant. In our discretion, however, we have treated the purported appeal as a petition for a writ of certiorari and have allowed the writ.

[2] The State's evidence at the hearing on the motion to suppress was as follows:

On 13 February 1980 L. D. Blakeney, a member of the Vice and Narcotics Section of the Charlotte Police Department, requested and obtained a search warrant for a designated apartment. He then went there with other officers to execute the warrant. He knew defendant's car; and because the car was not at the apartment, he and the other officers returned to the police station.

Later Blakeney drove by the apartment again and saw defendant's car there. He left and returned with another officer. They observed that defendant's car was still there, and they "noticed two males enter the vehicle and back [it] out of the driveway."

They then called another uniformed officer "to try to get the vehicle stopped." That officer stopped the vehicle, which defendant was driving, at a service station. Blakeney arrived at the scene, and the officer who had stopped defendant's car identified defendant to Blakeney.

Blakeney then arrested defendant pursuant to a warrant for uttering a forged check, which had been issued 28 August 1976 while defendant was in prison. He "then searched [defendant's] person incident to arrest and recovered seventeen bags of cocaine in his front pants pocket."

There is no special squad in the Charlotte Police Department which serves warrants. Any officer can serve warrants if the subject is identified, and it was a part of Blakeney's duties "to execute warrants and to go out and arrest people for worthless checks."

Defendant's evidence was as follows:

When his car was stopped on 13 February 1980, defendant thought it was a routine license check. As he started back to his car to obtain his registration, he was surrounded by police officers, one of whom said he had a warrant for defendant's arrest. No warrant was served on him, however, until he got to the Central Intelligence Bureau downtown. When he was searched, he "kept asking each officer what the warrant was for and was never told until [he] got downtown." He saw the warrant as he was being taken into the Central Intelligence Bureau. He had been in prison from August 1976 until February 1979. The first time he saw this warrant was on 13 February 1980 when Blakeney showed it to him at police headquarters.

The trial court found that Blakeney had knowledge that a warrant for defendant's arrest for forgery had been issued and was not executed; that Blakeney arrested defendant pursuant to that warrant; that incident to the arrest he searched defendant's person; that in defendant's pants pockets he discovered seventeen bags of a substance later determined to be cocaine; and that the arrest warrant was served on defendant "at the scene or shortly thereafter at the Law Enforcement Center." It concluded from these findings that "as a matter of law . . . the evidence was seized as a result of a search incident to a lawful arrest and [was] admissible in evidence." It therefore denied the motion to suppress.

Defendant contends the seizure was the result of "an unreasonable stop, seizure, and search . . . under the Fourth and Fourteenth Amendments of the United States Constitution," and that the evidence seized thus should have been suppressed. He argues that his arrest on the four-year-old forged check warrant was a mere pretext to search him for drugs; and that "even where an arrest is made under a valid arrest warrant, it may not be used as a mere pretext to make a search for incriminating evidence." *See, United States v. Lefkowitz*, 285 U.S. 452, 76 L.Ed.

877, 52 S.Ct. 420 (1932); *Taglavore v. United States*, 291 F. 2d 262 (9th Cir. 1961); *State v. Hall*, 52 N.C. App. 492, 279 S.E. 2d 111, *disc. rev. denied and appeal dismissed*, 304 N.C. 198, 285 S.E. 2d 104 (1981).

> Unreasonable searches and seizures are prohibited by the fourth amendment to the United States Constitution, and all evidence seized in violation of the Constitution is inadmissible in a State court as a matter of constitutional law. (Citation omitted.) However, . . . only *unreasonable* searches and seizures are prohibited by the Constitution. (Citation omitted.) . . . [S]ubject to a few specifically established exceptions, searches conducted without a properly issued search warrant are *per se* unreasonable under the fourth amendment . . . . [One] of the recognized exceptions . . . [is] search incident to a lawful arrest . . . . The United States Supreme Court has limited the scope of reasonable search when made incident to an arrest to the area from which the arrested person might have obtained a weapon or some item that could have been used as evidence against him. (Citations omitted.) . . . [W]hether a search and seizure is unreasonable must be determined upon the facts and circumstances surrounding each individual case.

State v. Cherry, 298 N.C. 86, 92-93, 257 S.E. 2d 551, 555-56 (1979), *cert. denied*, 446 US. 941, 100 S.Ct. 2165, 64 L.Ed. 2d 796 (1980).

> It is the fact of the lawful arrest which establishes the authority to search, and . . . in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment.

United States v. Robinson, 414 U.S. 218, 235, 38 L.Ed. 2d 427, 441, 94 S.Ct. 467, 477 (1973).

It is uncontroverted that at the time of the search here a valid warrant for defendant's arrest for uttering a forged check was extant. His arrest thereunder thus was lawful, and the search was incident to the lawful arrest.

The area searched, defendant's pants pockets, was one "from which [he] might have obtained a weapon. *Cherry*, 298 N.C. at 92,

257 S.E. 2d at 556. It was thus an area within "the scope of reasonable search" incident to the lawful arrest. *Id.*

The trial court's findings are supported by competent evidence. They sustain the conclusion that the evidence was seized as a result of a search incident to a lawful arrest and was thus admissible. Nothing in the "facts and circumstances surrounding [this] case" compels contrary findings or a contrary conclusion. *Id.* The assignment of error to denial of the motion to suppress is thus overruled, and the judgment is

Affirmed.

Judges WEBB and WELLS concur.

STATE OF NORTH CAROLINA v. ROBBIE ODELL HENRY

No. 8121SC1152

(Filed 4 May 1982)

1. **Robbery § 5.3— common law robbery—failure to instruct on lesser offenses proper**

The trial court properly failed to submit the offenses of larceny from the person and misdemeanor larceny, lesser included offenses of common law robbery, where the evidence tended to show that a service station employee recognized the defendant as the same person who had robbed the same station one month earlier and that she was afraid of the defendant because he had used violence against her in the earlier robbery.

2. **Criminal Law § 101.2— failure to question jurors about a newspaper article about defendant**

While it would have been the "better practice" for the trial court to have asked the jurors if they had read an article concerning defendant which was published the morning of the second day of their deliberation, reversible error is not presumed and no abuse of discretion was found.

APPEAL by defendant from *Seay, Judge*. Judgment entered 18 June 1981 in Superior Court, FORSYTH County. Heard in the Court of Appeals 7 April 1982.

Defendant was indicted upon and found guilty of common law robbery. At trial, the State's evidence tended to show that on 21

October 1980, at approximately 8:00 p.m., defendant entered the Reelo Gas Station in Winston-Salem and asked for some cigarettes. The employee on duty at the station, Linda Holt Caudill, recognized defendant immediately as the man who had robbed her at the same Reelo station one month before. Mrs. Caudill told defendant that "he was the man that robbed me the first time, and he told me to shut up and give him the money that was in my register. And I was afraid he was going to touch me." Mrs. Caudill stepped back from the cash register; defendant took approximately $52.35, and ran. Mrs. Caudill testified, over objection, that she was afraid the defendant would hurt her because when he had robbed the station on 17 September 1980, she had protested about giving him the money, and he had pushed her around, threatened to "blow her brains out," and "acted like he was going to get something out of his pocket."

Defendant did not testify, but through witnesses presented alibi evidence, and evidence of changed appearance refuting Mrs. Caudill's identification testimony.

The jury returned a verdict of guilty of common law robbery. From judgment and an active sentence of 8-10 years imposed on the verdict, defendant appeals.

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

John J. Schramm, Jr., for defendant-appellant.

WELLS, Judge.

Defendant brings forth two assignments of error on this appeal: the trial court's failure to submit to the jury possible verdicts of larceny from the person and misdemeanor larceny, and the trial court's refusal to question the jurors about a newspaper article about defendant which was published on the second day of the jury's deliberations. We find no error in defendant's trial.

[1] Citing *State v. Redfern*, 291 N.C. 319, 230 S.E. 2d 152 (1976), defendant first contends that there was evidence from which a jury could have found defendant guilty of larceny from the person and misdemeanor larceny, and that the trial judge's failure to submit those offenses to the jury was error. First, we note that larceny from the person is a lesser included offense of common

law robbery, *State v. Swaney*, 277 N.C. 602, 178 S.E. 2d 399 (1971), *cert. denied*, 402 U.S. 1006, 29 L.Ed. 2d 428, 91 S.Ct. 2199 (1971); *State v. Kirk*, 17 N.C. App. 68, 193 S.E. 2d 377 (1972), which differs from common law robbery in that it lacks the essential element that the victim be put in fear. G.S. 14-72. Similarly, misdemeanor larceny is a lesser included offense of felony larceny, which lacks the essential elements of larceny that the property have a value of over $400.00, or that the larceny was from the person. G.S. 14-72(a); G.S. 14-72(b)(1).

Essentially, defendant is arguing that the jury could have found that Mrs. Caudill was not put in fear during the robbery. However, the fact that a jury might accept the evidence in part and reject it in part is not sufficient to warrant inclusion of a lesser included offense. *State v. Coats*, 46 N.C. App. 615, 265 S.E. 2d 486 (1980). The proper test was enunciated in Justice Huskins' dissent in *State v. Poole*, 298 N.C. 254, 258 S.E. 2d 339 (1979), as follows:

> Submission of a lesser included offense when there is no evidence to support the milder verdict is not required when the indictment charges felony murder, arson, burglary, robbery, rape, larceny, felonious assault, or any other felony whatsoever. In all such cases if the evidence tends to show that the crime charged in the indictment was committed and there is no evidence tending to show commission of a crime of lesser degree, the court correctly refuses to charge on unsupported lesser degrees. The *presence* of evidence tending to show commission of a crime of lesser degree is the determinative factor. *State v. Fleming*, 296 N.C. 559, 251 S.E. 2d 430 (1979); *State v. Duboise*, 279 N.C. 73, 181 S.E. 2d 393 (1971), and cases there cited; *State v. Hicks*, 241 N.C. 156, 84 S.E. 2d 545 (1954).

In this case, Mrs. Caudill testified at some length to the fact that she was afraid of the defendant, because in the robbery one month earlier he used violence against her. This testimony was neither impeached nor rebutted by defendant, and thus there was no evidence from which a jury could find that Mrs. Caudill was not put in fear. We hold that the trial judge was not required to submit the offenses of larceny from the person and misdemeanor larceny to the jury, and overrule this assignment of error.

[2] Defendant's second assignment of error concerns the trial judge's refusal, at defendant's request, to question the jurors about a newspaper article about defendant. The record on this point reads as follows:

> (The jury retired to the jury room to begin its deliberations at 4:29 p.m., June 16, 1981, and returned to the courtroom with a question at 4:43 p.m., on the same day, June 16, 1981.)
>
> [MR. SCHRAMM: Let the record show that on June 16, prior to the jury—on June 17, rather, prior to the jury commencing its deliberation, counsel for the defendant approached the Court in chambers and advised the Court that on June 17, in the WINSTON-SALEM JOURNAL/SENTINEL, on page 38, there appeared a statement, or a newspaper report, about the case, Mr. Henry's case, that was being considered by the jury, and that in that report it did recite that the defendant had three other cases, robbery cases, pending against him, and that counsel for the defendant advised the Court that he would like to have the Court question the jurors before they resumed deliberations as to whether they had read that, especially that part of the newspaper report that indicated that this defendant had three other cases pending against him. And the court advised counsel in chambers that he would not so question the jury.
>
> (Defendant again conferred with Mr. Schramm at defense table.)
>
> MR. SCHRAMM: The defendant would also like the record to show that the newspaper report also read in part as follows: "Another jury has already convicted Henry of robbing Mrs. Caudill at the station on September 17, and he has been sentenced to eight years in prison. He still faces trial on similar charges."]

It thus appears that the article was published in the morning of the second day of the jury's deliberations.

In considering this type of situation, our courts have held that the trial court exercises its discretion in determining whether or in what manner to question jurors about a newspaper article, and absent a showing of prejudice and abuse of discretion,

the trial court's decision does not constitute a basis for a new trial. *State v. Denny*, 294 N.C. 294, 240 S.E. 2d 437 (1977); *State v. McVay* and *State v. Simmons*, 279 N.C. 428, 183 S.E. 2d 652 (1971); *State v. Byrd*, 50 N.C. App. 736, 275 S.E. 2d 522 (1981), *disc. rev. denied*, 303 N.C. 316, 281 S.E. 2d 654 (1981). While it would have been the "better practice" for the trial court to have asked the jurors if they had read the article and had been influenced by it, *see McVay* and *Simmons*, supra, reversible error is not presumed. *Id.*, *Byrd*, supra. We find no abuse of discretion here, and overrule this assignment of error.

Defendant's trial was fair and free from prejudicial error.

No error.

Judges WEBB and WHICHARD concur.

DEPARTMENT OF TRANSPORTATION v. RAY HARKEY, JOHN REAVIS & CHARLES SULLIVAN, AS TRUSTEES OF SOUTHSIDE BAPTIST CHURCH

No. 8118SC838

(Filed 4 May 1982)

Eminent Domain § 2.4— limited access highway—reasonable access to church property

The building of a limited access highway abutting church property did not constitute a taking of all reasonable and adequate access to and from the church property so as to entitle the church to compensation under G.S. 136-89.53 where the court found that the Department of Transportation plan included the construction and improvement of local traffic roads and that such roads would provide adequate alternative access from the church to the new highway.

Judge WEBB dissenting.

APPEAL by defendants from *Collier, Judge.* Judgment entered 7 May 1981 in Superior Court, GUILFORD County. Heard in the Court of Appeals 1 April 1982.

This action originated as a condemnation proceeding by which the N.C. Department of Transportation (DOT) sought to appropriate a strip of property owned by Southside Baptist Church

for a highway right-of-way. The order from which defendants here appeal was entered following a hearing conducted pursuant to G.S. 136-108 in which the issue was whether the building of a limited access highway abutting property of Southside Baptist Church constituted a taking of all reasonable and adequate access from the church property.

DOT presented evidence that its plan included street building and improvement which would provide adequate alternative access routes for the church, although direct access to the new highway from the church property would not be provided.

Defendants' evidence was that the alternative routes required church goers to travel approximately one mile further, partially through residential streets.

The trial court found that access to the church would be less convenient after the new highway was built, but that local traffic roads would provide "reasonable and adequate" access. Defendants appeal from this finding.

Attorney General Edmisten, by Special Deputy Attorney General James B. Richmond, for plaintiff appellee.

Turner, Rollins, Rollins & Clark, by Walter E. Clark, Jr., and Clyde Rollins, for defendant appellants.

ARNOLD, Judge.

Defendants' only assignment of error is that the trial court erred in its conclusion that the church would have reasonable and adequate access to the proposed highway abutting its property. Defendants contend that the route to be provided is so circuitous and inconvenient as to entitle them to compensation under G.S. 136-89.53 which provides:

> Section 136-89.53. New and existing facilities; grade crossing eliminations.
>
> The Department of Transportation may designate and establish controlled-access highways as new and additional facilities or may designate and establish an existing street or highway as included with a controller access facility. When

> an existing street or highway shall be designated as and included within a controlled access facility, *the owners of land abutting such existing street or highway shall be entitled to compensation for the taking or injury to their easements of access* (emphasis added) . . . .

In claiming a right to compensation under this statute, defendants rely heavily on *Smith Co. v. Highway Commission*, 279 N.C. 328, 182 S.E. 2d 383 (1971). The *Smith* court held an abutting property had been denied its right of access when the only available route to the adjacent highway was "by circuitous travel over residential streets." The court qualified its holding, however, by citing the long-standing rule that ". . . the owner is not entitled to compensation merely because of circuity of travel. . . ." (Citations omitted.) *Id.* at 334, 182 S.E. 2d at 387. This apparent inconsistency can be resolved by reference to an earlier opinion by Chief Judge Mallard of this Court who pointed out that the main question in cases such as this one concerns the reasonableness of the substitute access provided. *Highway Commission v. Rankin*, 2 N.C. App. 452, 163 S.E. 2d 302 (1968). Clearly, a determination of what is reasonable in any given case must be made in view of the particular facts and circumstances of that case.

We find the case at bar to be factually distinguishable from *Smith* in that *Smith* involved a commercial property rather than a church. Moreover, there is evidence that the State has made a greater effort to provide adequate alternative access routes in this case than in *Smith*. These factual distinctions were properly for the trial court to consider in arriving at its final judgment.

Defendants clearly are entitled to full compensation for any diminution in the market value of their property resulting from the highway project as well as for the value of the strip of land actually appropriated by DOT. With regard to the claim before us on appeal, however, we find sufficient evidence in the record to support the trial court's conclusion that defendants are not entitled to damages for loss of access.

Affirmed.

Judge CLARK concurs.

Judge WEBB dissents.

Judge WEBB dissenting.

I dissent from the majority. I believe that under the holding of *Smith Co. v. Highway Comm.*, 279 N.C. 328, 182 S.E. 2d 383 (1971), the defendants' access to the street has been injured for which they are entitled to compensation. I do not believe that the fact that commercial property was involved in *Smith* is a distinction which should make a difference. I vote to reverse.

STATE OF NORTH CAROLINA v. WILLIAM LEE DUNLAP

No. 8126SC1114

(Filed 4 May 1982)

Criminal Law § 91— speedy trial—Interstate Agreement on Detainers—inapplicable

Where defendant was indicted for murder while he was incarcerated in New York but was released from his prison in New York before the expiration of 180 days after his written notice of request for disposition of the murder charge, the Interstate Agreement on Detainers no longer governed defendant's right to a speedy trial, and upon his release, defendant's right to a speedy trial was fully protected under the provisions of the Speedy Trial Act. G.S. 15A-761 to -767, G.S. 15A-701 to -704.

APPEAL by defendant from *Gaines, Judge.* Judgment entered 17 February 1981 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 5 April 1982.

This appeal is argued upon the following facts:

1. 11 October 1977—A warrant was issued for defendant's arrest, charging him with the murder of Eugene Johnson. Authorities were unable to locate the defendant in North Carolina. He was eventually located at the Fishkill Correctional Facility in Beacon, New York, where he was serving a four-year sentence for a crime committed in that state.

2. 9 May 1980—By letter addressed to the warden of Fishkill, a detainer was lodged against the defendant. Pursuant to

N.C.G.S. 15A-761 to -767, Interstate Agreement on Detainers, a notice of untried indictment, information or complaint and of right to request disposition was forwarded to the defendant through the acting superintendent of Fishkill.

3. 19 May 1980—Pursuant to the Interstate Agreement on Detainers, all necessary forms were executed by the defendant and the authorities at Fishkill. The forms were mailed to and received by the clerk of superior court and the prosecuting attorney in Mecklenburg County.

4. 7 July 1980—The Mecklenburg County grand jury returned a true bill of indictment charging the defendant with the murder of Eugene Johnson.

5. 30 September 1980—Defendant was paroled by the New York authorities.

6. 1 October 1980—Defendant was apprehended by the North Carolina authorities and returned to this state. The record is inconclusive as to whether defendant was served with the bill of indictment on this date or on 15 October 1980.

7. 19 January 1981—Before defendant was brought to trial, he moved to have the action against him dismissed, alleging that more than 120 days had expired since he was indicted and that more than 180 days had expired since the date of his compliance with the provisions of the Interstate Agreement on Detainers.

8. 9 February 1981—The court ruled on defendant's motions to dismiss, the same being denied.

9. 12 February 1981—The state called the case for trial. Defendant moved for and was granted a continuance until 16 February 1981.

10. 16 February 1981—Defendant was tried, found guilty of murder in the second degree, and sentenced to imprisonment for not less than twenty nor more than thirty years.

Defendant appeals from the denial of his motions to dismiss and from the verdict of guilty.

Attorney General Edmisten, by Assistant Attorney General W. Dale Talbert, for the State.

Peter H. Gerns for defendant appellant.

MARTIN (Harry C.), Judge.

Defendant confines his argument to the assignments of error relating to the court's denial of his motion to dismiss for the state's failure to proceed to trial as required under the provisions of the Interstate Agreement on Detainers, N.C.G.S. 15A-761 to -767. The pertinent part of the statute is:

> Article III
>
> (a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within 180 days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint.

In denying defendant's motion, the court concluded that although defendant's evidence showed conclusively that more than 180 days had passed since written notice of his request for final disposition had been delivered to the Mecklenburg County authorities, the 180 days had not passed during the continuance of imprisonment in a correctional institution, "defendant's imprisonment having terminated on the 30th day of September, 1980, in the New York facility, and the Act not being applicable thereafter."

It is defendant's contention that his release from prison before the expiration of the 180-day period should have no bearing on his right to a speedy trial under the Interstate Agreement on Detainers. We disagree. The act provides

> that charges outstanding against a prisoner, detainers based on untried indictments, informations or complaints, and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party states and the pur-

> pose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers . . ..

N.C. Gen. Stat. § 15A-761, art. I (1978).

Thus, the purpose of the agreement on detainers is to obviate difficulties in securing speedy trials of persons incarcerated in other jurisdictions and to minimize the time during which there is an inherent danger that a prisoner may forego preferred treatment or rehabilitative benefits. A prisoner's release during the 180-day period essentially nullifies the stated purposes of the act by removing the difficulty of bringing the prisoner to trial while he is incarcerated in an out-of-state prison. Moreover, once he is released, the cloud of the detainer no longer has an adverse effect on the prisoner's status within the prison.

We hold that upon the release of defendant from prison in New York before the expiration of the 180-day period, the Interstate Agreement on Detainers no longer governed defendant's right to a speedy trial. Upon his release, defendant's right to a speedy trial was fully protected under the provisions of the Speedy Trial Act, N.C.G.S. 15A-701 to -704, with which the state complied.

No error.

Chief Judge MORRIS and Judge CLARK concur.

STATE OF NORTH CAROLINA v. STANLEY T. MAVROGIANIS

No. 8110SC894

(Filed 4 May 1982)

Searches and Seizures § 24— probable cause for warrant to search car

An officer's affidavit was sufficient to establish probable cause for the issuance of a warrant to search defendant's car for marijuana where it averred that defendant was a college student who resided in a dormitory room on the college campus and that a reliable confidential informant had told the officer that defendant had marijuana in his possession and was selling it, that the informant had seen marijuana in defendant's dormitory room, and that defend-

ant owned and had possession of a 1976 Ford Mustang with a specified license number, since a man of reasonable caution would be warranted in believing that a college student living on campus, who possessed and dealt in drugs, had drugs in both his dormitory room and his automobile parked on campus even though the drugs were seen only in his dormitory room.

APPEAL by the State from *Smith (Donald L.), Judge.* Order entered 6 August 1981 in Superior Court, WAKE County. Heard in the Court of Appeals 3 February 1982.

Defendant was charged in separate indictments with (1) possession with intent to sell in excess of one gram of cocaine, (2) manufacturing cocaine, (3) possession of more than one gram of cocaine, and (4) possession of less than 1 ounce of marijuana, all on 8 May 1981.

The indictments were issued on the same day that cocaine and marijuana was found in defendant's 1976 Mustang automobile pursuant to a search warrant. Defendant moved to suppress the evidence seized pursuant to the search warrant on the grounds that the search warrant and search and seizure were unlawful.

It was stipulated that defendant was the owner of the 1976 Mustang, that defendant was a student at North Carolina State University and resided in Room 401-A Bragaw Dorm on the campus, that defendant's dorm room was searched first, that a razor blade and straw found in a dresser drawer were seized but no illicit drug was found in his room, and that then the defendant's Mustang was located in a parking lot (not on the premises of Bragaw Dorm) on campus, and upon search cocaine and marijuana were found in the vehicle.

The trial court found that defendant's Mustang when searched was in a parking lot for a building across the street approximately 100 yards from Bragaw Dorm. The motion to suppress was allowed, and the State appealed, having complied with G.S. 15A-979(c).

Attorney General Edmisten by Assistant Attorney General J. Chris Prather for the State, appellant.

DeMent, Askew & Gaskins by Johnny S. Gaskins for defendant appellee.

CLARK, Judge.

In the search of the defendant's automobile illicit drugs were found and seized by law enforcement officers. The drugs seized, if offered and admitted in evidence, would be tangible support for conviction of the defendant on some if not all of the charges against him. The trial court ruled that the evidence seized must be excluded because it violated the Fourth Amendment protection against "unreasonable" searches and seizures. The basis for the ruling was that the affidavit supporting the search warrant, relying on an informant's tip, did not state sufficient underlying circumstances for the magistrate to have probable cause to believe that illicit drugs were in the defendant's automobile. *See Spinelli v. United States*, 393 U.S. 410, 21 L.Ed. 2d 637, 89 S.Ct. 584 (1969); *Aguilar v. Texas*, 378 U.S. 108, 12 L.Ed. 2d 723, 84 S.Ct. 1509 (1964); and G.S. 15A-244, -245.

The underlying affidavit contained the following information: The defendant was a student and resided in Bragaw Dormitory on the campus of North Carolina State University. The informant told the affiant officer that defendant had marijuana in his possession and was selling it, that informant had seen marijuana in his room, and that defendant owned and had possession of a 1976 Ford Mustang, License No. KNS-180.

We exclude exigent circumstances which would justify a warrantless search of the automobile. *Carroll v. United States*, 267 U.S. 132, 69 L.Ed. 543, 45 S.Ct. 280, 39 A.L.R. 790 (1925); 11 Strong's N.C. Index 3d *Searches and Seizures* § 11 (1978). We also exclude the application of the rule that a search warrant validly describing the property to be searched includes the curtilage and appurtenances of the place described. *See State v. Reid*, 286 N.C. 323, 210 S.E. 2d 422 (1974), which held that a valid search warrant for specifically described premises justified the search of an automobile located on the premises. In the case *sub judice* the automobile was not located in the parking lot of the dormitory where defendant lived. Nor is there a question as to sufficiency of the description of the automobile. Thus, the sole question on appeal is whether under the particular facts and circumstances of this case the magistrate had probable cause to believe that the defendant had marijuana in his automobile.

The defendant was a student living on campus. He possessed, actually or constructively, a dormitory room and an automobile. There was reliable information that he was dealing in marijuana; that marijuana was seen in his room and on his person.

Probable cause exists when the facts and circumstances are sufficient to warrant a man of reasonable caution to believe that seizable objects are located at the place to be searched. *Brinegar v. United States*, 338 U.S. 160, 93 L.Ed. 1879, 69 S.Ct. 1302 (1949). A man of reasonable caution would be warranted in believing that a university student living on campus, who possessed and dealt in drugs, had drugs in both his dormitory room and his automobile parked on campus, even though the drug was seen only in his dormitory room. A college student living on campus and dealing in drugs would probably find the operation of the illicit trading within the confines of a dormitory room, where he would transact both the purchase from his supplier and the sale and delivery to his customers, to be fraught with the danger of discovery and apprehension. The student's automobile would be a convenient instrumentality for receiving, storing, and delivering his illicit merchandise. The circumstances are sufficient to warrant a man of reasonable caution to believe that drugs were located in defendant's car, which was particularly described in the search warrant.

We find the search warrant valid, the search and seizure of the drugs lawful, and the evidence admissible. In so doing, we do not narrow the scope of the Fourth Amendment guaranty against unreasonable searches and seizures by holding that the possession of an illicit drug at one place supports a finding of probable cause for the search of any other place or thing in the possession of the accused. Our decision must be viewed in light of the particular facts and circumstances of this case.

We are not unmindful of the decision of this Court in *State v. Mackay*, 56 N.C. App. 468, 291 S.E. 2d 663 (1982), affirming the suppression of evidence of 418 pounds of marijuana seized from the accused's van, but we find that case distinguishable because the search was warrantless by an officer who had no more than a suspicion that marijuana was in the van.

The order of suppression is

Reversed.

Judges ARNOLD and WHICHARD concur.

MARSHA S. HAMILTON v. ROBERT CABOT HAMILTON

No. 8121DC783

(Filed 4 May 1982)

Divorce and Alimony § 24.1— limited increase in child support—evidence supporting

There was competent evidence to support the court's findings of fact as to the reasonable needs of the parties' minor child and to assume the court relied on this evidence in determining the child's needs were $950 per month rather than $1275 per month, and while the increase in child support payments from $300 to $400 per month seems low, the court apparently based its award on the amount of each parent's income over and above personal living expenses.

APPEAL by plaintiff from *Harrill, Judge.* Order entered 24 February 1981 in District Court, FORSYTH County. Heard in the Court of Appeals 30 March 1982.

This action arose when plaintiff sought an increase in the amount of payments required of defendant for support of the parties' minor child. The trial court found sufficient change of circumstances to justify an increase of $100 monthly in the amount of child support paid by defendant. The court ordered defendant to increase child support payments from $300 to $400 per month, but held that defendant was not liable for past or future medical expenses of the child. Plaintiff appeals.

Badgett, Calaway, Phillips, Davis, Stephens, Peed & Brown, by B. Ervin Brown, II, for plaintiff appellant.

Petree, Stockton, Robinson, Vaughn, Glaze & Maready, by W. Thompson Comerford, Jr. and Michael L. Robinson, for defendant appellee.

ARNOLD, Judge.

Plaintiff first assigns error to the trial court's finding that the reasonable needs of the parties' minor child are only $950 per

month when plaintiff's sworn affidavit showed them to be $1,275 per month. While we cannot determine from the court's findings exactly how it arrived at the $950 figure, we find no abuse of discretion. The plaintiff's affidavit included a number of expenditures which the court could have found to be unnecessary to the welfare of the child. We hold, therefore, that there was competent evidence to support the court's finding of fact as to the reasonable needs of the child and assume the court relied on this evidence in making its determination.

As her second assignment of error, plaintiff submits that the trial court erred in requiring defendant to pay only $400 per month in child support. We agree with plaintiff that this figure seems extremely low in view of the relative incomes of the custodial and non-custodial parents. However, the court found that the living expenses submitted by defendant were reasonable and that the plaintiff's second husband was able to provide for her needs. Presumably, therefore, the court based its award on the amount of each parent's income over and above personal living expenses. We wish to stress that plaintiff's second husband is not legally responsible for the support of her child. However, since he apparently is supporting plaintiff, the court could reasonably have found that plaintiff was capable of contributing to the support of the child to the extent of her own income.

We note that plaintiff has set forth in her brief two possible formulas by which the amount of child support could be determined according to objective criteria. These formulas, based on guidelines appearing in professional publications, do not appear in the record and therefore cannot be considered on appeal. Nevertheless, the Court wishes to lend its approval to the employment of such guidelines by many trial courts and to encourage their use by others. A review of case law underscores the total lack of consistency in the amount of child support awarded by courts. Moreover, the route by which the court arrived at a particular award is too often impossible to fathom.

We concede that each domestic case is unique and that there must be an element of judicial discretion in setting the amount each parent should contribute to the support of his or her children. Such discretion, however, should not be unfettered. Employment of a standard formula such as one of those suggested

by plaintiff would take into account the needs and resources of the parents, as well as the needs of the children, and would result in fair apportionment of responsibility in the majority of cases. While many others might not fit neatly into the established guidelines, the formula would provide a starting point for negotiations or formulation of judicial remedies. In cases where the trial judge determines, in his discretion, that considerations of fairness dictate a substantial departure from the standard award, we would recommend strongly that the court set forth specific findings of fact in support thereof. This would provide appellate courts with something more than the skeletal findings and conclusions on which we often must base our review of support orders.

Plaintiff's final argument is that the trial court erred in concluding as a matter of law that the defendant was not responsible for medical expenses of the minor child. While the wording of the 1979 court order on which this conclusion is based could be subject to different interpretations, we find the court's conclusion reasonable in light of all the evidence.

Affirmed.

Judges CLARK and WEBB concur.

MARY REIDY, D/B/A MARY REIDY REALTY COMPANY v. JOHN RICHARD MACAULEY AND WIFE, LINDALEE MACAULEY

No. 8126SC862

(Filed 4 May 1982)

1. **Contracts § 14.2— agreement to pay broker's fee—broker not third party beneficiary**

Plaintiff real estate broker was not an intended beneficiary of an agreement between the sellers and purchasers of a house requiring the purchasers to pay plaintiff's commission on the sale and thus was not entitled to maintain an action for breach of the contract as a third party beneficiary.

2. **Contracts § 4.2— provision not supported by consideration**

A provision in a contract for the purchase of a house requiring the purchasers to pay the real estate broker's fee, unilaterally inserted into the contract by the broker, was unsupported by consideration.

Reidy v. Macauley

APPEAL by plaintiff from *Gaines, Judge.* Judgment entered 24 March 1981 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals on 2 April 1982.

This is an action to recover a real estate broker's commission. On 23 April 1979, plaintiff, Mary Reidy, a real estate broker, entered into an exclusive listing contract with Mr. and Mrs. Robert Meyers. Plaintiff agreed to list the Meyers' house for sale, and the Meyers agreed to pay plaintiff a 6% commission if plaintiff produced a purchaser. Plaintiff testified: "At the time we signed the listing contract, I did have reason to believe that Mr. and Mrs. Macauley [the defendants] would be interested in the house." Consequently, within two days, plaintiff prepared, and the defendant signed a form styled "Offer to Purchase and Contract" (Contract) for the purchase of the Meyers' house. The total purchase was $140,000, $1,000 to be paid down, $90,000 to be financed, and the $49,000 balance to be paid in cash at closing. Although plaintiff's exclusive listing contract with the Meyers provided for the payment of a 6% broker's commission to plaintiff, plaintiff inserted, in her own handwriting, a separate subparagraph 5(b) into the Contract between the Meyers and the defendants which provided that "sellers agree to pay [plaintiff] 6% commission."

Because the defendants were unable to sell their own house, they were unable to pay the $49,000 cash balance required at closing. Consequently, defendants did not purchase the Meyers' house.

Following a jury trial, and at the close of all the evidence, the trial court directed a verdict for defendants and dismissed plaintiff's claim for a 6% broker's commission. Plaintiff appealed.

Mraz & Michael, P.A., by Mark A. Michael for plaintiff appellant.

Thigpen & Hines, P.A., by James L. Smith for defendant appellee.

BECTON, Judge.

Plaintiff states her sole argument thusly: "The Court erred by granting the defendant's [sic] motion for directed verdict at the close of all the evidence on the grounds that there was ample

record evidence of every element of the plaintiff's claims sufficient to take the case to the jury." Believing, first, that plaintiff is, at best, an incidental beneficiary under the Contract between the Meyers and defendants and, therefore, not entitled to maintain an action for breach of contract against the defendants; and, second, that the broker's commission provision inserted into the Contract is unsupported by consideration and, therefore, unenforceable against defendants, we reject plaintiff's argument.

[1] Since *Vogel v. Supply Co.* and *Supply Co. v. Developers, Inc.*, 277 N.C. 119, 177 S.E. 2d 273 (1970), our courts have consistently held that one may not maintain an action for breach of contract unless the contract was entered into for his or her direct benefit. *Matternes v. City of Winston-Salem*, 286 N.C. 1, 209 S.E. 2d 481 (1974); *Alva v. Cloninger*, 51 N.C. App. 602, 277 S.E. 2d 535 (1981); *Howell v. Fisher*, 49 N.C. App. 488, 272 S.E. 2d 19 (1980), *disc. rev. denied* 302 N.C. 218, 277 S.E. 2d 69 (1981); *Johnson v. Wall*, 38 N.C. App. 406, 248 S.E. 2d 571 (1978). *See also* 30 A.L.R. 3d Annot. 1395 (1970). The *Vogel* Court expressly adopted the "framework for analysis" of third party beneficiary claims set forth in the American Law Institute's 1932 Restatement of Contracts, requiring the promisee to either confer a gift on the beneficiary (the beneficiary being designated a "donee-beneficiary") or act to satisfy a duty owed to the beneficiary (the beneficiary being designated a "creditor-beneficiary"). Under the 1932 Restatement, other beneficiaries were deemed "incidental-beneficiaries" and were not allowed to maintain suits as third party beneficiaries. *See* Restatement of Contracts § 133 (1932).

Although the 1979 Restatement eliminates the "donee" and "creditor" categories in favor of a new designation—"intended benficiaries"— it nevertheless classifies all other beneficiaries as "incidental beneficiaries." Restatement (2d) of Contracts, § 302 (1979). Thus, the 1932 Restatement test for determining third party beneficiaries remains the same under the 1979 Restatement. Moreover, the *Vogel* test for determining if one other than the contracting parties has legally enforceable rights has not been changed by our courts.

Plaintiff relies on *Chipley v. Morrell*, 228 N.C. 240, 45 S.E. 2d 129 (1947), a case brought by a real estate broker to recover a

commission allegedly lost because the defendant-purchaser failed to perform the real estate contract. Suggesting that the plaintiffs in *Chipley* were incidental beneficiaries, the Court held that they could maintain an action to recover their commissions from the defendant. Significantly, the *Vogel* Court, while noting the *Chipley* decision, stated "[e]ven so, the law in this State as to *direct* third party beneficiaries is synonomous with the Restatement categories of donee and creditor beneficiaries." 277 N.C. at 127, 177 S.E. 2d at 278 (emphasis in original).

We believe *Chipley* has been overruled *sub silentio* by *Vogel* and its progeny. Applying the *Vogel* analytical framework to the case *sub judice*, plaintiff cannot qualify as an intended (donee or creditor) beneficiary. The contractual provision under which plaintiff claims a right of action against defendants states that "sellers agree to pay Mary Reidy Realty 6% commission." Thus the Meyers are the promissors and the plaintiff is the promisee. The Meyers' promise to pay the plaintiff's commission arose out of the pre-existing exclusive listing contract between plaintiff and the Meyers. The record does not suggest that the defendants intended to, or otherwise secured, a benefit from the Meyers to the plaintiff.

[2] Separate and apart from our analysis under *Vogel*, we are convinced that plaintiff cannot enforce the broker's commission provision in sub-paragraph 5(b) of the Contract between the defendants and the Meyers because that provision is not supported by valid consideration.

It is axiomatic that a contract, to be enforceable, must be supported by consideration and that failure of consideration constitutes legal excuse for non-performance of the contract. *Investment Properties v. Norburn*, 281 N.C. 191, 188 S.E. 2d 342 (1972); *Coleman v. Whisnant*, 225 N.C. 494, 35 S.E. 2d 647 (1945). In this case, plaintiff's right to receive a commission from the Meyers was already established in her exclusive listing contract, to which the defendants were not a party. Plaintiff's unilateral insertion of sub-paragraph 5(b) into the Contract does not obligate defendants to pay plaintiff's commission since there was no consideration to support plaintiff's efforts unilaterally to impose this additional burden upon the defendants.

For the foregoing reasons, the decision of the trial court is

Affirmed.

Judge WELLS and Judge HILL concur.

BARBARA ANN SHEPHERD v. JAMES E. OLIVER, M.D.

No. 8130SC924

(Filed 4 May 1982)

Rules of Civil Procedure § 26— expert witness not listed on interrogatories—refusing to allow witness to testify error

In a medical malpractice action where plaintiff's expert witness failed to testify as expected and plaintiff decided to call an expert listed as one of defendant's witnesses and informed defendant's attorney of that fact, the trial court erred in refusing to allow the witness to testify under G.S. 1A-1, Rule 26(e)(1)(B) since it was not a case in which plaintiff failed or refused to answer defendant's interrogatories or to supplement them. The probative value of the witness's testimony was great in that it would have precluded the defendant from obtaining a directed verdict, and the court properly could have allowed the defendant an opportunity to prepare for this witness by granting a continuance or an opportunity to take a deposition.

APPEAL by plaintiff from *Lamm, Judge.* Judgment entered 9 March 1981 in Superior Court, MACON County. Heard in the Court of Appeals 8 April 1982.

Plaintiff alleged medical malpractice on the part of the defendant. She offered evidence to show that defendant treated her over a long period of time, that he failed to properly treat her, failed and refused to see plaintiff when requested to do so, and failed to properly diagnose her condition in August and September of 1970 which resulted in this 27-year-old plaintiff losing her leg by amputation.

Plaintiff presented the expert medical testimony of Dr. Joseph Noto to the effect that defendant did not treat, care or diagnose plaintiff in accordance with the legally applicable standard of care and practice. On cross examination Dr. Noto testified that in his opinion it would have been unlikely that he could have saved the leg if he had started proper treatment in August 1970.

The trial of this case began on a Tuesday and on Wednesday morning counsel for plaintiff informed defendant's attorney that

plaintiff would call as her witness Dr. Michael Malinowsky, a medical expert on defendant's witness list. For reasons unrelated to this case, the trial court took a recess on Wednesday evening and did not resume trial until Friday morning. On Friday when plaintiff called Dr. Malinowsky as her witness, defendant objected on the ground of surprise. The court ordered *voir dire* of the witness who testified in response to hypothetical questions that: plaintiff could have had the occlusion in her leg on 7 August 1970; prompt diagnosis probably could have saved plaintiff's leg; a delay in the diagnosis could have resulted in the loss of plaintiff's leg; and that defendant's actions were not in accordance with the requisite standards of practice of practitioners in defendant's field, with similar education and experience in the same or similar location at the time.

The trial court found that because of the interrogatories served on plaintiff seeking the identity and proposed testimony of any expert witnesses, Dr. Malinowsky's testimony constituted surprise to defendant. The court would not allow this testimony to be presented to the jury. At the close of plaintiff's evidence, the court granted defendant's motion for directed verdict, stating that plaintiff had presented sufficient evidence of defendant's negligence but had not presented sufficient evidence that defendant's negligence had proximately caused plaintiff to lose her leg.

Herbert L. Hyde and R. S. Jones, Jr., for the plaintiff-appellant.

Harrell & Leake by Larry Leake for defendant-appellee.

MARTIN (Robert M.), Judge.

On 12 June 1979 the defendant served upon the plaintiff interrogatories regarding any expert witnesses plaintiff intended to use at trial. Pursuant to an order compelling plaintiff to answer these interrogatories, she responded on 10 April 1980. Rule 26(e)(1)(B), N.C. Rules Civ. Proc., provides that a party who has responded to a request for discovery has a duty seasonably to supplement his response with respect to any questions directly addressed to the identity of each person expected to be called as an expert witness at trial. The sanction provision, Rule 37(b)(2)(b), N.C. Rules Civ. Proc., allows the court to make such orders as are "just" when a party fails to obey an order to provide or per-

mit discovery, including refusing to allow the disobedient party to introduce the designated matters into evidence.

This is not a case in which plaintiff failed or refused to answer defendant's interrogatories. *See Hammer v. Allison*, 20 N.C. App. 623, 202 S.E. 2d 307, *cert. denied*, 285 N.C. 233, 204 S.E. 2d 23 (1974). She filed her answers within the time specified by the court. As soon as plaintiff decided to call Dr. Malinowsky as her witness, the defendant was informed. Plaintiff's counsel made this decision when their expert, Dr. Noto, failed to testify as expected. It would have been impossible for plaintiff to supplement her response pursuant to Rule 26(e)(1) before she expected to call Dr. Malinowsky as an expert witness. Thus plaintiff did not fail to make discovery in accordance with the appropriate discovery rules.

A separate consideration is whether defendant would have suffered unfair surprise had Dr. Malinowsky's testimony been admitted. Defendant listed Dr. Malinowsky as a defense witness prior to jury selection and the jury was examined concerning him. "Evidence may have *some* tendency to prove a fact and still be inadmissible because its probative force is so weak that to receive it would . . . unfairly surprise the opponent. . . ." 1 Stansbury's N.C. Evidence § 77, p. 236 (Brandis rev. 1973); *State v. Brantley*, 84 N.C. 766 (1881); *State v. Hugenberg*, 34 N.C. App. 91, 237 S.E. 2d 327, *disc. rev. denied*, 293 N.C. 591, 238 S.E. 2d 151 (1977). In this case, however, the challenged testimony brought out on *voir dire* tended to show that defendant's negligence was the proximate cause of plaintiff's injury. The probative value of this testimony was *great* in that it would have precluded the defendant from obtaining a directed verdict. The court properly could have allowed the defendant an opportunity to prepare for this witness by granting a continuance or an opportunity to take a deposition. In this case, however, the ends of justice require that Dr. Malinowsky's testimony be admitted into evidence. *See Thornburg v. Lancaster*, 303 N.C. 89, 277 S.E. 2d 423 (1981); *Peebles v. Moore*, 302 N.C. 351, 275 S.E. 2d 833 (1981).

For the foregoing reasons the trial court erred in disallowing Dr. Malinowsky's testimony and in granting a directed verdict for defendant.

Reversed.

Judges VAUGHN and ARNOLD concur.

STATE OF NORTH CAROLINA v. RONNIE ALI JENKINS

No. 816SC1146

(Filed 4 May 1982)

1. **Criminal Law § 89.5— non-corroborative testimony—absence of prejudice**

Although a witness's statement to a police officer that defendant stabbed deceased with something wrapped in a towel was not entirely corroborative of his trial testimony, the admission of the non-corroborative conclusion was not prejudicial error where it was the only logical inference one could reach if the testimony were believed, and where the trial court instructed the jury to disregard the witness's conclusory statement.

2. **Criminal Law § 46.1— sufficiency of evidence of flight**

The trial court did not err in instructing the jury on flight where the State's evidence showed that defendant left home at about the time of the stabbing of decedent, that he was not at home at a time when most people are sleeping, that those with whom he lived did not know where he was, that he could not be located during the hours following the stabbing although a general police alert had been ordered, and that defendant requested a ride to the State line during this same period, notwithstanding there was also evidence that defendant returned home voluntarily several hours later.

APPEAL by defendant from *Peel, Judge.* Judgment entered 29 March 1981 in Superior Court, NORTHAMPTON County. Heard in the Court of Appeals 6 April 1982.

Defendant was indicted for first degree murder in the death of Earl Spruill in the early morning hours of 25 July 1978.

State's evidence tended to show that defendant, Spruill and three other people were at the home of one Nita Ward on the night of 24 July 1978. Both defendant and Spruill were drinking. According to State's witness Eugene Whitaker, who was also present, defendant accused Spruill at one point of "trying to take [his] girl." Defendant also reportedly said "he was going to shoot somebody." Whitaker saw defendant go to the kitchen sink and put a white towel in his belt, but did not know whether anything was wrapped in the towel.

As Whitaker and Spruill were leaving, defendant went with them to the front door. Whitaker testified that defendant hit Spruill and that he saw the white towel go up, but saw no weapon. Afterward, Spruill left with Whitaker and told him he had been cut. Spruill collapsed after walking about fifty feet and Whitaker went for help. Spruill was dead when Whitaker returned.

Defendant's cross-examination of Whitaker showed that Whitaker, Spruill and defendant had consumed a large quantity of alcohol, and that Whitaker could not remember some of the details surrounding the incident.

The State presented further evidence tending to corroborate Whitaker's testimony and to show that defendant attempted to secure transportation to the state line after the stabbing incident. Defendant presented no direct evidence.

Defendant was convicted of second degree murder and sentenced to 14-20 years in prison. Defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Tiare B. Smiley, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Marc D. Towler, for defendant appellant.

ARNOLD, Judge.

[1] Defendant's first assignment of error is that evidence of prior non-corroborative statements made by Eugene Whitaker were placed before the jury to the prejudice of defendant, and that a police officer was permitted to vouch for the credibility of those statements.

The out-of-court statement to which defendant objects was Whitaker's statement to a police officer that defendant had stabbed Spruill with something wrapped in a towel. While Whitaker admitted at trial that he had only seen defendant hit Spruill with a towel, he further testified that Spruill told him immediately afterward he had been cut, and that Spruill was bleeding and unable to walk without assistance. While the conclusion communicated by Whitaker to investigating officers was not entirely corroborative of his testimony, it was the only logical

conclusion one could reach if the testimony were believed. Moreover, the trial court specifically instructed the jury to disregard the witness's conclusory statements and it must generally be assumed that jurors follow cautionary instructions. *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976). Here, we do not find the non-corroborative portions of Whitaker's out-of-court statement to be so prejudicial that the court's cautionary instructions could not cure the prejudicial effect.

Defendant's contention that he was prejudiced by Officer Sendlin's statement that he believed Whitaker had been telling the truth is also unpersuasive. The specific statement to which defendant objects was made in response to a question on redirect examination regarding the reason for Whitaker's release from police custody. However, the issue of Whitaker's release first had been raised on cross-examination by the defense attorney. Moreover, the jury was instructed to disregard the portion of Sendlin's testimony relating to his opinion of Whitaker's veracity. We find no prejudicial error.

[2] Defendant also contends the trial court committed reversible error by instructing the jury on flight. He argues that the evidence was insufficient as a matter of law to support a finding that defendant attempted to evade arrest, and that the instruction therefore unduly prejudiced the jury.

While it is true that defendant was arrested at his residence approximately twelve hours after Spruill's death, we find the evidence was sufficient to place the issue of flight before the jury. State's evidence showed that defendant left home at about the time of the stabbing, that he was not at home at a time when most people are sleeping, that those with whom he lived did not know where he was and that he could not be located during the hours following the stabbing although a general police alert had been ordered. Moreover, there was evidence that defendant requested a ride to the state line during this same period. Although there was also evidence that he returned home voluntarily several hours later, the jury could properly consider all of the circumstances in determining whether flight occurred and, if so, its significance. In view of the court's properly worded charge regarding the limited degree to which flight could be considered as evidence of guilt, we are not persuaded by this assignment of error.

In the trial of defendant we find

No error.

Judges VAUGHN and MARTIN (Robert M.) concur.

BERTHA JACKSON EARP v. ROY LEE EARP

No. 815SC880

(Filed 4 May 1982)

Contracts § 6.2; Husband and Wife § 4— agreement between husband and wife concerning transfer of property—consideration sufficient

The trial court erred in dismissing the wife's action against her husband seeking enforcement of an agreement between the parties to transfer real property to the parties' joint ownership where the terms of the agreement provided that the wife would return to the marital home, the husband would transfer title to certain land to the parties' joint name and the husband would fulfill certain obligations in the event that he "ever again abuse[d]" the wife, resulting in the parties' separation. The agreement was executed under seal creating a rebuttable presumption of consideration, and plaintiff's abandonment of a suit she instituted against defendant setting forth numerous incidents of physical abuse by defendant and her resumption of the marital relationship constituted good and adequate consideration.

APPEAL by plaintiff from *Rouse, Judge.* Judgment entered 6 April 1981 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 6 April 1982.

Plaintiff, the former wife of defendant, brought this action for specific performance of an agreement by defendant to transfer real property to the parties' joint ownership.

The agreement which forms the basis for this acton was executed under seal on 2 December 1977 and properly notarized. At that time the parties had been separated for several months and the wife had filed an action for alimony without divorce on grounds of abuse. Following execution of the agreement, the parties reconciled and the wife took voluntary dismissal of her suit.

The terms of the agreement provided, in pertinent part, that the wife would return to the marital home, that the husband

would transfer title to certain land to the parties' joint names and that the husband would fulfill certain obligations in the event that he "ever again abuse[d]" the wife, resulting in the parties' separation.

The trial court, sitting without a jury, held the contract to be unenforceable for want of consideration and void as an agreement looking to a future separation. Plaintiff's action was accordingly dismissed. Plaintiff appeals.

W. Hugh Thompson for plaintiff appellant.

Boyce, Morgan, Mitchell, Burns and Smith, by G. Eugene Boyce, for defendant appellee.

ARNOLD, Judge.

Plaintiff assigns error to the trial court's dismissal of her action and argues that she is entitled to specific performance of that portion of the contract which does not look to a future separation.

Defendant argues that the trial court correctly held the entire contract to be unenforceable since the only consideration given by plaintiff was performance of a pre-existing duty to fulfill her marital obligations.

We note at the outset that the agreement at issue was executed under seal and that consideration is therefore presumed. *First Peoples Savings & Loan Association v. Cogdell*, 44 N.C. App. 511, 261 S.E. 2d 259 (1980); *Mobil Oil v. Wolfe*, 297 N.C. 36, 252 S.E. 2d 809 (1979). However, this presumption is not irrebuttable and we agree with defendant that performance of pre-existing marital obligations does not constitute sufficient consideration to support a contract. *Matthews v. Matthews*, 2 N.C. App. 143, 162 S.E. 2d 697 (1968). Thus, if plaintiff's evidence had failed to show that defendant committed any wrong toward plaintiff sufficient to relieve her of her marital duties, we would agree with the conclusion of the trial court that no legal consideration resulted from her promise to resume the marital relationship. After careful review of the record, however, we find that the evidence overwhelmingly supports the opposite conclusion.

Plaintiff argues in her brief that the trial court erroneously excluded evidence of her injuries at the hand of defendant which

gave rise to her original complaint. While we agree that this evidence was relevant and should have been admitted, we find its exclusion harmless since abundant evidence appears in the record to support a finding of consideration. Prior to the reconciliation of the parties in December of 1977, plaintiff had filed a complaint setting forth numerous incidents of physical abuse by defendant. Evidence of the merit of her complaints is reflected in defendant's subsequent agreement in writing to perform certain contractual duties "in the event that Roy Lee Earp ever again abuses Bertha Jackson Earp either physically or mentally . . . ." We hold, therefore, that plaintiff's abandonment of her apparently meritorious claim through voluntary dismissal and resumption of the marital relationship constituted good and adequate consideration. Having accepted the benefits of the agreement, defendant should not now be permitted to challenge its validity. *Johnson v. Johnson*, 262 N.C. 39, 136 S.E. 2d 230 (1964).

As plaintiff concedes, that portion of the agreement relating to the parties' rights and obligations upon their subsequent separation was correctly held to be void as against public policy. *Matthews v. Matthews, supra.* However, we conclude that this portion of the agreement was independent, supported by separate consideration, and therefore severable. *Turner v. Atlantic Mortgage and Investment Co.*, 32 N.C. App. 565, 233 S.E. 2d 80 (1977).

We hold that the trial court erred in failing to grant plaintiff's request for specific performance of the portion of the agreement calling for the transfer of real property. This portion of the judgment is accordingly reversed and remanded with instructions to enter judgment for plaintiff.

Affirmed in part.

Reversed and remanded in part.

Judges VAUGHN and MARTIN (Robert M.) concur.

PARRIS V. TURNER, EMPLOYEE, PLAINTIFF v. EPES TRANSPORT SYSTEMS, INC., EMPLOYER; UNITED STATES FIDELITY & GUARANTY INSURANCE CO., CARRIER, DEFENDANTS

No. 8110IC869

(Filed 4 May 1982)

Master and Servant § 50.1— workers' compensation—trucker hauling under defendant's ICC franchise sticker—employee of defendant

Although the contract between the parties referred to plaintiff as an independent contractor, plaintiff was an employee of defendant while transporting goods for defendant in interstate commerce where defendant issued an ICC franchise sticker to the plaintiff which had to be displayed on all interstate hauls, the plaintiff had to maintain daily logs pursuant to ICC requirements, and those logs had to be turned in to defendant's main office before the plaintiff received payment.

APPEAL by defendants from the North Carolina Industrial Commission. Opinion and Award filed 17 April 1981. Heard in the Court of Appeals 2 April 1982.

The defendants appeal from the Commission's decision awarding Worker's Compensation benefits to the plaintiff for injuries he sustained while on a trip for his employer. The Commission decided that the employer's issuance of its Interstate Commerce Commission (ICC) franchise sticker to the plaintiff caused it to be the plaintiff's employer despite language in the parties' contract that the plaintiff was an independent contractor.

Womble, Carlyle, Sandridge & Rice, by Keith W. Vaughn, for defendant appellants.

McElwee, Hall, McElwee & Cannon, by John E. Hall and William F. Brooks, for plaintiff appellee.

BECTON, Judge.

The defendants' only argument is that the Commission erred when it decided that the plaintiff was an employee of Epes Transport, Inc. We disagree.

The plaintiff and his son-in-law owned T & R Trucking Company which had entered into an agreement with the defendant employer for the transport of goods. The employer is a franchise carrier registered with the ICC. The contract between the parties

refers to the plaintiff as an independent contractor. Little or no day-to-day control and supervision of the plaintiff was provided for in the contract. The contract did provide, however, that:

> 4. The party of the second part will furnish and operate only such vehicles as fully comply with the safety requirements and regulations of all states through which such vehicle(s) operate and of the Interstate Commerce Commission, and the party of the second part will, as agent for the party of the first part, provide and keep drivers' logs, drivers' medical certificates and make such reports, as may be required by the Interstate Commerce Commission or other public authorities.

The record also shows that the defendant employer issued an ICC franchise sticker to the plaintiff which had to be displayed on all interstate hauls. Further, the plaintiff had to maintain daily logs pursuant to ICC requirements, and these logs had to be turned in to the employer's main office before the plaintiff received payment.

On the authority of *Brown v. Truck Lines*, 227 N.C. 299, 42 S.E. 2d 71 (1947), we affirm the Commission's Opinion and Award. In *Brown*, the Court, on facts similar to the ones in the case *sub judice*, held that the issuance of its ICC sticker to a driver with whom the company had a trip-lease contract created an employer-employee relationship. The Court noted that the only way by which the owner-driver could operate in interstate commerce was under the license plate of the company. The Court's rationale was that by issuing its ICC sticker, the only means by which the freight could be hauled interstate, the employer obtained control of the vehicle. Specifically, the Court stated:

> The act of the defendant in accord with the provisions of the lease in placing its own license plates on Brown's truck under the circumstances disclosed, thus giving it the status and holding it out as its own vehicle for the purposes of this trip, a procedure which alone authorized its operation, must be regarded as an assumption of such control as would defeat the plea of non-liability for injury to the driver on the ground of independent contractor. Control of the employer must be completely surrendered to relieve liability. *Leonard v. Transfer Co.*, 218 N.C. 667, 12 S.E. 2d 729. The defendant cor-

> poration having been given a franchise for the operation of motor trucks on the highway as a carrier of goods in interstate commerce, cannot evade its responsibility by delegating its authority to others. *King v. Brenham Auto Co.* [145 S.W. 278]. Nor may an employer, by leasing the truck of one not authorized to transport goods in interstate commerce and causing its operation under its own franchise and license plates for interstate transportation avoid legal responsibility therefor.

Id. at 306-07, 42 S.E. 2d at 76-77.

Further, even though *Brown* was a trip lease case, we find the following language instructive.

> The transportation of goods in interstate commerce by motor vehicles was required to be under the rules and regulations of the Interstate Commerce Commission, and the Brown truck could only have been used in such transportation by the defendant franchise carrier as one of its fleet of trucks under its license plates. Hence it would seem to follow that control of the operation for the period of the lease was given to the license carrier, and that the owner-driven truck was in contemplation of law in its employ and the driver for the trip stood on the relationship of its employee, as found by the Industrial Commission.
>
> We think the applicable rule, under the facts here presented, is that the lease or contract by which the equipment of the authorized interstate carrier was augmented, must be interpreted as carrying the necessary implication that possession and control of the added vehicle was, for the trip, vested in the authorized operator.

Id. at 304-05, 42 S.E. 2d at 75.

For the foregoing reasons, the judgment below is

Affirmed.

Judge WELLS and Judge HILL concur.

JIMMY W. CURLINGS AND WIFE, MARTHA CURLINGS v. HENDERSON W. MACEMORE AND WIFE, SALLY MACEMORE

No. 8123DC904

(Filed 4 May 1982)

Rules of Civil Procedure § 13— dismissing plaintiff's claim as compulsory counterclaim error

The trial court erred in dismissing plaintiff's claim, concerning defendant landlord's duty of care for the maintenance of leased property and breach of that duty, on the ground that it should have been asserted as a counterclaim under G.S. 1A-1, Rule 13(a) in a prior summary ejectment action brought by defendant against plaintiff since the actions were highly divergent in nature and in remedy sought.

APPEAL by plaintiffs from *Ferree, Judge.* Judgment entered 5 May 1981 in District Court, YADKIN County. Heard in the Court of Appeals 8 April 1982.

Plaintiffs, who rented a space in a mobile home park owned and operated by the defendants, sought to recover $10,000 in damages from defendants based on the defendants' alleged negligence in maintaining the space rented to plaintiffs. Specifically, the Complaint alleged: (1) that plaintiffs rented a space in the mobile home park beginning December 1973; (2) that as a result of defendants' negligence, a water drainage problem developed underneath plaintiffs' trailer in 1974 which caused plaintiffs' trailer to sink and become unlevel; (3) that defendants negligently failed to cut away a dead hickory tree which was in close proximity to plaintiffs' trailer even though plaintiffs made numerous requests of defendant to remove the tree; and (4) that in July 1979, the hickory tree fell on plaintiffs' mobile home, puncturing the roof and causing the trailer to fall from its support.

Defendants, in their Answer, denied negligence and pleaded as an affirmative defense plaintiffs' failure to assert their present claim as a compulsory counterclaim in defendants' prior summary ejectment action against plaintiffs.

From the trial court's order dismissing plaintiffs' claim on the ground that it should have been asserted as a compulsory counterclaim in the prior summary ejectment action, plaintiffs appeal.

William M. Allen, Jr., for plaintiff appellants.

Finger, Park & Parker, by Daniel J. Park, for defendant appellees.

BECTON, Judge.

We agree with plaintiffs. The trial court erred in dismissing plaintiffs' action on the ground that it should have been asserted as a counterclaim in a prior action brought by defendants against plaintiffs.

G.S. 1A-1, Rule 13(a) states in relevant part that:

> A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. . . .

In *Apartments, Inc. v. Landrum*, 45 N.C. App. 490, 263 S.E. 2d 323 (1980), this Court, faced with a factual situation that was the reverse of the factual situation presented in the case at bar, held that plaintiffs' claim for summary ejectment was not a compulsory counterclaim in defendants' prior action for breach of a lease agreement, breach of covenants of fitness and habitability, and breach of duty of repair since the nature of the actions and remedies sought were too divergent. We said the following in *Landrum*:

> In order to find that an action must be filed as a compulsory counterclaim pursuant to G.S. 1A-1, Rule 13(a), a court must first find a logical relationship between the factual backgrounds of the two claims. In addition, the court must find a logical relationship between the nature of the actions. Rule 13(a) is a tool designed to further judicial economy. The tool should not be used to combine actions that, despite their origin in a common factual background, have no logical relationship to each other.

Id. at 494, 263 S.E. 2d at 325.

Our interpretation of Rule 13(a) is no different than the interpretation placed on Rule 13(a) of the Federal Rules of Civil Procedure by numerous federal courts. *See Valencia v. Anderson Bros. Ford*, 617 F. 2d 1278, 1291 (7th Cir. 1980); *Whigham v. Beneficial Finance Co. of Fayetteville*, 599 F. 2d 1322 (4th Cir. 1979); 6 Wright and Miller, *Federal Practice and Procedure:* Civil Section 410 (1971). In *Whigham*, the Fourth Circuit, in determining that a lender's claim for debt against a borrower who sued for a violation of the Truth-In-Lending Act was not a compulsory counterclaim, listed the following criteria to consider when determining whether a claim is a compulsory counterclaim: "[(1)] whether the issues of fact and law raised by the claim and counterclaim are largely the same[; (2)] whether substantially the same evidence bears on both claims[;] and [(3)] whether any logical relationship exists between the two claims." Id. at 1323.

Turning now to an examination of the facts in the case at bar, we note first that the trial court did not find as a fact that plaintiffs' present action for damages logically relates to defendants' prior action in summary ejectment either "factually" or in "nature." Indeed, the common factual background is at best tenuous since the only relationship common to both actions is the landlord-tenant relationship. Second, the issues of fact and law are different in a summary ejectment proceeding from the issues involved in a negligence proceeding. Plaintiffs' claim is whether the defendant landlord had a duty of care for the maintenance of leased property and breached that duty; the defendant landlord's claim, on the other hand, was based on a simple statutory right to eject once the lease was terminated. Plaintiff must show evidence of a duty of care and a breach of that duty to prove damages. The defendant needed only to produce a lease agreement for consideration in light of the statutory provisions. Further, plaintiffs' claim was for a substantial amount of damages whereas defendants' claim was solely for ejectment.

We hold that plaintiffs' negligence action and defendants' summary ejectment action were highly divergent in nature and in remedies sought. Defendants' affirmative defense should have been stricken from the Answer. Consequently, it was error for the trial court to dismiss plaintiffs' claim on the ground that it should have been asserted as a compulsory counterclaim in defendants' prior action.

For the foregoing reasons, the Order of the trial court is

Reversed.

Judge HEDRICK and Judge HILL concur.

IN THE MATTER OF: YVONNE HELEN BURNEY, REGINALD BURNEY, METESHA TIAWAN BURNEY

No. 8118DC927

(Filed 4 May 1982)

Parent and Child § 1— termination of parental rights—failure to strengthen parent-child relationship—failure to support children

The trial court's conclusion that respondent's parental rights should be terminated because he willfully left his children in foster care for more than two years without responding positively to efforts of the county department of social services to strengthen the parent-child relationship and to make and follow through with constructive planning for the children's future and because he failed to provide any support for the children while they were in the custody of the department of social services for a continuous period of six months next preceding the filing of the termination proceeding was supported by the trial court's findings, including findings establishing respondent's complete failure to make "substantial progress" toward correcting the conditions which led to the removal of the children from his custody, and to provide reasonable support for them, during an extensive period when he was not incarcerated and was gainfully employed, and findings further established respondent's complete failure to attempt to relate to the children during his last period of incarceration.

APPEAL by respondent John Burney from *Yeattes, Judge.* Order entered 15 June 1981 in District Court, GUILFORD County. Heard in the Court of Appeals 9 April 1982.

Respondent John Burney appeals from an order terminating his parental rights pursuant to G.S. 7A-289.32(3) and G.S. 7A-289.32(4).

Margaret A. Dudley for petitioner appellee.

John W. Lunsford for respondent appellant, John Burney.

WHICHARD, Judge.

G.S. 7A-289.32(3) permits termination of parental rights upon a finding that:

> The parent has willfully left the child in foster care for more than two consecutive years without showing to the satisfaction of the court that substantial progress has been made within two years in correcting those conditions which led to the removal of the child for neglect, or without showing positive response within two years to the diligent efforts of a county department of social services . . . to encourage the parent to strengthen the parental relationship to the child or to make and follow through with constructive planning for the future of the child.

G.S. 7A-289.32(4) permits termination of parental rights upon a finding that:

> The child has been placed in the custody of a county department of social services . . . and the parent, for a continuous period of six months next preceding the filing of the petition, has failed to pay a reasonable portion of the cost of care for the child.

The court here terminated the parental rights of respondent appellant and his wife upon concluding that (1) they had willfully left their children in foster care for more than two consecutive years, (2) the Guilford County Department of Social Services (hereafter "DSS") had diligently encouraged them to strengthen the parental relationship with their children and to make and follow through with constructive planning for the children's future, and neither had responded positively to these efforts, and (3) the children had been placed in the custody of DSS for a continuous period of six months next preceding the filing of the termination petition, and neither had paid any support for the children. Pursuant to the foregoing statutes, these conclusions sustain the order of termination. Respondent appellant has stipulated that the findings of fact are supported by the evidence of witnesses for petitioner, DSS. Whether the findings support the conclusions which sustain the order is thus the sole subject of our inquiry. We hold that they do, and we thus affirm.

The findings reveal, in pertinent part, the following:

DSS received five neglect complaints as to the children in April 1976. It attempted to work with the mother and took no court action at that time. The house in which the children were then living was deplorably unclean.

The children were placed in foster care on 19 October 1977 pursuant to a Voluntary Boarding Home Agreement signed by respondent appellant. Respondent appellant was then in jail awaiting trial. He was incarcerated from October 1977 through August 1978. He wrote DSS six times during that period inquiring about his children and expressing his love and concern for them. He was released on 6 August 1978, and visited with the children on 29 August 1978, 8 September 1978, and 10 October 1978. Upon his release he obtained employment with the Greensboro Parks and Recreation Department.

DSS had no contact with respondent appellant from November 1978 through March 1979, and his whereabouts was unknown. A DSS social worker made unsuccessful efforts to locate him. Respondent appellant called DSS on 22 March 1979, 23 March 1979, 29 March 1979, 21 May 1979, 27 July 1979, and 31 August 1979, to indicate that he was living in Richmond County and to request visits with the children. On 31 August 1979 the social worker asked him to pay $20.00 every other week for support of the children commencing 14 September 1979. He was then working for the North Carolina Department of Transportation earning $7,308.00 annually. He never made any support payments. He was advised that he could pursue plans to get his children back through the Richmond County Department of Social Services. He last visited with the children in August 1979, even though he was not re-incarcerated until March 1980. Since his incarceration in March 1980, he had not communicated with the children.

These findings clearly suffice to support the conclusions which sustain the order of termination. Given the stipulation that they are supported by the evidence of witnesses for petitioner, the findings show the presence of clear, cogent, convincing, and competent evidence that respondent appellant willfully left his children in foster care for more than two years, failed to respond positively to efforts by DSS to strengthen the parent-child rela-

tionship and to make and follow through with constructive planning for the children's future, and failed to provide any support for the children while they were in the custody of DSS for a continuous period of six months next preceding the filing of the termination proceeding.

Respondent appellant's contention that his periods of incarceration preclude findings that he willfully left the children in foster care for more than two consecutive years, and failed to provide reasonable support for them, is unavailing. The findings establish his complete failure to make "substantial progress" toward correcting the conditions which led to removal of the children, and to provide reasonable support for them, during an extensive period when he was not incarcerated and was gainfully employed. They further established complete failure to attempt to relate to the children during his last period of incarceration. These findings suffice to support the conclusions which sustain the order.

Affirmed.

Judges WEBB and WELLS concur.

CIRCLE J. FARM CENTER, INC. v. RICHARD E. FULCHER & WILLIAM E. FULCHER

No. 813DC785

(Filed 4 May 1982)

Courts § 14— dismissal of claim as exceeding $5,000 limitation of district court— no error

The district court did not err in granting defendant's motion to dismiss pursuant to Rule 12(b)(3) on the ground that the action was brought in the improper division since the amount sought to be recovered exceeded the $5,000 limitation of district court jurisdiction and, under G.S. 7A-243, the superior court is the proper division in which actions where the amount in controversy exceeds $5,000 should be brought, and since plaintiff did not move to transfer the action to superior court pursuant to G.S. 7A-258.

APPEAL by plaintiff from *Rountree, Judge.* Judgment entered 12 May 1981 in District Court, CRAVEN County. Heard in the Court of Appeals 30 March 1982.

Plaintiff's complaint contained allegations that defendants were indebted to plaintiff on a note for $13,640, plus interest from 10 March 1977; that defendant Richard Fulcher owed plaintiff $2,377.21, plus interest for merchandise sold and delivered; that plaintiff had demanded payment but defendants had refused to pay. Plaintiff prayed for recovery of $13,640, plus interest from defendants jointly and severally, and $2,377.21, plus interest from defendant Richard Fulcher.

Defendant William Fulcher moved to dismiss the complaint pursuant to Rule 12(b)(3) on the ground that the action was brought in the improper division since the amount sought to be recovered exceeded the $5,000 limitation of district court jurisdiction. From the granting of the motion to dismiss, plaintiff appeals.

Bowers & Sledge by Robert G. Bowers and E. Lamar Sledge for plaintiff appellant.

Ernest C. Richardson, III, for defendant appellee William Fulcher.

CLARK, Judge.

Plaintiff assigns as error the trial court's granting of the motion to dismiss and argues that the proper procedure would have been to transfer the action to superior court pursuant to G.S. 7A-258.

It is clear that the superior court is the proper division in which this action should have been brought since the amount in controversy exceeds $5,000. G.S. 7A-243. It is fairly common practice for an attorney to institute an action in district court, although not the proper division, in order to schedule an earlier trial date than would be available on the superior court calendar. This practice is allowed since original civil jurisdiction is vested concurrently in both divisions and since a judgment is not void or voidable solely because it was rendered in the improper trial division. G.S. 7A-240 and 7A-242; *Stanback v. Stanback*, 287 N.C. 448, 215 S.E. 2d 30 (1975). In the absence of a proper objection, an action begun in the wrong division may continue in that division to its conclusion.

However, in the case *sub judice*, defendant William Fulcher objected to the institution of the action in district court. While

the better procedure might have been to move to transfer the action to superior court pursuant to G.S. 7A-258, a motion to dismiss for improper division is also specifically authorized by Rule 12(b)(3) which provides for dismissal for "Improper venue or division." After defendant's motion to dismiss was filed, plaintiff's remedy was to move to transfer the action to superior court pursuant to G.S. 7A-258. Plaintiff did not make such a motion, but merely filed a response in opposition to defendant's motion to dismiss. Even after the action was dismissed, plaintiff could have filed another action in superior court since the dismissal was necessarily without prejudice. Instead of choosing either of these courses of action, plaintiff elected to proceed with an appeal to this Court. We view this appeal with disapproval since plaintiff did not elect to pursue the other remedies available to it, each of which would have brought this action to an earlier resolution than does the appeal process.

Defendant clearly had the right to object to the institution of the action in district court rather than superior court. We hold that the trial court did not err in granting defendant's motion to dismiss pursuant to Rule 12(b)(3).

Affirmed.

Judges ARNOLD and WEBB concur.

STATE OF NORTH CAROLINA v. KENNETH WAYNE BEASLEY

No. 8110SC1137

(Filed 4 May 1982)

Bastards § 3; Constitutional Law § 20— willful nonsupport of illegitimate—statute of limitations—constitutionality

The three-year statute of limitations of G.S. 49-4(1) for prosecutions under G.S. 49-2 for willfully failing to support an illegitimate child does not violate the equal protection rights of illegitimate children since the statute of limitations on criminal proceedings does not affect the illegitimate child's right to recover in a civil action. Furthermore, the State had no standing to question the constitutionality of the statute. G.S. 49-14 and G.S. 49-15.

State v. Beasley

APPEAL by the State of North Carolina from *Herring, Judge.* Order entered 9 July 1981 in Superior Court, WAKE County. Heard in the Court of Appeals on 6 April 1982.

Defendant was charged in a criminal summons issued 4 May 1981 with willfull nonsupport of his illegitimate child in violation of G.S. § 49-2. The summons alleged that the child was born on 7 September 1977. Defendant moved to dismiss the charge on the grounds that the three-year statute of limitations on prosecutions under G.S. § 49-2, contained in G.S. § 49-4(1), had run. The district court granted the motion to dismiss, and the State appealed the decision to superior court. From the superior court's order affirming the district court and dismissing the charge with prejudice, the State appealed to this Court.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Clifton H. Duke, for the State.

Canaday & Canaday, by C.C. Canaday, Jr., and Claude C. Canaday, III, for defendant appellee.

HEDRICK, Judge.

The State argues that the G.S. § 49-4(1) three year statute of limitations for prosecutions under G.S. § 49-2 violates the Equal Protection Clause of the federal constitution in that it prescribes a limitations period for the prosecution of persons who willfully fail to support their illegitimate children whereas there is no limitations period for the prosecution under G.S. § 14-322(d) of persons who willfully fail to support their legitimate children. Citing *County of Lenoir ex rel. Cogdell v. Johnson,* 46 N.C. App. 182, 264 S.E. 2d 816 (1980), the State contends that G.S. § 49-4(1) constitutes an impermissible legislative discrimination against illegitimate children, in that it "constitutes an impenetrable barrier to enforcing the illegitimate child's statutory right to parental support through criminal proceedings."

The illegitimate child has no statutory right to parental support through criminal proceedings; rather, such child's right to parental support is enforced by an action under G.S. § 49-14, entitled "Civil action to establish paternity," and G.S. § 49-15, which imposes a support obligation on persons determined to be the parents of an illegitimate child. The function of a criminal prose-

cution of a parent who willfully fails to support his illegitimate child is not to compensate the illegitimate child, but to promote society's interest in preventing the parents of children from willfully leaving those children without parental support. The actions to enforce the child's right to support under G.S. § 49-14, -15 are civil actions; a prosecution of a parent for willful nonsupport under G.S. § 49-2 is a criminal proceeding. The distinction between the two is explained in *State Highway and Public Works Commission v. Cobb*, 215 N.C. 556, 558, 2 S.E. 2d 565, 567 (1939) as follows:

> "The distinction between a tort and a crime with respect to the character of the rights affected and the nature of the wrong is this:
>
> A tort is simply a private wrong in that it is an infringement of the civil rights of individuals, considered merely as individuals, while a crime is a public wrong in that it affects public rights and is an injury to the whole community, considered as a community, in its social aggregate."
>
> "Crime is an offense against the public pursued by the sovereign, while tort is a private injury pursued by the injured party." [Citations omitted.]

Since the statute of limitations on the criminal proceedings does not affect the illegitimate child's right to recover in a civil action, unlike the discriminatory statute of limitations on an illegitimate's civil action which was invalidated in County of Lenoir, *supra*, there is no violation of equal protection. The parties to the present case are the State and the defendant; there has been no showing that either's rights to equal protection are impaired by the challenged statute of limitations, nor is it clear how a state could ever be the victim of an equal protection violation by its own legislation. No illegitimate children are parties. The State is attempting to assert the equal protection rights of illegitimate children, but even if the challenged statute did offend such rights, "[t]he general rule is that 'a person who is seeking to raise the question as to the validity of a discriminatory statute has no standing for that purpose unless he belongs to the class which is prejudiced by the statute.' " *Appeal of Martin*, 286 N.C. 66, 75, 209 S.E. 2d 766, 773 (1974). The State's assignment of error is without merit.

Affirmed.

Judges HILL and BECTON concur.

STATE OF NORTH CAROLINA v. TOMMY LEE NEELEY

No. 8123SC1145

(Filed 4 May 1982)

Criminal Law § 143.13— appeal from order of revocation of probation—inability to attack original judgment

Where defendant received a suspended sentence upon certain conditions, defendant failed to adhere to the conditions and his sentence was activated, the defendant could not question the validity of the original judgment when his sentence was suspended since attacking the original judgment is an impermissible collateral attack. G.S. 15A-1411.

APPEAL by defendant from *Long, Judge.* Judgment entered 10 April 1981 in Superior Court, WILKES County. Heard in the Court of Appeals 6 April 1982.

On 7 September 1979, the defendant entered a plea of guilty in Wilkes County District Court to the offense of unlawfully and willfully neglecting and refusing to support his minor child in violation of N.C. Gen. Stat. § 14-322. The court suspended a six-month sentence for five years on the condition that, among other things, the defendant pay the costs of court, pay the sum of $25.00 weekly to the Clerk of Superior Court for the use and benefit of the minor child, and maintain insurance on the child and be responsible for medical bills not covered by insurance. On 11 February 1981 the Wilkes County District Court ordered the 7 September 1979 six-month sentence into effect because the defendant was $685.00 in arrears in his payments for the support of the child. The defendant appealed the activation of his suspended sentence to the Wilkes County Superior Court. On 10 April 1981 the Superior Court ordered activation of defendant's six-month sentence, and it is from that order that defendant appeals.

Attorney General Edmisten by Assistant Attorney General Henry T. Rosser, for the State.

Appellate Defender Adam Stein by Assistant Appellate Defender James H. Gold, for the defendant-appellant.

MARTIN (Robert M.), Judge.

Defendant's assignments of error attack the validity of the judgment entered 7 September 1979. Defendant did not appeal from that judgment when entered, but now attacks that judgment upon the revocation of his probation. Defendant first argues that there was nothing in the record of his guilty plea to show whether defendant was indigent, whether he was represented by counsel or whether he made a knowing and intelligent waiver of counsel. Defendant further argues that the statute under which he was originally convicted, N.C. Gen. Stat. § 14-322, did not apply to him because it applies only to legitimate, not illegitimate children. This case is controlled by *State v. Noles*, 12 N.C. App. 676, 184 S.E. 2d 409 (1971). Here as in *Noles*, the defendant tries to attack collaterally the validity of the original judgment where his sentence was suspended, in an appeal from the revocation of that suspension. "When appealing from an order activating a suspended sentence, inquiries are permissible only to determine whether there is evidence to support a finding of a breach of the conditions of the suspension, or whether the condition which has been broken is invalid because it is unreasonable or is imposed for an unreasonable length of time." *State v. Noles*, 12 N.C. App. at 678, 184 S.E. 2d at 410 (1971); *State v. Caudle*, 276 N.C. 550, 173 S.E. 2d 778 (1970). The Court in *Noles* held that questioning the validity of the original judgment where sentence was suspended, on appeal from an order activating the sentence, is an impermissible collateral attack. The proper procedure which provides the defendant adequate opportunity for adjudication of claimed deprivations of constitutional rights is under Article 89, Post-Trial Relief, N.C. Gen. Stat. § 15A-1411, *et seq. See State v. White*, 274 N.C. 220, 162 S.E. 2d 473 (1968).

The order of the trial court is

Affirmed.

Judges VAUGHN and ARNOLD concur.

IN THE MATTER OF: RICHARD TAYLOR

No. 8112DC701

(Filed 4 May 1982)

Criminal Law § 148; Infants § 21— appeal from adjudication of delinquency before disposition part of juvenile hearing premature

Under G.S. 7A-666, an adjudication of delinquency is not a final order, and no appeal may be taken from such order unless no disposition is made within 60 days of the adjudication of delinquency; therefore, where respondent gave notice of appeal eight days after adjudication of delinquency, his appeal was premature.

APPEAL by respondent from *Guy, Judge.* Judgment entered 7 May 1981 in District Court, CUMBERLAND County. Heard in the Court of Appeals 10 December 1981.

This appeal arises from an adjudication on a petition filed in Juvenile Court alleging that the respondent committed an assault. After hearing evidence, the court adjudicated that the allegations contained in the petition were true and ordered that the disposition part of the hearing should proceed. No disposition was made. Eight days after the adjudication of delinquency, the respondent gave notice of appeal.

Attorney General Edmisten, by Assistant Attorney General Grayson G. Kelly, for the State.

Assistant Public Defender Staples Hughes for respondent appellant.

WEBB, Judge.

We hold the respondent's appeal is premature and order that it be dismissed.

G.S. 7A-666 provides:

> "Upon motion of a proper party as defined in G.S. 7A-667, review of any final order of the court in a juvenile matter under this Article shall be before the Court of Appeals. Notice of appeal shall be given in open court at the time of the hearing or in writing within 10 days after entry of the order. However, if no disposition is made within 60

days after entry of the order, written notice of appeal may be given within 70 days after such entry. A final order shall include:

(1) Any order finding absence of jurisdiction;

(2) Any order which in effect determines the action and prevents a judgment from which appeal might be taken;

(3) Any order of disposition after an adjudication that a juvenile is delinquent, undisciplined, abused, neglected, or dependent; or

(4) Any order modifying custodial rights."

We believe that under this section of the statute an adjudication of delinquency is not a final order. No appeal may be taken from such order unless no disposition is made within 60 days of the adjudication of delinquency. In the instant case the respondent is attempting to appeal from an adjudication of delinquency eight days after the adjudication when no disposition has been made. This he cannot do.

Appeal dismissed.

Judges VAUGHN and HILL concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 4 MAY 1982

CHAPEL HILL HOUSING AUTH. v. FALLS No. 8115SC962	Orange (80CVS579)	Affirmed
McKENZIE v. CARLSON No. 8128DC849	Buncombe (81CVD562)	Affirmed
REGELE-DeANGELIS v. REGELE-DeANGELIS No. 8110DC808	Wake (81CVD3251)	Reversed
STATE v. DAVIS No. 8129SC1134	Rutherford (80CRS5847)	No Error
STATE v. DUNCAN No. 8110SC977	Wake (80CRS71394)	No Error
STATE v. FERRELL No. 8114SC957	Durham (80CRS24848)	No Error
STATE v. HANDY No. 8121SC1162	Forsyth (81CR8176)	No Error
STATE v. HICKS No. 8112SC1033	Cumberland (81CRS4643)	No Error
STATE v. HIGH No. 8119SC1085	Cabarrus (81CRS6273) (81CRS6274)	No Error
STATE v. JACKSON No. 8127SC998	Gaston (80CRS19678) (80CRS19679) (80CRS19680) (80CRS20477)	No Error
STATE v. JONES No. 8114SC1014	Durham (81CRS8050) (81CRS8051)	Judgment is Arrested & Both Charges Are Dismissed
STATE v. LOCKS No. 8120SC1198	Richmond (81CRS0643)	Vacated & Remanded
STATE v. THOMPSON No. 8112SC675	Cumberland (80CRS19877)	No Error
STATE v. TURNER No. 8112SC666	Cumberland (80CR10397)	No Error
STATE v. WILSON No. 8129SC1205	Rutherford (80CRS5576) (80CRS5577) (80CRS5578) (80CRS5579)	No Error

DANNY LEE LOREN v. ALBERT JACKSON, JOHN DOE, HUBERT ORR, RICK ORR, HARRY CORN, MILFORD HUBBARD, AND HANK WHITMIRE

No. 8129SC876

(Filed 18 May 1982)

1. **Constitutional Law §§ 23, 40— civil rights action—failure to appoint counsel to prosecute**

In an action to recover damages under 42 U.S.C. § 1983 for the alleged deprivation of plaintiff's constitutional rights under color of state law during his pretrial detention, plaintiff was not entitled to the appointment of counsel under G.S. 7A-451(a) to prosecute his action, and the trial court did not abuse its discretion in refusing to appoint counsel pursuant to G.S. 1-110 to prosecute the action. Nor was plaintiff's right to due process violated by refusal of the trial court to appoint counsel or to recognize a fellow prisoner of the plaintiff to aid plaintiff in the prosecution of his case.

2. **Constitutional Law §§ 17, 18, 21; Public Officers § 9— pretrial detention—violation of constitutional rights under color of state law—insufficiency of complaint**

In an action to recover damages under 42 U.S.C. § 1983 for the alleged deprivation of plaintiff's constitutional rights under color of state law during plaintiff's pretrial detention, it was *held*: (1) plaintiff's allegations that the jailer defendants overheard his conversations with visiting family members, that his phone calls were monitored from an extension phone by the jailer defendants, and that the jailer defendants censored his incoming mail failed to state a claim for violation of his Fourth Amendment right to be free from unreasonable searches and seizures, since the alleged intrusions were plausible administrative responses to the jailers' reasonable perception of security needs; (2) plaintiff's allegations that he was allowed to visit with only his immediate family members, that such visits were permitted only once a week for no more than ten minutes, and that he was allowed only two telephone calls a week for a duration of no more than three minutes failed to state a claim for invasion of plaintiff's limited First Amendment right of freedom of association, since security interests and an interest in not overtaxing the resources of the detention facility and the capacity of the jailers to monitor and supervise reasonably justified the visitation and telephone privilege limitations; (3) plaintiff's allegations that, in the course of being arrested, he was threatened verbally and by a weapon wielded by a deputy sheriff failed to state a claim for violation of plaintiff's rights under the Due Process Clause of the U.S. Constitution; (4) plaintiff's allegations that during his detention, he was denied access to a bath towel, a face cloth, hot water for his instant coffee, and a bed sheet, that he had a dirty mattress, that he was served unappetizing and inedible and unsanitary food and was not allowed to have home-cooked food delivered to him, and that neither he nor his fellow detainees were ever examined by a doctor to determine whether any of them had a communicable disease were insufficient to state a claim based upon cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments, since plaintiff's

allegations of unsanitary food failed to state a claim for impermissible punishment where there was no allegation that plaintiff was harmed from the ingestion of such food or by refraining from eating it, and the other discomforts alleged by plaintiff did not constitute punishment; and (5) plaintiff's allegations were insufficient to state a claim based on alleged violation of his Fifth Amendment right to be free from forced self-incrimination and his Sixth Amendment right to confront his accusers and to have effective assistance of counsel.

Judge BECTON concurring in the result.

APPEAL by plaintiff from *Grist, Judge.* Judgment entered 11 June 1981 in Superior Court, TRANSYLVANIA County. Heard in the Court of Appeals on 6 April 1982.

This appeal arises from plaintiff's action under 42 U.S.C. § 1983 to obtain redress for "the deprivation, under color of state law, of rights secured by the United States Constitution."

On 6 October 1980, plaintiff, proceeding in forma pauperis, filed a complaint containing the following factual allegations:

Defendants, at all times complained of, were acting under color of state law in their various capacities as Henderson County Sheriff, chairman of the Henderson County Board of Commissioners, jailers of the Henderson County jail, and Sheriff and Deputy Sheriff of Transylvania County. On 6 May 1980, defendant Deputy Hank Whitmire ordered plaintiff to pull his car to the side of the road and cursed plaintiff and, while wielding a large gun, threatened to blow plaintiff's head off if plaintiff did not get out of the car; these actions placed plaintiff "in immediate fear of his life." Plaintiff was then formally charged at the Transylvania County Sheriff's Department with assault with a deadly weapon inflicting bodily injury, and was transported by defendant Whitmire, who continued to harass, abuse, curse, and threaten plaintiff, to the Henderson County jail for pretrial detention. During plaintiff's incarceration at the Henderson County jail, plaintiff's "visits were limited to less than 10 minutes one day each week" and he could be visited only by his immediate family and his "visits were had in such a manner as to allow at least two" of the three jailer defendants (Hubert Orr, Rick Orr, Harry Corn) "to overhear each and every work [sic] spoken by Plaintiff and his visitors;" plaintiff was allowed to make only two telephone calls, of no more than two to three minutes' duration, a week, and all

his telephone conversations were monitored from an extension phone by either defendant Hubert Orr, Rick Orr, or Corn; "[p]laintiff was not provided with sheets and was forced to sleep on a dirty mattress," and "was not provided with a bath towel or face cloth nor was plaintiff allowed to furnish these items himself;" plaintiff was served unidentifiable, uneatable, unsanitary, and unappetizing food by the Henderson County jail, and "was not allowed to receive any home cooked foods;" "plaintiff was denied hot water" for his instant coffee; neither plaintiff nor the other pretrial detainees with whom he was confined were ever examined by a doctor for a communicable disease; "[p]laintiff's incoming mail was censored by" either defendant Hubert Orr, Rick Orr, or Harry Corn, and all three defendants verbally harassed plaintiff.

Plaintiff's complaint then alleged the following:

> The facts related above disclose a concerted and systematic effort by defendants . . . to deprive plaintiff of constitutionally secured rights, including, but not limited to, those enumerated below:
>
> A. Plaintiff's rights secured by the 8th and 14th Amendment to be free from cruel and unusual punishment.
>
> B. Plaintiff's rights secured by the 1st Amendment to associate openly and freely with persons of his own choosing.
>
> C. Plaintiff's rights secured by the 4th Amendment to be free from unreasonable search and seizure.
>
> D. Plaintiff's rights secured to him [by] the 5th Amendment to be free from forced self incrimination.
>
> E. Plaintiff's rights secured to him by the 6th Amendment to confront his accusers with other evidence and testimony and to have effective assistance of counsel.

Plaintiff concluded his complaint by praying for compensatory damages, punitive damages, and declaratory relief.

Each defendant moved for the dismissal of plaintiff's action on the grounds that the complaint failed to state a claim for which relief could be granted. Plaintiff moved that the court appoint an attorney to prosecute plaintiff's claim, or that it allow

him to be assisted at hearings and at trial by a fellow inmate. The court denied plaintiff's motion and granted defendants' motions, dismissing plaintiff's complaint with prejudice. Plaintiff appealed.

Danny Lee Loren, pro se, for plaintiff appellant.

Van Winkle, Buck, Wall, Starnes & Davis, by Roy W. Davis, Jr. and Marla Tugwell, for defendant appellees Albert Jackson, John Doe, Hubert Orr, Rick Orr, and Harry Corn; Ramsey, White & Cilley, by William R. White, for defendant appellees Hank Whitmire and Milford Hubbard.

HEDRICK, Judge.

[1] Plaintiff first assigns as error "[t]he Court's denial of plaintiff's Motion for Appointment of counsel, or, in the alternative, that the Court recognize a fellow prisoner of the plaintiff to aid plaintiff in the prosecution of plaintiff's cause of action."

"G.S. 7A-451(a) . . . constitutes the latest legislative determination of the scope of an indigent's entitlement to court appointed counsel." *Jolly v. Wright,* 300 N.C. 83, 86, 265 S.E. 2d 135, 139 (1980). The statute nowhere, however, lists, as being entitled to court-appointed counsel, a plaintiff bringing an action for damages and declaratory relief under 42 U.S.C. § 1983. Another statute, G.S. § 1-110, provides that the court "may assign to the person suing as a pauper learned counsel, who shall prosecute his action." "[T]he use of [the word] 'may' generally connotes permissive or discretionary action and does not mandate or compel a particular act." *Campbell v. First Baptist Church of City of Durham,* 298 N.C. 476, 483, 259 S.E. 2d 558, 563 (1979), and "a discretionary order of the trial court is conclusive on appeal absent a showing of abuse of discretion." *Privette v. Privette,* 30 N.C. App. 41, 44, 226 S.E. 2d 188, 190 (1976). Since plaintiff has shown no abuse, by the court, of its statutory discretionary power to appoint counsel for pauper plaintiffs, no violation of G.S. § 1-110 has been shown.

Turning to constitutional considerations, "[t]he mandate of procedural due process contained in our Constitution and in the Fourteenth Amendment applies only to actions by the government which deprive individuals of their fundamental rights." *North Carolina National Bank v. Burnette,* 297 N.C. 524, 534, 256

S.E. 2d 388, 394 (1979). Even when some procedural due process must be afforded, the determination of whether due process requires the appointment of counsel may be made only after balancing the factors in favor of appointment "against the presumption that there is a right to appointed counsel only where the indigent, if he is unsuccessful, may lose his personal freedom." *Lassiter v. Department of Social Services of Durham County*, 452 U.S. 18, 26-27, 68 L.Ed. 2d 640, 649, 101 S.Ct. 2153, 2159 (1981). No procedural due process, and particularly no right to appointed counsel, inures to plaintiff in the present case where his action is a civil action initiated by him against private individuals, and where his action is one in which the State is not even a party, much less the initiator of proceedings to deprive an individual of his physical liberty. Finally, we are aware of no rule requiring a trial judge to order a furlough for an incarcerated inmate whereby that inmate may assist, in a nontestimonial capacity, a party to a legal dispute. Plaintiff's first assignment of error is therefore overruled.

[2] Plaintiff's next assignment of error is "[t]he Court's dismissal of plaintiff's complaint upon defendant's [sic] Motion to Dismiss for failure of the complaint to state a cause of action upon which relief could be granted."

"[A] complaint must be dismissed when, on its face, it reveals that no law supports it, that an essential fact is missing, or a fact is disclosed which necessarily defeats it." *Mumford v. Hutton & Bourbonnais Co.*, 47 N.C. App. 440, 442, 267 S.E. 2d 511, 512 (1980). Since plaintiff's action purports to be a 42 U.S.C. § 1983 action against defendants for their deprivation under color of state law, of his constitutional rights, the factual allegations in his complaint must be examined to determine whether, if believed, they amount to any violation of recognized constitutional rights. *See Evans v. Town of Watertown*, 417 F. Supp. 908 (D. Mass. 1976). Hence, the crucial inquiry in the present case is the scope of "the constitutional rights of pretrial detainees—those persons who have been charged with a crime but who have not yet been tried on the charge." *Bell v. Wolfish*, 441 U.S. 520, 523, 60 L.Ed. 2d 447, 458, 99 S.Ct. 1861, 1865 (1979).

The Government may permissibly detain a person suspected of committing a crime, even though such detention is prior to a

formal adjudication of guilt; "the Government has a substantial interest in ensuring that persons accused of crimes are available for trials and, ultimately, for service of their sentences, . . . [and] confinement of such persons pending trial is a legitimate means of furthering that interest." *Id.* at 534, 60 L.Ed. 2d at 465, 99 S.Ct. at 1871. Although pretrial detainees do not forfeit all constitutional protections by reason of their confinement, *Id.*, "maintaining institutional security and preserving internal order and discipline are essential goals [of the detention system] that may require limitation or retraction of the retained constitutional rights of . . . pretrial detainees." *Id.* at 546, 60 L.Ed. 2d at 473, 99 S.Ct. at 1878. "A detainee simply does not possess the full range of freedoms of an unincarcerated individual." *Id.* at 546, 60 L.Ed. 2d at 473, 99 S.Ct. at 1878.

> Prison officials must be free to take appropriate action to ensure the safety of inmates and corrections personnel and to prevent escape or unauthorized entry. Accordingly, . . . even when an institutional restriction infringes a specific constitutional guarantee, . . . the practice must be evaluated in the light of the central objective of prison administration, safeguarding institutional security.

Id. at 547, 60 L.Ed. 2d at 473, 99 S.Ct. at 1878. Furthermore, the judiciary should accord prison administrators wide-ranging deference in the adoption and execution of policies and practices that they judge necessary to achieve institutional objectives. *Id.*

With respect to plaintiff's allegation that his Fourth Amendment right to be free from unreasonable searches and seizures was violated, the pertinent factual allegations are those which bear on invasions of plaintiff's reasonable expectation of privacy, i.e. his allegations that the jailer defendants overheard his conversations with visiting family members, that his phone calls were monitored from an extension phone by the jailer defendants, and that the jailer defendants censored his incoming mail.

> The test of reasonableness under the Fourth Amendment . . . requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is

> conducted. . . . A detention facility is a unique place fraught with serious security dangers.

Id. at 559, 60 L.Ed. 2d at 481, 99 S.Ct. at 1884. Although plaintiff has alleged a violation of his privacy interest by the jailers, the intrusions were within that zone to which the constitution accords broad deference, since the intrusions were plausible administrative responses to the prison officials' reasonable perception of security needs. The jailer defendants could quite easily deem it prudent to monitor the conversations and mail for any mention of escape plans or other threat to security or internal order and, with respect to the mail, for contraband. Just as *Bell v. Wolfish, supra,* held that an invasion of privacy as intrusive as a visual body cavity search could constitutionally be made of pretrial detainees on less than probable cause, so too may the intrusions alleged here be made given the prison administrators' interest in preserving institutional security. Hence, the allegations bearing on any Fourth Amendment claim were properly dismissed.

The allegations which arguably bring into play the First Amendment right to freedom of association are plaintiff's allegations that he was allowed to visit with only his immediate family members, and then only once a week for no more than ten minutes, and that he was allowed only two telephone calls a week, and then for a duration of no more than three minutes. Evaluated, following *Bell v. Wolfish, supra,* in light of the prison administration's objective of maintaining institutional security, these alleged limitations on plaintiff's access to communication with persons in the outside world do not constitute a deprivation of rights secured by the First Amendment. The First Amendment contemplates the extension of latitude to the prison officials' likely determination that unlimited personal contact by detainees with non-inmates would afford too much opportunity for the introduction of contraband or weapons into the detention facility, and hence, too much potential for escape or internal disorder. Security interests and an interest in not overtaxing the resources of the detention facility and its capacity to monitor and supervise also offer a reasonable justification for the limitations on the detainee's use of the telephone. Furthermore, it is significant that plaintiff was not denied all visitation and telephone privileges. These alleged restrictions are sufficiently counterbalanced by in-

stitutional objectives to fail as a matter of law to state a claim for invasion of the detainee's limited right of freedom of association, and were properly dismissed.

Plaintiff also alleges that, in the course of his being arrested, he was threatened, verbally and by a weapon wielded by defendant Deputy Whitmire, and that he thereby was put in immediate fear for his life. This allegation does not rise to constitutional dimensions. The substantive guarantees of the Due Process Clause are not violated by the mere fact that the State may, in inflicting an injury upon the plaintiff, be characterized as a tortfeasor. *Paul v. Davis*, 424 U.S. 693, 47 L.Ed. 2d 405, 96 S.Ct. 1155 (1976). Hence, the allegation was insufficient to state a claim under 42 U.S.C. § 1983; similarly, the allegation fails to state a claim even under state tort law since the alleged use of threats by the arresting Deputy Whitmire was within the bounds of permissible privilege accorded an officer making an arrest of a person reasonably believed to have committed a criminal offense. Furthermore, plaintiff's allegations of the verbal abuse he received from the defendant jailers after his arrest also failed to state a claim for deprivation of a constitutional right, as required under 42 U.S.C. § 1983, or for a tort. These allegations were properly dismissed.

The allegations of plaintiff which arguably implicate his constitutional right as an unconvicted pretrial detainee to be free from punishment are the following: during his detention, plaintiff was denied access to a bath towel, a face cloth, hot water for his instant coffee, and a bed sheet; he had a dirty mattress; he was served unappetizing and uneatable and unsanitary food and was not allowed to have home-cooked food delivered to him; and neither he nor his fellow detainees were ever examined by a doctor to determine whether any of them had a communicable disease.

Prior to a formal adjudication of guilt, the State does not acquire the power to punish with which the Eighth Amendment Cruel and Unusual Clause is concerned; "[w]here the State seeks to impose such punishment without such an adjudication, the pertinent constitutional guarantee is the Due Process Clause of the Fourteenth Amendment." *Bell v. Wolfish, supra* at 535, 60 L.Ed. 2d at 466, 99 S.Ct. at 1872, n. 16. "Due process requires that a

pretrial detainee not be punished." *Id.* at 535, 60 L.Ed. 2d at 466, 99 S.Ct. at 1872, n. 16.

> [I]f a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees qua detainees.
>
> . . .
>
> Restraints [however] that are reasonably related to the institution's interest in maintaining jail security do not, without more, constitute unconstitutional punishment, even if they are discomforting and are restrictions that the detainee would not have experienced had he been released while awaiting trial. . . . [I]n addition to ensuring the detainees' presence at trial, the effective management of the detention facility once the individual is confined is a valid objective that may justify imposition of conditions and restrictions of pretrial detention. . . .

Id. at 539-40, 60 L.Ed. 2d at 468-69, 99 S.Ct. at 1874-75.

Plaintiff's allegations of nonaccess to a bath towel, a face cloth, hot water for his instant coffee, a bed sheet, and a clean mattress merely detail the discomfort to which he was subjected during detention; these minor privations do not amount to punishment. Similarly, his allegation that he and his fellow detainees were never examined for a communicable disease, absent an allegation that he thereby suffered in any sense, can in no way be said to constitute punishment. Plaintiff's most weighty allegation is that he was served unsanitary food and was not allowed to receive, in its stead, home-cooked food. Concern about the threat of smuggling can justify defendants' prohibition of deliveries of home-cooked food, especially when adequately sanitary prison food is provided. Furthermore, plaintiff's allegations fail to state a claim for impermissible punishment even when the prison food is unsanitary where, as here, there is no allegation that plaintiff in any way suffered or was harmed from the ingestion of such food or by refraining from eating it. The discomforts alleged by plaintiff may be explained as a function of the detention facility's limited resources and the defendants' legitimate interest in the

effective allocation of those resources. These allegations, therefore, were properly dismissed.

Finally, plaintiff has alleged that defendants violated his Fifth Amendment right to be free from forced self-incrimination and his Sixth Amendment right to confront his accusers and to have effective assistance of counsel. These allegations are supported by no factual allegations of even remote relevance to plaintiff's legal claims. "While a *pro se* complaint is held to less stringent standards than one drafted by an attorney, . . . 'courts need not conjure up unpleaded facts to support . . . conclusory [allegations].' " *Hurney v. Carver*, 602 F. 2d 993, 995 (1st Cir. 1979). These allegations were properly dismissed.

Since none of plaintiff's allegations were legally sufficient to state a claim for a deprivation of a constitutional right, or to state any other cognizable claim, the trial court properly dismissed the complaint.

Affirmed.

Judge HILL concurs.

Judge BECTON concurring in the result.

Judge BECTON, concurring in the result.

Plaintiff's complaint "served up a veritable potpourri of [claims] that implicated virtually ever facet of the [Henderson County Jail's] conditions and practices." *Bell v. Wolfish*, 441 U.S. 520, 526-27, 60 L.Ed. 2d 447, 461, 99 S.Ct. 1861, 1868 (1979). Believing, however, that the breadth and sweep of plaintiff's complaint does not require an equally broad and sweeping opinion, I write this concurring opinion.

The resolution of plaintiff's appeal is made simple by emphasizing the following three facts: (1) plaintiff's complaint was filed on 6 October 1980; (2) plaintiff was confined in the Henderson County Jail from 6 May 1980 until 30 June 1980 as a pre-trial detainee; and (3) plaintiff's action is an individual action, not a class action, brought to secure declaratory relief and compensatory and punitive damages. Because this action is an individual

action, rather than a class action, all claims seeking declaratory relief are moot since defendant is no longer housed in the Henderson County Jail. *See Inmates v. Owens*, 561 F. 2d 560, 562 (4th Cir. 1977). Even treating plaintiff's *pro se* complaint less stringently than a complaint drafted by an attorney, plaintiff has not shown that he was injured or entitled to relief as a result of the acts of defendants. Consequently, he has failed to state a claim for relief regarding compensatory and punitive damages.

As indicated, I concur in the result reached by the majority, but I believe the majority has painted with too broad a brush. Specifically, with regard to plaintiff's allegations that the jailer overheard his telephone conversations by monitoring them on an extension telephone and that the jailer censored plaintiff's incoming mail, the majority states: "The intrusions were within that zone to which the constitution accords broad deference, since the intrustions were plausible administrative responses to the prison officials' reasonable perception of security needs." Ante, p. 7. First, *Procunier v. Martinez*, 416 U.S. 396, 40 L.Ed. 2d 224, 94 S.Ct. 1800 (1974) will not allow censorship of all mail; mail censorship is permitted only in furtherance of security, order or rehabilitation. Second, there is no evidence, on this Rule 12(b)(6) motion, suggesting that defendants needed to monitor plaintiff's telephone calls based on a perceived "security need."

With regard to plaintiff's allegations that in the course of—and after—his arrest, he was threatened, verbally and by use of a weapon by defendant Whitmire, the majority states: "The allegation fails to state a claim . . . since the alleged use of threats by the arresting defendant deputy Whitmire was within the bounds of permissible privilege accorded an officer making an arrest of a person reasonably believed to have committed a criminal offense." Ante, p. 9. First, the majority's statement, by its breadth, condones too much. According to plaintiff, defendant Whitmire yelled in a loud voice: "Danny, you God-damned son-of-a-bitch come out of the car or I'll blow your Mother-Fucking head off." Taking plaintiff's allegations as true, as we are required to do on a Rule 12(b)(6) motion, we should not lend our imprimatur to this sort of conduct by an officer. Second, the majority's statement, by implication, does not cover defendant's further allegation that while being transported to the jail *after arrest* "the defendant Whitmire continually verbally harassed and abused

Plaintiff by cursing Plaintiff and threatening to shoot Plaintiff and throw him in the French Broad River. . . ." It is because plaintiff fails sufficiently to allege an injury that I concur in the majority's disposition of this claim. To the extent the majority's statement condones defendant Whitmire's conduct, I divorce myself from it. The law does not tolerate all verbal abuse of pre-trial detainees by jailers, guards or other prison officials. For example, if a threat is intended to intimidate a pre-trial detainee or an inmate from exercising a right, such as the right of access to court, a claim for relief has been stated. *See Hudspeth v. Figgins*, 584 F. 2d 1345 (4th Cir. 1978), *cert. denied* 441 U.S. 913, 60 L.Ed. 2d 386, 99 S.Ct. 2013 (1979).

For the foregoing reasons, I concur in the result.

CAROLYN C. ROBERSON, ADMINISTRATRIX OF THE ESTATE OF WILLIAM ALTON ROBERSON, JR. v. J. R. GRIFFETH AND CITY OF BURLINGTON

No. 8115SC918

(Filed 18 May 1982)

Negligence §§ 1.3, 29.1— accident resulting from high speed police pursuit—summary judgment improperly granted

In a negligence action in which plaintiff's intestate, a police officer for the City of Graham, was killed while on duty when he was struck by a car being pursued by an officer of the City of Burlington Police Department, the trial court erred in granting summary judgment for defendants, the City of Burlington and the Burlington officer, where plaintiff offered a forecast of evidence which questioned (1) the Burlington Police Department's training of its officers in the tactics and techniques and decision making process of high speed police pursuit chases and (2) the police officer's decision to pursue a suspected violator of a misdemeanor law rather than following a warrant arrest procedure.

APPEAL by plaintiff from *McLelland, Judge.* Judgment entered 17 April 1981 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 8 April 1982.

This action arises out of an automobile collision which occurred when a vehicle driven by Terry Lee McGee at an estimated speed in excess of 100 miles per hour struck head on an

automobile driven by plaintiff's decedent, William Alton Roberson, Jr. At the time of the collision, the McGee vehicle was the object of a high speed pursuit conducted by Officer J. R. Griffeth of the police department of the city of Burlington for a misdemeanor traffic violation.

Plaintiff's intestate Roberson, was a police officer for the city of Graham which adjoins Burlington. Roberson was on duty, driving a Graham police vehicle, when he was struck by the McGee vehicle on Hanover Road in Graham.

The Roberson car had been parked at a car dealership within the Haw River city limits where Roberson and Sergeant Conklin of the Burlington Police Department were conversing through their open driver's side windows. Conklin's radio broadcast the message from Griffeth that he was in pursuit of the McGee vehicle on Hanover Road proceeding toward Sellars Mill Road. Roberson immediately pulled out of the car dealership and proceeded onto Hanover Road in the direction of the chase. Roberson turned on his blue light and was complying with the speed limit. He could not hear any further transmissions from the Burlington Police Department without flipping a switch on his radio which would have allowed him to monitor the Burlington Police frequency instead of his own Graham Police frequency.

The plaintiff alleged negligence on the part of both defendants. From the granting of defendants' motion for summary judgment, plaintiff appealed. Other facts pertinent to the resolution of this appeal are contained in the opinion of the Court.

Hemric, Hemric & Elder by H. Clay Hemric, Jr., for the plaintiff-appellant.

Smith, Moore, Smith, Schell & Hunter by Robert A. Wicker and Peter J. Covington, for the defendant-appellees.

MARTIN (Robert M.), Judge.

A 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. His papers are carefully scrutinized; and those of the opposing party are on the whole indulgently regarded.' 6 Pt. 2 Moore's Federal Practice, § 56.15[8],

at 642 (2d ed. 1976);" *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 469-70, 251 S.E. 2d 419, 421 (1979). The language of Rule 56, N.C. Rules Civ. Proc., conditions the rendition of summary judgment upon a showing by the movant that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. The court is not authorized by Rule 56 to decide an issue of fact. It is authorized to determine whether a genuine issue of fact exists. "The purpose of summary judgment is to eliminate formal trials where only questions of law are involved by permitting penetration of an unfounded claim or defense in advance of trial and allowing summary judgment for either party when a fatal weakness in the claim or defense is exposed." *Moore v. Fieldcrest Mills, Inc., supra* at 470, 251 S.E. 2d 422; *Caldwell v. Deese*, 288 N.C. 375, 218 S.E. 2d 379 (1975). *Moore v. Fieldcrest Mills, Inc.*, supra at 470, 251 S.E. 2d 422, continues its analysis of summary judgment stating:

> "The device used is one whereby a party may in effect force his opponent to produce a forecast of evidence which he has available for presentation at trial to support his claim or defense. A party forces his opponent to give this forecast by moving for summary judgment. Moving involves giving a forecast of his own which is sufficient, if considered alone, to compel a verdict or finding in his favor on the claim or defense. In order to compel the opponent's forecast, the movant's forecast, considered alone, must be such as to establish his right to judgment as a matter of law." 2 McIntosh, N.C. Practice and Procedure, § 1660.5 (2d ed. Phillips Supp. 1970). "If there is any question as to the credibility of witnesses or the weight of evidence, a summary judgment should be denied. . . ." 3 Barron and Holtzoff, Federal Practice and Procedure, § 1234 (Wright ed. 1958).

We now determine the propriety of summary judgment for defendants in this case by applying these legal principles to the record properly before us.

Was plaintiff's intestate killed because of the negligence of either of the defendants? This is the overriding issue of fact which plaintiff must establish at trial in order to prevail on her cause of action. Plaintiff asserts that the Burlington Police Department failed to adequately train Officer J. R. Griffeth in the

proper techniques and decision-making processes of high speed police pursuit and the alternative uses of the warrant arrest procedure in lieu of high-speed pursuit. She further asserts that the conduct of Officer Griffeth while pursuing a suspect created an unreasonable risk of harm to plaintiff's decedent, Roberson. To support their motions for summary judgment and establish the non-existence of negligence on the part of either defendant, movants offered the affidavits and depositions of Raymond F. Shelton, James Elbie Conklin and James Robert Griffeth.

Defendant James Griffeth gave the following affidavit concerning the pursuit of the McGee vehicle:

> At approximately 1:50 a.m. on the morning of July 12, 1978, I was on patrol duty in the City of Burlington in the vicinity of the intersection of Graham-Hopedale Road and Hanover Road. While stopped at this intersection facing north on Graham-Hopedale Road, Officer M. O. Wall of the Burlington Police Department communicated by radio the direction of travel of a vehicle which he stated had been driving left of center and had almost run him off of Hanover Road. Both Officer Wall and the vehicle were within my sight heading east on Hanover Road towards my position at the intersection of Hanover Road and Graham-Hopedale Road. The vehicle passed directly in front of my patrol car and I was able to identify that the driver was Terry Lee McGee. I personally knew that Terry Lee McGee had had his driver's license revoked and had a very serious and extensive negligent driving record. I had apprehended him while he was driving the same vehicle approximately a week earlier for driving while his license was revoked and possession of marijuana. When the vehicle passed in front of my patrol car, I recognized Terry Lee McGee and his vehicle. The weather was clear, visibility was good, the road was dry, and, since it was an early weekday morning, there was no other traffic on Hanover Road.
>
> Once Terry Lee McGee's vehicle passed my patrol car heading east on Hanover Road and I made a visual identification, I turned right from my position facing north at the intersection of Graham-Hopedale Road and Hanover. I turned on my high beams and the blue revolving lights on top of my

patrol car. Once my blue lights were turned on, Terry Lee McGee increased his speed to 50 m.p.h. or more. When he increased the speed of his vehicle, I turned on my police siren; but Terry Lee McGee rapidly accelerated his vehicle. Both his vehicle and my patrol car were then heading east on Hanover Road. At the beginning of my pursuit, I had radioed police headquarters in Burlington that I was in pursuit of a vehicle on Hanover Road heading east towards Graham, North Carolina.

The pursuit proceeded east on Hanover Road through the intersection of Hanover Road and Sellars Mill Road and in the direction of the city limits of Graham. As the McGee vehicle approached the intersection of Hanover and Sellars Mill Road, the stop light was red. Terry Lee McGee, however, proceeded through the red light at the intersection. After crossing the intersection of Hanover and Sellars Mill Road, I radioed Burlington Police headquarters of my position and my continued pursuit of Terry Lee McGee. I again reported my location to the Burlington Police headquarters when my vehicle passed the back entrance to Cummings High School on Hanover Road. I estimated that the speed of the fleeing McGee vehicle at that point was in excess of 100 m.p.h.

Because of the speed of the McGee vehicle, it began to pull away from me once we passed the back entrance to Cummings High School on Hanover Road. At this time I discontinued the pursuit because the McGee vehicle was going too fast and I was aware that we were heading in the direction of, and soon would enter, a series of very sharp curves in the road and that I would not be able to overtake him or negotiate these curves. I lost sight of Terry Lee McGee's vehicle as I was breaking off the pursuit and as his vehicle entered the first curve still heading east on Hanover Road. Shortly after McGee's vehicle disappeared around the curve on Hanover Road, and while slowing down, I heard the voice of Corporal James Conklin of the Burlington City Police Department over the radio say that there had been a wreck in the curve. I drove to the scene and saw that Terry Lee McGee's vehicle had collided head-on with a City of Graham

patrol car. I did not know until I got out at the scene of the accident who was driving the City of Graham car.

At all times during my pursuit of the vehicle being driven by Terry Lee McGee, the emergency blue flashing lights and the siren on my police car were operating. I would estimate that I attained a top speed of approximately 80-85 m.p.h. in the pursuit, which I maintained for approximately 10-15 seconds. My entire pursuit of the McGee vehicle occurred on Hanover Road for approximately two miles from start to finish, and lasted approximately three minutes.

I did not see or meet any other traffic on Hanover Road during the pursuit. While I made several radio communications to the Burlington Police Department headquarters, at no time was I aware that Graham Police Officer William Alton Roberson, Jr. was proceeding towards the pursuit by driving his police vehicle in a westerly direction on Hanover Road towards the direction from which Terry Lee McGee's vehicle was heading. At the time of the collision between Officer Roberson's car and the vehicle driven by Terry Lee McGee occurred, I had disengaged the pursuit of the McGee vehicle and was no longer in visual contact with that vehicle.

Griffeth also testified by deposition in pertinent part as follows:

I do not recall who taught me the theories and procedures of pursuit driving in the classroom. In Police School Captain Long taught drugs, vice, prostitution, gambling and patrol operations, and that is all I recall of that.

As to pursuit driving, I do not recall who taught it or how much time was devoted to it. I do recall reading the portion of the manual on pursuit driving. I have not reread the pursuit procedures manual and my present knowledge of the pursuit manual is based on my reading of it when in training. . . . The practical training I received from the Burlington Police Department on pursuit driving when I was an auxiliary officer occurred during my field training in March when pursuit driving was taught. . . . The training I received from Officer Jordan was a training session in two actual pursuits, in which I was driving.

To the best of my knowledge, at the time of this incident on the 12th of July, 1978, there was no set violation as to when a car should be pursued. If a violation occurred in my presence, and the officer thought that the pursuit could be handled in a safe manner for himself and others, he could pursue that vehicle. And as far as the speed goes, I don't believe there was a set speed, saying that a police officer should go no faster than a certain speed. I don't believe there is a statement like that in the pursuit policy of the Burlington Police Department.

I am not familiar anymore with the procedure on pursuit driving of the training manual of the Burlington police officers. I don't think any segregation was ever created in pursuing a felony suspect such as rape or murder from pursuing a speeding misdemeanant or a driving while license revoked misdemeanant. The control of the chase was given to the line supervisor at that time, depending on the circumstances surrounding the pursuit.

The line supervisor could be the lieutenant on duty, the sergeant on duty, the first sergeant, or the corporal on duty—whichever was the ranking officer at the time of the pursuit. He could call, as far as radio communications, wanting to know the type of violation that you had. That would be just about all he'd ask. He had authority to terminate the pursuit.

That would be during the first stages of the pursuit. During this particular pursuit, I did call and notify my line supervisor of what the person I was chasing was suspected of. I suspected this person of driving-while-license-revoked. The line supervisor that I notified was Bill Fox. I notified Headquarters; I didn't call a specific car. No one told me to go ahead with the pursuit.

You did not have to receive permission to go ahead with the pursuit. The line supervisor could terminate the pursuit.

Sergeant James Conklin of the Burlington Police Department stated in his affidavit that he was talking with Roberson in the parking lot of a Haw River car dealership when Griffeth's message about the McGee chase came over his radio. Roberson

immediately left the parking lot and proceeded toward the chase, followed by Conklin. Both had on their blue lights and Conklin estimated Roberson's speed to be between 45-55 m.p.h. in a 45 m.p.h. zone. Conklin lost sight of the Roberson vehicle in a curve, heard the collision and then arrived upon the accident scene. Conklin, unaware of any termination of the chase by Griffeth, radioed to him about the accident and he arrived at the scene shortly thereafter.

Sergeant Conklin further testified by deposition in pertinent part as follows:

> As to whose responsibility it is to determine if a suspect should be chased and when the chase should be terminated, No. 1, the officer involved. He can break it off at any point that he feels that it's unsafe.
>
> A lot of things are taken into consideration; the time of day for one thing. Traffic conditions, heavy congested traffic. Charges, nature of charges. As to what factor the nature of the charges play in the decision to chase or terminate the chase, whether or not the seriousness of the charge plays any factor, as to whether or not it's a felony, a rape, murder or bank robbery, yes, but it depends on the situation. It's hard to say in black and white.
>
> As to what I meant by my prior answer stating that the seriousness of the crime is a factor in the decision to chase or terminate the chase, certainly, if it's a felony you would pursue. In a misdemeanor, traffic charges you pursue. But, if it gets to the point where it becomes too dangerous, you break it off. Or, you go outside the city, and you break it off. Considering all the factors such as time of day, traffic conditions and whether or not the suspect was a felon or a low-grade misdemeanant, I would think you would chase a felon more readily than you would a misdemeanant. But we're going to chase, regardless. If you make a positive identification of the suspect and you know the suspect before the chase begins and if you see the violation of the law before the chase begins you can utilize the warrant procedure to go arrest the person.
>
> As to whether it makes a difference whether you're chasing him for a misdemeanor or a felony, I would, as a

supervisor, if it were a felon, I would let my men go outside the City of Burlington and pursue a felon, more readily than I would a misdemeanant.

As to whether I would allow my men to pursue a suspect who was driving with a revoked license, a misdemeanor, and who had been positively identified and had been arrested before, and as to whether I would allow my men to pursue him at speeds of 80 or 85 miles an hour on city streets at any time of day or night, I would take into consideration, first, the time of day, the traffic conditions—heavy traffic, at 4:00 in the afternoon, with school out and Church Street traffic bumper to bumper, no, I wouldn't.

If an officer had made a positive identification of a man for a crime of driving while license revoked, and it were nonexistent traffic, and it were 1:50 in the morning, as to whether I would authorize an 80 to 85 miles an hour chase by an officer to apprehend a man that an officer had made a positive identification on, first of all, we don't set the pace on a chase; the car that we're chasing does. He can go 200 miles an hour. If the officer pursued, I would allow him to go. And then, if the officer decided it was too dangerous, he could cut it off. Or if I decided it was becoming too dangerous, I would cut it off. I would tell him to cut it off.

As to the amount of time that I would have to terminate a chase at 80 or 85 miles an hour, it would be a much shorter period of time than it would at 40 or 55.

Police Chief Raymond Shelton of the Burlington Police Department gave the following testimony in his deposition:

As to whether or not I am familiar with the fact that the pursuit driving section of the Burlington Police Officers' Training Manual does not provide as to the priority of chasing, whether chasing felons, low grade misdemeanants or status violators, the manual addresses all of those. I think that the manual sets priority on safety, when, and when not to pursue and not so much for the offense. The nature of the offense suspected does play a factor. Regardless of how serious an offense it was, if it was too dangerous to pursue, they'd be obligated to cease; even if it was a major offense, they'd be obligated to desist chasing the person.

As to whether or not somewhere in the pursuit procedure the difference between pursuing a serious misdemeanant or a low-grade misdemeanant or a serious felon—as in rape, murder or bank robbery—is explained to a patrolman, this policy puts a burden on the officer to stop, depending on the danger involved regardless of how minor or how serious an offense it is. The policy does not provide anywhere as to whether or not a pursuit should commence based on the severity of the crime the suspect is suspected of having committed. It's not one thing that governs whether he will or will not pursue. The officer has many factors to take into consideration.

Regardless of the time of day or night I would always classify a chase at 80 or 85 miles an hour in a 45 zone as a high speed chase.

As to the process involved in initiating the decision to chase a violator, the first responsibility is on the officer to make sure that he can chase and chase safely. The line supervisor can also terminate the chase, if he thinks the time of day is not appropriate. The line supervisor becomes aware of a chase because the officer calls it in to headquarters. Headquarters logs it out and all the other cars are monitored. The line supervisor works anywhere in the police department. He usually monitors traffic all the time. He has a portable radio he carries with him as well as one in his car, or if he's in the office there's a radio there. As to whether he is supposed to call and tell the officer to continue the chase, he doesn't call to tell him to continue; if he thinks it's too dangerous, he calls him and tells him to discontinue. Officers do not call in for permission to chase.

There is no policy in the Burlington Police Department for reviewing chases unless an accident occurs. If an accident occurs, then we have an Accident Review Board that hears all accidents that officers are involved in. I am speaking of an accident in which an officer is involved. If an officer is chasing a suspect, and if the suspect is killed that is not an accident involving a police officer. There is no review procedure if the suspect is killed.

When the affidavits and depositions offered by defendants in support of their motion for summary judgment are viewed in the

light most favorable to plaintiff, the evidentiary forecast is such that this evidence alone does not establish defendants' right to judgment as a matter of law. These depositions do not establish a lack of negligence on the part of either defendant. *Moore v. Fieldcrest, supra.* Furthermore, plaintiff offered a forecast of her evidence consisting of the affidavit of Richard Hathaway Turner, the founder and chairman of the Board of The National Academy of Police Driving, who stated as follows:

> Based upon the affiant's personal knowledge gathered from reading the materials in this case including the depositions hereinbore [sic] mentioned, the affiant has an opinion satisfactory to himself that the training employed by the Burlington, N.C. police dept in training officer J. R. Griffeth and other officers similarly situated in time in the tactics and techniques and decision making process of high speed police pursuit chases and the use of police pursuit was inadequate to protect the safety of the members of the general motoring public in that it failed to differentiate between the chasing of suspects who had committed crimes of different grades, such as felonies and misdemeanors and between low-grade misdemeanors and high grade misdemeanors. The training also failed to give officers such as Griffeth guidance as to when the warrant arrest procedure should be used instead of high speed chases, especially when the officer had made a complete identification of the suspect and knew where to arrest the suspect at a later time.
>
> . . .
>
> Affiant is further of the opinion that the conduct of J. R. Griffeth acting as an agent and employee of the Burlington, N.C. Police Dept. as a sworn police officer was improper police conduct and showed a reckless disregard for the rights of the motoring public in the Burlington, N.C. area when Griffeth pursued a fleeing suspect whom he suspected of violating the "driving while license revoked" laws and no others except for a violation of a red light statute after the chase began. Affiant says that the complete recognition of the suspect by Griffeth before the chase ensued which resulted in speeds of 84 mph for almost 5000 feet was totally improper police conduct and showed a reckless disregard for

the safety of others, notwithstanding that the officer was pursuing a suspected violator of the misdemeanor laws of the state of North Carolina. That Officer Griffeth was negligent in pursuing this suspect in this fashion, considering all of the circumstances and the police dept. of Burlington, N.C. was negligent in allowing officers such as Griffeth to drive police vehicles in such chases when they had not received proper training in pursuit driving and pursuit decision making.

As a general proposition, issues of negligence are ordinarily not susceptible of summary adjudication either for or against the claimant "but should be resolved by trial in the ordinary manner." 6 Pt. 2 Moore's Federal Practice, § 56.17 [42] at 946 (2d ed 1976); *Moore v. Fieldcrest Mills, Inc., supra.* It is only in the exceptional negligence case that summary judgment should be invoked. Even when there is no substantial dispute as to what occurred, it usually remains for the jury to apply the standard of the reasonably prudent man to the facts of the case. 11 Strong's N.C Index 3d, Rules of Civil Procedure § 56.6 (1978); *Caldwell v. Deese,* 288 N.C. 375, 218 S.E. 2d 379 (1975).

Our Supreme Court has recognized that the actions of a police officer are subject to the scrutiny of a jury in applying the reasonably prudent man standard when sufficient allegations of negligence are made. In *Goddard v. Williams,* 251 N.C. 128, 133-34, 110 S.E. 2d 820, 824-25 (1959) the court adopted the following language:

> "We do not hold that an officer, when in pursuit of a lawbreaker, is under no obligation to exercise a reasonable degree of care to avoid injury to others who may be on the public roads and streets. What we do hold is that, when so engaged, he is not to be deemed negligent merely because he fails to observe the requirements of the Motor Vehicles Act. His conduct is to be examined and tested by another standard. He is required to observe the care which a reasonably prudent man would exercise in the discharge of official duties of a like nature under like circumstances." . . . "We know of no better standard by which to determine a claim of negligence on the part of a police officer than by comparing his conduct * * * to the care which a reasonably prudent man would exercise in the discharge of official duties of like nature under like circumstances." (Citations omitted.)

In this case it is for the jury to decide whether the defendants were negligent.

The defendants also assert that their negligence was not the proximate cause of Officer Roberson's death due to the intervening negligence of the suspect McGee. We agree with plaintiff that the question of proximate cause is a question for the jury. *Nance v. Parks*, 266 N.C. 206, 146 S.E. 2d 24 (1966); *Moore v. Beard-Laney, Inc.*, 263 N.C. 601, 139 S.E. 2d 879 (1965). We likewise reject defendants' assertion that Officer Roberson was a borrowed servant of the City of Burlington.

For the foregoing reasons the judgment of the trial court is

Reversed.

Judges VAUGHN and ARNOLD concur.

SANDRA ELAINE CLOUTIER, EMPLOYEE, PLAINTIFF v. STATE OF NORTH CAROLINA, DIVISION OF PRISONS, SELF-INSURED, EMPLOYER, DEFENDANT

No. 8110IC433

(Filed 18 May 1982)

1. **Master and Servant § 73—workers' compensation—permanent injury to important internal organs—insufficiency of findings**

The Industrial Commission made insufficient findings of fact as to whether plaintiff sustained permanent injury to important internal organs, including her ethmoid and maxillary sinuses, her sense of taste and smell, and her innner ear which caused disequilibrium, since it cannot be determined from the findings and the evidence in the case whether the Commission denied compensation on the ground that there was no permanent injury to the sinuses, sense of taste and smell, or inner ear or whether it denied compensation on the ground that none of these were important internal organs.

2. **Master and Servant § 72— workers' compensation—permanent partial disability—insufficient findings**

The Industrial Commission made insufficient findings of fact for a proper determination as to whether plaintiff should be awarded compensation for permanent partial disability under G.S. 97-30 where the Commission found only that there was no competent evidence "to show permanent partial disability based on condition of plaintiff's inner ear," plaintiff contended that her permanent partial disability was based not only on the problems with her inner ear

but also on other permanent injuries including sinusitis, severe headaches, inability to wear prescription glasses, heavy sinus drainage causing pain in the throat and nausea, facial pains, and lack of hand-eye coordination, and there was evidence that plaintiff has a reduced capacity for work because of these symptoms combined with pain and suffering and the effects of medicine.

3. Master and Servant § 73— workers' compensation—important internal organs—sinuses—sense of taste and smell

The ethmoid and maxillary sinuses are important internal organs for which compensation may be paid under G.S. 97-31(24). The loss of the sense of taste and smell is also compensable under G.S. 97-31(24) as the loss of an important internal organ.

4. Master and Servant § 72— workers' compensation—permanent partial disability—earnings not diminished

No compensation could be paid for permanent partial disability where the evidence showed that plaintiff had retained her job and was earning more at the time of the hearing than at the time of her injury. However, if the Industrial Commission found facts upon which plaintiff was entitled to recover for permanent partial disability, it could retain jurisdiction for future adjustments in the event plaintiff's earnings should diminish.

5. Master and Servant § 97.2— workers' compensation—reopening hearing for additional evidence

The Full Industrial Commission erred in refusing to reopen a workers' compensation hearing to take additional evidence where the proposed evidence bore directly on plaintiff's condition which was in question before the Full Commission, the evidence was not available at the time of the original hearing, the evidence was not cumulative, and there could be a different result if the evidence is considered. G.S. 97-85; Industrial Commission Rule XX(6).

6. Master and Servant § 99— workers' compensation—agreement for attorney's fee

The Industrial Commission erred in failing to approve an agreement for the attorney's fee in a workers' compensation proceeding where the Commission made no finding as to the reasonableness or unreasonableness of the agreement pursuant to G.S. 97-90(c).

7. Master and Servant § 99— workers' compensation—costs of deposition—travel expenses of attorney

The travel expenses of plaintiff's attorney in taking the deposition of a witness in another state should have been taxed as a part of the cost of taking the deposition under G.S. 97-80.

APPEAL by plaintiff from order of North Carolina Industrial Commission entered 7 November 1980. Heard in the Court of Appeals 10 December 1981.

This appeal results from an opinion and award to plaintiff for injuries she received while she was employed at a prison unit in

Maury, North Carolina. A hearing was held by Deputy Commissioner Angela R. Bryant. The plaintiff's evidence showed that on 30 November 1977 she was working as a clerk in the prison unit at which time she was assaulted by a prisoner and was beaten severely about her head. A deposition of Dr. James Walker Ralph was taken and offered into evidence. Dr. Ralph testified that he first saw the plaintiff on 1 December 1977. At that time she had several broken bones in her face including a broken nose. He operated on her on 2 December 1977 to correct a right zygomatic arch fracture in order to let her have movement of her jaw. On 29 March 1978 he performed a procedure to correct the fractures to her nose. He performed a third operation on the plaintiff on 13 February 1979 to allow her sinuses to drain properly which would relieve the pain to her nose. Dr. Ralph testified that in his opinion the plaintiff suffers disabilities which are permanent as a result of the assault on her. He testified the disabilities are as follows:

"1. Sinus problems on both sides of her nose and her right cheek bone.

2. Headaches.

3. Scars in both nostrils.

4. A bump on the right side at the bridge of her nose, and an indention on the left side which prevents her from wearing glasses for any length of time.

5. A scar above the hairline over the right ear.

6. A deviated septum which is becoming more pronounced to the left.

7. Pain in her right upper teeth, due to the sinus problem.

8. The right cheek bone is lower or flatter than the left.

9. Very heavy sinus drainage every morning and during the day which causes throat problems and even nausea.

10. An arthritic like pain in the right side of her face which prevents her from sleeping on that side of the face and causes aches and pains before any change in the weather conditions.

11. She has not been able to go swimming and cannot stand the water from a shower on her face."

Dr. Ralph also testified that the plaintiff suffered from an inner ear problem causing disequilibrium which was being treated by Dr. Walter Sabiston. He testified that in his opinion, based on the length of time she had suffered from it, this would very likely be a permanent condition but he would defer to the opinion of Dr. Sabiston who was treating the plaintiff for this problem. Dr. Ralph testified further that in his opinion the plaintiff's injuries decreased her "working capability or her earning capacity."

Letters from Dr. Walter Sabiston were received into evidence without objection. In a letter dated 5 February 1979 he stated that he assumed she had a mild labrynthine disturbance; that it had been his experience that with this injury there is no permanent impairment. He stated further that she should respond to Antivert and be able to resume normal activities within six to eight weeks. He stated further that with the onset of further symptoms, she should consult with a neurosurgeon or neurologist. He wrote on 26 March 1980 that she still had a "mild disequilibrium that has been controlled by Antivert." He stated he "would expect the inner ear to respond to time" but could not put a time limit on it and would advise the plaintiff to continue with medical evaluation.

Deputy Commissioner Bryant found that the plaintiff had suffered serious head disfigurements which would tend to hamper plaintiff in her earnings and in seeking employment for which she should be compensated in the amount of $7,600.00. She also found as a fact that the plaintiff had suffered permanent damage to her sinuses which will cause excessive drainage, chronic headaches, and pain in her teeth. She found that the sinuses are important internal organs of the body for which no compensation is payable under any subdivision of G.S. 97-31 other than subdivision (24). She held that $6,000.00 was proper compensation for this part of the plaintiff's injuries. She found as a fact that plaintiff had suffered serious damage to her inner ear which had resulted in dizziness and nausea on a daily basis for two years. She found this injury was permanent, that the inner ear is an important internal organ for which no compensation is payable except under G.S. 97-31(24). She held that $3,500.00 was proper and equitable compensation for the permanent damage to the plaintiff's inner ear. Deputy Commissioner Bryant found that plaintiff had suffered no

loss of wages and concluded she was not disabled. She awarded the plaintiff compensation in the amount of $17,100.00.

The plaintiff and defendant appealed. When the matter came on for hearing before the Full Commission, the plaintiff filed a motion asking that in the event the Commission should find there was insufficient evidence to make an award for permanent partial incapacity, that the Full Commission would grant a new hearing and take further evidence. She supported this motion with three affidavits. One of the affidavits was by Dr. Sabiston in which he said that he could not say when, if ever, the symptoms of vertigo and dizziness would terminate. She filed her own affidavit which described her symptoms as they were at the time the affidavit was made shortly before the hearing before the Full Commission. She also filed an affidavit by Dr. Samuel B. McLamb, Jr. which described treatment he had given the plaintiff including drugs he had prescribed to her since the hearing before Deputy Commissioner Bryant. The motion to have a new hearing and take further evidence was denied.

The Full Commission struck in its entirety the opinion and award of Deputy Commissioner Bryant. It found the plaintiff had suffered serious disfigurement of the head which is permanent and would hamper the plaintiff in seeking employment. It held that $5,000.00 was a proper and equitable compensation for this injury. As to the evidence of the plaintiff's other injuries, the Full Commission found that the pain to her nose was such that she could not wear eyeglasses and would have to purchase contact lenses, that she had a pain in her right cheek that interfered with sleep and is extremely painful when exposed to either heat or cold. It found her face would swell when exposed to cold weather. It also found she had experienced a loss of her sense of taste and smell. The Full Commission found the plaintiff had not suffered the loss of or permanent injury to an important internal or external organ. The Full Commission also found "there is no competent evidence of record in this case at this time to show permanent partial disability based on condition of plaintiff's inner ear." It awarded the plaintiff $5,000.00.

The plaintiff appealed.

Freeman, Edwards and Vinson, by George K. Freeman, Jr., for plaintiff appellant.

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

WEBB, Judge.

At the outset we note that the plaintiff has not made any argument that there was error in the Industrial Commission's finding of fact or award as to the disfigurement to the plaintiff's head. We affirm this portion of the opinion and award.

As to the other features of this case, we hold the Industrial Commission failed to make sufficient findings of fact for us to determine whether the rights of the parties were properly determined. *See Thomason v. Cab Co.*, 235 N.C. 602, 70 S.E. 2d 706 (1952) and *Morgan v. Furniture Industries, Inc.*, 2 N.C. App. 126, 162 S.E. 2d 619 (1968). The appellant contends she sustained permanent injury to important internal organs including her ethmoid and maxillary sinuses; her inner ear which causes permanent disequilibrium; and her sense of taste and smell. She argues that she should be compensated for these injuries under G.S. 97-31(24). She also argues that as a result of all her injuries, she has a permanent partial incapacity for work for which she should be compensated under G.S. 97-30.

[1] It may be that on different evidence, findings of fact as were made in the instant case would be sufficient, but in this case we cannot so hold. In this case there was substantial uncontradicted evidence that the plaintiff had received permanent damage to her ethmoid and maxillary sinuses. The only finding of fact that related specifically to this injury was a finding that her sinuses were fractured. There was evidence that plaintiff suffered damage to her inner ear which caused dizziness which had lasted to the time of the hearing. The Commission's finding of fact on this evidence was that the plaintiff suffered a concussion of the inner ear which causes dizziness. There was also evidence that plaintiff has suffered a permanent loss of her taste and smell. The Commission's finding of fact on this evidence is that the "Plaintiff also experiences a loss of her sense of taste and smell." Under its findings of fact the Commission found that the plaintiff had "not suffered the loss of or permanent injury to an important external

or internal organ." On the evidence in this case and the findings of fact, we do not know whether the Commission reached this result because it did not consider there was permanent injury to the sinuses, inner ear, or the plaintiff's sense of taste and smell or whether the Commission did not consider any of these important internal organs. We believe there should be more complete findings of fact on the evidence as to these features of the case.

[2] As to the plaintiff's contention that she has suffered permanent partial disability, the Commission found that "there is no competent evidence of record in this case at this time to show permanent partial disability based on condition of plaintiff's inner ear." The plaintiff contends that her permanent partial disability is based not only on the problems with her inner ear but also on her other permanent injuries including sinusitis; severe headaches; inability to wear prescription glasses; heavy sinus drainage causing pain in the throat and nausea; facial pains; and lack of hand-eye coordination. The evidence is that plaintiff has to take medication for these symptoms and combined with the pain and suffering and the effects of the medicine, she has a reduced capacity for work. We believe there should be findings of fact on this evidence in order that we may determine whether the Commission has properly awarded or denied compensation for permanent partial disability under G.S. 97-30.

[3] The defendant contends there should be no award for the damage to the sinuses. It says this is so because they are not important internal organs. The defendant bases this contention on the testimony of Dr. Ralph that their only known function is to lighten the weight of the facial bones. Dr. Ralph also testified that these were important internal parts of the body. He testified further that there were nerves that run through the ethmoid sinus which were damaged as a result of the trauma causing persistent pain in her teeth. He testified further that some of the mucous production which causes excess drainage was due to the trauma to her ethmoid sinus. We believe that this testimony as to the consequences of damage to the sinuses demonstrates they are important internal organs.

We believe the loss of sense of taste and smell is compensable as the loss of an important internal organ. *See Arrington v. Engineering Corp.*, 264 N.C. 38, 140 S.E. 2d 759 (1965). The Com-

mission should make findings of fact on the evidence as to this feature of the case.

The defendant contends it was not error for the Commission not to find permanent damage to the plaintiff's inner ear because the record does not show that she had suffered permanent damage. The evidence is equivocal on this point. Dr. Ralph testified it is very likely a permanent condition but that he would defer to Dr. Sabiston's opinion. Dr. Sabiston stated in his letter that he did not think it would be permanent. In the affidavit from Dr. Sabiston which the plaintiff asked to be considered by the Full Commission, he stated that the condition had not cleared up some three years after the assault and he could not say the symptoms would ever terminate. The Commission may make findings of fact on the part of the case after considering Dr. Sabiston's testimony with the other evidence.

As to the claim of plaintiff for permanent partial disability, there was evidence that because of the pain and the drugs the plaintiff took to relieve the pain, she did not have her full capacity for work. The Commission's only finding of fact as to disability was that there was "no competent evidence of record in this case at this time to show permanent partial disability based on condition of plaintiff's inner ear." We believe there should be more complete findings of fact as to whether the plaintiff has suffered permanent injury from any or all her injuries. We note that if the Full Commission finds sufficient facts based on competent evidence that the plaintiff has suffered injuries which are compensable under G.S. 97-31 and finds she has not been permanently partially disabled for any other reason, she may not receive compensation for permanent partial disability under G.S. 97-30. *See Perry v. Furniture Co.*, 296 N.C. 38, 249 S.E. 2d 397 (1978).

[4] The evidence shows that the plaintiff had retained her job and was earning more at the time of the hearing than at the time of injury. For this reason, no compensation may be paid for permanent partial disability. If the Full Commission should find facts upon which the plaintiff is entitled to recover for permanent partial disability, it may retain jurisdiction for future adjustments in the event the plaintiff's earnings should diminish. *See Branham v. Panel Co.*, 223 N.C. 233, 25 S.E. 2d 865 (1943).

[5] The plaintiff assigns error to the Full Commission's refusal to reopen the hearings to take additional evidence. We believe this assignment of error has merit. G.S. 97-85 provides that when there is an appeal to the Full Commission it shall receive further evidence "if good ground be shown therefor." In the instant case two letters from Dr. Sabiston were received in evidence at the hearing before Deputy Commissioner Bryant. These letters were equivocal as to the permanency of the plaintiff's disequilibrium. At the hearing before the Full Commission the plaintiff offered an affidavit from Dr. Sabiston in which as a result of further treatment and examination of the plaintiff after the hearing before Deputy Commissioner Bryant, he was able to give a more definitive opinion in regard to her condition. The plaintiff also offered to introduce into evidence testimony from Dr. Samuel B. McLamb in regard to treatment she had received from Dr. McLamb after the hearing before Deputy Commissioner Bryant and her own testimony as to her treatment and symptoms during this time. All this evidence bore directly on the plaintiff's condition which was in question before the Full Commission. It was not available at the hearing before Deputy Commissioner Bryant. We believe this was "good ground" for taking further evidence. Rule XX(6) of the Rules of the Industrial Commission provides that "motions to take additional evidence on appeal before the Full Commissioner [sic] will be governed by the general law of the State for the granting of new trials on the grounds of newly discovered evidence." We believe that under this rule the motion should have been allowed. The evidence was not cumulative; the plaintiff could not have obtained it prior to the hearing before Deputy Commissioner Bryant; and there could be a different result if this evidence is considered. *See* 12 Strong's N.C. Index 3d, *Trials* § 49 (1978) for a discussion of new trials for newly discovered evidence.

[6] The plaintiff's last assignment of error deals with the attorney's fee and the costs. The plaintiff and her attorney entered into a contract under the terms of which her attorney was to receive one-third of the amount received subject to the approval of the Industrial Commission. The Full Commission allowed the plaintiff's attorney a fee of $1,500.00 which was less than one-third of the recovery. G.S. 97-90(c) provides in part:

"If an attorney has an agreement for fee or compensation under this Article, he shall file a copy or memorandum thereof with the hearing officer or Commission prior to the conclusion of the hearing. If the agreement is not considered unreasonable, the hearing officer or Commission shall approve it at the time of rendering decision. If the agreement is found to be unreasonable by the hearing officer or Commission, the reasons therefor shall be given and what is considered to be reasonable fee allowed."

The Full Commission made no finding of reasonableness or unreasonableness as to the agreement for the attorney's fee. It was therefore error under G.S. 97-90(c) not to approve the agreement.

[7] The plaintiff also contends the Full Commission did not tax all the costs of taking the deposition of Dr. Ralph. Prior to the hearing before Deputy Commissioner Bryant, Dr. Ralph moved to Florida. Deputy Commissioner Bryant ordered that Dr. Ralph's deposition be taken in Florida. The Full Commission ordered the cost of the transcript to be taxed as a part of the costs. It did not allow as a part of the costs the travel expenses of the plaintiff's attorney in taking the deposition. We believe this deposition was vital to the hearing. The travel expenses of the attorney who took the deposition is part of the cost of taking the deposition under G.S. 97-80 and should have been so taxed by the Full Commission.

For the reasons stated in this opinion, we reverse the opinion and award of the Industrial Commission and remand for further proceedings.

Reversed and remanded.

Judges VAUGHN and HILL concur.

RHONDA WALKER TALLENT v. JERRY LEE BLAKE

No. 8127SC868

(Filed 18 May 1982)

Libel and Slander § 16— insufficient evidence to support claim for slander actionable per quod—failure to show special damages

In an action instituted to recover actual and punitive damages resulting from "slanderous and defamatory statements" made by defendant, the trial court erred in failing to grant defendant's motions for directed verdict and judgment notwithstanding the verdict where plaintiff claims she was fired from her employment with defendant and defendant claims plaintiff had resigned and told a reporter "[a]ny claim Mrs. Tallent was fired is false," where such a statement did not constitute slander actionable *per se*, and where plaintiff failed to show special damages sufficient to support a claim for slander actionable *per quod*.

APPEAL by defendant from *Cornelius, Judge.* Judgment entered 24 March 1981 in Superior Court, CLEVELAND County. Heard in the Court of Appeals 2 April 1982.

O. Max Gardner III for plaintiff-appellee.

Whisnant, Lackey & Schweppe, by N. Dixon Lackey, Jr., for defendant-appellant.

HILL, Judge.

Plaintiff instituted this action to recover actual and punitive damages resulting from "slanderous and defamatory statements" made by defendant. Defendant's answer asserted truth as a defense.

Plaintiff's evidence tended to show that she worked for the School Food Service of the Cleveland County Board of Education. She did secretarial work and bookkeeping. She prepared checks for the School Food Service employees by using the computer in the central office of the Board of Education; however, she did so under the direction of Peggy Fuller. Peggy Fuller was the computer operator for the Board of Education, and she prepared the payroll checks for all employees other than those in the School Food Service. Plaintiff was not trained to operate the computer, she could not operate it on her own, and she was afraid of it. Peggy Fuller resigned her position effective 30 April 1980. On 1

May 1980, plaintiff was asked to use the computer to prepare the payroll for all ten-month employees of the Board. She responded that she did not know how to do this. Later that day, plaintiff was summoned to the office of defendant, Jerry Lee Blake, who was the superintendent of the county school system. Plaintiff told defendant that she did not know how to do the payroll. Defendant told plaintiff that she would do the job requested as best she could or else. Plaintiff testified that she asked defendant whether "or else" meant that she would be fired, that defendant said that it did, and that she left defendant's office with the understanding that she had been fired. Defendant, who was called to testify for plaintiff, testified that he told plaintiff that "or else" meant that she would be choosing not to work for the Board, that plaintiff then said that she quit, and that he regarded plaintiff as having resigned from her job. Michael Goforth, a reporter for the *Shelby Daily Star*, telephoned defendant on 2 May 1980 to ask some questions. Defendant told the reporter that two people had resigned and that "[a]ny claim Mrs. Tallent was fired is false." This statement was quoted in a newspaper article.

Defendant moved for a directed verdict at the close of plaintiff's evidence. Among other grounds, he argued that his statement to the reporter was in no way slanderous or defamatory and that plaintiff had failed either to allege or prove special damages. The trial judge allowed a directed verdict as to plaintiff's claim for punitive damages, but he otherwise denied the motion. Defendant presented no evidence and renewed his motion which again was denied.

The judge submitted two issues as to liability, which were stated and answered as follows:

> 1. Did the defendant, Jerry Lee Blake, slander the plaintiff, Rhonda Walker Tallent?
>
> [Yes.]
>
> 2. Were the statements concerning the plaintiff, Rhonda Walker Tallent, true?
>
> [No.]

The jury set actual damages at $1,500.00. Defendant moved for judgment notwithstanding the verdict based upon the same

arguments previously presented. The judge denied the motion and entered judgment on the verdict.

On appeal, defendant presents and argues six assignments of error, but the six assignments are based upon only three exceptions. These exceptions are to the denial of a directed verdict at the close of plaintiff's evidence, the denial of a directed verdict at the close of all evidence, and the denial of judgment notwithstanding the verdict. The standards applicable to a motion for a directed verdict and to a motion for judgment notwithstanding the verdict are the same. *Dickinson v. Pake*, 284 N.C. 576, 201 S.E. 2d 897 (1974); *Nytco Leasing, Inc. v. Southeastern Motels, Inc.*, 40 N.C. App. 120, 252 S.E. 2d 826 (1979). All the evidence which supports plaintiff's claim must be taken as true and must be considered in the light most favorable to plaintiff, giving her the benefit of every reasonable inference which legitimately may be drawn therefrom, with contradictions, conflicts and inconsistencies being resolved in plaintiff's favor. The issue is whether the evidence, when considered in that manner, is sufficient for submission to the jury. *Id.* Defendant's six assignments of error therefore present but a single issue. However, we must examine the record carefully in order to refine that issue.

Plaintiff asserts in her brief, "[T]his is not a case of slander. It is, rather, a case of libel *per se*." We cannot agree. The term defamation includes two distinct torts, libel and slander. In general, libel is written while slander is oral. Prosser, Law of Torts (4th ed. 1971), § 111, p. 737. Libel, being criminal in origin, always was regarded as the greater wrong, and greater responsibility was attached to it. "It was accordingly held that some kinds of defamatory words might be actionable without proof of any actual damage to the plaintiff if they were written, where such damage must be proved if they were spoken. [Footnote omitted.] This remains the chief importance of the distinction." *Id.* § 112, p. 752. *Accord, Kindley v. Privette*, 241 N.C. 140, 84 S.E. 2d 660 (1954). The distinction between libel and slander is sometimes a difficult one to make. For example, an interview given to a newspaper reporter may support an action for libel as well as slander. The speaking of defamatory words to a newspaper reporter will support an action for slander. However, the speaking of such words to a reporter also will support an action for libel if the speaker intends that his words be embodied

forthwith in a physical form and the words are subsequently so embodied. *Bell v. Simmons*, 247 N.C. 488, 101 S.E. 2d 383 (1958).

The present case concerns a statement made by defendant to a reporter that was then quoted in a newspaper article. Under the above principles, plaintiff might have been able to pursue both theories, libel and slander, against defendant. However, plaintiff's case was tried solely on the theory of slander; no issue as to libel was submitted. In fact, plaintiff did not present the newspaper article in evidence. The jury instructions have not been included in the record, and we must assume that the judge correctly instructed the jury in accordance with the issue submitted, the issue of slander. The argument on defendant's motion for a directed verdict has been included in the record. The argument was in terms of slander. The theory upon which the case was tried must prevail in considering the appeal, interpreting the record, and determining the validity of exceptions. *Paul v. Neece*, 244 N.C. 565, 94 S.E. 2d 596 (1956). A party may not acquiesce in the trial of his case upon one theory below and then argue on appeal that it should have been tried upon another. *Bryan Builders Supply v. Midyette*, 274 N.C. 264, 162 S.E. 2d 507 (1968). To put it more colorfully, "the law does not permit parties to swap horses between courts in order to get a better mount in the Supreme Court." *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934). This is true with respect to a motion for directed verdict. In passing upon a trial judge's ruling as to a directed verdict, we cannot review the case as the parties might have tried it; rather, we must review the case as tried below, as reflected in the record on appeal. *See Feibus & Company, Inc. v. Godley Construction Co.*, 301 N.C. 294, 271 S.E. 2d 385 (1980). This case was tried on the theory of slander, and plaintiff has not appealed or assigned as error the trial judge's failure to submit an issue as to libel. Therefore, plaintiff may not argue the law of libel on appeal.

In the present case, then, the issue for our decision is whether the evidence, when considered in the light most favorable to plaintiff, was sufficient for submission to the jury on the theory of slander. In arguing below that the evidence was insufficient, defendant stated, among other grounds, that his statement was not defamatory and that plaintiff had failed to prove special damages. We rest our decision on the second of these grounds.

Slander may be actionable *per se* or only actionable *per quod.* Special damages must be pleaded and proved in the latter case, but not the former. *Badame v. Lampke,* 242 N.C. 755, 89 S.E. 2d 466 (1955); *Williams v. Rutherford Freight Lines, Inc. and Willard v. Rutherford Freight Lines, Inc.,* 10 N.C. App. 384, 179 S.E. 2d 319 (1971). There are four categories of slander actionable *per se.*

> Decisions in this State generally limit false statements which may be classified as actionable *per se* to those which charge plaintiff with a crime or offense involving moral turpitude, impeach his trade or profession, or impute to him a loathsome disease. (A fourth category has been added by statute; that is, statements charging incontinency to a woman. G.S. 99-4.)

Williams v. Rutherford Freight Lines, Inc. and Willard v. Rutherford Freight Lines, Inc., supra at 388, 179 S.E. 2d at 322. The alleged slander in the present case can be actionable *per se* only if it comes under the second category listed above, *i.e.,* statements which impeach one's trade or profession. In order to come within this category of slander, a false statement must do more than merely injure a person in his business. The false statement "(1) must touch the plaintiff in his special trade or occupation, and (2) must contain an imputation necessarily hurtful in its effect on his business." *Badame v. Lampke, supra* at 757, 89 S.E. 2d at 468. The present statement, at its worst, indicates that plaintiff lied in relating the circumstances under which she left her job with the Board of Education. Such a statement does not impeach the plaintiff's occupation.

> North Carolina cases have held consistently that alleged false statements made by defendants, calling plaintiff "dishonest" or charging that plaintiff was untruthful and an unreliable employee, are not actionable per se. *See Satterfield v. McLellan Stores,* 215 N.C. 582, 2 S.E. 2d 709 (1939); *Ringgold v. Land,* 212 N.C. 369, 193 S.E. 267 (1937). Such false statements may be actionable *per quod;* if so, some special damages must be pleaded and proved. *Ringgold, supra.*

Stutts v. Duke Power Co., 47 N.C. App. 76, 82, 266 S.E. 2d 861, 865 (1980). We conclude that the evidence in the present case did not show a slander actionable *per se* and, thus, that plaintiff's evidence, in order to withstand defendant's motions for directed

verdict and judgment notwithstanding the verdict, had to show special damages.

In the law of defamation, special damage means pecuniary loss. Emotional distress and humiliation alone are not enough to support a claim actionable *per quod*. *Williams v. Rutherford Freight Lines, Inc. and Willard v. Rutherford Freight Lines, Inc., supra*. Furthermore, "where, as here, it is essential that some special damage must occur before a claim is actionable, *at least some special damage must have occurred by the time the action is instituted*. *Id.* at 390-91, 179 S.E. 2d at 324 (emphasis added). *Accord, Scott v. Harrison*, 215 N.C. 427, 2 S.E. 2d 1 (1939); *Crawford v. Barnes*, 118 N.C. 912, 24 S.E. 670 (1896). The *Scott* case was an action for slander in which the plaintiff alleged that as a result of the slander, her husband, a high school principal, had been required to accept as a condition of re-election to his position that he would not seek re-election in the future. The Supreme Court stated as follows:

> It is suggested that the condition imposed upon plaintiff's husband at the time of his re-election might eventually lead to his unemployment and result in damage to her. This, we think, is too remote and speculative for present consideration. Newell, Slander and Libel, 4th Ed., section 746, quotes *DeGrey, C.J.*, in *Onslow v. Horne*, 3 Wils., 177, 2 W. Bl., 750: "I know of no case where ever an action for words was grounded upon eventual damages which may possibly happen to a man in a future situation;" and refers to the established rule that the damages must have accrued before the institution of the suit.

Scott v. Harrison, supra at 431, 2 S.E. 2d at 3. The *Crawford* case was an action for slander in which the Supreme Court upheld dismissal because "[t]he special damage alleged, to-wit, the loss of the election of the plaintiff to Congress, did not accrue, according to the complaint, till 6 November, and the summons was issued 17 September. The damage not having accrued before the summons issued, the action cannot be maintained." *Crawford v. Barnes, supra* at 915-16, 24 S.E. at 671.

The alleged slander in the present case occurred on 2 May 1980. Plaintiff instituted her action on 13 May 1980. The evidence reveals no special damages resulting from the alleged slander at

that time. The loss of plaintiff's job with the Board of Education, of course, resulted from the events of 1 May 1980, not from the alleged slander of 2 May 1980. Plaintiff testified that she sought other employment, but she was not sure of the dates involved. She was not sure whether she had sought other employment at the time she filed this action. Plaintiff testified that she did not receive employment in May 1980, that she received employment in June 1980 which she held for only two weeks and lost by "mutual agreement" and that she received employment in August 1980 that she was still holding at the time of trial. There is nothing in her testimony to indicate that she ever was denied employment because of the alleged slander by defendant. Plaintiff also testified that she fell behind in monthly payments on various accounts in June and July of 1980, and that in October 1980 she filed "a Chapter Thirteen, which is part of the Bankruptcy Code, in which I made monthly payments to the Court to pay off my debts." This testimony shows no pecuniary loss, and it involves events occurring after institution of this action on 13 May 1980. Finally, plaintiff testified that she suffered worry, loss of sleep, and emotional problems that led her to go to a doctor for medication in June and July of 1980. Special damages include illness sufficient to require medical care and expense. *See Bell v. Simmons, supra.* However, plaintiff's testimony shows no such damages before 13 May 1980 and fails to show the amount of any medical expenses incurred thereafter.

Therefore, plaintiff failed to show special damages sufficient to support a claim for slander actionable *per quod*, and defendant's motions for directed verdict and judgment notwithstanding the verdict should have been allowed.

Reversed.

Judge BECTON concurs.

Judge WELLS concurs in result.

STATE OF NORTH CAROLINA v. BENJAMIN JACK ALLEN

No. 816SC1062

(Filed 18 May 1982)

1. Criminal Law §§ 77.1, 79— declarations by co-conspirators—admissions by defendant

In a prosecution for conspiracy to commit armed robbery, declarations made by defendant's co-conspirators that they needed a gun, that they should rob a certain store and that they should kill a man in the store were not inadmissible as hearsay since they were not offered to prove their truth but were offered to prove that they were asserted by the various co-conspirators and to establish the circumstances surrounding the alleged conspiracy. Furthermore, statements made by defendant that he said he had a gun but would have nothing to do with any trouble his companions got into and that defendant went into the store with the gun but returned saying that he "couldn't pull the gun" were admissible as admissions by defendant.

2. Conspiracy § 6— conspiracy to commit armed robbery—sufficiency of evidence

The State's evidence was sufficient for the jury in a prosecution of defendant for conspiracy to commit armed robbery where it tended to show that defendant was present in a group of six persons when someone in the group suggested that they rob a certain store; defendant, upon a suggestion that a gun would be needed for the robbery, volunteered and provided a .22 caliber pistol to be used in the planned robbery; and three of defendant's companions entered a store and forcibly removed cash from the store's cash register by threatening the attendant with a gun wielded by one of the companions.

3. Criminal Law § 87.1— leading question—admission not abuse of discretion

The trial court did not abuse its discretion in permitting the State to ask its own witness whether defendant had gone into a store which was robbed at any time after his 1:00 a.m. visit to the store, especially where the witness replied negatively, since the question did not improperly place any prejudicial matter before the jury and was not asked to impugn the witness's credibility.

4. Criminal Law § 90— impeachment of own witness—waiver of objection

Even if the State improperly impeached its own witness by asking if the witness was afraid to testify to the full truth, defendant waived his objection thereto by failing to make a timely objection.

5. Criminal Law § 89.6— impeachment of State's witness not prohibited

The trial court's ruling which prevented a State's witness from testifying about any fear he might have in testifying "for defendant's attorney" did not prohibit defendant from impeaching the witness since the ruling did not bar defendant's attorney from asking the witness about his fear to testify truthfully.

6. Criminal Law § 89.3— corroboration of witness—prior consistent statements

Prior statements of two State's witnesses were properly admitted to corroborate the testimony of the witnesses where the prior statements contained no material additional information and were not inconsistent with the testimony at trial.

APPEAL by defendant from *Fountain, Judge.* Judgment entered 6 May 1981 in Superior Court, BERTIE County. Heard in the Court of Appeals on 8 March 1982.

Defendant was charged in a proper bill of indictment with conspiracy to commit armed robbery. Upon defendant's plea of not guilty, the State presented evidence tending to show the following:

In the early morning hours of 31 July 1980, defendant was gathered with Dennis Demory, Grady Rice, Roy Johnson, Willie McCoy Outlaw, and Mark Bell. One member of the group stated that he was hungry and wanted some money and it was suggested that they rob the Flashbuy Grocery Store. When one member of the group proposed to the others that a gun would be needed to rob the store, defendant stated that he had a gun. The other members told defendant to go and get his gun, and defendant responded by leaving and returning between five to twenty minutes later with a .22 caliber pistol. Defendant gave the gun to Grady Rice, and at about 5:30 a.m. Rice, Bell, and Johnson entered the Flashbuy Grocery Store. Grady Rice was wielding the gun and said to the store's attendant, "This is a stick-up," and told him to "back up." The attendant, who "was scared," backed up and opened the cash register and told Rice, Bell, and Johnson to take anything they wanted. Johnson got money out of the cash register and some money from a customer, and then Rice, Bell, and Johnson ran out of the store.

The jury found defendant guilty of conspiracy to commit armed robbery, and the court entered a judgment imposing a prison sentence of not less than eight nor more than ten years. Defendant Appealed.

Attorney General Rufus L. Edmisten, by Special Deputy Attorney General Myron C. Banks, for the State.

Taylor & McLean, by Donnie R. Taylor, for defendant appellant.

HEDRICK, Judge.

[1] The first assignment of error brought forth in defendant's brief challenges the admission into evidence of testimony by persons alleged to be defendant's co-conspirators about declarations by other of the alleged co-conspirators. Defendant argues that this testimony was "hearsay," and that its admission "denied defendant the right to cross examine the declarants." The challenged testimony includes the following: Demory's testimony that someone said, prior to the robbery of the Flashbuy, "I want some money;" Demory's testimony that prior to the robbery of the Flashbuy someone suggested that the group rob the Flashbuy and shoot the store's attendant and that "[t]hey needed a gun;" the testimony of several witnesses that defendant said he had a gun and that when defendant provided the gun he stated that he would have nothing to do with any trouble they got into; Grady Rice's testimony that prior to the robbery defendant went into the Flashbuy with the gun but returned saying that he "couldn't pull the gun;" and Grady Rice's testimony that after the robbery one alleged co-conspirator said that another should return to the store and kill a man present in the store.

Whether the extrajudicial declaration of a co-conspirator is offered to impose substantive vicarious liability on a defendant co-conspirator, *see State v. Tilley*, 292 N.C. 132, 232 S.E. 2d 433 (1977) and 2 Stansbury's N.C. Evidence § 173 (Brandis rev. 1973), or to avoid the rule excluding hearsay testimony by charging the defendant co-conspirator with "vicarious admission of the facts declared," *see* McCormick's Handbook of the Law of Evidence, § 267 at 645 (2d ed. 1972), the declaration must be made by the co-conspirator "during the course of and in pursuit of the goals of the illegal scheme." *See State v. Tilley, supra* at 132, 232 S.E. 2d at 438. The evidence challenged in the present case, however, was offered for neither purpose. First, as discussed below, defendant's liability was not established vicariously but by his own direct acts of providing a gun to the other co-conspirators. Second, the challenged evidence does not even amount to hearsay, and therefore need not conform to an exception to the hearsay rule; the assertion of a person other than the presently testifying witness "is not hearsay when offered into evidence for some purpose other than to prove the truth of the matter asserted," *State v. Gray*, --- N.C. App. ---, ---, 286 S.E. 2d 357, 361 (1982), and

the extrajudicial assertions in the present case (e.g., that the co-conspirators needed a gun, that they should rob the Flashbuy, that they should kill a man in the store) were offered not to prove their truth, but to prove that they *were asserted* by the various co-conspirators and to thereby establish the circumstances surrounding the alleged conspiracy. Defendant had ample opportunity to cross-examine the co-conspirator witnesses on the veracity of their testimony that such assertions were made. Furthermore, the extrajudicial declarations of defendant (one of which may have been offered to prove the truth of the matter asserted) are admissible as admissions of a party opponent. *See State v. Cobb*, 295 N.C. 1, 243 S.E. 2d 759 (1978). Hence, the challenged testimony was properly admitted into evidence, and this assignment of error is overruled. *See also State v. Puryear*, 30 N.C. App. 719, 228 S.E. 2d 536, *disc. rev. denied and appeal dismissed*, 291 N.C. 325, 230 S.E. 2d 678 (1976).

By his next assignment of error, defendant argues that the court erred in denying defendant's motions for "directed verdict" and "for appropriate relief based upon lack of sufficiency of evidence to support the verdict."

"A motion for a directed verdict has the same effect as a motion for nonsuit and the test of the sufficiency of the evidence to withstand either motion is the same." *State v. Lowe*, 295 N.C. 596, 604, 247 S.E. 2d 878, 884 (1978). Upon such motions,

> the trial judge is required to consider the evidence in the light most favorable to the State, take it as true, and give the State the benefit of every reasonable inference to be drawn therefrom . . . [;] [r]egardless of whether the evidence is direct, circumstantial, or both, if there is evidence from which a jury could find that the offense charged has been committed and that the defendant committed it, the motion[s] should be overruled.

State v. Hood, 294 N.C. 30, 44, 239 S.E. 2d 802, 810 (1978). Similarly, if the evidence meets such test and was thereby sufficient to submit the case to the jury, a motion for appropriate relief for insufficiency of the evidence is also properly denied. *See* G.S. § 15A-1414(a), (b)(1)(c).

In the present case, the State was required to present sufficient evidence from which the jury could find defendant guilty of

conspiracy to commit armed robbery. "When the state attempts to prove a criminal conspiracy, 'it must show an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way.' " *State v. Aleem*, 49 N.C. App. 359, 362, 271 S.E. 2d 575, 578 (1980). The offense of criminal conspiracy is complete when the agreement is made, since the conspiracy itself, not the execution of the deed, is the gravamen of the offense. *State v. LeDuc*, 48 N.C. App. 227, 269 S.E. 2d 220 (1980). "Those who aid, abet, counsel or encourage, as well as those who execute their designs[,] are conspirators." *State v. Covington*, 290 N.C. 313, 342, 226 S.E. 2d 629, 648 (1976).

[2] The object of the conspiracy for which defendant was charged was armed robbery, the elements of which, according to *State v. Davis*, 301 N.C. 394, 397, 271 S.E. 2d 263, 264 (1980), are

> the taking of personal property from another in his presence or from his person without his consent by endangering or threatening his life with a firearm, with the taker knowing that he is not entitled to the property and the taker intending to permanently deprive the owner of the property.

In the present case, the State presented evidence tending to show that defendant was present when someone in a group consisting of defendant, Demory, Rice, Johnson, Outlaw, and Bell suggested that they rob the Flashbuy; that defendant, upon a suggestion that a gun would be needed for the robbery, volunteered and provided a .22 caliber pistol to be used in the planned robbery; and that Rice, Bell, and Johnson entered the Flashbuy and forcibly removed cash from the store's cash register by threatening the store's attendant with a gun wielded by Rice. This evidence is sufficient to enable the jury to find that defendant was present when the robbery plans were made; that defendant, with knowledge of the criminal plans, aided the perpetrators of the robbery; and, hence, that defendant knowingly entered into the unlawful confederation to commit armed robbery. This assignment of error is without merit.

[3] Of the exceptions properly brought forward in defendant's next two assignments of error, defendant first argues that the court erred in allowing the State to ask one of its witnesses, Dennis Mitchell, whether defendant had gone into the Flashbuy anytime after his 1:00 a.m. visit to the store. Although Mitchell

answered in the negative, defendant contends that such questioning was leading and that it improperly insinuated that defendant had been in the store after 1:00 a.m. "[I]t is within the sound discretion of the trial judge to determine whether counsel may ask leading questions, and his ruling will not be disturbed on appeal in the absence of gross abuse." *State v. Harris*, 290 N.C. 681, 694, 228 S.E. 2d 437, 444 (1976). "[A] question in which counsel assumes or insinuates a fact not in evidence, and which receives a negative answer, is not evidence of any kind." *State v. Smith*, 289 N.C. 143, 157, 221 S.E. 2d 247, 255 (1976). A prosecuting attorney, however, may not "place before the jury by . . . insinuating questions . . . incompetent and prejudicial matters not legally admissible in evidence." *State v. Smith, supra* at 158, 221 S.E. 2d at 256. The challenged question in the present case, particularly in light of the witness's negative response, did not improperly place any prejudicial matter before the jury; rather, the questioning was merely the prosecuting attorney's attempt to elicit from the witness an answer to the question of whether defendant ever entered the Flashbuy after 1:00 a.m. The question was not asked to impugn the witness's credibility, and the court's permitting such questioning was not an abuse of discretion.

[4] The other exception defendant argues under these two assignments of error is that the State impeached its own witness, Dennis Mitchell, by asking if he were afraid to testify to the full truth. The State twice asked Mitchell, without objection, if he was afraid, and Mitchell twice answered in the negative. Defendant did not object until the third such question. "[T]he admission of evidence without objection waives prior or subsequent objection to the admission of evidence of a similar character." *State v. Campbell*, 296 N.C. 394, 399, 250 S.E. 2d 228, 231 (1979). In the present case, the witness negatived any suggestion that fear influenced his testimony; nevertheless, even if the State were guilty of improperly impeaching its own witness, defendant has waived his objection thereto by failing to make a timely objection. These assignments of error have no merit.

[5] Defendant next assigns error to the court's "not permitting the defense counsel to cross examine a state's witness as to bias and motives for testifying." The exchange to which defendant takes exception occurred during defendant's attorney's cross examination of Willie Outlaw and is set out in the record as follows:

Q. And you are scared to testify and tell the truth for me; is that the case?

WITNESS: For not to tell the truth?

Q. Were you scared to testify *for me*?

MR. BEARD: I'm going to object to testifying *for him*. If he wants to ask him about telling the truth—

THE COURT: Sustained.

EXCEPTION NO. 41.

[Emphasis added.]

The record reflects that the court's ruling did not bar defendant's attorney from asking the witness about his fear to testify truthfully; rather, the ruling prevented the witness from testifying about any fear he might have in testifying *for defendant's attorney*. Since defendant's contention that he was not allowed to impeach the State's witness is unfounded, this assignment of error is overruled.

[6] Finally, defendant assigns error to the court's "allowing the testimony which was noncorroborative of the State's witnesses" and "allowing the S.B.I. agent to read from a witness'[s] statement." Defendant argues that testimony about the prior statement of Dennis Demory that defendant went home to get a gun and returned in fifteen minutes, and about the prior statement of Dennis Mitchell describing the events which had occurred on the morning of 31 July 1980 were noncorroborative hearsay and violative of the rule preventing the State from impeaching its own witnesses by using prior inconsistent statements.

" '[I]f a prior statement of the witness, offered in corroboration of his testimony at the trial, contains additional evidence going beyond his testimony, the State is not entitled to introduce the "new" evidence under the claim of corroboration.' " *State v. Warren*, 289 N.C. 551, 557, 223 S.E. 2d 317, 321 (1976). If, however, "the testimony offered in corroboration is generally consistent with the witness's testimony, slight variations will not render it inadmissible." *State v. Warren, supra* at 557, 223 S.E. 2d at 321.

In the present case, the challenged prior statements of Dennis Demory, testified to by Deputy Daniel Morgan, were generally

consistent with Demory's testimony at trial about defendant's volunteering to the group of alleged co-conspirators the use of a gun and his going home to retrieve such gun; the prior statements contained no material additional information and were not inconsistent with the testimony at trial. Similarly, the challenged prior statements of Dennis Mitchell, testified to by S.B.I. Agent Kent Inscoe, were generally consistent with Mitchell's testimony at trial about the events at the Flashbuy on 31 July 1980; the prior statements added nothing materially to what had been testified to by witness Mitchell and other witnesses, nor were they inconsistent with the testimony at trial. The admission of these statements, therefore, was not error, and this assignment of error has no merit.

We hold defendant had a fair trial free of prejudicial error.

No error.

Chief Judge MORRIS and Judge VAUGHN concur.

STATE OF NORTH CAROLINA v. CHARLES WAYNE STRANGE

No. 8127SC1069

(Filed 18 May 1982)

Criminal Law § 60.5— sufficiency of fingerprint evidence to withstand motion to dismiss

In an action in which defendant was charged with the larceny of a truck, the evidence was sufficient to support jury findings that: (1) a fingerprint lifted from the inside mirror of the truck was the defendant's fingerprint; (2) this fingerprint was placed there by defendant at the time alleged in the bill of indictment; and (3) the defendant was the person who committed the crime charged in the bill.

Judge MARTIN (Robert M.) dissenting.

APPEAL by defendant from *Friday, Judge*. Judgment entered 8 May 1981 in Superior Court, GASTON County. Heard in the Court of Appeals 9 March 1982.

Defendant was charged with breaking or entering into the home of James T. Grindle and larceny therefrom. He was also

charged in a separate indictment with felonious larceny of Grindle's pickup truck. The breaking or entering and larceny charges were dismissed, and he was convicted of the felonious larceny of the truck belonging to Grindle. Grindle's home was for sale. He began work at 6:00 a.m. on 18 November 1980, and his wife left the home for work about 6:00 a.m. He had two sets of keys for the truck; the "extra" keys were left hanging under the telephone near the kitchen sink.

A realtor, Helen Johnson, showed the Grindle home to defendant and his mother about 11:00 a.m. on 18 November 1980. They entered the house by a key the realtor had. While in the house, Ms. Johnson did not see defendant pick up anything in the house. There were no vehicles on the premises while they were there.

Mr. and Mrs. Grindle returned to the house about 3:00 p.m. When they left to take Mrs. Grindle to work at her second job, the pickup truck was at the house. It was unlocked and the keys were on the kitchen sink. When Grindle returned about 9:45 p.m., he found the truck was missing, along with two television sets, a CB radio, and "a couple of electric razors." The front door was open. He located the truck about two days later and notified the police.

The police lifted a fingerprint from the inside mirror in the truck and it was identified as being made by the right thumb of the defendant.

Defendant's evidence showed that his mother was with him constantly until about 6:00 p.m. when defendant and his brother went to visit another brother. They returned in about an hour and defendant remained at home the rest of the night. Defendant is an epileptic, does not drive a car, and does not have a driver's license. Defendant's brother Ralph testified that defendant and another brother, Hubert, came to his house that evening about 6:00 or 6:30 and stayed about an hour.

Attorney General Edmisten, by Assistant Attorney General Robert R. Reilly, for the State.

Assistant Public Defender, 27A Judicial District, Kellum Morris for defendant appellant.

MARTIN (Harry C.), Judge.

The decisive question on this appeal is whether the trial court erred in denying the defendant's motion to dismiss at the close of all the evidence. Such a motion requires the court to consider all the evidence in the light most favorable to the state. *State v. McKinney*, 288 N.C. 113, 215 S.E. 2d 578 (1975). In this case the state relies in part upon circumstantial evidence. If, however, there is substantial evidence to support a finding that the offense charged has been committed and that defendant committed it, the motion to dismiss should be denied whether the evidence is direct, circumstantial, or both. *Id.*

The only evidence tending to show that defendant was ever in James T. Grindle's truck is a latent fingerprint found on the inside rearview mirror of the truck on 20 November 1980. The determinative question, therefore, is whether the state offered substantial evidence that the fingerprint could only have been placed on the mirror at the time of the larceny of the truck.

The sufficiency of fingerprint evidence to withstand a motion to dismiss has been considered by our Supreme Court in numerous cases. *See, e.g., State v. Scott*, 296 N.C. 519, 251 S.E. 2d 414 (1979); *State v. Irick*, 291 N.C. 480, 231 S.E. 2d 833 (1977); *State v. Miller*, 289 N.C. 1, 220 S.E. 2d 572 (1975). Justice Huskins stated the applicable principles in *State v. Miller*, 289 N.C. 1, 4, 220 S.E. 2d 572, 574 (1975):

> These cases establish the rule that testimony by a qualified expert that fingerprints found at the scene of the crime correspond with the fingerprints of the accused, when accompanied by substantial evidence of circumstances from which the jury can find that the fingerprints could only have been impressed at the time the crime was committed, is sufficient to withstand motion for nonsuit and carry the case to the jury. The soundness of the rule lies in the fact that such evidence logically tends to show that the accused was present and participated in the commission of the crime.
>
> What constitutes substantial evidence is a question of law for the court. What the evidence proves or fails to prove is a question of fact for the jury. *State v. Stephens*, 244 N.C. 380, 93 S.E. 2d 431 (1956).

Circumstantial evidence that the fingerprint could only have been impressed at the time the crime was committed comes in several different forms. *See* Annot., 28 A.L.R. 2d 1115, 1154-57 (1953); *Scott, supra.* When a defendant takes the stand and denies that he was ever at the scene of the crime, his inability to offer a plausible explanation of the presence of his fingerprints is some evidence of guilt. Coupled with the appearance of his fingerprints at the scene, it may be enough to send the case to the jury. *Miller, supra.*

The defendant did not testify, but evidence for the state and defendant indicates that defendant and his mother were in the Grindle home on the morning of 18 November 1980. Although the truck was not on the premises at the time defendant was in the Grindle home, an ignition key to the truck was evidently in the kitchen. Grindle had two sets of keys for his truck. He had never seen the defendant before the theft. Defendant's evidence established an alibi as his defense. There was no evidence of forcible entry into Grindle's home or that his truck had been "straight wired" in order to start it.

All the evidence, therefore, leads to the logical and permissible inference that defendant's fingerprint could only have been impressed on the truck at the time of the robbery. All the evidence shows that defendant never had any contact with the truck except at the time of the robbery.

When considered in the light most favorable to the state, the evidence is sufficient to support jury findings that: (1) the fingerprint lifted from the inside mirror of the truck was the defendant's fingerprint; (2) this fingerprint was placed there by defendant at the time alleged in the bill of indictment; and (3) the defendant was the person who committed the crime charged in the bill. *State v. Jackson*, 284 N.C. 321, 200 S.E. 2d 626 (1973). The evidence satisfies the rule of *Miller, supra*, and the case was properly presented to the jury.

We find no merit in defendant's contentions that the fingerprint evidence was improperly allowed into evidence, *State v. Foster*, 284 N.C. 259, 200 S.E. 2d 782 (1973), or that the witness Sipe was not properly qualified as an expert in the field of fingerprint identification, 1 Stansbury's N.C. Evidence § 133 (Brandis rev. 1973).

No error.

Judge WHICHARD concurs.

Judge MARTIN (Robert M.) dissents.

Judge MARTIN (Robert M.), dissenting.

I cannot agree that on this record the State has produced substantial evidence that defendant's fingerprint could only have been impressed on James Grindle's truck at the time of the crime. This is not a case where defendant took the stand and denied that he was ever at the scene of the crime. *See, State v. Miller*, 289 N.C. 1, 220 S.E. 2d 572 (1975). In the present case, defendant did not testify. The court is not permitted to infer from defendant's silence that his fingerprint could only have been impressed upon the mirror during the commission of the crime. *State v. Scott*, 296 N.C. 519, 251 S.E. 2d 414 (1979). Neither the court nor the jury may draw any inference from the election by the defendant not to testify in his own behalf. *State v. Cutler*, 271 N.C. 379, 156 S.E. 2d 679 (1967).

The only evidence in this case tending to show when the fingerprint could have been impressed was the testimony of James Grindle, the owner of the truck, that he had "never seen Mr. Strange before." Mr. Grindle testified that the truck was unlocked the day it was stolen and nothing in the record indicates that the truck was ever locked. Both police officers who testified as expert witnesses on the fingerprint evidence could not give any opinion as to *when* the fingerprint was impressed on the mirror.

On its facts, this case is similar to *State v. Scott, supra*, in which the defendant was charged with murder and attempted robbery. There the defendant's thumbprint was found on a metal box where the victim's family kept its valuables. The victim's niece, who lived with him, testified that the defendant had never been in the house. The court held that defendant's motion to dismiss should have been allowed, because the niece worked outside the home five days per week and her testimony did not substantially exclude the possibility that defendant might have visited the house during the niece's absence for some lawful or unlawful purpose in the weeks preceding the murder.

Similarly in the present case, the fact that Mr. Grindle had never seen the defendant does not constitute substantial evidence that defendant's fingerprint could only have been imprinted on the mirror during the larceny of the truck. Mr. Grindle was in no position to personally know every time anyone entered his unlocked truck. There was no additional evidence of defendant's guilt. *See, State v. Jackson*, 284 N.C. 321, 200 S.E. 2d 626 (1973); *State v. Foster*, 282 N.C. 189, 192 S.E. 2d 320 (1972).

In the light of all these facts, I am constrained to hold that the evidence was insufficient to withstand a motion to dismiss. The burden is not upon the defendant to explain the presence of his fingerprint but upon the State to prove his guilt. I must conclude that the evidence introduced in the present case "is sufficient to raise a strong suspicion of the defendant's guilt but not sufficient ot remove that issue from the realm of suspicion and conjecture." *State v. Cutler, supra*, at 383, 156 S.E. 2d 682. For the foregoing reasons the trial court should have allowed defendant's motion to dismiss.

IN THE MATTER OF THE FORECLOSURE OF THE DEED OF TRUST OR MORTGAGE OF A. C. BURGESS, JR., SINGLE GRANTOR, TO L. B. HOLLOWELL, JR., TRUSTEE FOR GASTONIA MUTUAL SAVINGS AND LOAN ASSOCIATION, AS RECORDED IN DT 1467, P. 287, AND BILLIE D. CLINE, INTERVENOR

No. 8127SC888

(Filed 18 May 1982)

1. Mortgages and Deeds of Trust § 31— confirmation of foreclosure resale—pending appeals in related cases—mootness

The clerk of court did not err in confirming a foreclosure resale of property because of pending appeals in the Court of Appeals of related cases which raised issues as to the title of the borrower's property and the terms of and balance owing on the borrower's note to the mortgage lender. Furthermore, the issue as to whether the superior court should have stayed ratification of the order of confirmation because of the pending appeals became moot when each of the cases was decided by the Court of Appeals against respondents' interests. G.S. 45-21.29(h).

2. Mortgages and Deeds of Trust § 31— confirmation of foreclosure resale—effect of appeal time for prior order

The clerk of court did not violate her duty under G.S. 45-21.29(j) in confirming a foreclosure resale because the time for appealing an order by the trial court denying a motion to restrain confirmation of the resale had not passed when no notice of appeal had been given at the time of the confirmation.

3. Appeal and Error § 42— matters omitted from record—presumption of correctness

The trial court's order that a prior action was *res judicata* as to issues raised by one respondent's motion to restrain confirmation of a foreclosure resale will be presumed correct where neither the prior action nor the motion is in the record on appeal.

APPEAL by respondents Horace M. DuBose, III and Robert J. Bernhardt, trustees, from *Cornelius, Judge.* Order signed 16 April 1981 in Superior Court, GASTON County. Heard in the Court of Appeals 6 April 1982.

This foreclosure action has been before us on at least five previous occasions. Although a procedural and factual history of this action was given in *DuBose v. Savings and Loan Assoc.*, 55 N.C. App. 574, 286 S.E. 2d 617 (1982), *cert. denied*, 305 N.C. 584, 292 S.E. 2d 5 (1982), this history bears repeating.

On 12 October 1979 the foreclosure action was instituted by L. B. Hollowell, Jr., trustee for Gastonia Mutual Savings and Loan Association (hereinafter the Association). Prior to this, on 30 May 1978, A. C. Burgess, Jr., had given a promissory note to the Association in the amount of $56,000.00. The note was secured by a deed of trust encumbering five residential lots owned by Burgess. After Burgess' default on the note, respondents, trustees for various creditors of Burgess, were given notice of the foreclosure hearing pursuant to the procedure for a foreclosure sale formulated in G.S. 45-21.16 *et seq.* On 8 November 1979 the Clerk of Superior Court of Gaston County entered an order authorizing foreclosure. The Gaston County Superior Court affirmed this order on 27 November 1979 and respondents appealed to this Court. We affirmed the order authorizing a foreclosure sale on the Association's behalf. *In re Foreclosure of Burgess*, 47 N.C. App. 599, 267 S.E. 2d 915, *appeal dismissed*, 301 N.C. 90, 273 S.E. 2d 311 (1980). A second notice of foreclosure was then filed on 9

September 1980. On 2 October 1980 the trial court entered an order, pursuant to Rule 60 of the North Carolina Rules of Civil Procedure, vacating a default judgment against Burgess. The default judgment had been entered on behalf of Southern Athletic/Bike for a debt owing to this corporation and guaranteed by Burgess. Southern Athletic/Bike thereafter appealed to this Court. Also on 2 October 1980, respondents sought injunctive relief from the foreclosure sale pursuant to G.S. 45-21.34 and were granted a temporary restraining order.[1] On 14 November 1980 the trial court dissolved this temporary order and denied respondents' motion for a preliminary injunction. Earlier, on 7 November 1980, the trial court entered an order setting aside a sheriff's deed wherein Burgess' property had been conveyed to respondents on 14 February 1979.[2] Respondents gave notice of appeal from both of these November orders.

A foreclosure sale of the Burgess property was conducted on 15 December 1980. After various upset bids were advanced and the necessary resales were held, Billie D. Cline became the owner of the property at the final resale held 6 February 1981. The Clerk confirmed this resale in her order dated 27 February 1981. On 5 March 1981 respondents appealed to the superior court from the order of confirmation.

On 2 April 1981 Cline moved to intervene in the foreclosure dispute between respondents and the Association and "for confirmation of the resale of the property; or, in the alternative, for a refund of the purchase price paid and for improvements made to the property." In their response to this motion, DuBose and Bernhardt moved to continue the hearing on Cline's motion for the reason that there were cases presently pending before this Court which allegedly related to the right of the trial court to confirm

1. G.S. 45-21.34 provides: "Any owner of real estate, or other person, firm or corporation having a legal or equitable interest therein, may apply to a judge of the superior court, prior to the confirmation of any sale of such real estate by a mortgagee, trustee, commissioner or other person authorized to sell the same, to enjoin such sale or the confirmation thereof, 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. . . ."

2. Respondents, representing Southern Athletic/Bike and other creditors who had obtained judgments against Burgess, had elected to execute on Burgess' property and had purchased said property at the execution sale.

the foreclosure sale on Cline's behalf. The respondents further alleged that these pending appeals constituted an objection to the confirmation or ratification of the resale.

After the hearing on the parties' motion, Judge Cornelius made findings of fact and ordered the following: that respondents' motion for a continuance be denied; that Cline's motion to intervene be allowed; that the order of confirmation of the resale be ratified and that respondents' appeal from said order of confirmation be dismissed. Respondents have appealed from this 16 April 1981 order.

Hollowell, Stott, Palmer & Windham, by James C. Windham, Jr., for petitioner appellees Gastonia Mutual Savings and Loan Association and L. B. Hollowell, Jr., trustee.

Whitesides, Robinson and Blue, by Arthur C. Blue, III, for intervenor appellee Billie D. Cline.

Horace M. DuBose, III, for respondent appellants Horace M. DuBose, III, trustee and Robert J. Bernhardt, trustee.

MARTIN (Robert M.), Judge.

[1] Respondents have brought forward four assignments of error on appeal. We find it necessary to consider only assignment of error no. 3. Therein the respondents argue that the trial court committed prejudicial error by making findings of fact and conclusions of law that there was no objection to the confirmation of the foreclosure sale. They argue that at the time the 16 April 1981 order was entered, three related cases, wherein respondents raised issues as to the title to the Burgess property and the terms of and balance owing on the promissory note to the Association, were pending in this Court. They further argue that the Clerk was aware of these pending appeals and should have stayed confirmation of the 6 February 1981 foreclosure sale. Since these appeals were still pending at the time Cline moved for ratification of the resale, Judge Cornelius should have continued the hearing on this motion.

We disagree with respondents' argument, and affirm the order of Judge Cornelius ratifying the Clerk's confirmation of the resale and dismissing respondents' appeal from said confirmation.

G.S. 45-21.29(h) requires that a resale cannot be consummated until it is confirmed by the clerk of superior court. Confirmation cannot take place until the time for submitting any upset bid has expired.[3] It is uncontested that no upset bid was submitted prior to the clerk's confirmation. It therefore appears that the clerk was obligated by statute to confirm the resale.

This Court, however, is not compelled to consider respondents' arguments on their merit. Their argument, that the court should have stayed ratification pending the outcome of the respondents' three cases on appeal to this Court, has become a moot issue. Each one of these cases has been heard by this Court and decided against respondents' interests. We affirmed the 2 October 1980 order, wherein the trial court vacated a default judgment against Burgess and in favor of Southern Athletic/Bike. *Southern Athletic/Bike v. House of Sports, Inc.*, 53 N.C. App. 804, 281 S.E. 2d 698 (1981), *appeal dismissed and disc. review denied*, 304 N.C. 729, 288 S.E. 2d 381 (1982). Respondent DuBose had represented the corporate plaintiff on appeal. We also affirmed the trial court's 7 November 1980 order setting aside a sheriff's deed, wherein Burgess' property had been conveyed to respondents. *In re Execution Sale of Burgess*, 55 N.C. App. 581, 286 S.E. 2d 362 (1982), *cert. denied*, 305 N.C. 585, 292 S.E. 2d 5 (1982). In *DuBose v. Savings and Loan Assoc.*, 55 N.C. App. 574, --- S.E. 2d --- (No. 8127SC298, filed 2 February 1982), *cert. denied*, --- N.C. ---, --- S.E. 2d --- (No. 71P82, filed 4 May 1982), we specifically held that the trial court did not err in dissolving the temporary restraining order and in denying respondents' motion for a preliminary injunction thereby allowing the Association to consummate the sale of the land at issue. In addition we concluded:

> Because plaintiffs (DuBose and Bernhardt) 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 Billie Cline rendered the questions raised by plaintiffs moot.

3. Any upset bid must be submitted within ten days after the filing of the report of the sale. G.S. 45-21.27.

Id. at 580, 286 S.E. 2d at 621. This conclusion applies equally to the situation before us now. The following quotation cited in *In re Execution Sale of Burgess, supra,* further supports our conclusion that respondents' argument is moot.

> 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.]

Davis v. Zoning Board of Adjustment of Union County, 41 N.C. App. 579, 582, 255 S.E. 2d 444, 446 (1979). In the case *sub judice,* respondents' appeal from the trial court's denial of their motion to continue pending disposition of appeals filed in this Court, is clearly moot because disposition has taken place.

[2] We also find no merit to respondents' argument that the Clerk violated her duty under G.S. 45-21.29(j) when she confirmed the resale; and that the trial court thereby improperly ratified the order of confirmation. This argument is apparently based upon a motion, filed by respondent DuBose, to restrain confirmation of the resale. This motion was filed along with an action, neither of which appears in the record on appeal. The record merely contains a 26 February 1981 order wherein the trial court dismissed DuBose's action and denied his motion. The court noted:

> that the prior pending action entitled "Horace M. DuBose, III, Trustee, and Robert J. Bernhardt, Trustee, as their interests may appear vs. Gastonia Mutual Savings & Loan Association and L. B. Hollowell, Jr., Trustee" and presently an appeal before the North Carolina Court of Appeals is *res judicata* as to the matters and things alleged in the subject action . . ..

The day after this order was filed the Clerk entered her order of confirmation. Respondents contend that the Clerk should have stayed confirmation of the resale pending the running of the time to appeal from the 26 February 1981 order. Such conduct by the Clerk allegedly would have been consistent with G.S. 45-21.29(j) which provides:

> The clerk of the superior court shall make all such orders as may be just and necessary to safeguard the interests of all parties, and shall have authority to fix and determine all necessary procedural details with respect to resales in all instances in which this Article fails to make definite provision as to such procedure.

We disagree with respondents' argument. At the time the Clerk ordered confirmation of the resale, no upset bid had been filed nor had any notice of appeal been given from the 26 February 1981 order. It is obvious that respondents were aware of the resale's impending confirmation and, in good judgment, should have given notice of appeal immediately after the order was entered. We believe the Clerk acted consistently with G.S. 45-21.29(j) when she confirmed the resale, thus safeguarding Cline's interests.

[3] Irrespective of respondents' contentions, we are bound by the conclusions of the trial court in the 26 February 1981 order that the pending appeal in *DuBose v. Savings and Loan Assoc., supra,* is *res judicata* to the action initiated by respondent DuBose and that the motion for a restraining order be denied. Specifically we must presume that said order is correct, because neither DuBose's action nor his motion is in the record before us. *Moseley v. Trust Co.*, 19 N.C. App. 137, 198 S.E. 2d 36, *cert. denied,* 284 N.C. 121, 199 S.E. 2d 659 (1973); *Crotts v. Pawn Shop,* 16 N.C. App. 392, 192 S.E. 2d 55, *cert. denied,* 282 N.C. 425, 192 S.E. 2d 835 (1972).

For the foregoing reasons, the order of the trial court is

Affirmed.

Judges VAUGHN and ARNOLD concur.

BAXTER ERNEST DEITZ v. WILLIAM E. JACKSON, D/B/A W. E. JACKSON CONSTRUCTION COMPANY; RAY COLEMAN; AND AMERICAN CONSTRUCTION, INC.; AND SYNTEK CORPORATION

No. 8126SC717

(Filed 18 May 1982)

1. **Master and Servant § 21; Negligence § 2— general contractor's liability for injury to employee of independent contractor**

A general contractor may be subject to liability for an injury done to a plaintiff as a proximate result of the general contractor's negligence in hiring an independent contractor to perform construction work, and plaintiff sufficiently apprised defendant of the events that produced his claim although the specific facts constituting the manner in which defendants were negligent in their hiring of a construction company were not alleged.

2. **Master and Servant § 21; Negligence § 2— employer's liability for tort of independent contractor in conduct of risky activity**

In an action in which plaintiff was injured by a nail from a ramset gun, the trial court improperly dismissed a count of plaintiff's complaint alleging the general contractor was vicariously liable for the tort of the independent contractor. If the plaintiff can prove at trial that the operation of a ramset gun during apartment construction was intrinsically dangerous, plaintiff's count that was dismissed would state a legally recognizable claim for relief, to wit, defendants' vicarious liability for the negligent torts of their independent contractor in the performance of a peculiarly risky activity.

Chief Judge MORRIS dissents.

APPEAL by plaintiff from *Snepp, Judge.* Order entered 8 May 1981 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals on 10 March 1982.

This appeal arises from the dismissal with prejudice of two counts of plaintiff's complaint in an action for damages.

On 20 March 1981, plaintiff filed an amended complaint which, under "Count Four," alleged, *inter alia*, the following:

On 17 October 1978, plaintiff was an employee of the Cody Helms Construction Company and was working at an apartment building construction site when he was struck in his right thigh by a nail which had been propelled from a ramset gun owned by defendant W. E. Jackson and operated by defendant Ray Coleman, then an employee of defendant Jackson. Ray Coleman, at the time the ramset gun propelled the nail into plaintiff's thigh, operated such gun in a negligent manner in that he, e.g., careless-

ly jarred the ramset gun against a support and thereby caused it to go off, carelessly operated the gun in a manner for which it was not designed, and operated the gun when he knew or should have known he was not properly qualified to do so. Defendant William E. Jackson

> knew or had reason to know that Ray Coleman was unskilled, unknowledgeable and unlicensed to use the ramset gun and yet, with this knowledge he did then entrust the ramset gun of which he had charge, to Ray Coleman, creating an appreciable risk of harm to the public and to the plaintiff herein.

The general contractor, which was either defendant American Construction, Inc., or Syntek Corporation, "had a duty to hire and keep on the jobsite, competent workmen and construction companies." "W. E. Jackson Construction Company and Ray Coleman were not competent construction companies and workmen," and the general contractor "breached its duty to plaintiff . . . by their failure to hire competent construction companies and workmen, and by their negligent hiring of Ray Coleman and W. E. Jackson Construction Company, and that by reason thereof and by reason of the actions of Ray Coleman, plaintiff was injured." Finally, as a proximate result of the general contractor's failure to perform its duties and negligent performance of its duties, plaintiff incurred damages.

Also contained in plaintiff's amended complaint was his "Count Five," which incorporated by reference the pleadings in "Count Four" and additionally alleged, *inter alia*, the following:

> [T]he ramset gun was a dangerous instrumentality which Syntek Corporation or American Construction, Inc., knew or should have known would be used on and about the construction site and . . . the duties in supervising the use of this dangerous instrumentality were nondelegable to W. E. Jackson Construction Company, and that this duty was breached by Syntek Corporation and/or American Construction, Inc., and by reason whereof the plaintiff was injured.

Defendants Syntek Corporation and American Construction, Inc., moved to dismiss Counts Four and Five of plaintiff's amended complaint, on the grounds that such counts failed to state a

claim upon which relief can be granted. From the court's order dismissing such counts with prejudice, plaintiff appealed.

Harris, Bumgardner & Corry, by Seth H. Langson, for plaintiff appellant.

Cansler, Lockhart, Parker & Young, by John M. Burtis, for defendant appellee American Construction, Inc.

Caudle, Underwood & Kinsey, by C. Ralph Kinsey, Jr., for defendant appellee Syntek Corporation.

HEDRICK, Judge.

"A complaint is deemed sufficient to withstand a motion to dismiss under Rule 12(b)(6) where no insurmountable bar to recovery appears on the face of the complaint and the complaint's allegations give adequate notice of the nature and extent of the claim." *Presnell v. Pell*, 298 N.C. 715, 719, 260 S.E. 2d 611, 613 (1979). "A claim for relief should not suffer dismissal unless it affirmatively appears that plaintiff is entitled to no relief under any state of facts which could be presented in support of the claim." *Presnell v. Pell, supra* at 719, 260 S.E. 2d at 613.

With respect to the allegations contained in "Count Four" of plaintiff's amended complaint, defendants argue that dismissal was proper in that a general contractor's negligence in hiring an independent contractor to perform construction work is not actionable; alternatively, defendants argue that even if such negligence were actionable, dismissal was proper in that "plaintiff's Complaint neglects to allege those facts demonstrating defendants' failure to exercise reasonable care in hiring" the independent contractor.

[1] In determining whether there is any cause of action for the negligent hiring of an independent contractor, the following statement from *Page v. Sloan*, 12 N.C. App. 433, 439, 183 S.E. 2d 813, 817, *cert. allowed*, 279 N.C. 727, 184 S.E. 2d 886 (1971), *affirmed*, 281 N.C. 697, 190 S.E. 2d 189 (1972), is controlling:

> The general rule is that an employer or contractee is not liable for the torts of an independent contractor committed in the performance of the contracted work. . . . However, a condition prescribed to relieve an employer from liability for

> the negligent acts of an independent contractor employed by him is that he shall have exercised due care to secure a competent contractor for the work. Therefore, if it appears that the employer either knew, or by the exercise of reasonable care might have ascertained that the contractor was not properly qualified to undertake the work, he may be held liable for the negligent acts of the contractor. . . . "An employer is subject to liability for physical harm to third persons caused by his failure to exercise reasonable care to employ a competent and careful contractor (a) to do work which will involve a risk of physical harm unless it is skillfully and carefully done, or (b) to perform any duty which the employer owes to third persons."

Hence, a general contractor may be subject to liability for an injury done to a plaintiff as a proximate result of the general contractor's negligence in hiring an independent contractor to perform construction work.

The next inquiry is whether plaintiff's "Count Four" was subject to dismissal for insufficiently pleading the facts constituting defendants' alleged negligent hiring of an independent contractor. A motion to dismiss under Rule 12(b)(6) may not be successfully interposed to a complaint which was formerly labeled a "defective statement of a good cause of action;" for such complaint, other provisions of Rule 12, the rules governing discovery, and the motion for summary judgment provide procedures adequate to supply information not furnished by the complaint. *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970). "Detailed fact pleading is not required." *North Carolina National Bank v. Wallens*, 31 N.C. App. 721, 722, 230 S.E. 2d 690, 691 (1976). In the present case, "Count Four" of plaintiff's complaint alleges that defendants had a duty to hire competent construction companies on plaintiff's jobsite, that defendants breached such duty by negligently hiring an incompetent construction company, and that as a proximate result thereof, plaintiff was injured. Although the specific facts constituting the manner in which defendants were negligent in their hiring of a construction company were not alleged, such specificity was not required where, as here, the complaint sufficiently apprised defendants of the events that produced the claim and of what the claim was. "Count Four" discloses no insurmountable bar to recovery and gives defendants adequate notice of the

nature and extent of a legally recognized claim; hence, dismissal of plaintiff's "Count Four" was improper. *See Presnell v. Pell, supra.*

[2] With respect to "Count Five" of plaintiff's amended complaint, we turn to the law on an employer's liability for the torts of an independent contractor in the conduct of peculiarly risky activities. "[W]here it is reasonably foreseeable that harmful consequences will arise from the activity of . . . [an independent] contractor unless precautionary methods are adopted, the duty rests upon the employer to see that these precautionary measures are adopted and he cannot escape liability by entrusting this duty to the independent contractor." *Dockery v. World of Mirth Shows, Inc.*, 264 N.C. 406, 410, 142 S.E. 2d 29, 32 (1965); *see also Evans v. Elliott*, 220 N.C. 253, 17 S.E. 2d 125 (1941); *Cole v. City of Durham*, 176 N.C. 289, 97 S.E. 33 (1918). This rule imposes liability on an employer for the negligent torts of independent contractors performing, for the employer, an activity which would result in harmful consequences unless proper precautions are taken; the liability is imposed on the employer "since public policy fixes him with a non-delegable duty to see that the precautions are taken." *Evans v. Elliott, supra* at 259, 17 S.E. 2d at 129. " '[T]he cases of "non-delegable duty" . . . hold the employer liable for the negligence of the contractor, although he has himself done everything that could reasonably be required of him. They are thus cases of vicarious liability.' " *Hendricks v. Leslie Fay, Inc.*, 273 N.C. 59, 62, 159 S.E. 2d 362, 366 (1968).

Since this vicarious liability of the employer for the torts of the independent contractor obtains only when the independent contractor is performing certain kinds of activity for the employer, it is necessary to elaborate further on the kind of activity which will occasion an employer's vicarious liability for his independent contractor's torts. On the one hand, this activity must be "work which, as a general rule may be carried out with safety if certain precautions are observed, [but] will likely cause injury if these precautions are omitted," *Evans v. Elliott, supra* at 259, 17 S.E. 2d at 129;

> [i]t is not essential, to come under the rule, that the work shall involve a major hazard . . . [;] [i]t is sufficient if there is a recognizable and substantial danger inherent in the work,

> as distinguished from a danger collaterally created by the independent negligence of the contractor, which latter might take place on a job itself involving no inherent danger.

Evans v. Elliott, supra at 259, 17 S.E. 2d at 128. On the other hand,

> [t]he rule in regard to "intrinsically dangerous work" is based upon the unusual danger which inheres in the performance of the contract, and not from the collateral negligence of the contractor . . . [; m]ere liability to injury is not the test, as injuries may result in any kind of work where it is carelessly done, although with proper care it is not specially hazardous.

Vogh v. F. C. Geer Co., 171 N.C. 672, 676, 88 S.E. 874, 876 (1916). The difficulty in determining whether there may be employer's vicarious liability lies in making the not altogether obvious distinction between work done by an independent contractor which is intrinsically dangerous in that harm will likely result if precautions are not taken, and work which is not intrinsically dangerous in that it is merely the sort of work which could produce injury if carelessly performed.

There also remains the following question: Is the determination of whether an activity is sufficiently dangerous to allow for employer's vicarious liability one of law, or of fact? In the following cases, the determination was made by the court as a matter of law: *Evans v. Elliott, supra; Peters v. Carolina Cotton & Woolen Mills, Inc.*, 199 N.C. 753, 155 S.E. 867 (1930); *Vogh v. F. C. Geer Co., supra; Greer v. Callahan Construction Co.*, 190 N.C. 632, 130 S.E. 739 (1925); *Cole v. City of Durham, supra.* Hence, we hold that the court may pass upon the intrinsic dangerousness of an activity as a matter of law.

In the present case, "Count Five" of plaintiff's amended complaint alleges that defendant's independent contractor, W. E. Jackson Construction Company, was negligent in its operation of the ramset gun during construction work, and that the operation of the ramset gun during construction work was an activity involving a "dangerous instrumentality." Hence, if the operation of a ramset gun during apartment construction were intrinsically dangerous, plaintiff's "Count Five" would state a legally recognizable claim for relief, to wit, defendants' vicarious liability

for the negligent torts of their independent contractor in the performance of a peculiarly risky activity. In determining whether an activity is sufficiently hazardous to create a non-delegable duty of taking precautions in its performance, known conditions under which the contract is to be carried out, and the time, place, and circumstances attending the work must be considered. *Evans v. Elliott, supra.* Plaintiff's allegations here, however, state only that the ramset gun was a "dangerous instrumentality" which propels nails, that the gun was being used during apartment construction, and that its use was within the contemplation of defendants, who had a nondelegable duty to supervise its use. There are no allegations of circumstances which would render the activity unusually and inherently dangerous as opposed to the ordinary dangerousness which accompanies countless activities when they are negligently performed; nor are there allegations or circumstances which would constitute an insurmountable bar to a finding that the activity was inherently dangerous. As in *Orange County v. North Carolina Department of Transportation,* 46 N.C. App. 350, 383, 265 S.E. 2d 890, 911 (1980), "[w]e cannot say at this stage of the proceeding as a matter of law that appellants have not herein stated a claim." Evidence pertaining to the conditions under which the contract was to be performed by the independent contractor, and the time, place, and circumstances of that performance may be adduced in further proceedings, and a determination then may be made as to whether the activity was sufficiently dangerous to allow for defendants' vicarious liability. We therefore hold that the activity alleged, taken in the light most favorable to plaintiff, was sufficient to survive a Rule 12(b)(6) motion to dismiss. Hence, plaintiff's "Count Five" was improperly dismissed.

We hold that the order allowing defendants' Rule 12(b)(6) motions be reversed, and that the cause be remanded to superior court for further proceedings.

Reversed and remanded.

Judge VAUGHN concurs.

Chief Judge MORRIS dissents.

Complex, Inc. v. Furst and Furst v. Camilco, Inc. and Camilco, Inc. v. Furst

DANIEL BOONE COMPLEX, INC., A NORTH CAROLINA CORPORATION, CAMILCO, INC., A VIRGINIA CORPORATION, CLARENCE A. McGILLEN, JR., AND LINDA S. BROYHILL McGILLEN v. MITCHELL FURST, INDIVIDUALLY, MITCHELL FURST, TRUSTEE AND MATTHEW MEZZANOTTE

MITCHELL FURST, TRUSTEE, PLAINTIFF v. CAMILCO, INC., AND CLARENCE A. McGILLEN, JR., DEFENDANTS

CAMILCO, INC., PLAINTIFF v. MITCHELL FURST, TRUSTEE, MITCHELL FURST, INDIVIDUALLY, MATTHEW N. MEZZANOTTE AND WIFE, GENEVIEVE D. MEZZANOTTE

No. 8115SC863

(Filed 18 May 1982)

1. **Trial § 3.1— denial of motion for continuance—no abuse of discretion**

Plaintiffs failed to show abuse in discretion in the denial of their motion for continuance where plaintiffs' new counsel gave no indication of a lack of familiarity with or understanding of the issues in the case, and where the trial judge made it clear that if plaintiffs needed extra time to obtain a witness's presence in court, he would accommodate them.

2. **Fraud § 12— loan and mortgage with unidentified party—sufficiency of evidence of inducement by misrepresentations**

The evidence amply supported the trial court's failure to find that an usurious loan to a corporation was induced by the lender's agent's misrepresentations concerning undisclosed principals in the main transaction where there was testimony from the lenders and their agents that plaintiffs were having difficulty raising the required cash to close the sale of property; that plaintiffs had approached one of the lenders individually to inquire of him as to loan sources; that plaintiffs were so anxious to obtain a loan through the agent of the lenders that they agreed to obligate themselves to pay an interest rate of 100%, agreed to put up additional collateral besides the property in question, and agreed to execute the loan papers in Virginia so as to avoid the usury laws of North Carolina.

APPEAL from *McKinnon, Judge,* by those parties who were plaintiffs in cases 74CVS882 and 75CVS561 and who were defendants in case 74CVS889. Judgment entered 4 February 1981 in Superior Court, ORANGE County. Heard in the Court of Appeals 2 April 1982.

These cases are before us for the second time, following remand by this Court in these cases in an opinion reported at 43 N.C. App. 95, 258 S.E. 2d 379 (1979), where the underlying facts

are adequately summarized. We deem it unnecessary to repeat that factual summary in this opinion.

On remand, Judge McKinnon, sitting without a jury, heard evidence from all parties except Furst, who died prior to the second trial. By stipulation of the parties, however, Judge McKinnon also considered the record of the evidence received at the first trial of these cases as well as the record of evidence adduced in the jury trial of *Furst et al. v. Loftin et al.*, 74CVS1135.

After hearing the evidence at the second trial, Judge McKinnon entered a judgment containing findings of fact and conclusions of law adverse to the plaintiffs. The dispositive portions of the judgment were as follows:

> 5. *That Plaintiffs (Camilco, Inc., Clarence A. McGillen and Linda S. Broyhill McGillen as well as Daniel Boone Complex, Inc., in 74-CVS-882) have not satisfied the Court, as trier of the facts, by the greater weight of the evidence that Camilco, Inc., acting by and through Clarence A. McGillen and Linda S. Broyhill McGillen and their attorney, Gant Redmon, would not have accepted the Furst, Trustee—Camilco, Inc. loan and would not have caused the Furst, Trustee—Camilco, Inc. loan documents to be executed if the identity of Matthew N. Mezzanotte and Genevieve D. Mezzanotte as the principals making the subject loan had been disclosed.*
>
> Based upon the original FINDINGS OF FACT and ULTIMATE FINDINGS OF FACT set forth in the Judgment of this Court entered under date of December 14, 1977 as well as the additional FINDINGS OF FACT made by the Court heretofore at the request of Plaintiffs herein as well as the foregoing additional FINDINGS OF FACT made by the Court upon the trial of these actions on remand, the Court makes the following ultimate FINDING OF FACT and CONCLUSION OF LAW:
>
> > *That the identity of Matthew N. Mezzanotte and Genevieve D. Mezzanotte as lenders was not essential to Camilco, Inc.'s entering into the subject Furst, Trustee—Camilco, Inc. loan agreement and executing the various loan documents which were executed incident thereto.*

> WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that Plaintiffs (nor any one or more of them) shall not have and recover anything of Defendants (nor any one or more of them), and *that the actions of Plaintiffs to the extent that same have not been adjudicated heretofore be and the same as herewith dismissed with prejudice, and that the costs of these actions for trial on remand be taxed to Plaintiffs.* (Emphasis added.)

From the judgment entered against them, plaintiffs have appealed.

Charles Darsie and Robert E. Cooper, for plaintiff-appellants.

Newsom, Graham, Hedrick, Murray, Bryson & Kennon, by Josiah S. Murray, III, for defendant-appellees.

WELLS, Judge.

[1] In their first assignment of error, plaintiffs contend the trial court erred in denying their motion to continue the case when it was called for the second trial. Defendant strongly resisted the motion when it was made to the trial court. G.S. 1A-1, Rule 40(b) of the Rules of Civil Procedure provides that continuances "may be granted only for good cause shown. . . ". Upon a motion for continuance, which is addressed to the sound discretion of the trial judge, the burden is on the moving party to show the "good cause" required under the Rule. *Shankle v. Shankle*, 289 N.C. 473, 223 S.E. 2d 380 (1976). The duty of the trial judge is to determine the motion as the rights of the parties require under the circumstances. *Shankle*, supra. The two grounds for continuance argued to the trial court were: (1) insufficient time for plaintiffs' counsel, Mr. Darsie, to prepare for trial of the case; and (2) plaintiffs' difficulties in obtaining the presence of a witness, Gant Redmon. It is not clear from the transcript of plaintiffs' argument to the trial court as to how much time plaintiffs' counsel might require for further trial preparation, but Mr. Darsie's remarks could be construed as asking the court for only two or three additional days. The record does disclose that by the time the case was called for trial, Mr. Darsie had been involved in the case for several weeks, and Mr. Cooper, plaintiffs' other counsel, had been involved in the litigation since its inception 7 years before, and

was present in court for the call of the case. Before ruling on the motion, Judge McKinnon reviewed these circumstances and reviewed with counsel their contentions as to the issues to be tried on remand. At this juncture, Mr. Darsie gave no indication of a lack of familiarity with or understanding of the issues in the case. Conversely, it was Mr. Darsie who argued as to the problems associated with the availability of the witness Redmon, which would permit the trial court to infer that Mr. Darsie was familiar with defendant's trial plans. Under these circumstances, we find that the trial court was clearly justified in finding no good cause in this aspect of defendant's motion.

The second ground for continuance argued to the trial court was that the requested delay was for only a day or two, so that Mr. Redmon might be rescheduled. In denying the motion, Judge McKinnon made it clear that if plaintiffs needed extra time in which to obtain Mr. Redmon's presence in court, he would accommodate them. The record does not show that Redmon was ever called at the second trial. This aspect of plaintiffs' argument on this assignment is clearly without merit. This assignment is overruled.[1]

[2] In their next assignment of error, plaintiffs contend that the trial court erred in failing to find that the usurious loan to plaintiff Camilco was induced by Mitchell Furst's misrepresentations, which were directed, authorized, and ratified by the Mezzanottes. To establish the appropriate framework for our disposition of this question, it is necessary to refer to the previous opinion of this Court in these cases, where we reversed the original judgment of the trial court *on the question of fraud.* We quote in pertinent part from Judge Erwin's opinion in 43 N.C. App., supra, at 103, 104, and 105:

> The trial court found in its findings of fact that Furst had intentionally misrepresented the identity of his undisclosed principals, the Mezzanottes. In doing so, the trial court

1. In their brief, plaintiffs contend that the intervening death of Mr. Furst and the apparent absence of a personal representative for Furst's estate was a circumstance requiring a continuance. We note that the discussion as to Furst was merely incidental to the motion for continuance; there had been no motion by plaintiffs to substitute his personal representative; and there was no such motion presented at trial.

focused on the Mezzanottes' reasons for not having their identity revealed; however, the court's crucial inquiry, as trier of fact, should have focused on what significance Furst's misrepresentation of the identity had on Camilco's execution of the Furst-Camilco loan.

[I]n the instant case, Camilco has presented evidence indicating that it would not have dealt with the Mezzanottes for various reasons. We hold that the trial court erred in not making any determination of fact on the existence of this requisite element of fraud.

[S]hould the court determine that the identity of the undisclosed lenders, the Mezzanottes, was essential to Camilco's execution of the loan and mortgage agreements, Camilco would be able to meet the requisite damage element of fraud. The execution of the loan and mortgage agreement with a party with whom it did not wish to deal would be sufficient injury.

[S]hould the trial court determine that Furst's fraudulent misrepresentation of the identity of his undisclosed principals induced Camilco to execute the loan and mortgage agreements, then Camilco would be entitled to recover any damages shown to result therefrom.

It is clear that on remand, Judge McKinnon's findings adverse to plaintiffs, properly focused on the factual issues outlined by our previous opinion. If supported by any competent evidence as to plaintiffs' reliance on the representation that the Mezzanottes were not the principals in the loan transaction, Judge McKinnon's findings have the force and effect of a jury verdict and are binding on appeal. *See Henderson County v. Osteen*, 297 N.C. 113, 254 S.E. 2d 160 (1979); *Williams v. Insurance Co.*, 288 N.C. 338, 218 S.E. 2d 368 (1975), and cases cited therein. There was testimony from Matthew Mezzanotte, Genevieve Mezzanotte, Mitchell Furst, and Clarence McGillen that plaintiffs were having difficulty raising the required cash to close the Daniel Boone sale; that plaintiffs had approached Matthew Mezzanotte to inquire of him as to loan sources; that plaintiffs were so anxious to obtain a loan through Furst that they agreed to obligate themselves to pay an interest rate of 100 percent, agreed to put up additional collateral besides the Daniel Boone prop-

erty, and agreed to execute the loan papers in Virginia so as to avoid the usury laws of North Carolina. We are persuaded that such evidence supports Judge McKinnon's findings on the issues of inducement and reliance. This assignment is overruled.

In plaintiffs' next assignment, they contend that the trial court erred in failing to hold the Mezzanottes responsible as constructive trustees. We disagree. That issue was effectively disposed of in our prior opinion, where we held that because plaintiffs had not elected to rescind the loan agreement, but instead, elected to affirm it and seek damages, the remedy of establishing a constructive trust was not available to them. This assignment is overruled.

Finally, plaintiffs contend that the trial court erred in dismissing plaintiffs' claim for relief based on contract in case 75CVS561, wherein plaintiffs asserted that they held an option to purchase the Daniel Boone complex and prayed for an order of the court declaring them to be entitled to such an option. Prior to trial on remand, defendants, apparently out of an abundance of caution, argued to the trial court that it should consider plaintiffs' contract claim. Plaintiffs objected. At this point, Judge McKinnon ruled that the matter was not before him. We agree with this ruling, but hasten to point out that plaintiffs are not helped by our conclusion. Plaintiffs' contract claim was fully litigated at the first trial. The findings, conclusions, and judgment on the first trial were adverse to plaintiffs on that claim. Our previous opinion in these cases did not disturb that portion of the judgment entered at the conclusion of the first trial, and it therefore constitutes the law of the case on this issue. *See Hayes v. Wilmington*, 243 N.C. 525, 91 S.E. 2d 673 (1956); *see also Transportation, Inc. v. Strick Corp.*, 286 N.C. 235, 210 S.E. 2d 181 (1974); *compare In re University of North Carolina*, 300 N.C. 563, 268 S.E. 2d 472 (1980). A careful reading of our previous opinion can lead to but one conclusion: that plaintiffs were entitled to a new trial on the issue of *damages* for fraud in the loan transaction. It would strain all logic to read our previous opinion as remanding for a new trial an issue of whether plaintiffs were entitled to specific performance of the alleged option or damages for its breach. The judgment on remand was "[t]hat the actions of Plaintiffs to the extent that same have not been adjudicated heretofore be . . . dismissed . . .". We see no inconsistency in Judge McKinnon's initial ruling on plain-

tiffs' contract claim and his judgment, and find no error here. This assignment is overruled.

In the trial we find

No error.

Judges HILL and BECTON concur.

STATE OF NORTH CAROLINA v. BRENDA GRONER HOYLE

No. 8126SC1133

(Filed 18 May 1982)

1. **Homicide § 28— self-defense—no erroneous use of "without justification or excuse"**

The trial court did not use "without justification or excuse" as the equivalent of self-defense throughout the charge so as to deprive defendant of the benefit of the defense of imperfect self-defense.

2. **Homicide § 27.1— instructions on voluntary manslaughter—meaning of failure to prove malice—absence of instruction in final mandate**

Where the court instructed in the final mandate that if the jury found that the State had proved beyond a reasonable doubt the other elements of second degree murder but had not proved that defendant acted with malice, the jury should return a conviction of voluntary manslaughter, and the court had correctly explained the element of malice and how such element is negated in an earlier portion of the charge, the court did not err in failing to instruct the jury in the final mandate that failure to prove malice meant failure to prove that the defendant did not act in the heat of passion upon adequate provocation.

3. **Homicide § 28.8— instruction on accident not required**

Where all of the evidence indicated that the defendant intended to pull the trigger of the gun which fired the shots resulting in the death of the victim, the defendant was not entitled to an instruction on the defense of accident.

4. **Homicide § 30.3— submission of involuntary manslaughter not required**

Where all the evidence shows the occurrence of a death proximately resulting from the intentional discharge of a weapon in the direction of the deceased, the trial court is correct in not presenting the offense of involuntary manslaughter to the jury.

5. **Homicide § 28.3— instructions—self-defense—defendant as aggressor**

The trial court's instruction that the plea of self-defense was not available to the defendant if she was the aggressor was warranted by evidence tending

to show that defendant and the victim engaged in an argument; defendant and the victim were never closer than 30 feet apart; and although defendant stated to the police that she only fired a gun at the victim after the victim had shot at her, witnesses did not observe the victim holding any weapon and defendant's gun was the only weapon found by the police.

APPEAL by defendant from *Lewis, Judge.* Judgment entered 25 February 1981 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals on 6 April 1982.

Defendant was charged in a proper bill of indictment with the second degree murder of her husband, Dwight Wesley Hoyle, on 13 April 1979. She pleaded not guilty. The jury found defendant guilty as charged. From a judgment imposing a prison sentence of not less than eight years nor more than twelve years, defendant appealed.

Attorney General Rufus L. Edmisten, by Associate Attorney G. Criston Windham, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Marc D. Towler, for defendant appellant.

HEDRICK, Judge.

All of the assignments of error on this appeal relate to the trial judge's charge to the jury.

[1] Defendant first argues that the court's instructions deprived her of the benefit of the defense of imperfect self-defense. She contends that the trial judge's charge contained the same error found in *State v. Norris*, 303 N.C. 526, 279 S.E. 2d 570 (1981), where the expression "without justification or excuse" was used as the equivalent of self-defense throughout the charge and thus seemingly required the jury to find the existence of all four elements of perfect self-defense before the defendant could derive any benefit from imperfect self-defense. The *Norris* court distinguished the two categories of self-defense as follows:

> The law of perfect self-defense excuses a killing altogether if, at the time of the killing, these four elements existed:
>
> (1) it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and

(2) defendant's belief was reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness; and

(3) defendant was not the aggressor in bringing on the affray, *i.e.*, he did not aggressively and willingly enter into the fight without legal excuse or provocation; and

(4) defendant did not use excessive force, *i.e.*, did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm.

. . .

The existence of these four elements gives the defendant a *perfect right of self-defense* and requires a verdict of not guilty, not only as to the charge of murder in the first degree but as to all lesser included offenses as well.

On the other hand, if defendant believed it was necessary to kill the deceased in order to save herself from death or great bodily harm, and if defendant's belief was reasonable in that the circumstances as they appeared to her at the time were sufficient to create such a belief in the mind of a person of ordinary firmness, but defendant, although without murderous intent, was the aggressor in bringing on the difficulty, or defendant used excessive force, the defendant under those circumstances has only the *imperfect right of self-defense,* having lost the benefit of perfect self-defense, and is guilty at least of voluntary manslaughter.

Id. at 530, 279 S.E. 2d at 572-73. (Citations omitted.)

A new trial was awarded the defendant in *Norris* because the general equating of the term "without justification or excuse" with self-defense throughout the charge with respect to first degree murder, second degree murder, and voluntary manslaughter, created a reasonable potential that the jury may have convicted the defendant of murder instead of voluntary manslaughter through a misunderstanding of the applicability of the defense of imperfect self-defense.

We find no such possibility that the jury was misled or misinformed in the case at hand. The portion of the charge objected to by defendant reads as follows:

> Now, members of the jury, in both murder in the second degree and manslaughter, you will note that the State must prove that the Defendant acted unlawfully, that is, without justification or excuse, because those two elements are present in each of those offenses. The Defendant contends that whatever you find that she did on this occasion beyond a reasonable doubt that she acted in self-defense.

The trial judge thereafter enumerated the elements of perfect self-defense and the State's burden of proof. Immediately following the explanation, he stated that "if the State proves beyond a reasonable doubt that the Defendant, though otherwise acting in self-defense, either used excessive force or was the aggressor, though she had no murderous intent when she entered the fight, the Defendant would be guilty of voluntary manslaughter." This same sequence of instructions again appeared in the final mandate. Under these circumstances, reading the charge contextually and in its entirety, we find no reasonable ground to believe that the jury was misinformed or misled regarding the availability of the defense of imperfect self-defense to the defendant. *State v. Alexander*, 279 N.C. 527, 184 S.E. 2d 274 (1971). This assignment of error is overruled.

[2] Defendant next contends that the trial judge failed to adequately charge the jury in his final mandate on voluntary manslaughter. She apparently concedes to be correct the court's instruction that if the jury found that the State had proved beyond a reasonable doubt the other elements of second degree murder but had not proved that the defendant acted with malice, then the jury should return a conviction of voluntary manslaughter. It is at this point the defendant alleges error in the trial judge's failure to further instruct that failure to prove malice meant failure to prove that the defendant did not act in the heat of passion upon adequate provocation. We find no error. Defendant acknowledges that the trial judge correctly and adequately explained the element of malice and how such element is negated in an earlier portion of the charge. Reading the charge as a whole, we find that the law regarding the failure to prove

malice in voluntary manslaughter was fairly and clearly presented to the jury and there was no necessity for the trial judge to recapitulate his explanation in the final mandate. *State v. Alexander, supra.*

[3] In her third assignment of error defendant argues that the trial judge erred in failing to instruct the jury on the defense of accident. Conceding that she intentionally discharged the gun which killed her husband, defendant nonetheless argues that the defense of accident was raised by her testimony that she neither deliberately aimed at the deceased nor intended his death. The record reveals the following testimony by defendant concerning her shooting of the gun:

> At the time he pulled the pistol on me and I *threw up the rifle and fired at him,* I was about fifteen feet or something like that from him.
>
> . . .
>
> At the time that *I fired the rifle at Dwight in the driveway,* I did not intend to kill him.
>
> . . .
>
> I remember Mr. Hoyle raising up a pistol and shooting at me and I remember *raising up the rifle and shooting back at him.*
>
> Q. And you shot in his direction?
>
> A. I just shot. I just pulled it back. I didn't aim.
>
> Q. *Was the gun pointed at him?*
>
> A. *Apparently.* I mean, if I pulled it up and it hit me.
>
> . . .
>
> Q. *Did you fire it in the direction of your husband?*
>
> A. *I guess I did.* It hit him.

[Emphasis added.]

We believe that defendant's own testimony belies her assertion that she did not intentionally discharge the murder weapon while it was pointed in the direction of her husband. There is no evidence that defendant did not intend to pull the trigger of the

gun. *State v. Haith*, 48 N.C. App. 319, 269 S.E. 2d 205, *disc. rev. denied and appeal dismissed*, 301 N.C. 403, 273 S.E. 2d 449 (1980). This is unlike the situation in *State v. Graham*, 38 N.C. App. 86, 247 S.E. 2d 300 (1978), where the defendant threw up a gun and it went off, or in *State v. Ward*, 300 N.C. 150, 266 S.E. 2d 581 (1980), where the defendant fired a gun away from the victim and did not intend to shoot anywhere in his direction. Under the facts of this case, where all of the evidence indicates that the defendant intended to pull the trigger of the gun which fired the shots resulting in the death of the victim, the defendant is not entitled to an instruction on the defense of accident. *State v. Efird*, 37 N.C. App. 66, 245 S.E. 2d 226 (1978), *cert. denied*, 301 N.C. 98, 273 S.E. 2d 456 (1980). This assignment of error is overruled.

[4] Accordingly, we also find no merit in defendant's fourth assignment of error in which she argues that the trial court erred in not submitting to the jury the lesser included offense of involuntary manslaughter. Where all the evidence shows the occurrence of a death proximately resulting from the intentional discharge of a weapon in the direction of the deceased, the trial court is correct in not presenting the offense of involuntary manslaughter to the jury. *State v. Price*, 271 N.C. 521, 157 S.E. 2d 127 (1967). We find no error.

[5] In her fifth and final assignment of error defendant argues that the trial judge erroneously instructed the jury that the plea of self-defense is not available to the defendant if she was the aggressor since that instruction was not warranted by the evidence. We do not agree.

The State presented an eyewitness to the shooting who testified that shortly before the gun was fired she had heard the defendant and her husband arguing in the yard. She then saw defendant, who was standing at one end of the driveway approximately 30 to 45 feet from the victim, fire a gun at her husband. Mr. Hoyle was not observed holding any weapon. The two people were never observed being closer than 30 feet apart. Another witness testified that the defendant told her that she got the gun from under her son's bed. Although the defendant stated to the police that she only fired the gun after her husband had shot at her, no weapon was found by the police, other than the defendant's. We hold that the aggressor instructions were properly given by the trial judge based upon the above evidence by the State tending to show that defendant was the aggressor.

State v. Joyner, 54 N.C. App. 129, 282 S.E. 2d 520 (1981). This assignment of error is without merit.

No error.

Judges HILL and BECTON concur.

STATE OF NORTH CAROLINA v. GREGORY POWELL ROBERTSON

No. 8110SC1147

(Filed 18 May 1982)

1. Criminal Law § 146.4— failure to raise constitutional question in lower court

For an appellant to assert a constitutional or statutory right in the appellate court, the right must have been asserted and the issue raised before the trial court; therefore, where the defendant failed to set forth his reasons for wanting to see notes taken by an officer after the officer's arrest of defendant, upon appeal he could not allege error by the lower court.

2. Criminal Law § 118— jury instructions on flight of defendant proper

The trial court did not err in instructing that the State contended "the defendant's failure to appear for his first appearance . . . amounted to his flight from custody and responsibility to the court," since there was some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime charged.

3. Criminal Law § 112.1— no error in reasonable doubt instructions

The trial court did not err in failing to instruct the jury that a reasonable doubt could arise from the lack of evidence presented by the State since the State's evidence was amply sufficient to support the verdict.

APPEAL by defendant from *Godwin, Judge.* Judgments entered 3 June 1981, in Superior Court, WAKE County. Heard in the Court of Appeals 6 April 1982.

In August 1980, defendant was arrested under a warrant charging him with breaking and entering and larceny. After being released on his own bond, he failed to appear for his first appearance on 18 August 1980. An order for his arrest was issued on 22 August. On 2 September 1980, defendant was charged in a single indictment, proper in form, with felonious breaking and entering and felonious larceny. On 6 October, a second order for defendant's arrest was issued, alleging that defendant had failed to appear for trial on the two charges, and on 20 October, pursuant to G.S. 15A-932, the State took a dismissal with leave for nonappearance of defendant.

The case was reinstated for trial in March 1981. The State presented evidence tending to show that, on 22 July 1980, the Wakefield apartment of Tony Hartsfield was broken into, and approximately twenty-eight hundred dollars worth of Hartsfield's stereo equipment and televisions had been taken without his consent. According to Gloria Hartsfield's testimony, the equipment was removed during the period between 11:15 a.m. and 1:00 p.m., while she had been on an errand.

Cheryl Hall testified that on that same day defendant and one Vinson Hedgepeth came to the Wakefield apartment she shared with a friend of Hedgepeth. The two men requested that Hall allow them to leave at the apartment a television, two stereo speakers, and some clothing. After bringing the items into the apartment, the defendant and Hedgepeth tested the television to see if it worked. Once they had done this, they put the television in the hot water heater closet, told Hall they would come back later for the equipment, and left. Before they came back, however, Raleigh Police Department Detective Donald Brinson, while searching Hall's apartment with her consent, saw the stereo equipment and television. He later connected these items to the breaking and entering of the Hartsfield's apartment and returned with a warrant for Hall's arrest. The stereo speakers and the television were identified by Tony Hartsfield as the ones taken from his apartment.

The defendant put on evidence tending to show that, between 9:30 and 10:30 on the morning of 22 July, he had gone to the Wakefield apartment of a friend, Deborah Jones, but, finding no one there, had proceeded to the apartment swimming pool. On the way he ran into his cousin Vinson Hedgepeth who led him to some bushes. There Hedgepeth showed defendant "some merchandise," including a television set and some clothes. Hedgepeth and defendant put the items in defendant's car which defendant drove, at Hedgepeth's direction, to the apartment of Cheryl Hall. Defendant was not suspicious about the fact that Hedgepeth had the equipment in the middle of a bush because Hedgepeth had no definite residence and "[a]ll of his belongings and possessions . . . [had] been scattered."

The jury found defendant guilty of both felony charges for which the judge sentenced him to consecutive prison terms. Defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Robert L. Hillman, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Nora B. Henry, for the defendant-appellant.

VAUGHN, Judge.

During the course of defendant's trial, Detective Brinson was allowed to testify about statements defendant made to him after his arrest. According to Brinson's testimony, he had made "sketchy" notes during the earlier conversation. When defendant requested at trial to see the notes, the State objected and the trial court, observing that Brinson had not used the notes during his testimony, denied the request.

[1] Defendant now argues that the denial of his request to see the notes violated his right to confront witnesses against him, as guaranteed by the sixth amendment to the United States Constitution, made applicable to the states by the fourteenth amendment. Defendant's argument comes too late. Generally, for an appellant to assert a constitutional or statutory right in the appellate court, the right must have been asserted and the issue raised before the trial court. *State v. Jones*, 295 N.C. 345, 245 S.E. 2d 711 (1978). The record discloses that, while defendant requested at trial to see the notes, he did not set forth his reasons for seeing them. The trial court, in denying the request, apparently relied upon the rule set forth in *State v. Jackson*, 302 N.C. 101, 273 S.E. 2d 666 (1981), that, where a witness does not use or attempt to use the writings sought to be produced, opposing counsel cannot compel their production, even though the writings are under the witness' control. In the present case, the defendant failed to raise the constitutional issue at trial and cannot now allege error by the lower court. In passing, we would point out that, immediately after the denial of his request to see Brinson's notes, the defendant determined that the notes would not have differed from the detective's testimony. Defendant's first assignment of error is overruled.

Next, defendant contends that the trial court erred in admitting, and instructing on, evidence "that defendant exercised his right to remain silent. . .." A review of the record reveals that the portions of evidence to which defendant now takes exception pertained, for the most part, to statements defendant made to

Detective Brinson. Furthermore, the defendant failed to object to the introduction of such evidence and has, therefore, waived his right to argue error now. *State v. Burnette*, 39 N.C. App. 605, 251 S.E. 2d 717, application for further rev. denied, 297 N.C. 302, 254 S.E. 2d 924 (1979); 1 Stansbury's North Carolina Evidence § 27 (Brandis Rev. 1973). The trial court's instructions to the jury accurately reflected the evidence of the extent of defendant's conversation with Brinson and did not constitute error.

[2] As his third assignment of error, defendant contends that the trial court's jury instructions regarding flight of the defendant violated G.S. 15A-1232. Part of the instruction to which defendant excepted was the following paragraph:

> The state contends that the defendant's failure to appear for his first appearance. . . in court on July the 24, 1980, amounted to his flight from custody and responsibility to the court.

Defendant's argument is that there was insufficient evidence to support this statement, that there was conflicting testimony by defendant as to his understanding of when he was to appear and that there was evidence tending to show that Brinson was unable to locate defendant because he was using an erroneous address. In *State v. Irick*, 291 N.C. 480, 494, 231 S.E. 2d 833, 842 (1977), the Supreme Court stated:

> So long as there is some evidence in the record reasonably supporting the theory that defendant fled after commission of the crime charged, the instruction is properly given. The fact that there may be other reasonable explanations for defendant's conduct does not render the instruction improper.

In view of this and the testimony of Brinson that defendant failed to appear for his first appearance and also failed to meet him the day after defendant's arrest, we find no error in the trial court's instructions.

[3] Finally, defendant assigns as error the failure of the trial court to instruct the jury that a reasonable doubt could arise from the lack of evidence presented by the State. Defendant relies on *State v. Hammonds*, 241 N.C. 226, 85 S.E. 2d 133 (1954),

where the Supreme Court held that, once the trial judge undertakes to define the term "reasonable doubt" with the expression "a doubt arising out of the evidence in the case" or "growing out of the evidence in the case," he must add "or from the lack or insufficiency of the evidence." The Supreme Court emphasized that whether an error in the reasonable doubt instruction will be considered sufficiently prejudicial to warrant a new trial is determined by the evidence involved. In finding no error, the Court determined in that case that the State's evidence was direct and amply sufficient to support the verdict; that there could not have been any doubt as to the sufficiency of the State's evidence, if believed, to warrant a conviction; and that the only question before the jury was whether to accept the State's version of the facts or the facts as set forth by the defendant.

We believe that, in the instant case, the defendant has failed to show prejudicial error. As in *Hammonds*, the State's evidence was amply sufficient to support the verdict. There was substantial evidence that Hartsfield's apartment was broken into; that stereo equipment and televisions were removed from the apartment; and that the defendant, who was in the apartment complex at all relevant times, had possession of the goods shortly after their removal. The ultimate question before the jury was whether to believe the State's version of the facts or the defendant's evidence that he first saw the stolen items when his cousin showed them to him in some bushes. Obviously, the jury accepted the State's version. Based on this, we fail to find prejudicial error in the trial court's instructions.

In defendant's trial, we find

No error.

Judges MARTIN (Robert M.) and ARNOLD concur.

ANN A. BURNS v. PENDER R. McELROY, ADMINISTRATOR C.T.A. UNDER THE WILL AND FOR THE ESTATE OF MAUDE H. BARNETT, DECEASED

No. 8126SC968

(Filed 18 May 1982)

1. **Appeal and Error § 42.2— exceptions to issues and instructions—failure to include evidence in record**

Appellant failed to show error in the trial court's failure to submit certain issues to the jury and in the court's instructions where none of the evidence was included in the record on appeal.

2. **Evidence § 11.7— Dead Man's Statute—administrator not examined in own behalf—no opening of door for testimony**

In an action to recover for services rendered to deceased during her lifetime, the Dead Man's Statute, G.S. 8-51, prohibited testimony by plaintiff concerning circumstances surrounding deceased's endorsement and delivery to plaintiff of a check payable to deceased on the day prior to deceased's death, and defendant administrator's admission in a responsive allegation in his answer that deceased "gave to plaintiff the sum of $4,544.83 with the request that she hold this money for her in safekeeping" did not constitute the administrator's being "examined in his own behalf" within the meaning of G.S. 8-51 so as to open the door for plaintiff's testimony.

3. **Trover and Conversion § 2— alleged conversion of proceeds of check—summary judgment improper**

In an action to recover for services rendered to decedent, the trial court erred in entering summary judgment for defendant administrator on his counterclaim for conversion of the proceeds of a check payable to deceased which deceased endorsed and delivered to plaintiff on the day before her death, although plaintiff's evidence failed to show that the check was a gift causa mortis or a part payment for services, where the record discloses that plaintiff's possession of the check was at least initially authorized by deceased and that plaintiff does have possession of the proceeds of the check, since a genuine issue of material fact was presented as to whether such possession is wrongful.

APPEAL by plaintiff from *Allen, Judge.* Judgment entered 29 April 1981 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals on 29 April 1982.

This appeal arises from a civil action wherein plaintiff seeks to recover $9,021.40 from the estate of Maude Barnett, deceased, for services allegedly rendered to Barnett during her lifetime. In her complaint, plaintiff alleged that at Barnett's request, plaintiff had for a period of three years rendered 2680 hours of personal

services, at a total value of $13,400, for Barnett, with the mutual understanding that Barnett would pay plaintiff for such services. Plaintiff also alleged that she loaned or advanced to Barnett, at Barnett's request, $166.23, for which she had not been reimbursed, and that "[t]he Estate of Maude H. Barnett is justly and legally indebted to plaintiff in the sum of $13,566.23 for services rendered and monies loaned or advanced." Plaintiff further alleged that on the day before her death, Barnett "gave to the plaintiff the sum of $4,544.83 with the request that she hold . . . [the] money for her in safekeeping, but stated that if anything happened to her she wanted plaintiff to have the money," and that this sum was a "gift causa mortis as part payment" by Barnett of the debt owed to plaintiff. Plaintiff prayed for judgment against the estate of Maude H. Barnett in the amount of $9,021.40, such amount representing the balance of the debt owing for the services allegedly rendered by plaintiff.

Defendant filed an answer denying the material allegations of plaintiff's claim for services, and alleged a counterclaim to recover the $4,544.83 delivered to plaintiff by the deceased on the day before her death. In the counterclaim, defendant alleged that Barnett had delivered to plaintiff a check payable to Barnett in the amount of $4,544.83, but that Barnett had instructed plaintiff to safeguard the check in plaintiff's safety deposit box until Barnett got out of the hospital, and that plaintiff has continued "to refuse to surrender such money[,] and her continued wrongful possession, control and use of this money constitutes a conversion of the check or proceeds belonging to Mrs. Barnett."

In plaintiff's reply, plaintiff denied the material allegations of defendant's counterclaim, and alleged that upon delivery of the contested check to plaintiff, Barnett endorsed the check and instructed plaintiff to cash the check and place the funds in plaintiff's safety deposit box and stated to plaintiff, " 'If anything happens to me', she wanted the plaintiff to have the money as her own," "as a gift causa mortis and as in part payment of the indebtedness owed to plaintiff by Mrs. Barnett."

With respect to plaintiff's claim for services, the court submitted the following issues to the jury, which were answered as indicated:

1. Did the Plaintiff, Ann A. Burns, transport the Defendant, take care of the Decedent's property, perform errands and other personal services for Maude H. Barnett under such circumstances that Maude H. Barnett should be required to pay for them?

ANSWER: No.

2. What amount is Ann A. Burns entitled to recover from Maude H. Barnett?

ANSWER: . . .

The court, "having considered the complete file in this action in light of the jury's verdict," ruled that there were no genuine issues of material fact with respect to defendant's counterclaim and "that Defendant is entitled to the funds [in plaintiff's possession] as a matter of law." From a judgment on the verdict that plaintiff recover nothing on her claim against the estate for services, and a judgment for defendant in the amount of $4,544.83 plus interest against plaintiff on defendant's counterclaim, plaintiff appealed.

Lane and Helms, by Thomas G. Lane, Jr., for plaintiff appellant.

James, McElroy & Diehl, by Allen J. Peterson and David M. Kern, for defendant appellee.

HEDRICK, Judge.

[1] Based on Assignments of Error numbered 3, 4, and 5, plaintiff contends that the trial court erred in "not submitting certain issues" to the jury and in its instructions to the jury with respect to plaintiff's claim for services.

"The issues to be submitted to the jury are those raised by the pleadings and supported by the evidence." *Johnson v. Massengill*, 280 N.C. 376, 384, 186 S.E. 2d 168, 174 (1972). "The duty of the judge is to declare the law *arising on the evidence* and to explain the application of the law thereto. Rule 51(a) of the Rules of Civil Procedure." *Link v. Link*, 278 N.C. 181, 198, 179 S.E. 2d 697, 707 (1971). "The chief purpose of a charge is to aid the jury in clearly understanding the case and in arriving at a

correct verdict . . . [and to ensure] that the verdict represents a finding by the jury under the law and upon the evidence presented." *Warren v. Parks,* 31 N.C. App. 609, 612, 230 S.E. 2d 684, 687 (1976), *disc. rev. denied,* 292 N.C. 269, 233 S.E. 2d 396 (1977). "The record on appeal in civil actions . . . shall contain . . . so much of the evidence . . . as is necessary for understanding of all errors assigned." Rule 9(b)(1), N.C. Rules of Appellate Procedure. In the present case, none of the evidence is reproduced in the record, nor has a transcript of the testimony been provided. We are therefore unable to evaluate the assignments of error relating to the instructions and issues. The appellant has the burden of showing error in the trial court's judgment. *Brown v. Boney,* 41 N.C. App. 636, 255 S.E. 2d 784, *disc. rev. denied,* 298 N.C. 294, 259 S.E. 2d 910 (1979). With respect to these assignments of error, she has failed to do so.

[2] Plaintiff next assigns error to the trial judge's refusal to allow plaintiff to testify with respect to the circumstances surrounding the deceased's delivery to plaintiff of the $4,544.83 check. The testimony of the plaintiff, heard by the judge on *voir dire,* is reproduced in the record as follows: Barnett first delivered the check to plaintiff on a Friday to keep for her over the weekend; plaintiff returned the check to Barnett on the following Monday; Barnett fractured her hip that Monday and was hospitalized; while at the hospital and after undergoing surgery, Barnett endorsed the check and asked plaintiff to cash it for her and put the proceeds in plaintiff's safety deposit box until she was able to get out of the hospital; Barnett told plaintiff that if anything happened to her, that she wanted plaintiff to have the proceeds of the check. Pursuant to Barnett's instructions, plaintiff cashed the check and put the proceeds in her safety deposit for safekeeping. Barnett died two days later.

It seems clear that the trial judge excluded this testimony about communications and transactions between plaintiff and the now-deceased Barnett on the grounds that it violated the "Dead Man's Statute," G.S. § 8-51. The plaintiff argues that the court erred in excluding such testimony in that the defendant "opened the door" for plaintiff's proffered testimony when defendant himself, in response to the allegation in plaintiff's complaint that Barnett "gave to the plaintiff the sum of $4,544.83 with the request that she hold his [sic] money for her in safekeeping," admit-

ted in an allegation in his answer that "Barnett delivered to Plaintiff the sum of" $4,544.83.

"The law that an interested survivor to a personal transaction or communication cannot testify with respect thereto against the dead man's estate is intended as a shield to protect against fraudulent and unfounded claims. It is not intended as a sword with which the estate may attack the survivor," *Carswell v. Greene*, 253 N.C. 266, 270, 116 S.E. 2d 801, 804 (1960); hence, G.S. § 8-51 contains an exception to the prohibition of the survivor's testimony when "the executor . . . is examined in his own behalf." This exception is designed to prevent the estate from using G.S. § 8-51 as both a shield and a sword.

In the present case, it is not at all clear that the allegation in defendant's answer, being merely part of the pleadings in the case, constitutes his being "examined in his own behalf." First, the allegation did not amount to *testimony* by the defendant and, hence, did not amount to his being "examined" at trial. Second, the answer's allegation of delivery by Barnett to the plaintiff is not necessarily an allegation favorable to the defendant executor, insofar as it does imply that plaintiff's possession of the check was at least initially authorized by Barnett; hence, the allegation was not really on the executor's "own behalf." Furthermore, even if this allegation did constitute a binding admission of delivery, such an admission by defendant of a fact initially broached by plaintiff can hardly amount to defendant's use of the "Dead Man's Statute" as a sword against plaintiff. Finally, the door is opened to the survivor's testimony only when the executor "is a voluntary witness testifying in his own behalf, and not when he is forced upon the witness stand to testify against his interest." *Sorrell v. McGhee*, 178 N.C. 279, 281, 100 S.E. 434, 435 (1919). "A party does not have it in his power to remove his own incompetency by calling the administrator as a witness and examining him concerning the transaction in controversy." 1 Stansbury's N.C. Evidence, § 75, 229 (Brandis rev. 1973). Under G.S. § 1A-1, Rule 8(b), a defendant, in his answer, "shall admit or deny the averments upon which the adverse party relies;" hence, plaintiff's allegations put defendant in a situation in which he had to aver something with respect to plaintiff's receiving the check, and such a responsive averment should not suffice to "open the door" for plaintiff. Thus the trial court did not err in excluding the

testimony of plaintiff with respect to the personal transaction between the plaintiff and deceased as regards the delivery of the check for $4,544.83. The evidence, in our opinion, was clearly not admissible in plaintiff's claim against the estate for services rendered. This assignment of error is overruled.

[3] We note that in allowing defendant's motion for a directed verdict with respect to plaintiff's claim to have the proceeds of the check declared to be a "gift causa mortis," the trial judge apparently also relied on G.S. § 8-51 in excluding evidence with respect thereto. The trial court, relying on the jury's verdict against plaintiff's claim for services and apparently relying on his ruling directing a verdict for the defendant with respect to plaintiff's claim of "gift causa mortis," entered what amounts to a summary judgment for defendant on his counterclaim against plaintiff for conversion. The trial court simply declared that there were no genuine issues of material fact with respect to defendant's counterclaim. We find the trial court to be in error in this regard. Plaintiff, in her reply, specifically denied any wrongful possession or conversion of the funds. The record further discloses that plaintiff's possession of the check made payable to Barnett and endorsed by her was at least initially authorized by Barnett. Although plaintiff has failed to show that the delivery was a gift causa mortis or a part payment for services, the record discloses no more than that plaintiff does have possession of the funds; whether such possession is wrongful is a genuine issue of fact material to defendant's counterclaim for conversion. The burden of proving that plaintiff wrongfully converted these funds is on the counterclaiming defendant. Whether defendant can prove his claim of conversion against plaintiff without "opening the door" remains to be determined when the cause is heard upon remand for trial on defendant's counterclaim.

The result is: with respect to plaintiff's claim for services, we find no error; with respect to defendant's counterclaim, the summary judgment for defendant is reversed and remanded.

No error as to plaintiff's claim for services.

Reversed and remanded as to defendant's counterclaim.

Judges HILL and BECTON concur.

LOUIS F. ROSHELLI v. LAWRENCE F. SPERRY

No. 8115SC776

(Filed 18 May 1982)

Rules of Civil Procedure § 4— issuing summons to person not a party defendant— action revived upon issuance of summons on defendant

In a personal injury action, the trial court did not err in denying defendant's motion to dismiss where a summons was issued originally in the name of the driver, defendant's daughter, and not in defendant's name, and a second summons was issued for service on defendant eleven days after the complaint was filed. Although the action was subject to dismissal under Rule 4(b) since the summons for service on defendant was not issued within five days and did not relate back to the original summons to defendant's daughter, the action revived upon issuance and service of a summons on defendant prior to the time defendant moved to dismiss. G.S. 1A-1, Rule 4(a), (d), (e), (f), and (i).

APPEAL by defendant from *McLelland, Judge.* Order entered 19 June 1981 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 30 March 1982.

In his complaint plaintiff sought to recover for personal injuries received on 31 March 1978 as the result of an automobile accident involving plaintiff and defendant's daughter, Beverly Sperry. The action was brought against defendant as owner of the car under the family purpose doctrine. The action was filed on 27 March 1981. Summons was issued that same day in the name of the driver, Beverly Sperry, rather than in defendant's name. The summons was served on Miss Sperry on 31 March by leaving copies with her mother. A second summons was issued on 7 April in the defendant's name and served on 13 April by leaving copies with defendant's wife.

Defendant moved to dismiss the action on the grounds of lack of personal jurisdiction, insufficient process and service of process, and failure to state a claim upon which relief could be granted. Defendant appeals from the denial of this motion to dismiss.

Charles C. Thompson, III, for plaintiff appellee.

Tuggle, Duggins, Meschan, Thornton & Elrod by Joseph E. Elrod, III, and Joseph F. Brotherton for defendant appellant.

CLARK, Judge.

The issue underlying the ultimate determination of whether the trial court erred in denying the defendant's motion to dismiss is whether this action was commenced and, if so, when.

Under G.S. 1A-1, Rule 3, a civil action is commenced by filing a complaint with the court. Rule 4(a) provides, in pertinent part: "Upon the filing of the complaint, summons shall be issued forthwith, and in any event within five days." The North Carolina Rules of Civil Procedure are modeled after the Federal Rules and are numbered to correspond to them. Federal Rule 4 provides, in part, that "Upon the filing of the complaint the clerk shall forthwith issue a summons . . . ." Federal Rule 4 contains no express sanction for failure to issue the summons "forthwith." The federal circuits are split on the meaning of the word "forthwith" and what sanctions, if any, are imposed by the courts where there is a delay in issuing summons after the filing of the complaint. *See Ingram v. Kumar*, 585 F. 2d 566 (2d Cir. 1978), *cert. denied*, 440 U.S. 940, 59 L.Ed. 2d 499, 99 S.Ct. 1289 (1979); 4 Wright & Miller, Federal Practice and Procedure § 1086 (1969). The different and discretionary application of Rule 4 by the federal courts probably contributed to the addition, after the word "forthwith," of the words "and in any event within five days . . ." to North Carolina Rule 4. The purpose for this added provision, and the legislative intent as reflected in the Comment following Rule 4 in the General Statutes, was to establish an outer limit of five days after filing the complaint for issuance of summons.

W. Shuford, N.C. Civil Practice and Procedure § 3-7 (2d ed. 1981) makes the following unsupported comment:

> "There is no assurance, however, that the action has been irrevocably commenced until *both* the complaint has been filed *and* the summons issued. While the action may be commenced by obtaining issuance of the summons, it will abate if the complaint is not filed within the period of time extended by the clerk's order. Also, where the filing of the complaint marks the commencement of the action, the summons, under Rule 4, must be issued within five days to keep the action from being discontinued under Rule 41(b). Lack of diligence in obtaining service of the summons may also result in a discon-

tinuance under Rule 4(e) if the process is not kept alive by endorsement or the issuance of alias or pluries summons."

In the case *sub judice* the first summons was issued on 27 March 1981, the same date of the filing of the complaint, for service on Beverly N. Sperry, who was not a party defendant. The only party defendant was Lawrence F. Sperry. It appears from the complaint that Lawrence F. Sperry was the owner, and his daughter Beverly N. Sperry was the operator, of the family-purpose automobile involved in a collision with an automobile operated by plaintiff. Thus, the name of Beverly F. Sperry in the summons was not a "misnomer," but a new and different person and party. The summons was served on her and not the defendant. This summons obviously did not comply with the requirement of Rule 4(b) that "It shall be directed to the defendant . . . ." It is generally held that process must be issued and served in the manner prescribed by statute, and failure to do so makes the service invalid even though a defendant had actual notice of the lawsuit. *Guthrie v. Ray,* 293 N.C. 67, 235 S.E. 2d 146 (1977); *Philpott v. Kerns,* 285 N.C. 225, 203 S.E. 2d 778 (1974); *Distributors v. McAndrews,* 270 N.C. 91, 153 S.E. 2d 770 (1967); *Stone v. Hicks,* 45 N.C. App. 66, 262 S.E. 2d 318 (1980).

The second summons was issued on 7 April 1981, eleven days after the complaint was filed, for service on the defendant and was duly served on 13 April 1981. This summons had an endorsement by the clerk, by which the plaintiff attempted to connect the second summons to the original summons and thus comply with Rule 4(d), which provides that if a defendant is not served within the time allowed, the plaintiff may "secure an endorsement upon the original summons for an extension of time . . . ." Rule 4(d) is not applicable because the original summons was not issued for service on the defendant but on a person other than defendant, a person not a party to the action. The Rule 4(d) provisions for an endorsement on the original summons or issuance of an alias or pluries summons apply only when the original summons was not served, and their purpose is to keep the action alive until service can be made. *Williams v. Bray,* 273 N.C. 198, 159 S.E. 2d 556 (1968); *Cherry v. Woolard,* 244 N.C. 603, 94 S.E. 2d 562 (1956). The plaintiff's argument that the second summons related back under Rule 4(f) to the date of issuance of the original summons is without merit.

It is noted that plaintiff made no attempt to amend the original summons under Rule 4(i), which allows "any process . . . to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party. . . ." It is also noted that both the original and the second summons were served by leaving a copy with Doris Sperry, mother of Beverly N. Sperry and wife of defendant. We do not have before us the issue of whether the original summons could have been amended under Rule 4(i). See *Wiles v. Construction Co.*, 295 N.C. 81, 243 S.E. 2d 756 (1978).

Having ruled that the original summons was not issued within five days as required by Rule 4(a) and that the second summons did not relate back to the date of issue of the original, we conclude that this action was not commenced with the filing of the complaint on 27 March 1981. If the action has never been commenced and the court has no personal jurisdiction over the defendant, the trial court erred in denying the defendant's motion to dismiss.

When proper summons was not issued within five days of the filing of the complaint on 27 March 1981, the action was subject to dismissal upon motion by the defendant before the issuance of the second summons for service on the defendant. The motion to dismiss was made after the issuance and service of the second summons. The action abated upon failure to issue proper summons within five days of filing the complaint, but the action revived upon the issuance and service of summons on defendant. Therefore, the effect of the second summons, issued on 7 April 1981 for service on the named defendant and served on 13 April 1981, was to revive and commence a new action on the date of issue. For a supporting decision under former law, *see Morton v. Insurance Co.*, 250 N.C. 722, 110 S.E. 2d 330 (1959); and *see* Rule 4(e).

The defendant in his brief argues the bar of the statute of limitations. This issue was not before the trial court and is not before us. Defendant has not filed answer. The issue is prematurely raised.

This action having been reinstated and commenced on 7 April 1981, denial by the trial court of the defendant's motion to dismiss is affirmed.

Affirmed.

Judges ARNOLD and WEBB concur.

STATE OF NORTH CAROLINA v. DARRYL WASHINGTON

No. 8126SC1216

(Filed 18 May 1982)

1. **Criminal Law § 75— voluntariness of confession—standard of proof**

The standard of proof required for determination of the voluntariness of a confession is proof by a preponderance of the evidence.

2. **Criminal Law § 169.3— admission of testimony—error cured by similar testimony admitted without objection**

The benefit of an objection to testimony is lost when evidence of the same import is introduced without objection prior or subsequent to the admission of the evidence in dispute.

3. **Criminal Law § 114.2— instructions—expression of opinion on evidence—absence of prejudice**

The trial court expressed an opinion on the evidence in instructing the jury that the State had offered further evidence tending to show that defendant "made a statement freely and voluntarily." However, defendant was not prejudiced by such error where the evidence before the jury was uncontradicted that defendant's statement was voluntarily given; defendant's evidence, offered through cross-examination, only raised questions as to the accuracy of the statement; and the trial court left to the jury the determination of the weight and credibility to be given the confession by instructing that if the jury should find "that the defendant made that confession, then you should consider all of the circumstances under which it was made in determining whether it was a truthful confession and the weight you will give to it."

APPEAL by defendant from *Johnson, Judge.* Judgment entered 30 April 1981 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 28 April 1982.

Defendant appeals his conviction of robbery with a firearm. Two employees of McDonald's restaurant in Charlotte, North Carolina, testified that on 8 September 1980 two black men entered their establishment as they were closing for the night and took approximately $4,000 from the safe and cash register. The two men wore face masks. The taller of the two men was armed with a shotgun, while the shorter man carried a pistol.

The defendant made a pretrial motion to suppress an incriminating statement he made to police officers on 16 October 1980. Based on the evidence offered at a voir dire hearing, the trial court denied defendant's motion, and the confession was read to the jury.

Defendant offered no testimony on his own behalf.

Attorney General Edmisten, by Special Deputy Attorney General Myron C. Banks, for the State.

Assistant Appellate Defender Lorinzo L. Joyner for defendant.

MARTIN (Harry C.), Judge.

[1] Defendant assigns as error the denial of his motion to suppress the confession. We hold that the confession was properly admitted into evidence at trial. The trial court's findings with respect to the voluntariness of a confession, if supported by competent evidence in the record, are conclusive. *State v. Barber*, 278 N.C. 268, 179 S.E. 2d 404 (1971); *State v. Fox*, 277 N.C. 1, 175 S.E. 2d 561 (1970); *State v. Hawley*, 54 N.C. App. 293, 283 S.E. 2d 387 (1981), *disc. rev. denied*, 305 N.C. 305 (1982). Officers Murphy and Smith testified at the suppression hearing. The evidence at the hearing supports the trial court's conclusion that the statement was freely and voluntarily given. Likewise, the entire record on appeal supports this conclusion. *Davis v. North Carolina*, 384 U.S. 737, 16 L.Ed. 2d 895 (1966); *State v. Silver*, 286 N.C. 709, 213 S.E. 2d 247 (1975). Defendant further urges this Court to impose upon the state a requirement that the voluntariness of a confession as a basis for admissibility be proved beyond a reasonable doubt. Our Court has rejected this standard of proof, adopting under these circumstances a preponderance of the evidence standard. *See State v. Johnson*, 304 N.C. 680, 285 S.E. 2d 792 (1982); *State v. Byrd*, 35 N.C. App. 42, 240 S.E. 2d 494 (1978). The preponderance of the evidence standard complies with the constitutional tests under the United States Constitution. *Lego v. Twomey*, 404 U.S. 477, 30 L.Ed. 2d 618 (1972). We hold that the standard of proof required for a determination of voluntariness as it relates to the admissibility of a confession is a preponderance of the evidence.

[2] Defendant next argues that the trial court erroneously permitted testimony which improperly impeached defendant's char-

acter and constituted evidence of his prior criminal conduct. On direct examination of officer Smith, the state questioned him regarding the circumstances of a statement which the defendant had given the officer on a previous occasion. Without objection, the officer testified that this was not the first time he'd warned defendant of his rights; that he had previously used the same waiver form; that there was no difference in defendant's ability to understand the officer on the two occasions; that on both occasions defendant appeared competent; and that prior to talking with the defendant on the second occasion, the officer was confident that the defendant would again give him a statement. Defendant objected only twice during this series of questions. The trial judge sustained his objection when the officer was asked whether defendant made a written statement on the first occasion. Defendant's objection to a question concerning the number of occasions the officer had warned defendant of his rights was overruled.

The rule in North Carolina is that when evidence is admitted over objection, but evidence of the same import is introduced without objection prior or subsequent to the admission of the evidence in dispute, the benefit of the objection is lost. *State v. Chapman*, 294 N.C. 407, 241 S.E. 2d 667 (1978). The assignment of error is overruled.

[3] Finally, defendant contends that he is entitled to a new trial because the trial court improperly expressed an opinion on the weight of the evidence, in violation of N.C.G.S. 15A-1232.

State's witness officer Smith testified at trial concerning the circumstances under which defendant's confession was given. The trial court summarized his testimony as follows:

> [T]he defendant stated that he understood his rights and that [he] was willing to talk to [an officer] about it and make a statement. . . . [T]he defendant signed a Waiver of his right to remain silent and a Waiver of his right to have counsel during the interview by Officer Smith.
>
> [T]here were no promises, coercions, threats or any type of duress placed upon the defendant, Darryl Washington, at the time Officer Smith and Officer Mitchell were interviewing him.

The State has offered further evidence which tends to show that the defendant, Darryl Washington, made a statement freely and voluntarily. (Emphasis ours.)

It is defendant's contention that the italicized portion of the charge added weight and credibility to defendant's confession, considerations which were exclusively for jury determination.

N.C.G.S. 15A-1232 prohibits the trial judge from expressing "an opinion whether a fact has been proved." Simply put, the trial judge must confine his summary of the evidence to the facts and avoid drawing conclusions based thereon. It would appear that the challenged instruction was error.

Once the trial judge rules on the admissibility of a confession and the testimony is received in evidence for jury consideration, it is for the jury to determine the weight and credibility to be given thereto. *State v. Barber*, 268 N.C. 509, 151 S.E. 2d 51 (1966); *State v. Walker*, 266 N.C. 269, 145 S.E. 2d 833 (1966). The defendant may offer evidence at trial tending to show that no statement was made or that it was the result of coercive or unfair tactics on the part of the officers taking it. Under these circumstances, the voluntariness of the confession becomes not just a factor going to its initial admissibility, but is highly relevant as it pertains to weight and credibility. Prejudicial error would result if the trial judge were to suggest to the jury that a statement was in fact made or if he were to conclude in the presence of the jury that it was willingly and voluntarily given. Such was not the situation in the case sub judice.

Defendant did not offer testimony on his own behalf. The evidence before the jury was uncontradicted that defendant's constitutional rights were protected and that the statement was "voluntarily" given. Defendant's only evidence, offered through cross-examination, raised questions as to the accuracy of defendant's statement, in that the witnesses' version of the robbery differed in some respects from the defendant's version in the confession.

The record discloses that prior to summarizing the evidence the trial judge stated that "[t]he State has offered evidence in this case which tends to show, and what, if anything, the evidence does show is for you as members of the jury to decide." Having summarized defendant's evidence, as gleaned through cross-

examination, the trial court left to the jury a determination of the weight and credibility to be given the confession by stating: "If you find that the defendant made that confession, then you should consider all of the circumstances under which it was made in determining whether it was a truthful confession and the weight you will give to it." Under the facts of this case, we hold that defendant has not shown prejudicial error.

No error.

Chief Judge MORRIS and Judge CLARK concur.

FARMERS BANK, PILOT MOUNTAIN, NORTH CAROLINA v. MICHAEL T. BROWN DISTRIBUTORS, INC. (FORMERLY NED PELL DISTRIBUTORS, INC.); BRENDA M. BROWN, EXECUTRIX OF THE ESTATE OF MICHAEL BROWN; BRENDA M. BROWN; VIDA M. McCANLESS; PHILLIP H. PELL; AND O. M. NEEDHAM, JR.

No. 8117SC971

(Filed 18 May 1982)

1. **Guaranty § 2; Trial § 58— guaranty agreement—finding of no condition precedent supported by evidence**

In an action in which plaintiff bank sought to enforce a loan guaranty agreement, the evidence was sufficient to support the trial court's findings and conclusion that attaining valid signatures under the agreement was not a condition precedent to defendant's liability under the guaranty agreement. As the court sat without a jury and as there was evidence to support the findings, the appellate court was bound by them.

2. **Contracts § 2; Guaranty § 2— guaranty agreement—meeting of minds—no ambiguity in contract**

Where the court found a guaranty agreement was a guaranty of payment; that there were no oral conditions precedent to the agreement; and that the written guaranty set forth the agreement in clear and unambiguous language, defendant could not avoid the agreement on the ground that there was no meeting of the minds since the agreement controls and not what either party thought the agreement to be.

APPEAL by defendants Pell and Needham from *Long, Judge*. Judgment entered 12 February 1981 in Superior Court, SURRY County. Heard in the Court of Appeals 29 April 1981.

Plaintiff Farmers Bank filed this action against a corporation, the representatives of the estate of its deceased president (Michael T. Brown), his wife (Brenda M. Brown) and mother-in-law (Vida M. McCanless) upon an obligation contained in a promissory note executed by the corporation and each of the individuals as co-makers and against the defendants Pell and Needham upon a loan guaranty agreement. Each party answered denying liability.

The wife and mother-in-law were granted summary judgment because their signatures were determined to be forgeries on the notes in dispute. Default judgment was entered against the insolvent corporation and the estate of its deceased president.

The Bank's claim under the loan guaranty agreement was tried before the court, jury trial being waived by stipulation. The Bank alleged that the defendants Pell and Needham executed a loan guaranty agreement with the intent to induce the Bank to loan the other defendants up to the sum of $75,000.00. Pell and Needham asserted in defense that the guaranty agreement was given to the Bank only on the express condition that any money loaned would be loaned to all the other defendants jointly and that a condition precedent to their liability under the guaranty agreement was that the Bank obtain the signatures of each of the individual co-makers, but that the Bank failed to do so because the signatures of Brown and McCanless were forgeries.

The loan guaranty agreement was signed by Pell and Needham on 14 February 1977 and the promissory note was dated 15 February 1977. Mr. R. W. Smith, the vice-president of the Bank, testified that the promissory note represented a renewal extension of three notes that were combined together and which had been extended to the corporation over a period of years. These prior notes had been signed by Pell and Needham as officers of the corporation. A few days before the prior notes were due, Pell and Needham came to Smith's office, said they were selling their interest in the corporation and asked if the Bank would continue to carry this line of credit. Smith testified:

> They made three provisions, and those three provisions were that there would be a corporate note executed. They said that Michael Brown, Brenda Brown and Vida McCanless were willing to sign this note, and that they would issue a loan guaranty agreement if the bank would continue to carry this line of credit. My immediate response was that we would continue to carry this line of credit.

Smith further stated:

> Mr. Needham was the first person to mention the guaranty agreement.
>
> Q. He suggested that to you first?
>
> A. Those three conditions as we prior talked about. All three of those conditions were what Mr. Needham outlined to me.

Judgment was entered in favor of the Bank and against Pell and Needham for the unpaid principal of $60,000.00, interest to date of judgment of $16,200.00, and attorneys fees in the amount of $7,631.25. From this judgment, defendants appealed.

Otis M. Oliver and Finger, Park and Parker by Raymond A. Parker, II, for the plaintiff-appellee.

Badgett, Calaway, Phillips, Davis, Stephens, Peed & Brown by Herman L. Stephens, for the defendant-appellants.

MARTIN (Robert M.), Judge.

[1] The defendants first contend that the trial court erred in ruling that the contract between defendants Pell and Needham and plaintiff Bank did not include a condition precedent to the guaranty that the plaintiff must first obtain the valid signatures of all the other named defendants before the guaranty would be effective. We agree with plaintiff.

The trial court found as fact the following:

> (2) Shortly before February 15, 1977, the defendants, Phillip H. Pell and O. M. Needham, Jr., informed R. W. Smith, Vice-President of Farmers Bank, that they wished to sell their stock in the corporation to Michael T. Brown, and inquired whether the bank would continue to extend its previous line of credit to the corporation under the new stockholder, if the new stockholder, Michael T. Brown, his wife, Brenda M. Brown, and his mother-in-law, Vida M. McCanless, signed the corporate notes as makers, and if the defendants, Phillip H. Pell and O. M. Needham, Jr., signed a guaranty of payment of such indebtedness. R. W. Smith informed the defendants, Phillip H. Pell and O. M. Needham,

Jr., that the bank would continue to extend credit under such arrangement.

(3) On or about February 15, 1977, the bank prepared a new note in the amount of Seventy-Five Thousand Dollars ($75,000.00) to consolidate old notes signed by corporate officers. The new note was signed by officers of the corporation and by Michael T. Brown (Individually) in the presence of R. W. Smith. Michael T. Brown then took the note from the bank to have it signed by Brenda M. Brown and Vida M. McCanless. Michael T. Brown later returned the note to the bank bearing the purported signatures of Brenda M. Brown and Vida M. McCanless.

(4) As a part of this same transaction, the defendants, Phillip H. Pell and O. M. Needham, Jr., signed a loan guaranty agreement on February 14, 1977, jointly and severally guaranteeing full and prompt payment of any indebtedness of Ned-Pell Distributors, Inc., to Farmers Bank, to the extent of Seventy-Five Thousand Dollars ($75,000.00), plus interest, and all costs, expenses and reasonable attorney's fees incurred in endeavoring to collect said indebtedness or in enforcing the guaranty agreement.

The court further concluded as a matter of law "[t]hat valid signatures of Brenda M. Brown and Vida M. McCanless as comakers or endorsers of the note were not a condition preceding which was communicated to the plaintiff so as to make the plaintiff responsible for obtaining these signatures and insuring their validity." The defendants except to this conclusion of law.

It is well settled in North Carolina that when the parties waive a trial by jury the duty falls upon the trial court to find the facts and the law in the case. The resolution of conflicting evidence is a matter for the court, and when the evidence is sufficient to support the findings and when error of law does not appear upon the face of the record proper, the court's findings of fact have the force and effect of a verdict by a jury and are conclusive on appeal. *See Distributing Corp. v. Schofield*, 44 N.C. App. 520, 261 S.E. 2d 688 (1980); *Fletcher v. Fletcher*, 23 N.C. App. 207, 208 S.E. 2d 524 (1974). The appellate court is bound by these findings where there is some testimony to support them, even if there is evidence to the contrary that would support a dif-

ferent finding. *Williams v. Insurance Co.*, 288 N.C. 338, 218 S.E. 2d 368 (1975). In this case there was evidence consisting of Mr. R. W. Smith's testimony to support the court's finding that defendants told Smith that they would sign a guaranty in addition to the other signatures on the corporate note. This in turn supported the trial court's conclusion of law that the valid signatures of Brown and McCanless on the note were not a condition precedent to defendants' liability. Thus defendants' assignments of error are without merit and are overruled.

[2] The defendants next argue that if there was no condition precedent then there was no meeting of the minds and thus, no contract of guaranty between plaintiff and defendants Pell and Needham. To constitute a valid contract, the parties must assent to the same thing in the same sense. The agreement, however, controls and not what either party thought the agreement to be. A party to a contract cannot avoid it on the ground that he made a mistake where there has been no misrepresentation, there is no ambiguity in the terms of the contract, and the other contractor has no notice of such mistake and acts in good faith. 3 Strong's N.C. Index 3d Contracts § 2 (1976).

In the present case, the court found that the guaranty agreement executed by defendants Pell and Needham was a guaranty of payment. The court also concluded that there were no oral conditions precedent to the guaranty agreement. The written guaranty sets forth the agreement in clear and unambiguous language and the defendants are bound by those terms. Thus this assignment of error is without merit and is overruled.

We have carefully considered the defendants' remaining assignment of error that the trial court's judgment is not supported by the evidence. This assignment of error is without merit and is overruled.

The judgment of the trial court is

Affirmed.

Judges VAUGHN and ARNOLD concur.

LENN RAY HERNDON v. LARHUE H. ROBINSON, INDIVIDUALLY AND AS SUCCESSOR ADMINISTRATOR FOR THE ESTATE OF GARTHA A. HERNDON, DECEASED, CLARA HERNDON HATLEY, DILLIE HERNDON WILSON, HATTIE BELL HERNDON TEASELEY, VIOLA HERNDON STROUD, RAYMOND BURNETTE, JUANITA BURNETTE DEANS, EVELYN BURNETTE MORROW, BERNICE BURNETTE ALSTON, MINNIE BURNETTE BYERS, RUBY BURNETTE PHILYAW, ODESSA BURNETTE THOMPSON, WILLIAM HENRY HERNDON, THURMAN HERNDON, OTIS HERNDON, VERNON HERNDON, JR., MADGE HERNDON PAGE, JAMES W. HERNDON, ERSELDINE HERNDON BAILEY, LEON WALKER HERNDON, KATHLEEN HERNDON BURT AND RUFUS L. EDMISTEN, ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA

No. 8110SC902

(Filed 18 May 1982)

1. **Descent and Distribution § 8; Constitutional Law § 23.7— illegitimate child—constitutionality of statute governing intestate succession**

The statute permitting an illegitimate child to inherit by, through and from his putative father only if certain acknowledgment or filing requirements have been followed, G.S. 29-19, is constitutional.

2. **Descent and Distribution § 8— illegitimate child—acknowledgment by father—no constructive compliance with statute**

Plaintiff did not show a "constructive" compliance with the provisions of G.S. 29-19(b)(2) permitting an acknowledgment of paternity by the father's written admission of paternity executed or acknowledged before a certifying officer and filed in the office of the clerk of court by offering written documents signed by the putative father, including applications for insurance and employment, which acknowledged the putative father's paternity of plaintiff.

APPEAL by plaintiff from *Hobgood, Judge*. Order filed 22 May 1981 in Superior Court, WAKE County. Heard in the Court of Appeals 7 April 1982.

Gartha A. Herndon died intestate in Wake County, North Carolina, on 19 June 1980. No children were born of his marriage to Eula Ray Herndon, who died 28 August 1966. Mr. Herndon did not remarry. Plaintiff alleges that he is the son of Gartha Herndon and Evie (Hatley) Terry; that Mr. Herndon paid the medical expenses incurred as a result of plaintiff's birth on 2 June 1931 and provided financial support to his mother for the benefit of the plaintiff until she married Mr. Terry; and that Mr. Herndon openly acknowledged plaintiff as his son.

Plaintiff began living with Mr. and Mrs. Herndon in 1940 when he was nine years old. His early school records indicate that Mr. Herndon was his father. Plaintiff adopted the last name of Herndon, rather than Hatley, at Mr. Herndon's request. Mr. Herndon paid the premiums on a life insurance policy insuring the life of the plaintiff. The application showed Gartha Herndon as the father and beneficiary of the policy. Although plaintiff lived intermittently with his mother from 1942 until 1951, his school records consistently list Gartha Herndon as his father. The 1950 federal census shows plaintiff living in the Herndon household as "son." On 22 February 1959, Gartha Herndon signed an employment application for Eastern Airlines that listed plaintiff as his son.

Defendant LaRhue Robinson is serving as the successor administrator for the estate of Gartha Herndon. Other defendants include Mr. Herndon's sisters, nieces and nephews, all of whom claim adversely to him under N.C.G.S. 29-15(4).

Plaintiff filed an action for declaratory judgment on 28 January 1981, asking that the court find him to be the acknowledged natural son of Gartha Herndon and therefore entitled to take any property of the estate before and to the exclusion of all the defendants. The trial court dismissed plaintiff's complaint, from which dismissal plaintiff appeals.

Ashmead P. Pipkin for plaintiff appellant.

Winston, Blue, Larimer & Rooks, by David M. Rooks III, for the individual defendant appellees.

Attorney General Edmisten, by Special Deputy Attorney General Charles J. Murray, for Rufus L. Edmisten, Attorney General of the State of North Carolina, defendant appellee.

MARTIN (Harry C.), Judge.

[1] Plaintiff challenges the constitutionality of N.C.G.S. 29-19 (1976 & Cum. Supp. 1981), which permits an illegitimate child to inherit by, through and from his putative father if proof of paternity has been established by any one of the following methods: (1) a judicial decree entered during the life of the putative father; (2) the father's written admission of paternity "executed or acknowledged before a certifying officer named in G.S. 52-10(b) and filed during his own lifetime and the child's lifetime" in the

appropriate office of the clerk of superior court; (3) the father's acknowledgment of paternity in his duly probated will. A child may also be legitimated by the intermarriage of the mother and putative father at any time after the illegitimate child's birth. N.C. Gen. Stat. § 49-12 (1976). Absent the statute, plaintiff would have no right to inherit from his putative father. *Jolly v. Queen*, 264 N.C. 711, 142 S.E. 2d 592 (1965).

There is nothing in the record to disclose, nor does plaintiff suggest, that the provisions of N.C.G.S. 29-19 have been complied with. It is plaintiff's position that the facts of his case, assuming for all purposes that he is the natural son of the deceased, prove fatal to the constitutionality of the statute.

Our Supreme Court in *Mitchell v. Freuler*, 297 N.C. 206, 254 S.E. 2d 762 (1979), addressed this issue on strikingly similar facts and held, upon the authority of *Lalli v. Lalli*, 439 U.S. 259, 58 L.Ed. 2d 503 (1978), that N.C.G.S. 29-19 and those statutes in *pari materia* "are substantially related to the lawful State interests they are intended to promote." 297 N.C. at 216, 254 S.E. 2d at 768. We are thus bound by the decision in *Mitchell* finding no violation of the equal protection and due process clauses of the United States Constitution by the statute. *See also Outlaw v. Trust Co.*, 41 N.C. App. 571, 255 S.E. 2d 189 (1979).

Plaintiff would have us reexamine the holding in *Mitchell* in light of our North Carolina Constitution. In the alternative, he contends that his evidence amply supports "constructive" compliance with the mandate of N.C.G.S. 29-19(b)(2), acknowledgment by written instrument filed during the lifetime of the putative father. Plaintiff's arguments are ably presented and well conceived. Nevertheless, we remain unpersuaded.

[2] Plaintiff contends that although he is unable to show strict compliance with the acknowledgment and filing requirements of N.C.G.S. 29-19(b)(2), he has complied with the spirit of the provision by offering numerous written documents, signed by Mr. Herndon, which clearly acknowledge paternity. Arguably, none of these writings admits of a conscious intent to establish paternity for purposes of intestate succession. Nevertheless, plaintiff argues, if the purpose of the statute is to safeguard the just and orderly disposition of a decedent's property and to ensure the

dependability of titles passing under intestate laws, he has fulfilled this purpose.

The formalities of N.C.G.S. 29-19(b)(2), however, serve a dual purpose. As a method for establishing paternity, a written instrument acknowledging paternity, executed and filed with the clerk of superior court, assures the requisite degree of certainty. The formalities further assure that the decedent intended that the illegitimate child share in his estate, much in the same way that a father intentionally excludes legitimate children as beneficiaries under his will. But, just as a father must act to *exclude* a legitimate child from sharing in his estate, he must also act to *include* an illegitimate child. The distinction is an important one. Yet, our statute does recognize certain acts permitting inclusion, and our Supreme Court has deemed these constitutionally sufficient.

We find that plaintiff's constitutional arguments, whether viewed against the federal or our state constitution, have been answered in *Mitchell, supra.* It is for our legislature or our Supreme Court to reevaluate the existing law as to any shortcomings and its intended purposes. Nor can we agree, upon the facts before us, that plaintiff's proof rises to the dignity of constructive compliance with N.C.G.S. 29-19(b)(2). Although there is little doubt that plaintiff is, in fact, the natural son of Gartha Herndon, the written documents he offers were executed for purposes other than to establish paternity as contemplated under the statute.

Affirmed.

Chief Judge MORRIS and Judge CLARK concur.

JOHN RAY COWAN v. LAUGHRIDGE CONSTRUCTION COMPANY, A CORPORATION

No. 8129SC941

(Filed 18 May 1982)

Negligence § 29.1 — personal injury action — negligence — directed verdict improper

In a personal injury action, the trial court erred in entering a directed verdict for defendant where the evidence tended to show plaintiff was helping

to install a roof; defendant furnished a ramp which was the only access to the building's roof; defendant's ramp did not meet certain federal OSHA regulations; defendant's ramp gave under the weight of people crossing it; and plaintiff was injured when one side of the ramp tilted and he fell in an excavated trench which had not been filled.

APPEAL by plaintiff from *Lane, Judge.* Order entered 3 July 1981 in Superior Court, MCDOWELL County. Heard in the Court of Appeals 27 April 1982.

Plaintiff appeals from an order directing a verdict in favor of defendant.

Defendant, as the general contractor of a building to be constructed in Marion, North Carolina, subcontracted with Pyatt Heating and Air Conditioning Company, Incorporated, for the installation of the building's roof. Plaintiff was an employee on Pyatt's roofing crew.

Plaintiff alleges that pursuant to an agreement with Pyatt or, alternatively to the usual custom in the construction industry, defendant provided the subcontractor's employees access to the roof. It furnished a ramp consisting of plywood and boards across a foundation trench from the ground level to a doorsill of the building. The roofing crew placed a ladder on the ramp, which extended to the roof. On 20 August 1976, while working on the roof's installation, plaintiff fell from the ramp onto a cement footing at the bottom of the trench.

Plaintiff alleges that defendant was negligent in furnishing a defective ramp with inadequate safety features and in failing to fill the excavated trench. As a proximate result of defendant's negligence, plaintiff was severely and permanently injured.

Defendant denies plaintiff's allegations and alleges that plaintiff himself was negligent. It alleges that plaintiff used a ladder in an area where he had reason to know there was spilled gravel. Defendant also alleges that should it be found negligent in any respect, then plaintiff's employer was concurrently negligent in using a ladder which failed to conform to safety regulations.

At trial, plaintiff presented evidence that the ramp provided by defendant was level but would give when someone walked across it: "As to whether I had observed any defects of any kind

in the ramp, just that it was pretty flimsy." Plaintiff did not recall whether the ramp was braced for stability. All employees used the ramp, including workmen pushing wheelbarrows of concrete. The ramp was the only access Pyatt's employees had to reach the roof.

Plaintiff's accident occurred about 5:30 p.m. He and another Pyatt employee were standing on the ramp, hoisting up buckets of gravel to the roof: "Ray Trantham was just getting ready to pull the bucket . . . he stepped back some to pull the rope, and I imagine I had too much weight on one side of the scaffold . . . when the bucket came up the platform tilted up on the right-hand corner and throwed me off." There were no guardrails on the ramp for plaintiff to grab. He fell 10 to 12 feet into the foundation trench.

Plaintiff introduced into evidence certain OSHA regulations which require guardrails and toeboards for open-sided runways a certain number of feet above ground. A witness who had been employed in the construction industry for thirty years testified that the custom and practice in the building industry was to require guardrails. Plaintiff also presented evidence that there was no loose gravel on the ramp at the time of the accident.

At the close of plaintiff's evidence, defendant moved for a directed verdict pursuant to Rule 50, North Carolina Rules of Civil Procedure. The court found that there was no evidence of any negligence by defendant and that plaintiff's evidence established contributory negligence as a matter of law. It granted defendant's motion.

Goldsmith and Goldsmith, by C. Frank Goldsmith, Jr., for plaintiff appellant.

Roberts, Cogburn and Williams, by Landon Roberts, James W. Williams, and Isaac N. Northup, Jr., for defendant appellee.

VAUGHN, Judge.

Negligence is not presumed simply because an accident has occurred. In order to establish a *prima facie* case of negligence, plaintiff must offer evidence that defendant owed him a duty of care, that defendant breached that duty, and that defendant's breach was the actual and proximate cause of plaintiff's injury.

Burr v. Everhart, 246 N.C. 327, 98 S.E. 2d 327 (1957). If plaintiff fails to show any one of these elements, it is proper for the court to enter a directed verdict in favor of defendant.

It is the exceptional negligence action, however, where a directed verdict is entered. On a motion for directed verdict, the court must view the evidence in the light most favorable to the plaintiff. Where plaintiff receives the benefit of every reasonable inference, the issues of reasonable care and breach of that care are usually for the jury. *Williams v. Power & Light Co.*, 296 N.C. 400, 250 S.E. 2d 255 (1979); *Robinson v. McMahan*, 11 N.C. App. 275, 181 S.E. 2d 147, *cert. denied*, 279 N.C. 395, 183 S.E. 2d 243 (1971).

In the present action, the court concluded there was insufficient evidence to require submission of the issue of defendant's negligence to the jury. We disagree.

Defendant, as general contractor, subcontracted with plaintiff's employer for the installation of the building's roof. Plaintiff was, therefore, an invitee to whom defendant owed a duty of ordinary care. *Benton v. Construction Co.*, 34 N.C. App. 421, 238 S.E. 2d 655 (1977), *cert. denied*, 294 N.C. 182, 241 S.E. 2d 517 (1978). When defendant furnished a ramp which was the only access to the building's roof, it could reasonably foresee that plaintiff would use the ramp. Defendant owed plaintiff the duty to use proper care in the ramp's construction. *See Casey v. Byrd*, 259 N.C. 721, 131 S.E. 2d 375 (1963).

Plaintiff argues that defendant breached that duty as a matter of law by violating certain federal OSHA regulations. These regulations require guardrails for open runways four feet or more above ground and toeboards wherever tools and materials are likely to be used on the runway. We disagree that defendant's noncompliance constituted negligence *per se*.

The Occupational Safety and Health Act of 1970 (OSHA) was enacted to assure safe working conditions for employees. 29 U.S.C. §§ 651-678. It authorizes the Secretary of Labor to set mandatory safety standards. 29 U.S.C. § 651. In G.S. 95-131(a), the General Assembly of North Carolina has adopted the Secretary's occupational safety and health standards as the rules and regulations of the North Carolina Commissioner of Labor. Plaintiff con-

tends that the adopted regulations establish a standard of care and are enforceable by criminal sanctions. When noncompliance with an administrative safety regulation is criminal, the rule in North Carolina is that the violation is negligence *per se* in a civil trial. *Swaney v. Steel Co.*, 259 N.C. 531, 131 S.E. 2d 601 (1963).

According to G.S. 95-139, however, a willful violation of an OSHA rule constitutes a misdemeanor only if said violation causes the death of an employee. For all other violations, the sanction is a possible *civil* penalty accessed by the Commissioner. G.S. 95-138. We conclude that the adopted OSHA regulations are not penal in nature, and, therefore, a violation does not constitute negligence *per se*. *Accord Otto v. Specialties, Inc.*, 386 F. Supp. 1240 (N.D. Miss. 1974).

OSHA regulations are, however, some evidence of the custom in the construction industry. *See, e.g., National Marine Service, Inc. v. Gulf Oil Co.*, 433 F. Supp. 913 (E.D. La. 1977), *aff'd* 608 F. 2d 522 (5th Cir. 1979); *Knight v. Burns, Kirkley & Williams Const. Co., Inc.*, 331 So. 2d 651 (Ala. 1976). *See generally* Annot., 79 A.L.R. 3d 962 (1977) (violation of OSHA regulation as affecting tort liability). Custom is admissible to establish the standard of care required of reasonable men in the same circumstances. 1 Stansbury, N.C. Evidence § 95 (Brandis rev. 1973). Therefore, by presenting evidence that defendant had violated certain OSHA regulations, plaintiff presented some evidence on the issue of defendant's negligence. *See Flying Service v. Thomas*, 27 N.C. App. 107, 218 S.E. 2d 203 (1975).

Plaintiff's evidence also showed that defendant's ramp gave under the weight of people crossing it. The accident occurred when one side of the ramp tilted, suggesting that it was not anchored in place. The ramp was located over an open trench which was ten to twelve feet deep.

We hold that such evidence was sufficient to permit a finding that defendant failed to exercise ordinary care in the construction of the ramp and that the results of its failure were foreseeable. It was error for the court to find no negligence as a matter of law.

Defendant argues that the court nevertheless properly entered a directed verdict because plaintiff's evidence established contributory negligence as a matter of law. We disagree.

Contributory negligence is a jury question unless the evidence is so clear that no other conclusion is possible. *R.R. v. Trucking Co.*, 238 N.C. 422, 78 S.E. 2d 159 (1953); *Ridge v. Grimes*, 53 N.C. App. 619, 281 S.E. 2d 448 (1981). In the present action, reasonable men could differ as to whether plaintiff exercised ordinary care in working from a ramp which lacked guardrails. Conflicting conclusions could also arise concerning plaintiff's balancing of weight on the ramp. There was no evidence that plaintiff's fall was caused by loose gravel which he should have observed.

Because the evidence will support a finding that defendant's negligence was the proximate cause of plaintiff's injuries, the court erred in directing a verdict in defendant's favor. The order is reversed.

Reversed.

Judges MARTIN (Robert M.) and ARNOLD concur.

FAIRY ESTELLE ZACH, ADMINISTRATRIX OF THE ESTATE OF STEPHEN YON ZACH, DECEASED v. SURRY-YADKIN ELECTRIC MEMBERSHIP CORPORATION

No. 8117SC936

(Filed 18 May 1982)

1. Electricity § 8— death from electric wires—contributory negligence

In an action to recover for the death of plaintiff's intestate who was electrocuted by defendant power company's power lines, the evidence was sufficient to be submitted to the jury on the issue of contributory negligence where it tended to show that the intestate attempted, by himself, on a windy day, to remove a twenty-foot-long antenna from his family's house in the presence of high voltage power lines and that the antenna struck the power lines, and where the evidence was conflicting as to whether the intestate was aware of the danger associated with the presence of the high voltage lines.

2. Negligence § 38; Trial § 33.8— contributory negligence—failure to apply law to evidence

The trial court's instructions on contributory negligence were insufficient in failing to relate to the jury specific acts or omissions arising from the evidence which would constitute contributory negligence. G.S. 1A-1, Rule 51(a).

Zach v. Electric Membership Corp.

APPEAL by plaintiff from *Freeman, Judge.* Judgment entered 31 March 1981 in Superior Court, SURRY County. Heard in the Court of Appeals 7 April 1982.

Plaintiff-administratrix brought this wrongful death action alleging that the death by electrocution of her son, Stephen Yon Zach, was proximately caused by the negligence of defendant power company. The jury returned a verdict finding defendant negligent and plaintiff's decedent contributorily negligent.

At trial, plaintiff presented evidence tending to show that at the time of his death on 18 March 1979, Stephen Zach was 19 years old, and was living in a trailer on the property of his family's home. Uninsulated power lines carrying 7,200 volts of electricity passed within approximately 2 feet of the house at a height of approximately 22 feet. There were no notices posted in the area indicating that these were "live," high voltage lines. On 18 March, a breezy day, Stephen asked his mother if he could take one of the three aerial television antennas off the house to use at his trailer. Plaintiff agreed that Stephen could have one of the antennas, but suggested that he not try to remove one alone. At 4:30 p.m. on 18 March, Stephen's body was found about five feet from the house. A hatchet which apparently had been used to sever the antenna from its cement base lay on the ground near the body. An antenna measuring approximately twenty feet was found dangling in the power lines overhead. Burn marks on the decedent's hands matched marks on the antenna. The cause of Stephen's death was determined to be electrocution. There were no witnesses to the events surrounding Stephen's death.

Defendant's evidence tends to show that the power lines were open and obvious as they ran past the Zach's home; that it was not uncommon or unsafe for high voltage wires to be uninsulated and unmarked as being dangerous; and that newsletters sent to defendant's members, including plaintiff's family, warned of the dangers of placing antennas too close to live power lines.

From judgment entered on the verdict, plaintiff appeals.

White and Crumpler, by G. Edgar Parker, Edward L. Powell and David R. Crawford, for plaintiff-appellant.

Petree, Stockton, Robinson, Vaughn, Glaze & Maready, by R. M. Stockton, Jr. and John F. Mitchell, for defendant-appellee.

WELLS, Judge.

In one of her assignments of error, plaintiff contends that the trial court erred in denying plaintiff's motion for a directed verdict on the issue of contributory negligence. Plaintiff also contends that the trial court failed to properly instruct the jury on the issue of contributory negligence. We agree with plaintiff's second contention and award plaintiff a new trial.

[1] Plaintiff argues that the trial court erred in denying her motion for a directed verdict on the issue of contributory negligence, on the grounds that there was no evidence to support a jury determination that Stephen Zach was contributorily negligent.[1] We disagree.

On plaintiff's motion for a directed verdict on this issue, defendant's evidence must be taken as true and considered in the light most favorable to defendant, and plaintiff's motion was properly denied unless the evidence favorable to defendant on this issue was insufficient to justify a verdict for defendant. *Dickinson v. Pake*, 284 N.C. 576, 201 S.E. 2d 897 (1974); *Howell v. Lawless*, 260 N.C. 670, 133 S.E. 2d 508 (1963). Although there were no witnesses to Stephen's death, the evidence tended to show that Stephen Zach attempted, by himself, on a windy day, to remove a twenty-foot-long antenna from his family's house in the presence of high voltage lines. There was conflicting evidence as to whether Stephen was aware of the dangers associated with the presence of the high voltage lines. Viewing this evidence in the light most favorable to defendant, *Dickinson v. Pake*, supra, we hold that the evidence was sufficient to support, but not compel, a jury finding that Stephen Zach was contributorily negligent.[2] *Dennis v. Albemarle*, 242 N.C. 263, 87 S.E. 2d 561 (1955), *reh. dis.*, 243 N.C. 221, 90 S.E. 2d 532 (1955), *Partin v. Power and Light Co.*, 40 N.C. App. 630, 253 S.E. 2d 605 (1979), and cases cited therein,

1. We note that defendant has not cross-appealed from the trial court's denial of defendant's motion for a directed verdict on the issue of contributory negligence, and that in its brief, defendant concedes that the issue was properly submitted to the jury.

2. For cases which discuss the standard or standards of care to be exercised by persons engaged in activity in the vicinity of dangerous electrical wires, *see Williams v. Power & Light Co.*, 296 N.C. 400, 250 S.E. 2d 255 (1978), and cases cited therein; *Willis v. Power Co.*, 42 N.C. App. 582, 257 S.E. 2d 471 (1979).

disc. rev. denied, 297 N.C. 611, 257 S.E. 2d 219 (1979). We hold, therefore, that the trial court did not err in submitting this issue to the jury, and we overrule this assignment.

[2] Plaintiff also contends that the trial court failed to properly instruct the jury on the issue of contributory negligence, by giving no specific examples of how plaintiff's decedent might have been contributorily negligent. In his charge, Judge Freeman first gave a general recital of the evidence presented by each party. Then, on the issue of decedent's contributory negligence, Judge Freeman instructed the jury as follows, in pertinent part:

> The second issue reads, "If so, did Stephen Yon Zach, by his own negligence, contribute to his death?" Now in this issue, the burden of proof is on the defendant. This means that the defendant must prove by the greater weight of the evidence that the plaintiff—Strike that.—that the intestate, that is, Stephen Yon Zach, was negligent, that such negligence was a proximate cause of the intestate's own death. The test of what is negligence, as I've already defined and explained, is a reasonable and prudent doing of something that a reasonable prudent person would not have done, or not doing something that a reasonable prudent person should have done; and when the intestate's own negligence concurs with the negligence of the defendant and proximately causes the death, it's called "Contributory Negligence."
>
> The law imposes upon a person a duty to use ordinary care to protect himself from injury. When a person realizes, or in exercise of reasonable care should realize, that another has violated the duty owed to him, he must be vigilant in attempting to avoid injury. If one who has the capacity to understand and avoid a known danger fails to take advantage of the opportunity, it would be contributory negligence. A person is charged not only with knowledge of what he sees, but knowledge of what he simply should see.
>
> A person is required to use or exercise due care and to use his faculties to discover and avoid danger, care being commiserate (sic) with the danger or the appearance thereof.
>
> So, finally, in this contributory negligence issue, I'll instruct you that if the defendant has proved by the greater

> weight of the evidence that at the time of this death, the intestate, Stephen Yon Zach, was negligent in any one or in any manner, I'll say to you that if you find that Stephen Yon Zach was negligent and if the defendants further prove by the greater weight of the evidence that such negligence was a proximate cause of and contributed to the intestate's death, that it would be your duty to answer this issue, "Yes," in favor of the defendant.

G.S. 1A-1, Rule 51(a) places a mandatory duty on the trial court to "[d]eclare and explain the law arising on the evidence given in the case. The Judge shall not be required to state such evidence except to the extent necessary to explain the application of the law thereto; . . .". It is not enough that the trial court recites a general explanation of the law of negligence or contributory negligence. *Hunt v. Montgomery Ward and Co.*, 49 N.C. App. 642, 272 S.E. 2d 357 (1980). Our Supreme Court stated in *Griffin v. Watkins*, 269 N.C. 650, 153 S.E. 2d 356 (1967) that:

> Failure to exercise due care is the failure to perform some specific duty required by law. To say that one has failed to use due care or that one has been negligent, without more, is to state a mere unsupported conclusion. "(N)egligence is not a fact in itself but is the legal result of certain facts." (Citation omitted.)

The trial court must relate to the jury specific acts or omissions arising from the evidence which would constitute contributory negligence. *Griffin*, supra; *Sugg v. Baker*, 258 N.C. 333, 128 S.E. 2d 595 (1962); *see also Everhart v. LeBrun*, 52 N.C. App. 139, 277 S.E. 2d 816 (1981); *Hunt*, supra.

In the instant case, the trial court failed to specify any acts or omissions, supported by the evidence, from which the jury could find that Stephen Yon Zach was contributorily negligent. *See Everhart*, supra; *Hunt*, supra. This instruction left the jury free to conclude that general carelessness would constitute contributory negligence under the law. *Griffin*, supra. Our courts having ruled that such failure in the jury instructions is inherently prejudicial, *Investment Properties v. Norburn*, 281 N.C. 191, 188 S.E. 2d 342 (1972), and plaintiff is entitled to a new trial. As the other errors asserted by plaintiff are not likely to occur on retrial, we deem it unnecessary to address them in this opinion.

New trial.

Judges WEBB and WHICHARD concur.

VIVIAN OGLE COFFEY, WIDOW OF HARLEY E. COFFEY, DECEASED v. AUTOMATIC LATHE CUTTERHEAD, DEFENDANT-EMPLOYER AND PENNSYLVANIA NATIONAL MUTUAL INSURANCE COMPANY, DEFENDANT-CARRIER

No. 8110IC1015

(Filed 18 May 1982)

Master and Servant § 55.1— workers' compensation—accident—compensation improperly denied

The Industrial Commission erred in concluding plaintiff did not sustain an injury by accident where the evidence tended to show that plaintiff was a heavy man only about 71 inches tall; that as he was returning in the company car to defendant's parking lot, his order pad slipped off the seat and lodged between the passenger door and the seat; that plaintiff parked the car, opened the door, set his left foot on the gravel in the parking lot and turned to get his order pad; and that when he turned to get his order pad he injured his back. The evidence did not support the Commission's ultimate finding that at the time plaintiff was injured, he "was engaged merely in exiting from his car in the manner in which he normally exited from his car."

APPEAL by plaintiff from the North Carolina Industrial Commission. Opinion entered 20 July 1981. Heard in the Court of Appeals 5 May 1982.

At the time he was injured, Harley Coffey had been employed with the Automatic Lathe Cutterhead Company (hereinafter "defendant") for approximately 13½ years. He used a company car to carry out his routine duties. On 5 January 1979, he was returning in the company car to defendant's parking lot. As he made a lefthand turn into the lot, his order pad, which had been beside him on the seat, slid off the seat and lodged between the (passenger) door and the seat. Coffey parked the car, opened the door, set his left foot on the gravel in the parking lot and turned to get his order pad. He reached across the seat to get the pad, started turning back to the left, and felt a stinging sensation in his lower back. He got out of the car and put both feet on the

ground. At that time, the pain was so severe his legs folded and he fell to his knees. In a few minutes he was able to get up and go inside. He was subsequently treated by several doctors. On 5 February, a lumbar laminectomy was performed and an extruded disc was removed. His doctor gave Coffey a permanent partial disability rating of 25 percent. At the time of his injury, Coffey was over 50 years old, was 5'11½" tall, had a 38 inch waist, and weighed 215 pounds. The order pad he used in his work was about the size of a clipboard and weighed about a pound or a pound and a half.

The hearing officer awarded Coffey compensation, finding that he had sustained an injury by accident when he stretched across the seat to retrieve his order book. Following the hearing, Coffey died, apparently from unrelated causes, and his widow was substituted as the plaintiff in this action. The case was appealed to the Full Commission and on appeal, the Full Commission, with one commissioner dissenting, denied compensation.

From the opinion of the Industrial Commission denying compensation, plaintiff has appealed.

Sigmon, Clark & Mackie, by Jeffrey T. Mackie and Barbara H. Kern, for plaintiff-appellant.

Farthing & Cheshire, by Edwin G. Farthing, for defendant-appellee.

WELLS, Judge.

The hearing officer's opinion and award contained the following pertinent findings of fact and conclusion of law:

FINDINGS OF FACT

. . .

2. Plaintiff had worked for defendant employer [for] 13½ years as a sales representative on the date of the alleged injury, January 5, 1979. He called on wholesale furniture accounts and took orders. He used a three-quarter inch thick order book on a clipboard which weighed approximately 1½ pounds.

3. Defendant employer furnished plaintiff with a 1978 Chevrolet Impala which had a 54 inch bench front seat to

travel in. He had had this vehicle one year on the date of the alleged injury.

4. Plaintiff drove back into the company parking lot on Friday, January 5, 1979 at 2 p.m. The lot was covered with loose stone. He placed his left foot out on the parking lot in his customary manner and reached to his right side to pick up his order pad and clipboard. The clipboard had slipped to the right side of the seat and slid down between the right part of the front seat and the inside of the right door. Plaintiff leaned over to his right and stretched to get the order pad which was lodged between the seat and the right door. As he reached across the seat to the right door with his left foot on the ground, he felt a stinging (burning) sensation in his lower back, like a bee sting. He then raised back up, turned and placed his right foot out on the gravel. He stood up and the pain was so severe, he fell to the ground. After sitting on the ground a short while, he went in and told Randy Buchanan. The clipboard and order book was [sic] usually in the middle of the front seat to his right.

. . .

9. On January 5, 1979, plaintiff sustained an injury by accident arising out of and in the course of his employment with defendant employer when he stretched across the seat to retrieve an order book and clipboard which had slipped between the seat and right door. This was an unlooked for and untoward event which is not expected or designed by the injured employee, but a result produced by furtuilous [sic] cause.

. . .

CONCLUSIONS OF LAW

1. On January 5, 1979, plaintiff sustained an injury by accident arising out of and in the course of his employment with defendant employer. . . .

. . . .

On appeal, the Full Commission adopted findings of fact numbered 2, 3, and 4 quoted above, but vacated finding number 9

and conclusion number 1 above, and substituted its finding and conclusion, as follows:

FINDING OF FACT

9. On 5 January 1979, plaintiff sustained an injury to his back arising out of and in the course of his employment with the defendant employer. However, at the time he felt pain, plaintiff was engaged merely in exiting from his car in the manner in which he normally exited from his car. That plaintiff had to reach to the end of the seat to retrieve his order pad, as opposed to the middle of the seat where he normally placed the pad, does not create an exceptional circumstance or an unusual condition, nor was plaintiff's normal manner of exiting from his car thereby interrupted. Therefore, although plaintiff sustained an injury to his back, such injury did not arise by accident and thus is not compensable.

. . .

CONCLUSION OF LAW

At the time complained of, plaintiff was engaged in his normal routine under normal work conditions and did not sustain an injury by accident. Thus, he is not entitled to the benefits of the Workers' Compensation Act.

The Commission's own finding of fact that Coffey, a heavy man only about 71 inches tall, with his left foot on the ground outside the car, had to reach all the way across a 54 inch bench seat to retrieve the clipboard lodged between the end of the seat and the passenger door, simply does not support the Commission's ultimate finding that at the time Coffey was injured, he "was engaged merely in exiting from his car in the manner in which he normally exited from his car". Nor does the evidence support the Commission's finding that there was no unusual circumstance or condition. In fact, its own findings show the unusual circumstance of the clipboard being off the seat at the far end, rather than in its usual place in the middle of the seat. The Commission's own finding also shows that Coffey's normal manner or routine of exiting his car was interrupted by the unusual location of the clipboard. Not only does the Commission's own finding not support its ultimate finding of no unusual conditions or interruption of

normal routine, such ultimate findings are not supported by the evidence. The evidence clearly shows that the clipboard was usually on the seat beside Coffey, within easy reach as he exited the car, and that on the occasion of his injury, with his left foot on the ground, he had to lean and reach all the way across a 54 inch seat to dislodge the clipboard from its position between the seat and the door, and that as he began the movement to straighten up from this unusual position, he immediately felt a sharp pain in his back.

We find that the Commission's own findings of fact, as well as the evidence, support neither the Commission's finding that Coffey was engaged in his normal work routine under normal conditions nor the conclusion that he did not sustain his injury by accident. We are persuaded that the only conclusion that can be made upon the Commission's findings and upon the evidence is that Coffey experienced an accidental injury upon the interruption of his usual routine of work and the introduction of unusual conditions likely to result in unexpected consequences. *See Pardue v. Tire Co.*, 260 N.C. 413, 132 S.E. 2d 747 (1963) and cases cited therein; *Dunton v. Construction Co.*, 19 N.C. App. 51, 198 S.E. 2d 8 (1973). The accident suffered by Coffey was the subjecting of his torso and back to significant and unusual stress due to the strained position he assumed in reaching for his clipboard. His injury was caused by this accident. *See Porter v. Shelby Knit, Inc.*, 46 N.C. App. 22, 264 S.E. 2d 360 (1980).

The opinion and award of the Full Commission is reversed, and the cause is remanded with instructions to reinstitute the award of the hearing officer.

Reversed and remanded.

Judges WEBB and WHICHARD concur.

MARGIE E. SHEETS v. CLIFFORD B. SHEETS, J. B. SHAVER AND WIFE, DARE M. SHAVER, AND B. A. SHAVER

No. 8123SC934

(Filed 18 May 1982)

Adverse Possession § 7— tenant in common—no constructive ouster of cotenants

A tenant in common did not constructively oust her cotenants by paying past due taxes on the property in 1939 or by using the property without paying rents or profits to the cotenants where she recognized the cotenancy in 1971 by buying a share in the property from a cotenant.

APPEAL by respondents Shaver from *Long, Judge.* Judgment signed 3 April 1981 in Superior Court, WILKES County. Heard in the Court of Appeals 26 April 1982.

The subject matter of this litigation is an eighty-two-acre tract of land, known as the Movield (Moveal) Mountain property, located in Wilkes County, North Carolina, owned at one time by Alfred Reeves. Mr. Reeves died intestate and the property devolved to his five sons, Everette, Goye, Eugene, Oscar, and Jesse. Jesse died in 1947, at which time his interest in the property went to his wife, Annie Mae Dancy Reeves. In 1971 Annie Reeves purchased Oscar's interest through his widow, Myrtle. By deed dated 29 May 1973, Annie Mae Dancy Reeves conveyed "all of her right, title and interest in and to the Movield Mountain property" to Clifford B. and Margie E. Sheets.

Everette, Goye, and Eugene Reeves left Wilkes County before 1930. In 1971 they conveyed their interests in the property to respondents Shaver.

Clifford Sheets entered into a separation agreement with his wife, Margie Sheets, in July of 1977, the terms of which included the payment of $9,000 to Margie Sheets, to be paid "from the proceeds of the sale of an eighty-two (82) acre tract of land" located in Wilkes County. Margie Sheets filed a petition for a partition sale of the property on 30 August 1978. The petition alleged that the respective interests of the parties were:

Margie Sheets—one-fifth undivided interest;

Clifford Sheets—one-fifth undivided interest, subject to a lien in favor of Margie Sheets as provided in the separation agreement;

J. B. Shaver and wife—three-tenths undivided interest;

B. A. Shaver—three-tenths undivided interest.

Clifford Sheets answered, alleging that he and his wife were the sole owners of the subject property. Upon appeal from an order of the clerk finding contrary to respondent Sheets on the issue of ownership, the superior court judge found, *inter alia*, that:

1. On 31 August 1937, summons was issued and complaint filed in the action of *Wilkes County v. Reeves Heirs* for failure of the heirs to pay the ad valorem taxes on the eighty-two-acre tract.

2. Annie Mae Reeves paid the past-due taxes and was assigned a certificate of sale of real estate for taxes for the years 1929-39.

3. Annie Mae Reeves continued to pay taxes on the property until the conveyance to Clifford and Margie Sheets.

4. At various times between 1939 and 1971, Annie Mae Reeves planted crops on a portion of the arable land, occasionally rented small portions of the land for sharecropping, and allowed her sons to cut and remove timber on at least one occasion.

5. Annie Mae Reeves neither paid rents nor gave profits to Everette, Goye, Eugene, or Oscar Reeves. Nor was demand made for the same.

Based on the foregoing, the court concluded that:

> 2. On 20 February 1939 Annie Mae Reeves constructively ousted Everette Reeves, Oscar Reeves, Eugene Reeves and Goye Reeves from said property by paying in its entirety past due taxes, foreclosure fees, penalties and interest for a period of ten (10) years on said property in order to protect and preserve title to said property.
>
> . . . .
>
> 4. That Everette Reeves, Oscar Reeves, Goye Reeves and the heirs of Eugene Reeves were barred by the twenty (20) year Statute of Limitations to any interest in the locus in quo and that the Respondents J. B. Shaver and wife, Dare M. Shaver and B. A. Shaver receive[d] no interest in the 82 acre

Moveal Mountain land as a result of instruments executed by Everette Reeves, Goye Reeves and the heirs of Eugene Reeves in 1971.

The court ordered a partition of the property by judicial sale. Respondents Shaver appealed.

W. G. Mitchell for respondents Shaver.

George G. Cunningham for respondents Sheets.

MARTIN (Harry C.), Judge.

Our courts have, on numerous occasions, applied the law of constructive ouster. *See Dobbins v. Dobbins*, 141 N.C. 210, 53 S.E. 870 (1906); *Thomas v. Garvin*, 15 N.C. 223 (1833); *Collier v. Welker*, 19 N.C. App. 617, 199 S.E. 2d 691 (1973). The rule has been criticized as penalizing a cotenant out of possession for "sleeping on his rights," when under the traditional rules of adverse possession, cotenants share a special fiduciary relationship virtually precluding adverse possession by any other means.[1]

On the facts before us, however, we need not consider the potential problems and inconsistencies raised by our court-adopted rule of constructive ouster. Nor is it necessary to discuss appellants' evidentiary questions. This case falls squarely under the rule enunciated in *Mott v. Land Co.*, 146 N.C. 525, 60 S.E. 423 (1908), as applied in *Hi-Fort, Inc. v. Burnette*, 42 N.C. App. 428, 257 S.E. 2d 85 (1979).

Hi-Fort states that "where the party claiming adversely was found to have recognized the cotenancy by, in previous years, having bought . . . shares of the property from the heirs of the

1. See *Real Property—Adverse Possession Between Tenants in Common and the Rule of Presumptive Ouster*, 10 Wake Forest L. Rev. 300 (1974). A cotenant in possession is encouraged to deal with his fellow tenants in a less than open and honest manner. Knowing that the tenant out of possession has been lulled into believing that actual ouster is necessary, the tenant in possession need only fail to account for rents and profits and avoid open, notorious and hostile acts calculated to put his fellow tenants on notice. After twenty years of sole possession, he may claim the land as his own. The policy behind the rule, as originally stated by Lord Mansfield in *Fishar v. Prosser*, 98 Eng. Rep. 1052 (K.B. 1774), seems somewhat illogical. If undisturbed and quiet possession for twenty years is sufficient to presume actual ouster, the rule requiring actual ouster plus twenty years of open, continuous, exclusive and notorious possession has no meaning.

party through whom all were claiming title," the presumption of ouster will not arise. 42 N.C. App. at 435, 257 S.E. 2d at 90. The record here discloses that in 1971 Annie Mae Reeves recognized the cotenancy when she bought a one-fifth share in the property from Myrtle Reeves.

Reversed.

Chief Judge MORRIS and Judge CLARK concur.

GEORGE W. RIVENBARK, JR. AND WIFE MARGARET B. RIVENBARK v. JOSEPH MOORE; WENDELL V. TEACHEY, JOHN H. SHEFFIELD AND HOMER M. BONEY, JR. PARTNERS T/D/B/A SHEFFIELD'S TOBACCO WAREHOUSE OR SHEFFIELD'S WAREHOUSE

No. 814SC839

(Filed 18 May 1982)

Agriculture § 2— lease of farm property—landlord's lien for advancements—directed verdict improper

In an action in which plaintiffs alleged that they had leased farm property to an individual defendant; that they had incurred certain expenses and made advancements to the individual defendant which had not been paid; and that the individual defendant sold the tobacco crop grown on plaintiffs' land to the other defendants who owned a tobacco warehouse, the trial court erred in directing a verdict for defendants where the evidence showed plaintiffs had a landlord's lien on the crop grown by the individual defendant on plaintiffs' farm by virtue of G.S. 42-15, and defendants presented no evidence on waiver or estoppel of the lien rights.

APPEAL by plaintiffs from *Barefoot, Judge.* Judgment entered 24 March 1981 in Superior Court, SAMPSON County. Heard in the Court of Appeals 1 April 1982.

In their complaint plaintiffs alleged that they had leased farm property to defendant Moore in 1979; that they had incurred certain expenses and made advancements to Moore which had not been paid and which therefore constituted a lien against crops grown by Moore on plaintiffs' land; that Moore sold the tobacco crop grown on plaintiffs' land to the defendants who own Sheffield's Tobacco Warehouse; and that defendants paid Moore di-

rectly for the sale of the tobacco, although the name of plaintiff George W. Rivenbark, Jr., (hereafter "Rivenbark") was on the tobacco marketing card issued by the Agricultural Stabilization and Conservation Service. Plaintiffs sought to recover $20,404.26 for expenses and advancements from Moore and the sales proceeds from the tobacco crop from defendants.

Defendant warehouse owners answered that plaintiffs had given the marketing card to Moore and showed Moore as producer with no retained interest in plaintiffs; that plaintiffs had clothed Moore with apparent authority to sell the tobacco for their joint benefit; and that therefore plaintiffs were estopped from recovering against defendants.

Defendant Moore requested in his answer that the matter be submitted to arbitration as provided in his lease with plaintiffs. The arbitration resulted in a judgment against Moore in the amount of $20,358.11, which was subject to a landlord's lien in favor of plaintiffs.

At the trial of plaintiffs' claim against defendant warehouse owners, plaintiffs' evidence tended to show the following: Rivenbark leased his farm to Moore for the crop year 1979, Rivenbark designated the tobacco grown on his land to be sold at defendants' warehouse and on the designation form listed Moore with one hundred percent of the quota. The tobacco marketing card had Rivenbark's name embossed on it, and Rivenbark gave the card to Moore for the purpose of marketing their tobacco.

Rivenbark advanced expenses to Moore for crops produced on the farm. Moore had made no settlement of these advancements, so Rivenbark went to defendants' warehouse and tried to obtain his marketing card from the warehouse. Defendant Teachey told Rivenbark the tobacco was on the floor and he would have to wait two days to get his card. When Rivenbark returned for his card, he learned that the tobacco had been sold and all sales proceeds paid to Moore. Although Rivenbark expected the check for the tobacco to be made out jointly to him and Moore, he did not ask defendants to do this.

At the close of plaintiffs' evidence, defendants moved for directed verdict. From the granting of this motion, plaintiffs appeal.

John R. Parker for plaintiff appellants.

Russell J. Lanier, Jr., for defendant appellees.

CLARK, Judge.

Plaintiffs assign error to the granting of defendants' motion for directed verdict. A motion for directed verdict under G.S. 1A-1, Rule 50(a), involves a determination of whether the evidence was sufficient to entitle the plaintiff to have a jury pass on it. The question presented to the appellate court in reviewing the decision of the trial court is identical to that presented to the lower court by defendant's motion: whether the evidence, considered in the light most favorable to plaintiff, was sufficient for submission to the jury. *Hunt v. Montgomery Ward and Co.*, 49 N.C. App. 642, 272 S.E. 2d 357 (1980).

Plaintiffs' claim to the proceeds from the sale of the tobacco crop derives from the landlord's lien statute, G.S. 42-15, which provides, in pertinent part, as follows:

> "When lands are rented or leased by agreement, written or oral, for agricultural purposes, . . . unless otherwise agreed between the parties to the lease or agreement, any and all crops raised on said lands shall be deemed and held to be vested in possession of the lessor or his assigns at all times, until the rents for said lands are paid and until all the stipulations contained in the lease or agreement are performed, or damages in lieu thereof paid to the lessor or his assigns, *and until said party or his assigns is paid for all advancements made and expenses incurred* in making and saving said crops. . . .
>
> *This lien shall be preferred to all other liens,* and the lessor or his assigns is entitled, against the lessee or cropper, or the assigns of either, who removes the crop or any part thereof from the lands without the consent of the lessor or his assigns, or against any other person who may get possession of said crop or any part thereof, to the remedies given in an action upon a claim for the delivery of personal property." (Emphasis added.)

The evidence presented at trial and the order confirming the arbitration award show clearly that plaintiffs had a landlord's lien

on the crops grown by Moore on plaintiffs' farm. The lien is acquired automatically by virtue of the landlord's status, and no writing or recordation is required in order to establish the lien. A person who deals with the tenant is charged with notice of the landlord's rights under G.S. 42-15. "The statute itself gives notice to all the world of the law relative to a landlord's lien." *Hall v. Odom*, 240 N.C. 66, 69, 81 S.E. 2d 129, 132 (1954).

It is correct, however, as defendants argue in their brief, that the landlord can expressly or impliedly waive the lien or by his acts and conduct be estopped from asserting the lien. *Hall v. Odom, supra.* Relying on *Adams v. Warehouse*, 230 N.C. 704, 55 S.E. 2d 331 (1949), defendants contend that by giving Moore his tobacco marketing card, Rivenbark in effect constituted Moore as his agent to sell the tobacco for their joint benefit, with the understanding that Moore would account to Rivenbark for his share of the proceeds of the sale. However, waiver and estoppel are affirmative defenses which must be pleaded with certainty and particularity and established by the greater weight of the evidence. *Hall v. Odom, supra.* The record shows that defendants presented no evidence in the case *sub judice.* While the evidence presented by plaintiffs might permit a finding that plaintiffs waived their lien rights or were estopped to assert them, we do not believe that the evidence compels such a finding as a matter of law. Plaintiffs' evidence could also permit a finding that prior to issuance of the check to Moore for the sales proceeds, defendants had knowledge of plaintiffs' superior claim since Rivenbark attempted several times to obtain possession of the tobacco marketing card from defendants. *See, Sugg v. Parrish*, 51 N.C. App. 630, 277 S.E. 2d 557, *disc. rev. denied*, 303 N.C. 550, 281 S.E. 2d 401 (1981). We find that plaintiffs' evidence was sufficient to require submission to the jury and to overcome defendants' motion for a directed verdict.

The judgment allowing defendants' motion for a directed verdict is reversed, and this action is remanded for a new trial.

New trial.

Judges ARNOLD and WEBB concur.

Ward v. Ward

BARBARA PORTER WARD v. VIRGIL VAUGHN WARD AND EUGENE McKEITHAN

No. 8113DC943

(Filed 18 May 1982)

1. **Husband and Wife § 15.1— husband's right to rents and profits from farmlands**

Plaintiff wife's testimony that defendant husband told her when they bought farmland that "while we were young we were going to clear the land and have it paid for so that when we got older that would be our future" was insufficient to show an express or implied agreement that plaintiff was entitled to share in the rents and profits received for jointly owned property during the marriage, and the husband was not required to account to plaintiff for rents received from farmland owned by the parties as tenants by the entirety during the marriage.

2. **Husband and Wife § 3.1— wife not entitled to interest in stock**

Plaintiff wife's testimony that stock in an insurance company was acquired during her marriage to defendant and that they "went together and bought it" was insufficient to entitle plaintiff to half of the shares of the stock.

3. **Husband and Wife § 3.1— interest of wife in personalty—sufficiency of evidence**

Plaintiff wife's evidence was sufficient for the jury to find that she was entitled to an interest in farm equipment and household goods purchased by the parties during their marriage where it tended to show that plaintiff wife and defendant husband each paid a part of the purchase price of the farm equipment and household goods.

APPEAL by plaintiff from *Wood, Judge.* Judgment entered 19 May 1981 in District Court, COLUMBUS County. Heard in the Court of Appeals 27 April 1982.

Plaintiff and defendant Ward were married in 1957, separated on 15 February 1978 and divorced on 24 May 1979. Plaintiff brought this action on 13 November 1980 seeking: (1) a division of personal property acquired during the marriage to defendant Ward pursuant to an implied agreement that the parties would share equally in the profits gained by their individual and combined business efforts as well as by individual and combined assets (first cause of action); (2) one-half of the net rents for 1978, 1979 and 1980 from jointly held farmland and for reimbursement of one-half of the insurance paid by plaintiff for 1980 (second cause of action); (3) a division of shares of stock of Combined Insurance Company (third cause of action); and (4) an accounting of

the proceeds of the jointly held property leased to defendant McKeithan for 1978, 1979 and 1980 by defendant Ward (fourth cause of action). The trial court granted defendant's motions for directed verdict at the conclusion of plaintiff's evidence on plaintiff's first and third causes of action, and on plaintiff's second cause of action for all rents accruing prior to the date of divorce. From this judgment plaintiff appealed.

Ralph G. Jorgensen for the plaintiff-appellant.

No counsel appeared for defendant-appellee Ward on this appeal.

MARTIN (Robert M.), Judge.

Plaintiff contends that the trial court erred in directing the verdicts for defendant Ward. Our Supreme Court in *Kelly v. Harvester Co.*, 278 N.C. 153, 158, 179 S.E. 2d 396, 398 (1971) stated the test for allowing a directed verdict:

> On a motion by a defendant for a directed verdict in a jury case, the court must consider all the evidence in the light most favorable to the plaintiff and may grant the motion only if, *as a matter of law*, the evidence is insufficient to justify a verdict for the plaintiff. (Citation omitted.)

Considering plaintiff's second and third causes of action first, we find that the trial court properly granted defendant's motions for directed verdict.

[1] It is well-settled in North Carolina that during the existence of a tenancy by the entirety, the husband has the absolute and exclusive right to the control, use, possession, rents, income and profits of the land. 2 R. Lee, N.C. Family Law § 115 (4th ed. 1980). The husband does not have to account to his wife for the rent and income received from the property. *Board of Architecture v. Lee*, 264 N.C. 602, 142 S.E. 2d 643 (1965). In the case at bar, as a matter of law defendant husband did not have to account to plaintiff for the rents received from the farmland owned as tenants by the entirety during the parties' marriage. Plaintiff testified as follows: "Virgil told me when we bought the farms that they were for our future. That while we were young we were going to clear the land and have it paid for so that when we got older that

would be our future." Considering this testimony in the light most favorable to plaintiff, it is insufficient to show an express or implied agreement that plaintiff is entitled to the rents received for the jointly owned property during the marriage. The husband, therefore, was legally entitled to those rents. *Id.* Thus, the trial court's entry of a directed verdict was proper.

[2] In her third cause of action plaintiff sought one-half of the value of the stock in the Combined Insurance Company held in defendant's name. Plaintiff's only evidence was that the stock was acquired during the marriage and that they "went together and bought it." Considering this evidence in the light most favorable to plaintiff, as a matter of law the evidence is insufficient to justify a verdict for plaintiff. *Kelly v. Harvester Co., supra.*

[3] Plaintiff in her first cause of action sought one-half of personal property acquired during the marriage or one-half of its value of $43,760.00. This property consisted primarily of farm equipment and household goods, and all the property was financed by Southeast PCA where both plaintiff and her husband had signed the notes. Plaintiff testified as follows:

> The property was financed at the PCA and she and her husband both signed the Notes at the PCA. We both paid the loan and Notes off. The payments made on the farm equipment and household goods in 1978 were $1,103.09 on interest and $11,595.18 on principal. These payments were made on debts, Notes that she and her husband signed—the debts were used to acquire money—monies to purchase this personal property. During 1979 she and her husband paid $1,156.30 on interest and $6,567.97 on principal.
>
> She paid off half of the money. During 1980 she paid half of $1,130.73 [interest] plus $7,869.90 [principal] to PCA. In addition she paid a total of half of $47,000.00 on the debts used to acquire equipment in 1980. Since her separation in 1978, the defendant has not given her any of that property.
>
> * * *
>
> After we were separated, he had me go to the PCA and to borrow—sign to borrow, Nine Hundred Dollars to pay off part of the equipment, and I paid half of that. I paid off half of the remaining debts.

The Note at the PCA was toward the final purchase price of the farm and the Eight or Nine Thousand Dollars still owing on the equipment in 1980.

In *Bullman v. Edney,* 232 N.C. 465, 61 S.E. 2d 338 (1950), a husband and wife purchased an automobile, each paying a part of the purchase price or promising to pay such a part. The court held that they became tenants in common therein in the proportion which the amount paid, or agreed to be paid, by each bore to the entire purchase price. In this case we cannot say that plaintiff's evidence was insufficient as a matter of law to justify a verdict finding her to have some interest in the property. The trial court improperly granted defendant's motion for a directed verdict on this cause of action.

We have carefully considered plaintiff's remaining assignment of error and find it to be totally without merit and overruled.

The judgment of the trial court is

Affirmed in part and reversed in part.

Judges VAUGHN and ARNOLD concur.

BRADFORD P. DAILEY v. INTEGON GENERAL INSURANCE CORPORATION, A NORTH CAROLINA CORPORATION

No. 813SC915

(Filed 18 May 1982)

Damages §§ 12, 12.1; Insurance § 113— refusal to settle fire insurance claim—dismissal of claims for special damages and punitive damages improper

The trial court erred in dismissing plaintiff's claim for special damages and punitive damages in an action concerning fire insurance on his dwelling home and its contents where the specific facts necessary to support plaintiff's claims were stated clearly in his complaint.

APPEAL by plaintiff from *Rouse, Judge.* Order entered 11 August 1981 in Superior Court, CRAVEN County. Heard in the Court of Appeals 8 April 1982.

In his complaint, plaintiff alleged that in June 1980, defendant's agents advised him to increase the fire insurance on his property; plaintiff heeded the advice, increasing his coverage from $100,000 to $105,000 on his dwelling house and from $50,000 to $52,500 on his unscheduled personal property. The added coverages commenced on 22 June 1980. On 25 July 1980, a fire destroyed plaintiff's dwelling house and its contents. Plaintiff further alleged that since the loss by fire, he has made good faith efforts to settle his claim with defendant, but that defendant "has failed and refused to settle said claim . . . without justification." Plaintiff sought to recover for compensatory damages, special damages, and punitive damages.

Defendant moved to dismiss plaintiff's claim for relief under G.S. 1A-1, Rule 12(b)(6). The judge dismissed plaintiff's claims for special damages and punitive damages. Plaintiff appeals.

Sumrell, Sugg & Carmichael, by Rudolph A. Ashton III, for plaintiff-appellant.

Dunn & Dunn, by Raymond E. Dunn, for defendant-appellee.

HILL, Judge.

We initially note that this appeal is subject to dismissal under Rule 54(b) of the North Carolina Rules of Civil Procedure as premature and fragmentary; it is from an interlocutory order which adjudicates fewer than all of the claims of the parties, and the trial judge has not determined that there is no just reason for delay. This rule is for the benefit of the parties as well as the court since it reduces the multiplicity of appeals, saving time and money for all concerned. Nevertheless, because this appeal is already before us at this time, and in the interest of saving further time and money for all concerned, we elect to treat the appeal as a petition for writ of certiorari, grant it, and dispose of the questions raised.

Plaintiff's sole arguments present the question of whether the judge erred in granting defendant's motion to dismiss his claims for special damages and punitive damages. His claim for special damages is, in part, as follows:

SECOND CLAIM FOR RELIEF

. . . .

II. The Defendant's refusal to provide or pay the benefits and coverages under the provisions of the policy attached hereto as Exhibit A has been in bad faith and a breach of the covenant of good faith and fair dealing.

III. As a direct and proximate result of the actions of the Defendant in delaying and denying benefits due the Plaintiff under the policy, the Plaintiff has sustained compensable economic losses including but not limited to expert witness fees, construction estimate fees, photograph fees, loss of time, and other incidental expenses in the sum of $10,000.00, and has suffered embarrassment and humiliation, unnecessary mental pain and suffering, and emotional distress and discomfort, all to his detriment and damage in the amount of $20,000.00.

IV. As a direct and proximate result of the actions of the Defendant in delaying and denying benefits due the Plaintiff under the policy the Plaintiff has sustained and incurred legal expenses to protect this interest under his policy with the Defendant.

Plaintiff's claim for punitive damages is, in part, as follows:

THIRD CLAIM FOR RELIEF

. . . .

II. The Defendant has refused to settle Plaintiff's claim in good faith; has refused to acknowledge the damage estimates of Plaintiff or contractors hired by the Plaintiff; has refused to assign qualified agents to identify and estimate the amount of damage to Plaintiff's property; and upon information and belief, Defendant's agent acting within the course and scope of his employment in investigating Plaintiff's claim offered sums of money to local individuals and did other things in an attempt to discredit Plaintiff's claim and credibility.

III. The actions of the Defendant above-stated and the Defendant's refusal to settle or negotiate the Plaintiff's claim:

> (1) have been in bad faith and a breach of the covenant of good faith and fair dealing, (2) have been willful, oppressive, and malicious with the obvious intent to forestall the Plaintiff sufficiently long enough to bring additional financial pressure upon him so that he would be forced to accept a settlement far below what is legally owed to him under the contract with the Defendant, (3) have been a misuse of power and authority tantamount to outrageous conduct, and (4) have been in reckless and wanton disregard of the Plaintiff's rights under the policy attached hereto as Exhibit A.

Because of the nature of the above-quoted claims, we merge them for our consideration of their adequacy to withstand defendant's motion to dismiss.

In *Stanback v. Stanback*, 297 N.C. 181, 196, 254 S.E. 2d 611, 621 (1979), our Supreme Court stated the general rule regarding a claim for punitive damages in a contract action:

> [Generally,] punitive damages are not recoverable for breach of contract with the exception of breach of contract to marry. *Newton v. Standard Fire Ins. Co.*, 291 N.C. 105, 229 S.E. 2d 297 (1976); *Oestreicher v. Stores*, 290 N.C. 118, 225 S.E. 2d 797 (1976); *King v. Insurance Co.*, 273 N.C. 396, 159 S.E. 2d 891 (1968). But when the breach of contract also constitutes or is accompanied by an indentifiable tortious act, the tort committed may be grounds for recovery of punitive damages. [Citation omitted.] Our recent holdings in this area of the law clearly reveal, moreover, that allegations of an identifiable tort accompanying the breach are insufficient alone to support a claim for punitive damages. In *Newton* the further qualification was stated thusly: "Even where sufficient facts are alleged to make out an identifiable tort, however, the tortious conduct must be accompanied by or partake of some element of aggravation before punitive damages will be allowed." *Newton, supra*, at 112, 229 S.E. 2d at 301.

Such aggravation has been defined to include " 'fraud, malice, such a degree of negligence as indicates a reckless indifference to consequences, oppression, insult, rudeness, caprice, wilfulness . . ..' " *Newton v. The Standard Fire Insurance Co.*, 291 N.C. 105, 112, 229 S.E. 2d 297, 301 (1976), *quoting Holmes v. The Carolina Central Railroad Co.*, 94 N.C. 318, 323 (1886). The tortious act

must be pleaded with specificity; "even 'notice pleading' requires that the complaint be more precise and the facts and allegations be sufficiently pleaded so as to prevent confusion and surprise to the defendant and preclude the recovery of punitive damages for breach of contract where there is not tortious conduct." *Shugar v. Guill*, 304 N.C. 332, 338, 283 S.E. 2d 507, 510 (1981).

Based upon these principles, we conclude that plaintiff *sub judice* has sufficiently alleged a tortious act accompanied by "some element of aggravation" to withstand defendant's motion. The specific facts necessary to support plaintiff's claims are stated clearly in the portions of his complaint quoted above. Unlike the allegations stated in *Newton v. The Standard Fire Insurance Co., supra*, plaintiff has alleged recognizable, aggravated tortious behavior. For this reason, the judge erred in dismissing the claims.

The order of the judge below is

Reversed.

Judges HEDRICK and BECTON concur.

STATE OF NORTH CAROLINA v. BEVERLY ELAINE TATE

No. 8121SC1280

(Filed 18 May 1982)

Criminal Law § 73.2— testimony not hearsay—exclusion as prejudicial error

In a prosecution for various offenses arising from defendant's alleged delivery of methaqualone at a garage and body shop, defendant's proffered testimony about a conversation with the garage owner in which the owner stated that he had important business to take care of and would see defendant later at a barbecue stand did not constitute hearsay since it was not offered to prove the truth of the matter asserted but was offered to explain defendant's subsequent conduct in quickly leaving the garage, and the exclusion of such testimony constituted prejudicial error where the State's case against defendant was based entirely on circumstantial evidence and the testimony was the only evidence tending to show why defendant left the garage so quickly.

Judge VAUGHN dissenting.

State v. Tate

APPEAL by defendant from *Walker, Judge.* Judgment entered 5 August 1981 in Superior Court, FORSYTH County. Heard in the Court of Appeals 6 May 1982.

The defendant was charged with conspiracy to traffic in methaqualone, delivery of methaqualone, felonious trafficking in methaqualone and feloniously transporting methaqualone. The jury found her guilty on all charges. From a sentence of imprisonment of ten years maximum and five years minimum, defendant appealed. Other facts pertinent to the resolution of this appeal are contained in the opinion of the court.

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

Morrow and Reavis by John F. Morrow for the defendant-appellant.

MARTIN (Robert M.), Judge.

The State's evidence consisted primarily of the testimony of two undercover agents, M. D. Robertson and Susan G. Forrest. They testified that Agent Robertson had arranged to purchase 1200 quaaludes from Donald Watson at his garage and body shop on 23 January 1981. Watson told them that his female source of supply would deliver the drugs to him at approximately 12 noon. The agents began surveillance of the garage at approximately 12 noon on 23 January 1981. At 12:20 the defendant arrived in her car, entered the garage and within a minute thereafter exited the garage. The agents noticed that she had her hand inside her coat as though she was carrying something on the way in but that her hand was outside her coat as she left the garage. After defendant departed, Donald Watson motioned Agent Robertson inside where Robertson purchased 1200 quaaludes.

The defendant's evidence tended to show that she went to Donald Watson's garage on 23 January 1981 to make her monthly payment for repairs he had done on her car and to discuss some problems with the repairs. Earlier that day Franklin Watson, Donald Watson's brother, had called defendant. She told him that she was going to the garage to make the payment, and they agreed to meet at the garage and have lunch nearby. The trial

court would not permit the defendant to testify to the conversation between herself and Donald Watson when she entered the garage. The Court said, "I'm not going to allow going into what a third party says." The defendant excepted and presented the following testimony on *voir dire:*

> When I entered Mr. Watson's office and I pushed the bag across and sat down on the corner of his desk and I started to talk to him about when he could possibly repaint the roof of my car, and Don told me, he said, "I have some urgent business to take care of." He said, "If you're going up to the barbecue stand with my brother to eat lunch, as soon as I get finished with it, I'll be right, come up there with you and I'll be glad to come up with a date we can repaint your car." So he rushed me, he literally rushed me out of the office, and he said there was a guy waiting outside and he had something to take care of.

The trial court presumably excluded defendant's testimony about her conversation with Donald Watson because it was hearsay. Whenever the assertion of any person, other than that of the witness himself in his present testimony, is offered to prove the truth of the matter asserted, the evidence so offered is hearsay. If offered for any other purpose, it is not hearsay. 1 Stansbury's N.C. Evidence § 138 (Brandis rev. 1973). In this case the excluded evidence was not offered to prove the truth of the matter, that is, that Donald Watson had urgent business to take care of and that he would see defendant later at the barbecue stand. Rather this evidence was offered to show defendant's state of mind, to explain her subsequent conduct of leaving the garage. Thus this testimony was not hearsay and its exclusion was error. *See e.g. State v. Potter,* 295 N.C. 126, 244 S.E. 2d 397 (1978), (victim's widow's testimony—that she had heard that defendant threatened to kill her husband—admissible to show why she called sheriff); *State v. Irick,* 291 N.C. 480, 231 S.E. 2d 833 (1977), (testimony of recipient as to radio dispatches from one officer to another admissible to explain officer's subsequent conduct); *State v. Thomas,* 35 N.C. App. 198, 241 S.E. 2d 128 (1978), (witness testified she heard on radio about store robbery, admissible to explain why she remembered the man at store).

Even so, the State submits that any error in excluding defendant's testimony did not amount to prejudicial error. The test

for prejudicial error is whether there is a reasonable possibility that the evidence complained of contributed to defendant's conviction. *State v. Milby and State v. Boyd*, 302 N.C. 137, 273 S.E. 2d 716 (1981). Here the State's case against defendant was based entirely on circumstantial evidence. Defendant's testimony was the only evidence that tended to show why defendant left the garage so quickly. Under these circumstances we cannot say that there is no "reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial. . . ." N.C. Gen. Stat. § 15A-1443(a); *State v. Culpepper*, 302 N.C. 179, 273 S.E. 2d 686 (1981). Thus the exclusion of defendant's testimony about her conversation with Donald Watson was prejudicial error.

We do not consider defendant's remaining assignments of error because they are not likely to recur on retrial.

New trial.

Judge ARNOLD concurs.

Judge VAUGHN dissents.

Judge VAUGHN dissenting.

I do not agree that the exclusion of the evidence quoted by the majority must result in a new trial. The majority states that defendant's testimony was the only evidence that tended to show why defendant left the garage so quickly. However that may be, the *excluded* testimony was not the only testimony by defendant as to why she left so quickly. She testified that, prior to going to the garage, she had discussed a lunch date with one Frankie Watson, who later met her at the garage. The pair talked for about five minutes in front of the garage. She then testified, "I told him I was going *to run in the office and give Don $200.00 and I would be right back* out and help him walk up to the barbecue stand and go eat with him." (Emphasis added.) She then testified as to what happened after she entered Donald Watson's garage:

> "He has a big desk in that office and a couch. I sat down on the desk and I happened to push and put my hands on a bag that was sitting there and push something and im-

mediately was told something. I said, 'Listen, I'll come back and give you the $200.00 after you got [*sic*] finished taking care of what you got to take care of. I'm going up to the barbecue stand with your brother and when you have finished doing what you got to do, come up and get me and then I'll finish talking to you about my vehicle.' "

In light of the foregoing, I fail to see how the exclusion of the testimony quoted by the majority could have had the slightest effect on the trial.

FT. RECOVERY INDUSTRIES, INC. v. LOREN PERRY D/B/A PERRY CAMPERS, ALSO D/B/A PERRY SNYDER PLASTICS, ALSO D/B/A PERRY PLASTICS

No. 8121DC895

(*Filed 18 May 1982*)

Constitutional Law § 26; Courts § 2— in personam jurisdiction—enforcement of judgment of another state

The trial court properly granted summary judgment for plaintiff on its action to enforce an Ohio judgment where defendant raised the issue of personal jurisdiction in his answer and was given the opportunity to litigate the question of jurisdiction and failed to present any evidence to support his contention that he did not have sufficient minimum contacts so as to extend the jurisdiction of the Ohio courts to him. The determination of jurisdiction by the Ohio court was *res judicata* and precluded a collateral attack on the judgment in the North Carolina courts.

APPEAL by defendant from *Keiger, Judge.* Order entered 4 May 1981 in District Court, FORSYTH County. Heard in the Court of Appeals 7 April 1982.

Plaintiff instituted this action to enforce an Ohio judgment against defendant in the amount of $3,463.14, plus interest, for goods sold and delivered. Defendant in his answer challenged the Ohio court's personal jurisdiction over him on the grounds that the Ohio long-arm jurisdictional statute did not reach him and that his appearance in the Ohio action was limited to contesting jurisdiction.

In the Ohio action, defendant filed an answer denying the allegations in plaintiff's complaint asserting that he had never

personally done business with plaintiff, and praying that the action be dismissed. Defendant also filed a separate motion to dismiss on the ground that he had never dealt on an individual basis with plaintiff but solely as agent of Perry Plastics. Judgment was rendered against defendant in the Ohio courts on 14 March 1979. The judge found that plaintiff had received payments on account that were drawn on defendant's personal checking account, that plaintiff had a valid complaint against defendant, and that defendant had produced no evidence supporting his answer and motion to dismiss.

In the action filed in Forsyth County, plaintiff moved for summary judgment. From the granting of this motion, defendant appeals.

Zachary, Zachary & Harding by Warren E. Kasper for plaintiff appellee.

Robert Tally for defendant appellant.

CLARK, Judge.

Defendant argues that the court erred in granting summary judgment in that there existed genuine issues as to the reach of Ohio's *in personam* jurisdiction and the nature of defendant's appearance in that State. Pursuant to G.S. 1A-1, Rule 56, summary judgment will be granted when the moving party has shown that there is no genuine issue as to any material fact and that he is entitled to judgment as a matter of law. *Prather, Thomas, Campbell, Pridgeon, Inc. v. Properties, Inc.*, 29 N.C. App. 316, 224 S.E. 2d 289 (1976).

The judgment rendered by the Ohio court is a judgment *in personam* and is void if the court did not have jurisdiction over the person and subject matter of the action. The requirements for personal jurisdiction are that the nonresident defendant had sufficient minimum contacts with the forum state and that service of process did not offend traditional notions of fair play. *Hanson v. Denckla*, 357 U.S. 235, 2 L.Ed. 2d 1283, 78 S.Ct. 1228 (1958); *International Shoe Co. v. Washington*, 326 U.S. 310, 90 L.Ed. 95, 66 S.Ct. 154, 161 A.L.R. 1057 (1945). There is no deficiency of service of process asserted by defendant in the case *sub judice*. Defend-

ant contends that the Ohio long-arm statute cannot reach him since he did not have sufficient minimum contacts with that State.

If the Ohio court had jurisdiction over defendant, Art. IV, § 1 of the United States Constitution requires that this State give "full faith and credit" to the Ohio judgment. Our courts have held that a mere recital that the court had jurisdiction is not conclusive, and that North Carolina may, within limits, make its own inquiry into the jurisdiction of the court which rendered judgment. *Prather, Thomas, Campbell, Pridgeon, Inc. v. Properties, Inc., supra.* However, if the issue of personal jurisdiction has been litigated in and determined by the foreign court rendering judgment, the judgment is entitled to full faith and credit and cannot be collaterally attacked. *Durfee v. Duke*, 375 U.S. 106, 11 L.Ed. 2d 186, 84 S.Ct. 242 (1963); *Sherrer v. Sherrer*, 334 U.S. 343, 92 L.Ed. 1429, 68 S.Ct. 1087, 1 A.L.R. 2d 1355 (1947); *Hosiery Mills v. Burlington Industries*, 285 N.C. 344, 204 S.E. 2d 834, 72 A.L.R. 3d 466 (1974). If the foreign court made an erroneous determination of jurisdiction, such decision is grounds for reversal in the appellate court of that state. 5 Am. Jur. 2d *Appearances* § 4 (1962). The defendant in this case did not appeal the Ohio judgment.

The record before us shows that defendant raised the issue of personal jurisdiction in his answer and motion to dismiss filed in the Ohio action by asserting that he had done business with plaintiff only as an agent of Perry Plastics and not in an individual capacity. At the trial and hearing on the motion held on 14 March 1979, defendant was present through counsel, who advised the court that he would offer no evidence in support of the answer and motion filed in defendant's behalf. The court heard evidence from plaintiff concerning the account due and payments received on the account which had been drawn on defendant's personal checking account, and entered judgment for plaintiff. While there is no specific finding of personal jurisdiction in the court's judgment, such a finding is implicit in the entry of judgment against defendant. A distinction must be made between this case and an action in which the question of lack of personal jurisdiction is never raised until enforcement of the foreign judgment is sought. In the latter situation, the State in which judgment is sought to be enforced may itself determine whether the first state had personal jurisdiction. *Prather, Thomas, Campbell, Pridgeon, Inc. v. Properties, Inc., supra.* In the case *sub*

judice, the jurisdictional issue was raised by defendant in his answer and motion and duly considered by the Ohio court. Defendant was given the opportunity to litigate the question of jurisdiction and failed to present any evidence to support his contention that he did not have sufficient minimum contacts so as to extend the jurisdiction of the Ohio courts to him. The determination of jurisdiction by the Ohio court is *res judicata* and precludes a collateral attack on the judgment in the North Carolina courts. *Sherrer v. Sherrer, supra.*

We hold that the Ohio judgment in question is valid and entitled to full faith and credit in North Carolina.

Summary Judgment for the plaintiff on its action to enforce the Ohio judgment is

Affirmed.

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

WALTER E. SCOTT, JR. v. ALLSTATE INSURANCE COMPANY

No. 8126SC1002

(Filed 18 May 1982)

Insurance § 74— automobile collision insurance—notice of expiration not required

Defendant insurer was under no legal duty by reason of statute, agreement, custom or course of dealing to notify plaintiff insured of the expiration of his motor vehicle collision insurance.

APPEAL by plaintiff from *Burroughs, Judge.* Order entered 24 July 1981 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 4 May 1982.

Plaintiff appeals from an order granting summary judgment in favor of defendant.

On 27 March 1976, plaintiff applied to defendant for liability and collision insurance on his 1976 Chevrolet van. Plaintiff paid the specified premium, and defendant added the coverage to a policy initially issued to plaintiff on 12 March 1976. The stated termination date of plaintiff's policy was 12 March 1977.

On 30 March 1977, plaintiff had a collision which resulted in the total destruction of his truck. He unsuccessfully sought reimbursement from defendant under the terms of the insurance policy. Defendant denied coverage. Plaintiff subsequently filed a complaint. Defendant answered and moved for summary judgment.

Both parties presented affidavits for the court's consideration. Defendant's evidence showed that on 4 January 1977, it mailed plaintiff a letter informing him of increased rates for renewed collision coverage. If plaintiff desired coverage, he should contact one of defendant's agents. The letter noted that the date plaintiff's current coverage would stop was 12 March 1977. Defendant received no response and no premiums to provide collision coverage after 12 March 1977. On that date, collision coverage expired.

Plaintiff testified that he never received the January letter. The only letter he received was one of 3 April 1977 advising him of the cancellation of his insurance coverage on 11 April 1977 for nonpayment of premiums. Plaintiff believed that until that date, his collision coverage was in effect.

After considering the pleadings, affidavits, and arguments of counsel, the court concluded there was no genuine issue as to any material fact and that defendant was entitled to summary judgment as a matter of law. It granted defendant's motion.

James, McElroy and Diehl, by Gary S. Hemric, for plaintiff appellant.

Walker, Palmer and Miller, by Robert P. Johnston, for defendant appellee.

VAUGHN, Judge.

At issue on appeal is whether defendant was required to give plaintiff notice of nonrenewal of his collision coverage at the expiration of the policy's stated period. If plaintiff was entitled to such notice, then there exists an issue as to whether notice was ever mailed and summary judgment was improper. *See White v. Insurance Co.*, 226 N.C. 119, 36 S.E. 2d 923 (1946). We hold, however, that notice was not a material fact in the present action. The court properly ordered summary judgment.

Insurance policies are usually for a short period with provisions for renewal upon payment and acceptance of premiums. Where there is a stated expiration date, such as in plaintiff's policy, courts in general do not require the insurer to give notice of expiration or of an intent not to renew automatically. 13A J. Appleman, Insurance Law and Practice § 7642 (1976). The insured is charged with knowledge of the terms of his policy.

In some circumstances, however, a duty of notification may arise because of statute, custom, or agreement between the parties. *Id., E.g., Kapahua v. Haw'n Ins. & Guar. Co.*, 50 Hawaii 644, 447 P. 2d 669 (1968); *Waynesville Security Bank v. Stuyvesant Ins. Co.*, 499 S.W. 2d 218, 222 (Mo. App. 1973). In the present case, plaintiff concedes that defendant was under no statutory duty to notify him of expiration of collision insurance coverage. G.S. 20-310 governs only termination of liability coverage. Plaintiff contends that defendant's duty rested upon agreement and custom.

Plaintiff asserts that defendant expressly agreed to provide plaintiff with notice in paragraph 19 of the policy. That section states that defendant may cancel the policy by mailing to the insured written notice not less than ten days prior to when cancellation shall be effective. Plaintiff, however, mistakenly equates cancellation with nonrenewal. Cancellation occurs when the insurer unilaterally terminates a policy then in effect *before* the end of the stated term. Where defendant did not terminate coverage until the end of the stated date, the policy was not cancelled. It lapsed. The notice provisions of paragraph 19 are, therefore, not applicable. *See Waynesville Security Bank v. Stuyvesant Ins. Co.*, 499 S.W. 2d at 220.

Plaintiff next argues that defendant's attempted notification demonstrates that defendant customarily gave notice of nonrenewal to its policyholders. In order to establish a duty because of custom, however, plaintiff must show not only the existence of the custom but also his knowledge of it. Plaintiff has failed to do so. There is no evidence that he knew of defendant's practice with other policyholders. Neither is there any evidence of a course of dealings between the parties such that plaintiff could reasonably infer defendant would either notify him of termination or automatically renew collision coverage.

In the absence of statute, agreement, custom or course of dealings to the contrary, we conclude that defendant had no legal duty to give plaintiff notice of expiration of his collision coverage. The coverage stopped at the end of the policy period on 12 March 1977. Plaintiff made no premium payments after that date. Therefore, at the time of plaintiff's accident on 30 March 1977, plaintiff had no right to reimbursement from defendant.

The order granting defendant's motion for summary judgment is affirmed.

Affirmed.

Judges MARTIN (Robert M.) and ARNOLD concur.

OMA J. HARRIS, EXECUTRIX OF THE WILL OF KENNETH RAY HARRIS, DECEASED v. MARION URIAH HODGES, JR.

No. 812SC997

(Filed 18 May 1982)

Death § 3— wrongful death—self-defense as defense in civil action

In a wrongful death action, the trial court properly submitted to the jury an issue as to whether defendant acted justifiably in self-defense where the evidence tended to show that defendant was hunting when plaintiff's decedent drove up in his pickup truck and hit and beat defendant at which time defendant shot him with a .22 caliber derringer.

APPEAL by plaintiff from *Reid, Judge.* Judgment entered on 18 February 1981 in Superior Court, BEAUFORT County. Heard in the Court of Appeals on 4 May 1982.

This appeal arises from plaintiff's wrongful death action for damages, in which plaintiff alleged that defendant "maliciously, willfully, wantonly, intentionally and unlawfully" "shot and killed plaintiff's decedent." The jury returned a verdict that the gunshot wound inflicted upon decedent by the defendant was the direct and proximate cause of the decedent's death, but that the defendant acted "justifiably in self-defense." From a judgment that plaintiff recover nothing of defendant by reason of the action, plaintiff appealed.

McMullan & Knott, by Lee E. Knott, Jr.; and James, Hite, Cavendish & Blount, by M. E. Cavendish, for plaintiff appellant.

Griffin & Martin, by Clarence W. Griffin; and Wilkinson & Vosburgh, by John A. Wilkinson, for defendant appellee.

HEDRICK, Judge.

Plaintiff's sole assignment of error is "the submission of issue number 2 to the jury which issue reads as follows: 'Did the defendant act justifiably in self defense?' " Plaintiff argues that the evidence was insufficient to support the issue of self-defense.

> [E]vidence is sufficient to go to the jury on an issue when the evidence is sufficient to permit, but not compel, a favorable verdict. . . . "[T]he jury may disbelieve the evidence presented, or believe the evidence but decline to draw the inferences necessary to a finding of the ultimate fact, or believe the evidence and draw the necessary inferences."

Brandon v. Nationwide Mutual Fire Insurance Co., 301 N.C. 366, 372, 271 S.E. 2d 380, 384 (1980).

In the present case, the contested issue is that of self-defense in a civil action for wrongful death. There are relatively few tort cases on the substantive law of self-defense; "[t]he tort rules are apparently completely identical with those of the criminal law." W. Prosser, Handbook of the Law of Torts § 19, 108 n. 12 (4th ed. 1971). Hence, criminal cases will provide the guidance for what evidence is necessary to justify submission of a self-defense issue.

"[W]hen there is evidence from which it may be inferred that a defendant acted in self-defense, he is entitled to have this evidence considered by the jury under proper instruction from the court." *State v. Marsh*, 293 N.C. 353, 354, 237 S.E. 2d 745, 747 (1977). A defendant may employ deadly force in self-defense when and only when it reasonably appears to be necessary to protect against death or great bodily harm. *See State v. Clay*, 297 N.C. 555, 256 S.E. 2d 176 (1979) and *State v. Deck*, 285 N.C. 209, 203 S.E. 2d 830 (1974). "The reasonableness of defendant's apprehension of death or great bodily harm must be determined by the jury on the basis of all the facts and circumstances as they appeared to defendant at the time." *State v. Clay, supra* at 563, 256 S.E. 2d at 182.

Defendant testified in the present case to, *inter alia*, the following:

On 22 November 1976, defendant was hunting deer in Martin County and sitting in his parked pickup truck when plaintiff's decedent, Kenneth Ray Harris, drove up in his pickup truck and stopped right in front of defendant's truck. Harris got out of his truck and hit defendant through the open truck window and grabbed defendant in the throat and beat him on the side of the head and jerked him from his truck. Harris, who was strong and of large build, then slung defendant to the ground and was hovering over defendant when defendant shot him with a .22 caliber derringer. Although Harris was not armed, defendant shot him because defendant was afraid of Harris and wanted to stop Harris from hurting him; in shooting Harris, defendant knew Harris was going to stomp him in the ground or do something to hurt him, and that Harris had a dangerous and violent record. Defendant knew he was going to get hurt if he did not stop Harris. When he shot Harris, he did not want to kill him, and was aiming at his leg. Harris died from the gunshot wound inflicted by defendant.

Assuming arguendo that the firing of a derringer at an assailant's leg is deadly force, *State v. Clay, supra*, states that the determination of the reasonableness of defendant's apprehension of death or great bodily harm, which apprehension justifies the use of deadly force, is for the jury. Furthermore, defendant's testimony was sufficient to permit but not compel the jury to find that he reasonably apprehended that Harris would have inflicted death or great bodily harm upon him had he not taken preventive action. Hence, there was sufficient evidence to allow submission of the self-defense issue to the jury and the assignment of error is overruled.

No error.

Judges HILL and BECTON concur.

IN THE MATTER OF: TIMOTHY G. HAGAN v. PEDEN STEEL COMPANY AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

No. 8110SC819

(Filed 18 May 1982)

Master and Servant § 108.1— unemployment compensation—insolence toward supervisor—discharge for misconduct

An employee's discharge for gross insolence toward his supervisor because he called the supervisor a "God-damned liar" constituted a discharge "for misconduct in connection with his work" within the meaning of G.S. 96-14(2), and the employee was thus disqualified for unemployment compensation.

APPEAL by defendants from *Brewer, Judge.* Judgment entered 3 June 1981 in Superior Court, WAKE County. Heard in the Court of Appeals on 31 March 1982.

This appeal arises from a claim for unemployment compensation filed with the Employment Security Commission (Commission) of North Carolina by Timothy Hagan (claimant), formerly employed by Peden Steel Company (employer).

The Commission made the following unchallenged findings of fact:

1. Claimant last worked for Peden Steel on November 25, 1980. From November 30, 1980 until December 6, 1980, claimant has registered for work and continued to report to an employment office of the Commission and has made a claim for benefits in accordance with G.S. 96-15(a).

2. Claimant was discharged from this job for gross insolence toward his supervisor.

3. On the last day of his employment his supervisor was discussing the claimant's performance record (progress report). Among other things, the supervisor made reference to such short comings on the part of the claimant relative to his job performance, i.e. among other things, too many visits to the toilet, staying in the toilet too long, hindering other people at their work.

4. During the course of the interview, the claimant addressed himself to the supervisor in the following manner,

"You are a liar—you are a God-damned liar." Thereupon the claimant broke off the conference and left the room where the progress report was being made. The claimant was subsequently discharged.

From these findings, the Commission "concluded that the claimant's actions . . . which precipitated his discharge contains [sic] the elements of misconduct" and that the "[c]laimant must, therefore, be disqualified for benefits" since he was "discharged from the job for misconduct connected with the work." Upon claimant's appeal to superior court, the court concluded that "[t]he findings of fact do not support the conclusion that claimant was discharged for misconduct," and reversing the Commission, ruled that "[c]laimant is not disqualified for unemployment benefits." Defendants appealed.

No counsel for plaintiff appellee.

Poyner, Geraghty, Hartsfield & Townsend, by Cecil W. Harrison, Jr., for defendant appellant Peden Steel Company; and C. Coleman Billingsley, Jr. and V. Henry Gransee, Jr., for defendant appellant Employment Security Commission of North Carolina.

HEDRICK, Judge.

In any judicial proceeding appealing a decision of the Employment Security Commission, "the findings of the Commission, as to the facts, if there is evidence to support it, and in the absence of fraud, shall be conclusive, and the jurisdiction of said court shall be confined to questions of law." G.S. § 96-15(i). Even when the findings are not supported by the evidence, however, "where there is no exception taken to such findings, they are presumed to be supported by the evidence and are binding on appeal." *Beaver v. Crawford Paint Co.*, 240 N.C. 328, 330, 82 S.E. 2d 113, 114 (1954). In the present case, the findings of fact were not challenged and, hence, are conclusive; the sole question on appeal therefore is whether the findings of fact support the Commission's conclusion that the claimant was disqualified for unemployment compensation.

G.S. § 96-14(2) provides in pertinent part, "An individual shall be disqualified for benefits . . . if it is determined by the Commission that such individual is, at the time such claim is filed,

unemployed because he was discharged for misconduct connected with his work." "Misconduct," in the context of G.S. § 96-14(2), has been defined as "conduct which shows a wanton or wilful disregard for the employer's interest, a deliberate violation of the employer's rules, or a wrongful intent." *Intercraft Industries Corp. v. Morrison*, 305 N.C. 373, 375, 289 S.E. 2d 357, 359 (1982). "Misconduct" may consist in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee. *In re Collingsworth*, 17 N.C. App. 340, 194 S.E. 2d 210 (1973). Although it has been stated that, "[o]rdinarily a claimant is presumed to be entitled to benefits under the Unemployment Compensation Act, but this is a rebuttable presumption with the burden on the employer to show circumstances which disqualify the claimant," *Intercraft Industries Corp. v. Morrison, supra* at 376, 289 S.E. 2d at 359, it has also been stated, "Each claimant is required to show to the satisfaction of the Commission that he is not disqualified for benefits under the terms of this section." *In re Steelman*, 219 N.C. 306, 310, 13 S.E. 2d 544, 547 (1941); *see also State ex rel. Employment Security Commission v. Jarrell*, 231 N.C. 381, 57 S.E. 2d 403 (1950).

Whatever party bears the burden of nonpersuasion with respect to the issue of disqualification, the conclusive findings of fact in the present case are that the "[c]laimant was discharged from this job for gross insolence toward his employer." The question of law presented by this appeal therefore resolves itself into the following: Is discharge for such insolence a "discharge[ ] for misconduct connected with [the employee's] work?" Such insolence does represent a wilful disregard by the employee of the employer's interest in maintaining a cooperative and harmonious employment environment. Supervisor-personnel relations are apt to deteriorate if personnel unjustifiably call their supervisors "God-damned liar[s]," and such offensive and insulting behavior by the employee is properly characterized as a deliberate violation of standards of behavior which the employer has the right to expect of his employee. Although an employee's insulting outburst towards a supervisor may in some provoking circumstance be understandable, the Commission in the present case negatived any mitigating factors with respect to claimant's behavior when it described his conduct as "gross insolence." The Commission's

findings of fact support its conclusion that the claimant was discharged for misconduct. *See In re Chavis*, 55 N.C. App. 635, 286 S.E. 2d 623 (1982). The judgment of the superior court is reversed and the cause is remanded to the superior court for the entry of an order reinstating the order of the Commission.

Reversed and remanded.

Chief Judge MORRIS and Judge VAUGHN concur.

RILDA J. LUCAS, EMPLOYEE PLAINTIFF v. BURLINGTON INDUSTRIES, EMPLOYER AND LIBERTY MUTUAL INSURANCE CO., CARRIER DEFENDANTS

No. 8110IC826

(Filed 18 May 1982)

1. **Master and Servant § 68— workers' compensation—finding of no disability—conclusion as to occupational disease not required**

The Industrial Commission was not required to make a conclusion of law as to whether plaintiff suffered from an occupational disease where the Commission determined that plaintiff was not disabled.

2. **Master and Servant § 68— workers' compensation—occupational disease—capability of other work**

The Industrial Commission did not err in concluding, as a matter of law, that plaintiff textile worker is not disabled as a result of exposure to conditions in her employment where it found that, although she may have bronchitis in part due to cotton dust exposure in her employment, plaintiff is capable of work involving moderately strenuous activities in a clean environment.

APPEAL by plaintiff from the North Carolina Industrial Commission opinion and award of 25 February 1981. Heard in the Court of Appeals 31 March 1982.

Plaintiff appeals from an award denying her compensation benefits.

Plaintiff's claim is one for chronic bronchitis due to exposure to cotton dust and lint in her employment with defendant. After hearing evidence, the Deputy Commissioner found that plaintiff was permanently and partially disabled as the result of an occupational disease. She awarded plaintiff partial disability benefits.

On appeal, the Full Commission set aside the Deputy Commissioner's opinion and award, and substituted its own in lieu thereof. It made the following pertinent findings of fact:

. . .

"2. Plaintiff was born on 30 June 1915. She has a seventh grade education. She has no skills other than those in the textile industry which she has learned by virtue of her occupation in the mills since age 14.

. . .

7. Plaintiff's breathing problems began in about 1972. They were noticeable but did not appreciably hinder her work. But in about 1973, plaintiff's various symptoms began to get very bad and particularly during her last six months of her employment she could hardly make it to work. During those last two years, plaintiff would wheeze, get markedly short of breath and at home would run a vaporizer year-round in order to ease her breathing. She did not develop a cough, although she took cough medicine in hopes of helping her respiratory problems. During the last six months, plaintiff was particularly affected at work when a blowing-off operation would have taken place during her shift.

8. Plaintiff stopped working for defendant-employer at age 62. At that time, plaintiff was totally disabled from working in the mill. Plaintiff consulted the unemployment office with regard to other jobs. She was told that a job was available as a maid at Howard Johnson's, but she decided not to take it because of the cleaning fluid. Plaintiff's experience during the last several years she worked with defendant-employer was that when they were overhauling the mill with varsol, she would have to get out on about the third day of a two-week period because her chest would close up. She felt that the cleaning fluid at Howard Johnson's would affect her.

9. Plaintiff has continued to look for other jobs. Plaintiff is capable of work which involves a clean environment and which involves moderate activity. She has looked for work in dime stores and other retail stores and is capable of that kind of gainful employment."

Based on its findings, the Commission concluded that plaintiff was not disabled as a result of her exposure to conditions in her employment. It denied compensation.

Michael E. Mauney, for plaintiff appellant.

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

VAUGHN, Judge.

[1] Plaintiff first argues that the Commission erred in setting aside the hearing commissioner's conclusion of law that plaintiff suffered from an occupational disease without reaching its own conclusion on the issue. We disagree. The dispositive question is whether plaintiff's capacity to earn wages has been diminished. *Mills v. J. P. Stevens & Co.*, 53 N.C. App. 341, 280 S.E. 2d 802 (1981). In the present cause, the Commission considered plaintiff's physical symptoms and found that she may have had bronchitis in part due to cotton dust exposure. It also found, however, that plaintiff was not disabled. Since the absence of disability is a sufficient basis upon which to deny compensation, the Commission was not required to address the other elements necessary for a compensation award.

Plaintiff argues that she is nevertheless entitled to a conclusion on the presence of an occupational disease in order to preserve her rights under G.S. 97-47. Plaintiff's argument is without merit. Under G.S. 97-47, plaintiff may seek review of the Commission's award upon a showing of a change in condition. A previous conclusion of occupational disease is not a prerequisite. Plaintiff's assignment of error is, therefore, overruled.

[2] Plaintiff also argues that the Commission erred in concluding, as a matter of law, that plaintiff was not disabled as a result of exposure to conditions in her employment. We disagree.

"Disability" under Chapter 97 does not mean physical impairment. Rather, the term signifies an impairment in the employee's *wage-earning capacity* because of injury. G.S. 97-2(9). In determining disability, the Commission is not allowed to consider whether the average employee with plaintiff's injury is capable of working

and earning wages. The question is whether this particular employee has such a capacity. *Little v. Food Service*, 295 N.C. 527, 246 S.E. 2d 743 (1978); *Mabe v. Granite Corp.*, 15 N.C. App. 253, 189 S.E. 2d 804 (1972).

On review, we are not triers of fact. Our responsibility is twofold. We must determine whether the Commission's findings are supported by competent evidence and whether those findings reasonably lead to the legal conclusions. *Buck v. Proctor & Gamble Co.*, 52 N.C. App. 88, 278 S.E. 2d 268 (1981).

We conclude there is ample support for Finding No. 10. "[P]laintiff has no disability due to causes and conditions arising out of plaintiff's employment by the defendant-employer." Dr. Herbert O. Sieker, a pulmonary specialist, testified that fumes, dust, or chemicals would cause an inflammation of plaintiff's bronchial system and that plaintiff should avoid such environments. He also testified, however, that she could work at moderately strenuous activities in a clean environment: "She could work in an office that's air-conditioned. She could work in a store that's relatively clean. She could work in a home setting that's clean."

The Workers' Compensation Act does not insure an employee any particular employment. G.S. 97-2(9) speaks of incapacity to earn wages "in the same *or any other* employment." (Emphasis added.) The present plaintiff's situation is similar to that of the plaintiff in *Sebastian v. Hair Styling*, 40 N.C. App. 30, 251 S.E. 2d 872, *cert. denied*, 297 N.C. 301, 254 S.E. 2d 921 (1979) and *Mills v. J. P. Stevens & Co.*, 53 N.C. App. 341, 280 S.E. 2d 802 (1981). In *Sebastian*, this Court affirmed the denial of compensation to a plaintiff who was no longer able to continue her job as a hair stylist. Although she had developed allergies to hair chemicals, the Commission found that she was capable of performing other gainful employment. In *Mills*, we affirmed the denial of compensation to a plaintiff with symptoms of mild obstructive lung disease who was advised not to return to his job at the textile mill but who could perform other work "except the most strenuous."

The finding of no disability, supported by the evidence, is binding on this Court. That finding justifies the Commission's conclusion of law. The award is affirmed.

Affirmed.

Chief Judge MORRIS and Judge HEDRICK concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 18 MAY 1982

BYRD v. BYRD No. 818DC1016	Lenoir (80CVD802)	Dismissed
GOODMAN v. GOODMAN No. 8119DC1094	Cabarrus (79CVD0163) (80CVD0331)	Affirmed
GOUGH v. GOUGH No. 8123DC1108	Yadkin (81CVD51)	Appeal Dismissed
GRIFFIN v. BUNCOMBE CO. BD. OF ED. No. 8128SC1048	Buncombe (80CVS1923)	Affirmed
IN RE NUSSER No. 8110DC1234	Wake (81SP645)	Affirmed
LEATHERWOOD v. BD. OF TRANSP. No. 8130SC784	Haywood (78CVS377)	Appeal Dismissed
McCULLOUGH v. PETERS No. 8126SC1060	Mecklenburg (81CVS3121)	Affirmed
MOORE v. NICHOLSON No. 812SC967	Martin (81CVS4)	Affirmed
SHEPHERD v. CONNESTEE No. 8129SC1035	Transylvania (79CVS07)	Affirmed
STATE v. CRAWFORD No. 8126SC1211	Mecklenburg (81CRS16812) (81CRS16975) (81CRS21150) (81CRS21154)	No Error
STATE v. DUNN No. 8120SC1177	Union (79CRS3196) (79CRS3197)	No Error
STATE v. FAIRCLOTH No. 815SC1254	New Hanover (80CRS2072) (80CRS2885)	Affirmed
STATE v. GOODE No. 8129SC1058	Rutherford (81CRS868)	No Error
STATE v. HILL No. 8126SC1268	Mecklenburg (80CRS80571)	No Error
STATE v. HILL No. 8119SC1274	Randolph (80CRS7225) (80CRS7419) (80CRS7789)	Appeal Dismissed

STATE v. JACKSON No. 8112SC1249	Cumberland (80CRS59883) (80CRS59588) (80CRS59589)	No Error
STATE v. KEE No. 8127SC1103	Cleveland (81CRS4625)	Affirmed
STATE v. KIMBRELL No. 813SC1190	Craven (81CRS1317)	Appeal Dismissed
STATE v. KINNEY No. 8119SC1132	Randolph (77CRS7704) (77CRS7705)	Affirmed
STATE v. OUTLAW No. 8118SC1161	Guilford (81CRS0783)	No Error
STATE v. SMITH No. 8125SC1224	Catawba (80CRS21069) (80CRS21321)	No Error
STATE v. WILLIAMS No. 8110SC1272	Wake (80CRS17866)	No Error
THOMPSON v. JOHN UMSTEAD HOSP. No. 8110IC1019	Industrial Commission (TA-5883)	Affirmed
WHITEHURST v. BATES No. 813DC961	Carteret (80CVD593)	Affirmed

SHEILA LOCKLEAR BECK, ADMINISTRATRIX OF THE ESTATE OF DARYL IVAN BECK, DECEASED v. CAROLINA POWER & LIGHT COMPANY

No. 8110SC833

(Filed 1 June 1982)

1. **Electricity § 4; Negligence § 37.3— instructions on degree of care for power company**

In a wrongful death action following the electrocution of a man by a utility wire, the trial judge was slightly incorrect in stating that "another rule" of negligence applies to power companies; however, the instructions had no prejudicial effect on the defendant as the instruction merely informed the jury that the degree of care owed by a power company in maintaining and inspecting its lines is a high degree of care, which degree of care is different from ordinary care required under ordinary circumstances.

2. **Electricity § 4; Negligence § 37.3— instructions—degree of care by utility company**

In a wrongful death action against a power company, the trial judge did not commit prejudicial error by failing to couple the term "highest degree of care" with "consistent with the practical operation of its business" on every occasion on which the judge used the phrase "highest degree of care," since when the judge first set forth the duty of the power company, he clearly stated that the power company had a degree of care which was "commensurate with the practical operation of the business of an electric utility company."

3. **Trial § 34— instructions—equal stress to contentions of both parties**

Where plaintiff presented the testimony of 19 witnesses and defendant presented the testimony of only three witnesses, by reviewing the evidence which the defendant presented and by stating that the defendant contended the plaintiff's allegations were untrue, the court adequately fulfilled its obligations to instruct the jury as to defendant's contentions.

4. **Death § 7.4— evidence concerning prospective economic losses of plaintiff properly admitted**

The trial court in a wrongful death action properly permitted an expert in economics to testify on the prospective economic losses of the plaintiff from decedent's death where his testimony was based on testimony of work supervisors, testimony regarding the decedent's skills and wage data, and the expert's own expertise and ability to project a person's likely economic status. Such evidence provided a reasonable basis for the computation of damages even though the result was, at best, only approximate.

5. **Death § 7.4— wrongful death action—competency of hypothetical question**

In a wrongful death action, the trial court properly permitted an expert to give his opinion in response to a hypothetical question referring to the statistical group of persons to which the decedent belonged.

6. Electricity § 10; Death § 7.6— wrongful death action—punitive damages properly submitted to jury

In a wrongful death action in which decedent was electrocuted by a guy wire attached to defendant's power pole, plaintiff's evidence which tended to show numerous violations of the National Electrical Safety Code and of defendant's own standards was sufficient to merit the submission of the issue of punitive damages to the jury.

Judge WHICHARD concurring.

Judge MARTIN (Harry C.) dissenting.

APPEAL by defendant from *Godwin, Judge.* Judgment entered 17 February 1981 in Superior Court, WAKE County. Heard in the Court of Appeals 1 April 1982.

This action arose following the death of Daryl Beck, a 24-year-old Lumbee Indian. Beck was last seen alive at his mother's home in Robeson County on 1 July 1978. On 2 July 1978 his body was found in the woods behind his mother's home surrounding "Bill's pond." This area was frequently crossed by residents of this community who hunted in the woods and fished and swam in the pond. Daryl Beck was found lying halfway under a guy wire attached to Carolina Power & Light Company power pole 1998 in an area of low vegetation and within a few feet of a path which crossed through these woods.

When Beck's body was found, the skin on the palm of his right hand was burned and a skin-like substance was on the guy wire approximately 3-1/2 feet from the ground. An autopsy revealed burns on his right hand, left leg and the soles of both feet. Otherwise Beck appeared to be in good health at the time of his death. The cause of death was determined by a pathologist to be electrocution, consistent with electrocution caused by contact of the deceased's right hand with an energized wire.

In addition to the skin-like substance found on the guy wire on 2 July, leaves near the guy wire appeared burned. Leaves and grass at the base of the guy wire were scorched, forming a burned spot approximately 1-1/2′ in diameter at the guy anchor. Fresh burn marks were on the guy wire, including burns on the wire 18″ above and below the lightning arrestor.

Plaintiff's evidence tended to show that the condition of the equipment attached to pole 1998 was as follows:

(1) The transformer attached to pole 1998 was located in a congested corner of the pole. Due to this placement of the transformer, the lightning arrestor and arrestor cap, parts which are attached to the transformer, were only 1″ to 3-1/2″ from the guy wire at the time Daryl Beck's body was found. This close proximity of the lightning arrestor and arrestor cap, an energy-carrying part of the electrical system, to the guy wire, a non-energized part of the system, was in violation of both Carolina Power & Light Company's own specifications and the specifications of the National Electrical Safety Code, the mandatory and minimum safety rules of North Carolina with respect to electric utilities. The National Electrical Safety Code requires a minimum clearance of 7.8″ between an energized and non-energized part at 13,000 volts as was carried by this transformer.

(2) An examination of the lightning arrestor following Daryl Beck's death revealed that the lightning arrestor jumper, which connects the lightning arrestor to the arrestor cap, was separated from the lightning arrestor due to being broken or burned off in the presence of extreme heat. On the arrestor cap were signs of arcing and on the lightning arrestor were signs of melted black insulation. According to defendant's employee Bill Potter, who testified that the guy wire was 3-1/2″ from the lightning arrestor on his 2 July inspection of the facilities, this displacement of the arrestor cap from the lightning arrestor resulted in the cap being further from the guy wire at the time at which he observed it than it would have been before it had broken off from the lightning arrestor.

(3) An examination of the guy wire revealed that it was neither grounded nor insulated. This was in violation of both the National Electric Safety Code and Carolina Power & Light Company's own specifications. The National Electrical Safety Code requires that all guy wires be grounded if not insulated.

(4) Examination of the guy wire also revealed it to be slack; so slack that it could be pulled in either direction when grabbed and that when simply touched, it would sway. Bill Potter testified that he moved it 18″ in either direction. The slackness of the guy wire was in violation of the National Electrical Safety Code in that these safety rules require that guy wires be maintained with sufficient tautness so that they carry their load. This guy wire was not so maintained.

(5) During the several days following Daryl Beck's death periodic arcing was observed at the transformer on pole 1998.

Further evidence presented at trial revealed that the last documented occasion on which the pole in question was examined was in 1974. At that time, Sumpter Builders installed a new transformer on that pole, failing to place that transformer in the safest position on the pole. No inspection was performed by Carolina Power & Light Company of Sumpter Builders' work for the purpose of insuring that the work had been performed safely. Carolina Power & Light Company was unable to produce any record or witness indicating that this pole had been inspected for the purpose of insuring that it was in safe condition at any time between 1974 and July 1978.

Evidence through expert testimony showed that under the conditions found to exist on 2 July, the guy wire under which Daryl Beck's body had been found and on which a skin-like substance was found, could have become energized on being grasped. Physical evidence showed that this guy wire had been brought in contact with the lightning arrestor cap, an energized part of the electrical system. The voltage with which the guy wire would have been energized would have been of sufficient voltage to kill a person.

Evidence at the trial on the issue of damages consisted of testimony of Daryl Beck's family, friends and former employers. An expert economist also testified for plaintiff regarding the projected loss of income of the decedent. The jury awarded $200,000 compensatory damages to plaintiff and $175,000 punitive damages based on a finding that the defendant was grossly negligent.

Thorp, Anderson & Slifkin by Anne R. Slifkin and William L. Thorp; Locklear, Brooks & Jacobs by Dexter Brooks, for plaintiff-appellee.

Fred D. Poisson and Manning, Fulton & Skinner by Howard E. Manning for defendant-appellant.

MARTIN (Robert M.), Judge.

THE JURY CHARGE ON THE ISSUE OF NEGLIGENCE

[1] Defendant's first argument on appeal is that the trial court failed to properly instruct the jury on the issue of negligence. The trial court instructed:

> What is negligence? It's a lack of ordinary care. It's a failure to do what a reasonably careful and prudent person would have done, or the doing of something which a reasonably careful and prudent person would not have done; considering all of the circumstances existing at the time in question and on the occasion in question.

The court continued with another rule of negligence for electric utility companies:

> There is another rule with respect to negligence that applies to electric utility companies. The rule of negligence that I have just read to you applies to individuals. It is a proper definition of negligence. An electric utility company owes to the public the highest degree of care, not ordinary care, but the highest degree of care for the safe installation, safe maintenance and safe inspection of the electrical lines and apparatus as is commensurate with the practical operation of the business of the electric utility company.

We agree with defendant that there is no separate rule of negligence for an electric utility company. The standard is always the rule of the prudent man or the care which a prudent man ought to use under like circumstances. "What reasonable care is, of course, varies in different cases and in the presence of different conditions. [Citation omitted.] The standard is due care, and due care means commensurate care under the circumstances." *Jenkins v. Electric Co.*, 254 N.C. 553, 560, 119 S.E. 2d 767, 772 (1961).

As a general rule, power companies are held to the "utmost diligence" in striving to prevent injury to others from electricity. *Keith v. Gas Co.*, 266 N.C. 119, 130, 146 S.E. 2d 7, 15 (1966). The courts view electricity as inherently dangerous and apply a correspondingly "higher standard of care." Wake Forest University, North Carolina Tort Practice Handbook 142 (1981).

In *Ellis v. Power Co.*, 193 N.C. 357, 137 S.E. 163 (1927), the decedent had been found dead near a path with an electrical wire in his hand. As in this case, the wire was uninsulated and the pole was found to be in an unsafe condition. No one had been seen inspecting or repairing the line. In discussing the duty of this defendant, the Supreme Court stated:

> It [the wire] lay there, perhaps several days, like a serpent. The rattle-snake warns its victim, but not so with this subtle, invisible and death-producing power. It is a matter of common knowledge that this wonderful force is of untold benefit to our industrial life. . . . Every legitimate encouragement should be given to its manufacture and distribution for use by public utility corporations, manufacturing plants, homes and elsewhere. On the other hand, the highest degree of care should be required in the manufacture and distribution of this deadly energy and in the maintenance and inspection of the instrumentalities and appliances used in transmitting this invisible and subtle power.

Id. at 362, 137 S.E. 166.

In *Jenkins v. Electric Co.*, *supra* at 560, 119 S.E. 2d 772, the court reasoned:

> One who installs an instrumentality for a known use, which involves a great danger to life and limb, must exercise a degree of care commensurate with the danger for the protection of those who rightfully may be subject to the peril. The duty rests upon those who make and distribute the dangerous current . . . Electricity is not only dangerous, even deadly, but it is invisible, noiseless, and odorless, rendering it impossible to detect the presence of the peril until the fatal work is finished. It is for this reason that the high duty is imposed, a breach of it fixes liability for the resulting injury to those to whom the duty is owed. [Citation omitted.]

In *Lynn v. Silk Mills*, 208 N.C. 7, 11, 179 S.E. 11, 13 (1935), the Supreme Court acknowledged the " 'highest degree of care' " owed by the power company and refused to hold improper a judge's charge which stated that: "it was its [the defendant's] duty to keep a constant lookout, a constant vigilance, and to observe a high degree of care in keeping its equipment outside of the house in good condition." *Id.* at 12-13, 179 S.E. 14. Likewise, in *Letchworth v. Town of Ayden*, 44 N.C. App. 1, 4, 260 S.E. 2d 143, 145 (1979), *disc. rev. denied*, 299 N.C. 331, 265 S.E. 2d 396 (1980), this Court noted: " 'The danger is great, and care and watchfulness must be commensurate to it.' " (Citation omitted.) *See also Rice v. Lumberton*, 235 N.C. 227, 69 S.E. 2d 543 (1952); *Willis v.*

Power Co., 42 N.C. App. 582, 257 S.E. 2d 471 (1979); and *Hale v. Power Co.*, 40 N.C. App. 202, 252 S.E. 2d 265, *disc. rev. denied*, 297 N.C. 452, 256 S.E. 2d 805 (1979), all stating that a supplier of electricity owes the "highest degree of care" in providing for the safety of the public.

Thus the courts agree that in order for a power company to be reasonably prudent in the exercise of its business, a high degree of care must be implemented because the hazards inherent in the business are great. This understanding of the duty of power companies does not differ in any significant or prejudicial fashion from that set out by Judge Godwin. Judge Godwin's instruction merely informed the jury that the degree of care owed by a power company in maintaining and inspecting its lines is a high degree of care, which degree of care is different from ordinary care required under ordinary circumstances. Although the judge may have been slightly incorrect in stating that "another rule" applies to power companies, the defendant has made no showing that this charge, when viewed as a whole, had any prejudicial effect on the defendant's opportunity to prevail on this issue.

[2] The defendant also protests that the court failed to couple the term "highest degree of care" with "consistent with the practical operation of its business" on every occasion on which the judge used the phrase "highest degree of care." When Judge Godwin first set forth the duty of the power company, he clearly stated that the company had ". . . the highest degree of care for the safe installation, safe maintenance and safe inspection of the electrical lines and apparatus *as is commensurate with the practical operation of the business of an electric utility company.*" (Emphasis added.) Later in discussing the degree of care the judge stated, "[t]his high degree of care . . ." The defendant has made no showing that within the context of the charge as a whole, this omission constituted prejudicial error. In fact, the charge as given could not be deemed prejudicial because the negligence which plaintiff alleged was the failure of the defendant to abide by its own rules and regulations and the rules and regulations promulgated by the National Electrical Safety Code and given the force of law by the Utilities Commission. See Rule R8-26, Rules and Regulations of the North Carolina Utilities Commission. Thus any failure of the judge to repeat the phrase "con-

sistent with the practical operation of its business" could have had no material impact on the outcome of this action.

[3] The defendant's final argument concerning the jury charge is that the trial court did not give equal stress to the contentions of the defendant. This claim is without merit. Where one party presents substantially more evidence than the other, it is not error for the court's recapitulation of that party's evidence to be longer than the recapitulation of the evidence of the other party. *Love v. Pressley*, 34 N.C. App. 503, 239 S.E. 2d 574 (1977), *disc. rev. denied*, 294 N.C. 441, 241 S.E. 2d 843 (1978). Plaintiff presented the testimony of 19 witnesses who gave the jury information relating to the physical facts surrounding the decedent's death, medical findings, the scientific explanation for the decedent's death, the applicable standards of the industry, the worth of Daryl Beck to his family, friends and as a worker and the economic loss suffered by his family as a result of his death. Defendant's evidence consisted of three witnesses, none of whom gave testimony relevant to the plaintiff's decedent and none of whom could provide anything other than speculation as to the cause of Beck's death. By reviewing the evidence which the defendant presented and by stating that the defendant contended that plaintiff's allegations were untrue, the court adequately fulfilled its obligation to instruct the jury as to defendant's contentions.

The assignments of error based on the judge's charge are without merit and overruled. When an error in the judge's charge is asserted by the appellant as a basis for reversal of the verdict below, the burden is on that party not merely to demonstrate that the court's instructions were in error, but also to demonstrate that when the judge's instructions are considered in their entirety, as opposed to in fragments, the error was prejudicial to the appealing party's chance of success and amounted to the denial of a substantial right. Otherwise, reversal or a new trial is unwarranted. *Gregory v. Lynch*, 271 N.C. 198, 155 S.E. 2d 488 (1967); *Burgess v. Construction Co.*, 264 N.C. 82, 140 S.E. 2d 766 (1965). The defendant has failed to meet this burden.

COMPENSATORY DAMAGES

[4] The defendant next argues that the trial court erred by admitting into evidence the testimony of Dr. J. C. Poindexter, on

the prospective economic losses of the plaintiff. Dr. Poindexter, qualified as an economics expert, testified that based on the decedent's life expectancy, education, race, geographic location and sex he could project the loss of income support, reduced to present monetary value, incurred by Beck's wife Sheila and daughter Rekelle as a result of Daryl Beck's death. Dr. Poindexter testified that the figures produced through his calculations were consistent with the actual earnings received by Daryl Beck during his short work history. Dr. Poindexter pointed out that earnings of people within the statistical group which Dr. Poindexter utilized as representative of this decedent were low. In fact, in arriving at his opinion, Dr. Poindexter used computations which presumed an initial earnings figure less than that amount which Daryl Beck earned during 1978, the last year of his life. The economist testified that a loss figure of $186,245 was appropriate if Daryl Beck had worked until age 60, and that a figure of $204,037 was appropriate presuming a work life to 65. In addition, Dr. Poindexter valued the present value of Daryl Beck's projected in-home services for 10 hours per week at minimum wage, at $47,653.

The testimony of Dr. Poindexter was not improper speculation as defendant contends. The General Assembly intended the wrongful death statute to as fully as possible compensate persons for the loss of their decedent. *Bowen v. Rental Co.*, 283 N.C. 395, 196 S.E. 2d 789 (1973). In allowing recovery under this statute, the North Carolina courts have recognized that, by necessity, some speculation is necessary in determining damages. In *Bowen* at 419, 196 S.E. 2d 805-06, the court noted that monetary recovery cannot be denied simply "because no yardstick for ascertaining the amount thereof has been provided."

In *Brown v. Moore*, 286 N.C. 664, 673, 213 S.E. 2d 342, 348-49 (1975), in discussing the monetary value of a 17 year old, the court noted that although an award of damages must not be based on sheer speculation that:

> The present monetary value of the decedent to the persons entitled to receive the damages recovered will usually defy any precise mathematical computation. [Citation omitted.] Therefore, the assessment of damages must, to a large extent, be left to the good sense and fair judgment of the jury . . . The fact that the full extent of the damages must be a

> matter of some speculation is no ground for refusing all damages. [Citations omitted.] . . . "The damages in any wrongful death action are to some extent uncertain and speculative. A jury may indulge in such speculation where it is necessary and there are sufficient facts to support speculation." [Citation omitted.]

Plaintiff has presented the testimony of an expert who has predicted economic loss based on available knowledge pertaining to Daryl Beck: testimony of work supervisors, testimony regarding the decedent's skills and wage data. This testimony also was based on Dr. Poindexter's own expertise and ability to project a person's likely economic status through the use of data available in his field. Such evidence provided a reasonable basis for the computation of damages, even though the result is, at best, only approximate. It is the function of cross examination to expose any weakness in such testimony. Normally, "the lack of sufficient basis for testimony goes primarily to the weight to be accorded such evidence." *Rutherford v. Air Conditioning Co.*, 38 N.C. App. 630, 639-40, 248 S.E. 2d 887, 894 (1978), *disc. rev. denied*, 296 N.C. 586, 254 S.E. 2d 34 (1979). Dr. Poindexter's testimony was properly admitted into evidence.

[5] Furthermore, the trial court properly permitted Dr. Poindexter to give his opinion in response to a hypothetical question referring to the statistical group of persons to which Daryl Beck belonged. In examining Dr. Poindexter, plaintiff's counsel asked a hypothetical question which concluded as follows: " . . . do you have an opinion satisfactory to yourself as to the present monetary value or the reasonably expected net income for the statistical group of persons to which Daryl Beck belonged. . . ." In *Rutherford v. Air Conditioning Co.* at 638, 248 S.E. 2d 893, the expert witness was asked if he had an opinion "as to the present monetary value of the reasonably expected net income for the *statistical group of persons to which this deceased person belonged.* . . ." The defendant in *Rutherford* objected to this question on the ground that an expert opinion could not be based on facts, figures and statistics not in evidence. In rejecting the defendant's claim, this court noted:

> The facts, figures, statistics and charts relied upon by the witness, although not offered into evidence, are customarily

> relied upon by persons in the profession. *See generally* McCormick, Evidence §§14-16 (2d Ed.). Based upon the better reasoned cases, such information may be relied upon by the expert regardless of whether admissible into evidence. . . .
>
> . . . [Just as a] diagnosis . . . of injury is within the expertise of physicians and is based upon all reliable information which physicians consider when making such a diagnosis . . . an expert in economics commonly relies upon statistics and data relating to all aspects of the work force and economy which affect the present value of the loss of future income earning capacity.

Id. at 638-39, 248 S.E. 2d 893.

As in *Rutherford*, the materials on which Dr. Poindexter relied constituted information on which Dr. Poindexter appropriately based his expert opinion. The reports did not need to be introduced into evidence. The defendant had adequate opportunity to cross-examine the witness on these matters.

We have carefully considered defendant's remaining assignments of error regarding the compensatory damages and the testimony of Dr. Poindexter. We find these assignments to be totally without merit and thus overruled.

PUNITIVE DAMAGES

[6] The defendant argues that the trial court erred in submitting the issue of punitive damages to the jury and that the court erred in its instruction on gross negligence as the basis for a punitive damages award. We disagree.

Our Court has stated that "[u]nder the common law of this State punitive damages may be awarded 'when the wrong is done willfully or under circumstances of rudeness or oppression, or in a manner which evinces a reckless and wanton disregard of plaintiff's rights.' " *Russell v. Taylor*, 37 N.C. App. 520, 525, 246 S.E. 2d 569, 573 (1978). " 'An act is wanton when it is done of wicked purpose or when done needlessly, manifesting a reckless indifference to the rights of others.' " *Siders v. Gibbs*, 39 N.C. App. 183, 187, 249 S.E. 2d 858, 861 (1978), citing *Foster v. Hyman*, 197 N.C. 189, 191, 148 S.E. 36, 37-38 (1929). An act is wilful when there exists "a deliberate purpose not to discharge some duty

necessary to the safety of the person or property of another," a duty assumed by contract or imposed by law. *Brewer v. Harris*, 279 N.C. 288, 297, 182 S.E. 2d 345, 350 (1971), citing *Foster v. Hyman, supra.*

Moreover, the North Carolina wrongful death statute specifically allows the award of punitive damages upon a showing of gross negligence. N.C. Gen. Stat. § 28A-18-2(b)(5) provides for punitive damages for wrongful death caused through "maliciousness, wilful or wanton injury, or gross negligence." Although the term gross negligence is not defined in the statute, based on prior case law the inclusion of gross negligence would authorize punitive damages in cases where the defendant's conduct was something less than wilful or wanton. Blanchard and Abrams, North Carolina's New Products Liability Act: A Critical Analysis, 16 Wake For. L.Rev. 171, 183-84 (1980).[1] In *Clott v. Greyhound Lines*, 9 N.C. App. 604, 609, 177 S.E. 2d 438, 441 (1970), *rev'd on other grounds*, 278 N.C. 378, 180 S.E. 2d 102 (1971), Judge Morris, now Chief Judge, stated that gross negligence was something less than willful or wanton conduct. We follow this position, a position in accord with the rule in other states that gross negligence is very great negligence or the absence of even slight care.[2]

1. *See, Clott v. Greyhound Lines, Inc.*, 278 N.C. 378, 180 S.E. 2d 102 (1971) (as a gratuitous bailee, a carrier is liable only for gross negligence); *Perry v. Seaboard Air Line Ry.*, 171 N.C. 158, 88 S.E. 156 (1916) (gratuitous bailee is liable only for gross negligence, which is a failure to exercise the care of an ordinary prudent person undertaking to carry the goods of another without compensation).

2. *See, e.g., Sumner v. Edmunds*, 130 Cal. App. 770, 21 P. 2d 159 (1933) (gross negligence is the absence of slight diligence and distinguishable from willful or wanton conduct); *Sebastian v. Wood*, 246 Iowa 94, 66 N.W. 2d 841 (1954) (a plaintiff may recover punitive damages upon a showing of gross negligence, something greater than ordinary negligence); *Storm v. Thompson*, 155 Or. 686, 64 P. 2d 1309 (1937) (gross negligence is the absence of care which even careless, thoughtless, or inattentive persons are accustomed to exercise). *See also Smith v. Stepp*, 257 N.C. 422, 125 S.E. 2d 903 (1962). In *Smith* the North Carolina Supreme Court applied Virginia case law to Virginia's automobile guest statute. The Virginia statute imposed liability for "gross negligence or willful and wanton disregard of the safety" of a passenger. *Id.* at 424, 125 S.E. 2d at 905. The Virginia courts had recognized gross negligence as something less than willful or wanton conduct. The North Carolina Supreme Court concluded that evidence of the defendant's lack of experience in driving a car, combined with her persistence despite plaintiff's protests, magnified the negligent character of the defendant's conduct, rendering the issue of gross negligence one for the jury. The North Carolina Court of Appeals later cited *Smith* as North Carolina authority for the rule that gross negligence is something less

Plaintiff's evidence which tended to show numerous violations of the National Electrical Safety Code and of defendant's own standards was sufficient to merit the submission of the issue of punitive damages to the jury.

The judge instructed the jury on gross negligence:

> Gross negligence is an extreme departure from the ordinary standard of conduct; it is great or very great negligence; negligence materially greater than ordinary negligence, the difference being one of degree; although it is sometimes said to be of a different kind, negligence of an aggravated character and gross failure to exercise proper care.
>
> The term implies a thoughtless disregard of consequences without exerting any effort to avoid them, an indifference to the rights and welfare of others. Gross negligence is a relative term, which is to be understood as meaning a greater want of care than is implied by the term ordinary negligence.
>
> The plaintiff contends that she has shown by the greater weight of the evidence that the defendant, through its agents, erected pole 1998 and the attachments thereto in 1974, in violation of the safety code and in violation of its own specifications as has been set forth above; and that such conduct was negligence within itself; that the negligent condition continued continually until the day of the death of Daryl Beck; that if the defendant made appropriate inspections of the pole and attachments during the interim, it failed to note or to correct the alleged negligent condition; that Daryl Beck's death was proximately caused by such condition and that the complained of negligent conduct on the part of the defendant was willful or wanton or gross negligence.
>
> And so, I instruct you that if you find by the greater weight of the evidence that the defendant's conduct in erecting, maintaining and inspecting pole 1998 and the attachments was accompanied by such aggravating cir-

than willful or wanton conduct in *Clott v. Greyhound Lines, Inc.*, 9 N.C. App. 604, 609, 177 S.E. 2d 438, 441 (1970), *rev'd on other grounds*, 278 N.C. 378, 180 S.E. 2d 102 (1971).

> cumstances, under the instructions that I have given you—as under the instructions I have given you, will permit an award of punitive damages you may award to the plaintiff an amount which in your discretion will serve to punish the defendant and deter others from committing like offenses.

We agree with plaintiff that gross negligence is a lesser degree of wrongdoing than willful and wanton negligence. Therefore, the trial court's instructions were proper.

We have carefully examined all of defendant's assignments of error and found them to be without merit and overruled.

In the judgment of the trial court we find no error.

No error.

Judge WHICHARD concurs.

Judge MARTIN (Harry C.) dissents.

Judge WHICHARD concurring.

The first issue raised in the dissenting opinion, that relating to the instruction on independent contractors, was not argued in defendant's brief. Assuming there was in fact error in the instruction, it was not of such magnitude, in my view, that this Court should *ex mero motu* make it the basis for awarding a new trial.

As to the punitive damages issue, "[i]t is a well established principle of statutory construction that a statute must be construed, if possible, so as to give effect to every part of it, it being presumed that the Legislature did not intend any of its provisions to be surplusage." *State v. Williams*, 286 N.C. 422, 431, 212 S.E. 2d 113, 119 (1975). To treat the G.S. 28A-18-2(b)(5) phrases "willful or wanton injury" and "gross negligence" as synonymous, as does the dissenting opinion, effectively renders one or the other mere surplusage, contrary to the mandate of the foregoing rule of construction.

I believe the General Assembly intended, by use of the disjunctive in the phrase "through maliciousness, willful or wanton injury, *or* gross negligence," to establish three separate categories of wrongful conduct which could be found to have

caused a decedent's death. By analogy to the criminal law, conduct from which a jury could find murder could fall in the category of "maliciousness," *see, e.g., State v. Withers*, 271 N.C. 364, 156 S.E. 2d 733 (1967); conduct from which a jury could find voluntary manslaughter could fall in the category of "willful or wanton injury," *see, e.g., State v. Rummage*, 280 N.C. 51, 185 S.E. 2d 221 (1971); and conduct from which a jury could find involuntary manslaughter could fall in the category of "gross negligence," *see, e.g., Rummage, supra.*

For the foregoing reasons, I concur in the opinion by Judge Robert M. Martin.

Judge MARTIN (Harry C.) dissenting.

This cause of action arose 1 July 1978 and resulted in a lengthy and important trial in the Superior Court of Wake County. Nevertheless, I am compelled to dissent.

The defendant excepted to the following portion of the charge:

> And so I instruct you that you may find that Carolina Power & Light Company, that it may be found to be negligent under the doctrine of corporate negligence; and I instruct you that if you find from the evidence and by its greater weight that the defendant corporation has itself been negligent through its agents, *or independent contractors*, in failing to promulgate adequate safety rules, or failing to assure proper installation, maintenance and inspection of its electrical lines, poles and apparatus in accord with its duty to exercise the highest degree of care in performing such responsibility; and that such negligence was a proximate cause of Daryl Beck's death, then you may find that the defendant is liable to the plaintiff under the doctrine of corporate negligence. (Emphasis ours.)

I find this exception to be prejudicial error. Although the particular aspect of the challenged instruction discussed herein is not argued by counsel, I find the error so palpable as to require analysis by this Court. *See State v. Booher*, 305 N.C. 554 (1982). One of the principal acts of negligence alleged by plaintiff is that defendant did not take proper care in replacing the transformer

on the pole in 1974. At that time, a new transformer was installed to increase the voltage from 7,200 to 13,200 volts. All the evidence shows that Sumter Brothers, an independent contractor, made this change under a contract with defendant.

This portion of the charge allows the jury to find defendant liable for the acts of an independent contractor. Ordinarily, an independent contractor is not liable for injuries to third parties occurring after the work has been completed and accepted by the owner. *Price v. Cotton Co.*, 226 N.C. 758, 40 S.E. 2d 344 (1946); 26 Am. Jur. 2d Electricity § 54 (1966). It may be otherwise where the work done is so negligently defective as to be imminently dangerous to third persons, provided the contractor knows, or should know, of the dangerous situation created by him, and the owner does not know of the dangerous condition and would not discover it by reasonable inspection. *Price, supra; Williams v. Stores Co., Inc.*, 209 N.C. 591, 184 S.E. 496 (1936).

The facts in this aspect of the case are similar to *Texas Traction Co. v. George*, 149 S.W. 438 (1912). In *Traction Co.*, George was killed while installing a transformer at Traction's substation. George worked for a plumbing company that was doing the installation for the benefit of Traction and Stark Grain, Traction's customer. The court held that the plumbing company was an independent contractor and that Traction, the electric company, was not responsible for its negligence. The court further held that the installation of a transformer was not intrinsically and necessarily dangerous. Likewise, the actions of Sumter Brothers in installing the transformer for defendant were not ultrahazardous so as to invoke liability upon defendant. *Insurance Co. v. Blythe Brothers Co.*, 260 N.C. 69, 131 S.E. 2d 900 (1963) (blasting); *Evans v. Rockingham Homes, Inc.*, 220 N.C. 253, 17 S.E. 2d 125 (1941) (open ditch); *Cole v. Durham*, 176 N.C. 289, 97 S.E. 33 (1918) (opening in sidewalk).

Of course, where an electric company owes a direct duty to its patron, the duty cannot be evaded and shifted to an independent contractor. This principle is illustrated in *Alabama Power Co. v. Emens*, 228 Ala. 466, 153 So. 729 (1934). Alabama Power generated and distributed electricity. In addition, it sold and installed electrical home appliances. It engaged an independent con-

tractor to install a stove in plaintiff's home. A fire resulted from the negligent installation. The court held that where the power company sold and installed the electric appliance in the patron's home, it could not evade its responsibility to the patron by use of an independent contractor for the installation. The duty was a direct personal obligation from the power company to its patron. *See also National Fire Ins. Co. of Hartford v. Westgate Const. Co.*, 227 F. Supp. 835 (D. Del. 1964).

By installing the transformer through its independent contractor, Carolina Power & Light Company was not performing a direct personal duty to the deceased. Therefore, the general rule that there is no vicarious liability for the negligence of an independent contractor applies. *Hendricks v. Fay, Inc.*, 273 N.C. 59, 159 S.E. 2d 362 (1968).

The challenged instruction is also erroneous in that it would allow the jury to find defendant negligent by reason of Sumter Brothers' failing to promulgate adequate safety rules or failing to *assure* proper installation, maintenance and inspection of its electrical lines, poles and apparatus. There is no evidence that Sumter Brothers had a duty to promulgate adequate safety rules or to assure proper installation of the electrical facilities. These duties were obligations of the power company. The evidence of negligence as to Sumter Brothers was limited to its actions in the installing of the transformer in 1974.

I also find error in the punitive damage aspect of the case. Defendant excepted to the submission of issues 4A and B to the jury. The issues, and the answers by the jury were as follows:

> 4. Was Plaintiff's intestate Daryl Beck killed by:
>
> A. The willful ~~and~~ or (APGJr) wanton negligence of Defendant Carolina Power and Light?
>
> ANSWER: No
>
> B. The gross negligence of Defendant Carolina Power and Light?
>
> ANSWER: Yes

The trial court obviously believed that N.C.G.S. 28A-18-2(b)(5) (adopted 1973) (Cum. Supp. 1981) required that issues based upon

willful or wanton negligence and gross negligence be submitted to the jury. I find this to be error. The pertinent part of the statute reads: "(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."

As the majority states, gross negligence is not defined in the statute, although the statute has a section of definitions. By failing to define gross negligence for the purpose of the statute, the legislature obviously intended to adopt the meaning of gross negligence established by our Supreme Court. In addressing the question of gross negligence as a basis for punitive damages, the Court held:

> References to *gross* negligence as a basis for recovery of punitive damages may be found in our decisions . . . When an injury is caused by negligence, any attempt to differentiate variations from slight to gross is fraught with maximum difficulty. . . .
>
> An analysis of our decisions impels the conclusion that this Court, in references to gross negligence, has used that term in the sense of wanton conduct. Negligence, a failure to use due care, be it slight or extreme, connotes inadvertence. Wantonness, on the other hand, connotes intentional wrongdoing. Where malicious or wilful injury is not involved, wanton conduct must be alleged and shown to warrant the recovery of punitive damages. Conduct is wanton when in conscious and intentional disregard of and indifference to the rights and safety of others. . . .
>
> True, decisions in other jurisdictions are somewhat divergent in the statement of the applicable rule. The divergence is greater in the application to specific factual situations.

Hinson v. Dawson, 244 N.C. 23, 27-28, 92 S.E. 2d 393, 396-97 (1956).

Thus, in 1956 our Court clearly established that with respect to punitive damages, gross negligence and wanton conduct are synonymous. This holding by our Court has been consistently followed in an unbroken procession of cases. *Newton v. Insurance Co.*, 291 N.C. 105, 229 S.E. 2d 297 (1976); *Brewer v. Harris*, 279

N.C. 288, 182 S.E. 2d 345 (1971); *Van Leuven v. Motor Lines*, 261 N.C. 539, 135 S.E. 2d 640 (1964); *Rubber Co. v. Distributors*, 253 N.C. 459, 117 S.E. 2d 479 (1960); *Jenkins v. Department of Motor Vehicles*, 244 N.C. 560, 94 S.E. 2d 577 (1956); *Robinson v. Duszynski*, 36 N.C. App. 103, 243 S.E. 2d 148 (1978); *Siders v. Gibbs*, 31 N.C. App. 481, 229 S.E. 2d 811 (1976); *Brake v. Harper*, 8 N.C. App. 327, 174 S.E. 2d 74, *cert. denied*, 276 N.C. 727 (1970); *McAdams v. Blue*, 3 N.C. App. 169, 164 S.E. 2d 490 (1968).

The principle is well stated by this Court, speaking through Judge Robert M. Martin, in *Duszynski, supra*:

> Our courts have generally held that punitive damages are recoverable where the tortious conduct which causes the injury is accompanied by an element of aggravation, as when the wrong is done wilfully or under circumstances of rudeness or oppression, or in a manner evincing a wanton and reckless disregard of the plaintiff's rights. . . . In cases where plaintiff's action was grounded on negligence, our courts have referred to *gross* negligence as the basis for recovery of punitive damages, using that term in the sense of wanton conduct. *Hinson v. Dawson*, 244 N.C. 23, 92 S.E. 2d 393 (1956). In *Hinson*, the Court explained that "[c]onduct is wanton when in conscious and intentional disregard of and indifference to the rights and safety of others."

36 N.C. App. at 106, 243 S.E. 2d at 150. It is to be noted that *Duszynski* was a wrongful death case in which the issue of punitive damages was controlled by N.C.G.S. 28A-18-2(b)(5), as in the case sub judice.

The majority relies upon *Clott v. Greyhound Lines*, 9 N.C. App. 604, 177 S.E. 2d 438 (1970), *rev'd*, 278 N.C. 378, 180 S.E. 2d 102 (1971), a bailment case, in which the Court of Appeals stated: "Our Supreme Court has defined gross negligence as 'something less than willful and wanton conduct.' *Smith v. Stepp*, 257 N.C. 422, 125 S.E. 2d 903 (1962)." 9 N.C. App. at 609, 177 S.E. 2d at 441. While it is true that *Smith v. Stepp* does contain the quoted language, it must be understood that our Supreme Court was stating the law of the Commonwealth of Virginia, not the law of North Carolina. *Smith* involved an automobile accident that occurred in Virginia, but the lawsuit was tried in North Carolina. The Court was concerned with the application of Virginia's guest

passenger statute which required a finding of gross negligence to support recovery. The Court cited as authority for the quoted statement the Virginia case of *Thomas v. Snow*, 162 Va. 654, 174 S.E. 837 (1934). Furthermore, the *Clott* opinion by this Court was reversed by the Supreme Court. Although *Duszynski* did not cite or refer to *Clott*, it was decided subsequent to *Clott* and, by implication, removes any vestigial authority of *Clott* in this regard. The *Clott* decision cannot be taken as authority that the quoted statement is the law of North Carolina. Rather, *Hinson v. Dawson, supra*, remains the law of North Carolina.

This position with respect to punitive damages is also consistent with the philosophy expressed in *Hinson* that "[W]e are not disposed to expand the doctrine beyond the limits established by authoritative decisions of this Court." 244 N.C. at 27, 92 S.E. 2d at 396.

Although it can be argued that under the law of *Hinson* the jury, by finding in its answer to issue 4A no willful or wanton conduct on the part of defendant, has foreclosed the issue of punitive damages, it is submitted that a more just result is to allow a new trial on that issue. The submission of issues 4A and B resulted in a misapplication of the law with respect to punitive damages. Only one issue should be submitted to the jury with respect to a basis for allowing punitive damages.

I vote for a new trial on all issues consistent with this opinion.

LEA COMPANY v. NORTH CAROLINA BOARD OF TRANSPORTATION

No. 8118SC623

(Filed 1 June 1982)

1. Eminent Domain § 13; Judgments § 37.5— consent judgment in condemnation action—no bar to damages for flood easement

In an inverse condemnation action seeking compensation for a flood easement allegedly taken by defendant Board of Transportation, the evidence supported determinations by the trial court that the complaint, notice and declaration of taking in a prior condemnation action instituted by defendant and a consent judgment in that action in which defendant agreed to pay for the taking of small portion of plaintiff's property did not give plaintiff notice that

damages from construction responsible for the flooding were included in the condemnation action and that plaintiff's action is not barred by the prior consent judgment.

2. Eminent Domain § 13— highway construction—inverse condemnation—easement for flooding

The trial court properly concluded that defendant Board of Transportation took an easement for flooding by the placement of its highway structures where the evidence supported determinations by the court that (1) the interest taken by defendant is maximally measured by the overflow of waters occasioned by a 100 year flood, and such an event was legally foreseeable by defendant; (2) defendant's structures substantially increased the level of flooding which would have been experienced had those structures not been built; (3) the highway structures are of a permanent nature and the overflow which occurs with the 100 year flood constitutes a permanent invasion of plaintiff's land; (4) and plaintiff showed substantial physical damage to its property measurable in monetary terms through evidence of repair costs, lost present and future rental income, and an estimate of the value of the property immediately before and immediately after the taking.

3. Eminent Domain § 13.4— inverse condemnation—easement for flooding—calculations of flood levels—similarity of conditions

In an inverse condemnation action seeking compensation for a flood easement allegedly taken by defendant Board of Transportation by the placement of its highway structures, an expert's calculations of flood levels were not inadmissible because construction of the highway project was not complete at the time of the flooding and conditions then were different where there was evidence of substantial similarities of conditions and no evidence of significant dissimilarities.

4. Evidence § 47— expert testimony—computer computations—inability to state basis of calculations

Computer calculations by defendant's expert witness were properly excluded where the witness was unable to state with certainty the basis of his calculations.

5. Eminent Domain § 13; Nuisance § 1; Waters and Watercourses § 1.1— inverse condemnation for flooding—doctrine of moving to the nuisance

Assuming, *arguendo*, that the doctrine of "moving to the nuisance" or "priority of occupation" is applicable in an inverse condemnation action, mere priority of occupation would not *ipso facto* bar recovery in an inverse condemnation action but would be merely one factor in the court's determination of whether there was a taking; furthermore, the trial court's finding supported by competent evidence that the nuisance was caused by a combination of structures constructed or extended subsequent to plaintiff's purchase of the property precluded a conclusion that plaintiff "moved to the nuisance."

6. Rules of Civil Procedure § 15.2— amendment of complaint to conform to evidence

The trial court did not abuse its discretion in permitting plaintiff's G.S. 1A-1, Rule 15(b) post-trial motion to amend its complaint to conform to the

evidence where defendant did not object to any evidence as being outside the pleadings.

7. **Eminent Domain § 13— inverse condemnation action for flooding—statute of limitations**

The evidence was insufficient to show damage to plaintiff's property from the taking of an easement for flooding prior to 1 September 1974, and the filing of plaintiff's complaint on 30 May 1975 thus was within the statute of limitations, whether the two-year statute of G.S. 136-111, the three-year statute of G.S. 1-52, or the ten-year statute of G.S. 1-56 is the applicable provision.

8. **Appeal and Error § 57; Trial § 58— failure to adopt proposed findings**

The trial court did not err in failing to adopt defendant's proposed findings of fact where the findings made by the court were supported by evidence and were fully dispositive of the issues.

APPEAL by defendant from *McLelland, Judge.* Judgment entered 3 November 1980 in Superior Court, GUILFORD County. Heard in the Court of Appeals 10 February 1982.

Plaintiff brought this inverse condemnation action seeking compensation for a flood easement allegedly taken by defendant when its highway structures foreseeably increased the level of flooding on plaintiff's property, resulting in substantial damage to apartments thereon. After trial without a jury the court adjudged that defendant had taken a defined interest in plaintiff's property as a result of a flood on 1 September 1974, and ordered that just compensation be determined by a jury.

Defendant appeals.

Attorney General Edmisten, by Special Deputy Attorney General James B. Richmond and Lindsay R. Davis, Jr., for defendant appellant.

Turner, Enochs & Sparrow, P.A., by C. Allen Foster and B. J. Pearce, for plaintiff appellee.

WHICHARD, Judge.

CONSENT JUDGMENT

[1] Defendant contends the action is barred by a prior consent judgment in which it agreed to pay for the taking of a small portion of plaintiff's property, including fee simple title to a right of

way and a temporary construction easement. It argues that because "compensation paid for the taking of property includes . . . the effects on the remaining property should only a portion be taken," *see* G.S.136-112(1)(1981), the subsequent damage by flooding to the remainder of plaintiff's property was encompassed by the prior consent judgment, which expressly included "any and all damages caused by the construction of said project." It specifically argues that the project number involved in the consent judgment gave plaintiff notice that damages from construction responsible for the instant flooding were included in that condemnation action.

The trial court made the following pertinent findings of fact:

> 13. The condemnation action referred to above [the prior action in question] was concluded by the execution and filing of a consent judgment . . . .
>
> 14. The complaint, notice and declaration of taking and the consent judgment referred the defendants in that action, who are the general partners of the plaintiff in this action, solely to . . . highway project no. 8.1533802.
>
> 15. The complaint and the notice and declaration of taking had attached to them a map showing the area of the taking. This map did not show Ramp A, Y-3 or Ramp B [the areas in question here] as being involved in the condemnation proceeding.
>
> 16. The highway project numbers assigned by defendant to the construction of Ramp A and the construction of the extensions to Y-3 and Ramp B were 8.1533804 and 8.133805, respectively.
>
> 17. The property taken was not adjacent to or near the area of Ramps A, B and Y-3.

Because the trial was by a judge without a jury, "the court's findings of fact have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary." *Williams v. Insurance Co.*, 288 N.C. 338, 342, 218 S.E.2d 368, 371 (1975); *see also Worthington v. Worthington*, 27 N.C.App. 340, 219 S.E.2d 260 (1975), *disc. rev. denied*, 289 N.C. 142, 220 S.E.2d 801

(1976). We find ample competent evidence in the record to support the foregoing findings, and they thus are conclusive on this appeal.

These findings suffice to support the following pertinent conclusions of law:

> 1. Neither the description of the highway project in the condemnation complaint and notice of taking initiated by the defendant, . . . nor the description of this project in the consent judgment which concluded the action provided plaintiff in this action . . . any notice that the general release contained in the consent judgment referred to or covered damages caused by construction associated with . . . the numbers of the projects of which plaintiff now complains.
>
> 2. The doctrines of res judicata, estoppel, or law of the case do not bar plaintiff from bringing the instant action by reason of the prior consent judgment.
>
> 3. The language in the consent judgment "for any and all damages caused by the construction of that project" as a matter of law cannot be construed to preclude a claim by [plaintiff] rising from construction other than on or directly affecting the plaintiff's property which was taken or which lies directly adjacent to the property taken. Whatever the project numbers that may have been recited, the language relied on by defendant cannot be construed to have included, within the necessary contemplation of the parties to the consent judgment, any damages arising from construction away from [plaintiff's] property.

We thus overrule defendant's assignments of error relating to the prior consent judgment.

EASEMENT FOR FLOODING

[2] Defendant contends the court erred in concluding that it took an easement for flooding by placement of its highway structures.

> In order to create an enforceable liability against the government it is, at least, necessary that the overflow of water be such as [1] was reasonably to have been anticipated by the government, [2] to be the *direct* result of the structure established and maintained by the government, and [3] con-

stitute an actual permanent invasion of the land, or a right appurtenant thereto, amounting to an appropriation of and not merely an injury to the property.

Midgett v. Highway Commission, 260 N.C. 241, 248, 132 S.E. 2d 599, 607 (1963) [hereinafter *Midgett I*]. We hold that the flooding here was adequately shown to fulfill these requirements.

I.

Plaintiff must first prove that defendant could reasonably foresee the overflow. Defendant assigns error to the conclusion that the flood here was a "reasonably foreseeable and recurring [event]." The court concluded that the interest taken by defendant is maximally measured by the overflow of waters occasioned by a 100 year flood, since the flooding here was at approximately 100 year flood levels. This conclusion is supported by the findings which in turn are supported by competent evidence in the record. *Williams, supra; Worthington, supra.* Defendant does not dispute that a 100 year flood is one which, as a matter of statistical probability, can be anticipated to occur once in every 100 years. A foreseeable flood is not an extraordinary one, but "one, the repetition of which, although at uncertain intervals, can be anticipated." *Midgett I*, 260 N.C. at 247, 132 S.E. 2d at 606. Because competent evidence in the record establishes that a 100 year flood is statistically foreseeable by those familiar with the science of hydrology, there was no error in the conclusion that such an event was legally foreseeable by defendant. The conclusion is further supported by the finding, to which defendant did not except, that defendant's own *Handbook of Design for Highway Drainage Structure* requires it to "check the effect of the 100 year flood when designing box culverts under interstate highways and make adjustments to the design criteria as necessary."

Defendant also assigns error to admission of the definition of "act of God" from its specification manual, arguing that the definition is prejudicial to the extent that it enlarges the scope of foreseeability beyond that fixed by the common law. The definition, admission of which was objected to, is as follows: "Events in nature so extraordinary that the history of climate variations and other conditions in the particular locality affords no reasonable warning of them." This definition was derived directly from the

common law. *See Midgett I,* 260 N.C. at 247, 132 S.E.2d at 606. The argument is thus without merit.

Defendant further assigns error to the conclusion that "neither the rain nor the associated flood" here were acts of God. The findings and evidence amply support the conclusion.

II.

Plaintiff must prove that the overflow was the direct result of defendant's structures. The crucial question regarding causation is: "Were the [structures] sufficient in size, design and manner of construction to accommodate [flood] water . . . which could be reasonably anticipated, so as to prevent it from rising on the land to a substantially greater height than it would had the [structures] not been constructed?" *Midgett v. Highway Commission,* 265 N.C. 373, 378, 144 S.E.2d 121, 125 (1965) [hereinafter *Midgett II*]. The finding that defendant's structures "substantially increas[ed] the level of flooding which otherwise would have been experienced had these structures not been built" is supported by competent scientific evidence in the record, and is therefore conclusive on appeal. *Williams, supra; Worthington, supra.*

III.

Plaintiff must show "an actual *permanent* invasion of the land, or a right appurtenant thereto." *Midgett I,* 260 N.C. at 248, 132 S.E.2d at 607. (Emphasis supplied.) Defendant argues that the flooding here was not sufficiently "frequent" to constitute a taking under this standard.

The frequency of the flooding is not, in itself, determinative of a taking. "There is no difference of kind, but only of degree, between a permanent condition of continual overflow . . . and a permanent liability to intermittent but inevitably recurring overflows . . . ." *United States v. Cress,* 243 U.S. 316, 328, 37 S.Ct. 380, 385, 61 L.Ed. 746, 753 (1917). The 100 year flood is, by statistical definition, an inevitably recurring event. Thus, if the structures causing the overflow are permanent, the overflow which occurs with the 100 year flood constitutes a permanent invasion. A permanent structure is

> one which may not be readily altered at reasonable expense so as to remedy its harmful effect, or one of a durable

> character evidently intended to last indefinitely and costing practically as much to alter or remove as to build in the first place . . . . *A segment of an improved highway is a structure of permanent nature.*

Midgett I, 260 N.C. at 248, 132 S.E.2d at 607. (Emphasis supplied.) We thus find defendant's argument relating to frequency of flooding without merit.

IV.

A *prima facie* showing of substantial physical damage measurable in monetary terms is also required. *Midgett II*, 265 N.C. at 377-78, 144 S.E.2d at 125. Defendant contends the court erred in finding that "[p]laintiff's property suffered substantial damage" as a result of the flooding.

Plaintiff adequately demonstrated its monetary loss through evidence of repair costs, lost present and future rental income, and an estimate of the value of the property immediately before and immediately after the taking by a person familiar with the property. *See* G.S. 136-112 (1981); *Highway Comm. v. Fry*, 6 N.C.App. 370, 374, 170 S.E.2d 91, 94 (1969). The finding is thus supported by competent evidence and is conclusive on appeal. *Williams, supra; Worthington, supra.*

V.

Defendant contends the court erred in making numerous findings regarding its errors in calculating anticipated flows and its faulty design of structures to accommodate these flows. It argues that: (1) these findings are irrelevant to whether there was a taking, (2) the court was probably improperly influenced by them, and (3) there is insufficient evidence to support them. We find competent evidence sufficient to support the findings that (1) defendant's computations "were not reasonably accurate projections of the magnitude of flood waters to be associated with the design criteria flood, i.e., the 50 year flood," and (2) the structures built by defendant "could not carry the waters associated with the design discharge flood, as that flood is properly determined by defendant's own method." These findings are relevant to whether the 100 year flood was reasonably foreseeable, because the undisputed evidence shows that the same methodology defendant used to calculate (improperly) the 50 year

flood can be used to calculate and thus foresee the 100 year flood. They are also relevant to whether defendant's structures were a direct cause of the flood here, because a structure which would not accommodate a 50 year flood clearly would not accommodate a 100 year flood. Defendant offers no support for its claim that the court improperly applied these findings where they were not relevant, and we find no support therefor in the record.

We note that the court stated in its conclusions of law that defendant's faulty design "is not . . . concluded by the Court to constitute . . . negligence on the part of the defendant, but the same does support the findings and conclusions that [defendant's structures] directly and proximately cause[d] the substantial increase in levels of flooding. . . ."

EVIDENTIARY OBJECTIONS

"In a trial before a judge, technical objections to the admissibility of evidence will not be observed. Prejudicial results must be shown or it may be deemed the court in its findings considered only competent evidence." *Contracting Co. v. Ports Authority,* 284 N.C. 732, 739, 202 S.E.2d 473, 477 (1974). Error is shown, however, when it affirmatively appears that the trial judge was influenced by incompetent testimony. *Hicks v. Hicks,* 271 N.C. 204, 208, 155 S.E.2d 799, 802 (1967).

Defendant first contends that evidence admitted regarding flooding subsequent to 1 September 1974, and flood levels other than that for the 100 year flood, was irrelevant and prejudicial. While it is true that such evidence does not support the fact of a taking on 1 September 1974, plaintiff also alleged a taking by subsequent flooding. The evidence was thus relevant to the issues pled, and it was only through consideration of evidence of all allegedly damaging floods that the court was able fully to determine whether and when a taking occurred. Further, assuming, *arguendo,* that the evidence was irrelevant, defendant has failed to show that the court was improperly influenced thereby.

[3] Defendant next contends the court erred in admitting plaintiff's expert's calculations of flood levels which were based on the allegedly false assumption that conditions had remained unchanged since the time of the flood. It argues that because construction of the highway project was not complete at the time of

flooding, conditions then were indisputably different. It suggests no specific ways in which they differed, however. The record reveals some evidence of substantial similarities and no evidence of significant dissimilarities. Whether the calculations were made under sufficiently similar conditions to be admissible was within the discretion of the trial court. *See Mintz v. R.R.*, 236 N.C. 109, 114-15, 72 S.E. 2d 38, 43 (1952). We find no abuse of discretion in admission of the calculations here.

[4] Defendant further contends certain computer computations by its expert witness were improperly excluded. "[T]he data upon which an expert witness bases his opinion must be presented to the [fact finder] in accordance with established rules of evidence. ... A witness is not permitted to base an opinion upon facts of which he has no knowledge." *Todd v. Watts*, 269 N.C. 417, 420, 152 S.E. 2d 448, 451 (1967). *See also State v. Bock*, 288 N.C. 145, 162, 217 S.E. 2d 513, 524 (1975), *death sentence vacated*, 428 U.S. 903, 49 L.Ed. 2d 1209, 96 S.Ct. 3208 (1976); 1 *Stansbury's North Carolina Evidence* § 136, p. 445-46 (Brandis Rev. 1973 & Cum. Supp. 1979).

The expert here failed to produce the computer printouts used in making his calculations. When questioned regarding his method of calculation, the witness stated that he had used the same computer deck plaintiff's expert had used, with some modifications. When asked if he could state with certainty what modifications were made without seeing the input data in the missing computer printouts, he answered, "I *think* I can from the results." (Emphasis added.) Because the witness was unable to state with certainty the basis of his calculations, we find no error in the exclusion of his testimony.

Further, the record shows the excluded testimony was substantially similar to calculations admitted through plaintiff's expert, and that any differences tended to support plaintiff's allegation of a taking. Thus, even if improper, the exclusion was not prejudicial to defendant.

NUISANCE

[5] Defendant contends this action is grounded on a theory of nuisance, which has its origin in negligence, and that it therefore should be barred by the doctrine of "moving to the nuisance," the analogue of contributory negligence.

It is true that in this jurisdiction an inverse condemnation action for flooding is grounded on a nuisance theory.

> The right to have water flow in the direction provided by nature is a property right, and if such right of a landowner is materially interfered with so that his land is flooded by the manner in which a highway is constructed, it is a nuisance and a taking of property for public use for which compensation must be paid.

Midgett I, 260 N.C. at 248, 132 S.E. 2d at 606. Further,

> 'the nuisance . . . was negligence-born, and must, in legal sense, make obeisance to its parentage.' . . . Negligence and nuisance are separate torts, but the line of demarcation between them is often indistinct and difficult to define. Primarily a nuisance is a condition, not an act or omission, but a structure or condition which is lawful may be a nuisance by reason of the manner of its maintenance or management.

Midgett II, 265 N.C. at 379, 144 S.E. 2d at 125-26.

It is the general rule that one is not barred from bringing an action for damages merely because he purchases property in the vicinity of a nuisance. 58 Am. Jur. 2d, *Nuisances* § 216, p. 816 (1971); Annot., 42 A.L.R. 3d 344, § 3, p. 347 (1972). Our Supreme Court has recognized, however, that "priority of occupation as between the parties" is one factor to be considered in determining whether an invasion of another's land is unreasonable and thus a nuisance. *Watts v. Manufacturing Co.*, 256 N.C. 611, 618, 124 S.E. 2d 809, 814 (1962).

We find no dispositive authority in this jurisdiction on whether the doctrine of "moving to the nuisance" or "priority of occupation" is applicable in an inverse condemnation action. Assuming, *arguendo*, that it is, defendant at most could have expected the court to consider any evidence relevant thereto as one factor in its determination of whether there was a taking. Mere priority of occupation would not *ipso facto* bar recovery.

Further, although two of the structures in question were constructed in the 1950's, they were extended and a third structure was constructed between 1972 and 1974. The court concluded that "[t]he interest taken by defendant is an easement for the accommodation of those flood waters in excess of those which would

have been experienced on the site had the [*three*] *structures* . . . not been constructed, maintained, and/or extended." (Emphasis supplied.) The evidence establishes that plaintiff purchased its property in 1972. Excess flooding caused by *the combination of the three structures* could not have occurred before the third structure was constructed between 1972 and 1974. Thus, the foregoing conclusion, which is supported by the findings and by competent evidence, precludes a conclusion that plaintiff "moved to the nuisance."

Defendant also contends the finding that "plaintiff did not know or have reason to know of any propensity of the property to flood to any significant extent at reasonably predictable and recurring intervals" is unsupported by the evidence, and that it is relevant to the defense of "moving to the nuisance" and thus prejudicial. We hold that the finding is supported by competent evidence, and that it is irrelevant to the issue of moving to the nuisance because the nuisance was caused by a combination of structures constructed or extended subsequent to plaintiff's purchase of its property.

MOTION TO AMEND

[6] Defendant contends the court erred in allowing plaintiff's G.S. 1A-1, Rule 15(b) post-trial motion to amend its complaint to conform to the evidence. The rule reads in pertinent part as follows:

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

G.S.1A-1, Rule 15(b) (1969). Failure of a party to object to evidence offered at trial on the specific grounds that the evidence was outside the pleadings results in trial of those issues by implied consent. *See McRae v. Moore*, 33 N.C.App. 116, 123, 234 S.E.2d 419, 422-23, *disc. rev. denied*, 293 N.C. 160, 236 S.E.2d 703 (1977).

The record does not disclose that defendant objected to any evidence as being outside the pleadings. It thus was not necessary to amend the pleadings, since "failure to so amend does not affect the result of the trial of these issues." G.S. 1A-1, Rule 15(b) (1969). *See* W. Shuford, *North Carolina Civil Practice and Procedure* § 15-6, p. 137 (1975). There was thus no abuse of discretion in allowing plaintiff to amend its complaint to conform to the evidence. *See generally Auman v. Easter,* 36 N.C.App. 551, 555, 244 S.E.2d 728, 730, *disc. rev. denied,* 295 N.C. 548, 248 S.E.2d 725 (1978); *Davis v. Connell,* 14 N.C.App. 23, 26-27, 187 S.E.2d 360, 362-63 (1972).

STATUTE OF LIMITATIONS

[7] Defendant pled the statute of limitations as a defense. It assigns error to the conclusion that plaintiff's cause of action arose on 1 September 1974, the "date the property first experienced substantial damage as a direct and proximate result of defendant's [structures]," and that commencement of the action on 30 May 1975 was thus within the applicable statute of limitations. It argues that plaintiff's property had been flooded many years earlier to a height greater than that of the 1 September 1974 flood, and that plaintiff's cause of action thus accrued at an earlier time which was outside the statute of limitations.

> Where there has been a taking of property by the construction and maintenance of a nuisance, the right of action does not accrue until damage has occurred. [Citations omitted.] And ordinarily the applicable statute of limitations begins to run against the landowner at the time the first damage arises from the nuisance.

Midgett I, 260 N.C. at 251, 132 S.E.2d at 608. We agree with the trial court that the evidence was insufficient to show damage to plaintiff's property from the taking of an easement for flooding prior to 1 September 1974. The filing of plaintiff's complaint on 30 May 1975 thus was within the statute of limitations, whether the two year statute (G.S. 136-111 (1981)), the three year statute (G.S. 1-52 (1969)), or the ten year statute (G.S. 1-56 (1969)), is the applicable provision. *See Dayton v. Asheville,* 185 N.C. 12, 16, 115 S.E. 827, 829-30 (1923).

PROPOSED FINDINGS AND CONCLUSIONS

[8] Defendant contends the failure to adopt its proposed findings of fact and conclusions of law is reversible error. In a trial without a jury the court's findings are conclusive on appeal if supported by competent evidence. *Williams, supra; Worthington, supra.* The trial judge is required to make findings on sufficient material facts to support the judgment, but is not required to make or adopt further findings which are not essential. *See Anderson v. Insurance Co.*, 266 N.C. 309, 313, 145 S.E.2d 845, 849 (1966); *In re* Custody of Stancil, 10 N.C.App. 545, 549, 179 S.E.2d 844, 847 (1971). Because the findings made here are supported by the record and are fully dispositive of the issues, we find no error in the failure to adopt defendant's proposed findings and conclusions.

RESULT

We have examined carefully defendant's other assignments of error. We find nothing therein, or in those discussed above, which merits reversal or re-trial. The judgment is therefore

Affirmed.

Judges CLARK and ARNOLD concur.

DONNA W. AARHUS v. WAKE FOREST UNIVERSITY

No. 8121SC878

(Filed 1 June 1982)

1. Evidence § 40— opinion testimony—use of "guess"

A witness's testimony that he called a certain office "I would guess for you 4 or 5 times" was an expression of opinion based upon his personal knowledge, not mere conjecture, and was improperly excluded.

2. Landlord and Tenant § 1; Trial § 6.1— stipulation not admission of lessor-lessee relationship

A stipulation stating that defendant "leased" premises and facilities for food service to plaintiff's employer was not intended as an admission that a lessor-lessee relationship existed between defendant and plaintiff's employer and that plaintiff's employer was thus not an independent contractor.

3. Master and Servant §§ 3.1, 19; Negligence § 52.1— employee of independent contractor—invitee—duty of premises owner

Plaintiff's employer was an independent contractor, not a lessee of defendant university, where the contract between defendant and plaintiff's employer granted the employer the right to manage the food service facilities on its campus; required the employer to provide food and beverages to serve as meals for defendant; required defendant to provide equipped facilities for food service, to make all equipment repairs and replacements, and to furnish maintenance and repair services for the premises; and required the employer to maintain an adequate staff but gave defendant the right of approval of the employees hired by the employer during the contract period and for six months thereafter. Therefore, plaintiff employee was an invitee of defendant, and defendant owed plaintiff the duty of due care under all the circumstances.

4. Master and Servant § 19; Negligence § 57.3— employee of independent contractor—fall of table on foot—negligence of premises owner

In an action to recover damages for an injury to plaintiff caused by the collapse of a cash register table onto plaintiff's foot while she was working on defendant university's premises as a cashier for an independent food service contractor and thus was an invitee of defendant, plaintiff's evidence was sufficient to be submitted to the jury on the issue of defendant's negligence in failing to repair or replace the table or to warn plaintiff of its condition where it tended to show that defendant's superintendent of buildings was aware of the wobbly condition of the cash register table and, after looking at the table on one occasion, stated that "we've got to get this done," but no repair work was done on the table.

APPEAL by plaintiff from *Wood, Judge.* Judgment entered 1 April 1981 in Superior Court, FORSYTH County. Heard in the Court of Appeals 6 April 1982.

This is a negligence action arising from an injury to plaintiff caused by the collapse of a cash register table onto her foot. At the time of this incident, plaintiff was employed as a cashier by ARA Food Services, Inc. [hereinafter referred to as ARA], which operated the cafeteria on defendant's campus. Plaintiff alleges that defendant was negligent in that (1) its agents and employees failed to repair or replace the table after repeated requests from plaintiff's employer to do so, (2) defendant's agents and employees failed to warn plaintiff of the defective condition of the table, (3) defendant's agents and employees failed to authorize or request plaintiff's employer to replace or repair the table, (4) defendant failed to provide a safe place to work for plaintiff, and (5) defendant failed to provide a table suitable for the purposes for which it was used. Defendant answered, denied plaintiff's allegations, and asserted the further defenses that

(1) the accident was unavoidable, (2) plaintiff was contributorily negligent, (3) plaintiff assumed the risk of injury since such risk was open and obvious, (4) plaintiff's employer's negligence is a bar to its subrogation interests or that of its workers' compensation carrier, and (5) the negligence of plaintiff and her employer constituted independent causes which intervened between any negligence of defendant and plaintiff's injuries.

At trial, the judge granted defendant's motion for a directed verdict at the close of plaintiff's evidence on the grounds that (1) plaintiff's evidence did not show defendant's negligence, (2) the intervening negligence of plaintiff's employer was the proximate cause of the accident, and (3) the negligence of plaintiff's employer would have combined with defendant's negligence—if there had been any such negligence—and barred the subrogation claim as a matter of law. Plaintiff appeals from the judgment entered thereon.

House, Blanco, Randolph & Osborn, by Clyde C. Randolph Jr. and Reginald F. Combs, for plaintiff-appellant.

Petree, Stockton, Robinson, Vaughn, Glaze & Maready, by W. Thompson Comerford Jr. and John F. Mitchell, for defendant-appellee.

HILL, Judge.

Plaintiff testified that about 10 a.m. on 2 September 1976, she "closed down" her own cash register and relieved a co-worker, Mary Dingman, at cash register "D" in the cafeteria on defendant's campus. She began working, but the register would not ring. Plaintiff in a free moment looked for the plug with no success. When she again had no customers, plaintiff testified that she "decided to bend around and see where that outlet was, and it came down. The leg on the table came down and the cash register with it. The right leg of the table hit the top of my foot, on the arch." Plaintiff worked at cash register "D" about five minutes before the accident. She further testified that she had not noticed "any difficulty or any peculiarity about the condition of the cash register table" two days earlier when she worked with cash register "D," and that "[n]o one had made any statement to me or in my presence about the condition of the cash register table before I was injured."

Mary Dingman, the regular operator of cash register "D," testified that she noticed a problem with one of the legs of the cash register table and told her supervisor, Lucille Smith Jackson, of the problem about six weeks before the accident. She stated, "I had no trouble seeing the problem with the table because it was wobbly. I looked at it and saw what it was. You couldn't help but see it at that time. The table was wobbly. It wasn't lopsided." One of Dingman's supervisors told her not to worry about the condition of the table, it would be fixed.

Lucille Smith Jackson supervised the cashiers at the cafeteria at the time of the accident. She testified,

> During the 30 days before the accident to [plaintiff], I observed that cash register D was shaky, very shaky and both legs were really shaky, but none of them were out of proportion that I could see, but I felt that they were going to collapse on someone. I reported what I had observed concerning the condition of cash register D to Mr. Pardue, my supervisor. . . . It was before the accident. I made communication to Mr. Pardue concerning the condition of this particular table quite a few times.

Robert Ernest Pardue, production manager of the cafeteria for ARA at the time of the accident, testified that he had talked to Royce Weatherly, defendant's superintendent of buildings, concerning the condition of the table under cash register "D." Pardue described the problem as "loose legs." He stated that "it looked like probably a screw was with—one screw was holding them, and, . . ., then we'd knock them back under there and try to straighten them up. When I say 'we' I mean myself, or some other employee of ARA." If one looked for the problem, Pardue testified, one could see it. Weatherly came to the cafeteria on one occasion, looked at the table, and told Pardue, " 'Yes, Bob, we've got to get this done.' " This conversation occurred "right in the neighborhood of the time that the accident happened, right before that . . . ." Pardue testified that he also telephoned Weatherly's office about the condition of the table on another occasion, but he never submitted a written request to have any work done on the table.

[1] In her first assignment of error, plaintiff argues that the trial judge erred in refusing to allow the following testimony of Pardue:

Q. Do you recall approximately how many occasions you called Mr. Weatherly's office concerning the condition on cash register D?

A. The exact number I couldn't, I couldn't recall, but I would guess for you 4 or 5 times.

MR. COMERFORD: Well, I object and move to strike.

THE COURT: How many times?

A. 4 or 5 times.

THE COURT: Sustained. Now don't consider that answer.

Q. Give your best recollection as to the number of times that you telephone Mr. Weatherly's office concerning the condition of cash register D?

A. 4. May I—Your Honor—May I clear this up?

THE COURT: Now, I will sustain the objection. I instruct you to strike that answer from your mind as to that.

We sustain plaintiff's assignment.

> "[T]he word 'guess' does not necessarily mean mere conjecture, but may connote judgment. If a person is asked to estimate the number of people in a crowd, he may say 'I guess' a certain number. By either term he is expressing an opinion based on observation."

State v. Clayton, 272 N.C. 377, 382, 158 S.E.2d 557, 561 (1968), *quoting Finnerty v. Darby*, 391 Pa. 300, 310, 138 A.2d 117, 122 (1958). *Accord Boyd v. Blake*, 1 N.C. App. 20, 159 S.E.2d 256 (1968). Thus, the mere fact that a witness says he is "guessing" does not *per se* exclude the evidence as conjecture, but goes to its weight for the jury to consider. *See State v. Clayton, supra.*

Pardue's excluded testimony that he called Weatherly's office about the table, "I would guess for you 4 or 5 times," was an expression of opinion based upon his personal knowledge, not "mere conjecture." *See* 1 Stansbury's N.C. Evidence (Brandis rev. 1973) § 122, pp. 382-83. Therefore, the jury should have been allowed to weigh Pardue's excluded testimony.

Plaintiff also argues that the trial judge erred in allowing defendant's motion for directed verdict at the conclusion of his

evidence on the grounds stated above. 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. Harvester Co.*, 278 N.C. 153, 179 S.E.2d 396 (1971). In passing upon such a motion, the trial judge must consider the evidence in the light most favorable to the nonmovant, resolving all conflicts and giving to him the benefit of every inference reasonably drawn in his favor. *Rappaport v. Days Inn of America, Inc., supra; Summey v. Cauthen*, 283 N.,C. 640, 197 S.E.2d 549 (1973). A directed verdict motion by defendant may be granted only if the evidence is insufficient as a matter of law to justify a verdict for plaintiff. *Husketh v. Convenient Systems, Inc.*, 295 N.C. 459, 245 S.E.2d 507 (1978); *Dickinson v. Pake*, 284 N.C. 576, 201 S.E.2d 897 (1974).

[2] Since defendant's duty to plaintiff arises from the relationship subsisting between them, *Matthieu v. Piedmont Natural Gas Co.*, 269 N.C. 212, 152 S.E.2d 336 (1967), our analysis of plaintiff's argument begins with the parties' disagreement over the proper characterization of the contractual relationship between defendant and ARA. Defendant contends that a stipulation by the parties which was read to the jury controls this question. The stipulation reads, in part, as follows:

> On or about September 2, 1976, the Plaintiff was employed by ARA Food Service, Inc., which Corporation had a contract with Defendant, Wake Forest University, to provide food and services to the Defendant. Pursuant to that agreement, the Defendant *leased* premises and facilities for food service to ARA Food Service, Inc.

(Emphasis added.) Thus, defendant argues that it, as lessor, is not liable for injuiries to persons on the leased premises resulting from disrepair, even when the lessor is under a contractual obligation in the lease to repair and maintain the premises. *See* 8 Strong's N.C. Index 3d, Landlord and Tenant § 8.2, pp. 241-42. Despite the stipulation quoted above, however, plaintiff argues that ARA is an independent contractor, and that as ARA's employee, defendant owed her a duty of "due care under all circumstances." We agree with plaintiff.

> Stipulations are viewed favorably by the courts because their usage tends to simplify, shorten, or settle litigation, as well

> as save costs to litigants. *Rickert v. Rickert*, 282 N.C. 373, 193 S.E.2d 79 (1972); *Rural Plumbing and Heating, Inc. v. H. C. Jones Construction Co.*, 268 N.C. 23, 149 S.E.2d 625 (1966); *Chisolm v. Hall*, 255 N.C. 374, 121 S.E.2d 726 (1961). Yet, the effect or operation of a stipulation will not be extended by the courts beyond the limits set by the parties or by the law. *Rickert v. Rickert, supra; Lumber Co. v. Lumber Co.*, 137 N.C. 431, 49 S.E. 946 (1905). In determining the extent of the stipulation, it is appropriate to look to the circumstances under which it was entered, as well as to the intentions of the parties as expressed by the agreement. *Rickert v. Rickert, supra.* Stipulations will receive a reasonable construction so as to effect the intentions of the parties, but in ascertaining the intentions of the parties, the language employed in the agreement will not be construed in such a manner that a fact which is obviously intended to be controverted is admitted or that a right which is plainly not intended to be waived is relinquished.

Outer Banks Contractors, Inc. v. Forbes, 302 N.C. 599, 604-05, 276 S.E.2d 375, 379-80 (1981).

To hold the parties in this action to a theory that defendant's liability to plaintiff is controlled by a lessor-lessee relationship between defendant and ARA would be to construe the stipulation quoted above as admitting "a fact which is obviously intended to be controverted . . . ." *Id.* at 604, 276 S.E.2d at 380. For this reason, we do not believe that the parties intended that the nature of their relationship be admitted. Thus, we now must determine the true nature of the contractual relationship between defendant and ARA.

On 18 June 1968, defendant's Board of Trustees and Slater Corporation entered into an agreement providing, in part, as follows:

> 1. GRANT TO SLATER: College hereby grants to Slater the right to sell food, food products, candy and non-alcoholic beverages in the food service facilities on its campus in Winston-Salem, North Carolina, and further hereby agrees to purchase from Slater all of the foregoing items to the extent it sells them to its students, faculty, staff and guests.

2. FACILITIES AND EQUIPMENT: College will provide Slater with all facilities for food service including adequate office equipment and furniture (together with adequate sanitary toilet facilities and dressing rooms for Slater's employees) completely equipped and ready to operate, together with such heat, fuel, refrigeration and utilities service reasonably required for efficient operation. In the event that College requests service of food other than in the Student Union Building, College will furnish, at no cost to Slater, all transportation necessary to enable Slater to provide such service. College will make all equipment repairs and replacements and will furnish building maintenance and repair service for the premises. College will also provide an adequate initial inventory of glassware, chinaware and silverware but Slater will maintain the inventory of these items at its expense. Slater will be responsible for routine cleaning and housekeeping in the food preparation and service areas and for the cleaning of dining room tables, chairs and floors, but College will provide regular cleaning service for dining room walls, windows, light fixtures, draperies and blinds, and periodic buffing and waxing of floors. Slater will maintain high standards of sanitation; however, College will be responsible for trash and garbage removal and extermination service.

3. SLATER AGREES:

A. FOOD SERVICE: To purchase, prepare and serve food, food products, candy and non-alcoholic beverages on the campus and to provide College with meals for College to resell to its students, faculty, staff and guests on such hourly schedule as may be mutually agreed upon.

B. MENUS: To submit menus at least one (1) week in advance of service to such person as College shall designate.

C. HEALTH EXAMINATIONS: To cause all of its employees assigned to duty on College's premises to submit to periodic health examinations at least as frequent and as stringent as required by law, and to submit satisfactory evidence of compliance with all health regulations to College's medical department upon request.

D. INSURANCE: To furnish College with a certificate in form acceptable to College, certifying that Slater carries workmen's compensation, comprehensive (including products), bodily injury and property damage liability insurance in such amounts as are acceptable to College. College hereby waives any and all right of recovery from Slater for loss caused by perils defined in fire, extended coverage and sprinkler leakage insurance policies.

E. RETURN OF EQUIPMENT: To return to College at the expiration of this contract the food service premises and all equipment furnished by College in the condition in which received, except for ordinary wear and tear and except to the extent that said premises or equipment may have been lost or damaged by fire, flood or other unavoidable occurrence, or theft by persons other than employees of Slater without negligence on the part of Slater or its employees.

4. PERSONNEL: Slater will at all times maintain an adequate staff of its employees on duty on College's campus for efficient operation, thereat, and to provide expert administrative, dietetic, purchasing, equipment consulting and personnel advice and supervision. Slater employees will strictly adhere to campus regulations regarding personal behavior. Slater agrees to assign to duty at College only employees acceptable to College.

Slater agrees that no employees of College will be hired by Slater without specific permission of College for the period of this contract and six months thereafter. College agrees that no employees of Slater will be hired by College without specific permission of Slater for the period of this contract and six months thereafter.

5. STUDENT LABOR: College will furnish Slater with student labor to an extent mutually agreed upon, for which Slater will reimburse College at a rate which will at least be equal to the applicable state and/or federal minimum wage regulations.

The contract also provides that Slater must submit to defendant a statement of "gross manual sales" during each accounting period, and that defendant "shall have full access to the food service

facilities with or without notice," including records which defendant may audit at any time.

> An independent contractor has been defined as one who exercises an independent employment, contracts to do a piece of work according to his own judgment and methods, and without being subject to his employer, except as to the result of the work, and who has the right to employ and direct the action of other workmen in the prosecution of the work without interference or right of control on the part of his employer.

Askew v. Leonard Tire Co., 264 N.C. 168, 177, 141 S.E.2d 280, 287 (1965). The vital test is whether the employer "has or has not retained the right of control or superintendence over the contractor or employee as to details." *Hayes v. Board of Trustees of Elon College*, 224 N.C. 11, 15, 29 S.E.2d 137, 140 (1944). *See also Cooper v. Asheville Citizen-Times Publishing Company, Inc.*, 258 N.C. 578, 129 S.E.2d 107 (1963).

[3] The contract quoted above indicates that defendant granted to Slater, an independent entity, the right to manage the food service facilities on its campus. While defendant is to provide equipped facilities for food service, including responsibilities to "make all equipment repairs and replacements" and to "furnish building maintenance and repair service for the premises," Slater is to provide the food and beverages to serve as meals for defendant. It is Slater's responsibility to provide and maintain an adequate staff, but defendant retains approval of the employees hired by Slater during the contract period and six months thereafter. These facts are sufficient to show that Slater exercises an independent employment and generally employs and directs the activities of its employees without excessive interference by defendant. Specifically, defendant has not retained the right of control over ARA as to the details of its work. Therefore, from the record before us, we conclude that ARA is an independent contractor of defendant, not a lessee, and that defendant's liability to plaintiff, if any, must be governed under that relationship.

As in *Maness v. Fowler-Jones Construction Co.*, 10 N.C. App. 592, 179 S.E. 2d 816, *cert. denied*, 278 N.C. 522, 180 S.E. 2d 610 (1971), plaintiff's action in the present case lies in tort and the contract between defendant and ARA "merely furnishes the occa-

sion, or creates the relationship which furnishes the occasion, for the tort." *Toone v. Adams,* 262 N.C. 403, 407, 137 S.E.2d 132, 135 (1964). *Accord Pinnix v. Toomey,* 242 N.C. 358, 87 S.E.2d 893 (1955). Plaintiff, an employee of ARA, defendant's independent contractor, was an invitee of defendant. "Defendant's duty to plaintiff, therefore, was one of due care under all the circumstances." *Spivey v. The Babcock & Wilcox Co.,* 264 N.C. 387, 388, 141 S.E.2d 808, 810 (1965). *Accord Maness v. Fowler-Jones Construction Co., supra.*

[4] On the issue of defendant's negligence, it is clear that Weatherly, defendant's superintendent of buildings, was aware of the condition of the cash register table. In fact, Weatherly told Purdue, then ARA's production manager, that "we've got to get this done." Plaintiff's co-worker, Dingman, also was aware of the "wobbly" table; she was the regular operator of cash register "D." However, Dingman was told by her supervisors not to worry about the condition of the table, it would be fixed. Under this evidence, it was for the jury to determine whether defendant breached its duty to plaintiff of due care under all circumstances in failing to repair or replace the table or warn plaintiff of its condition. Therefore, the trial judge erred in granting a directed verdict for defendant on the ground that she has failed to show defendant's negligence. Our decision that plaintiff's evidence is sufficient to go to the jury on the above issue necessarily requires reversal of defendant's directed verdict on the remaining grounds specified by the trial judge.

We do not address plaintiff's second assignment of error concerning the exclusion of testimony elicited by a hypothetical question because the issue is unlikely to arise in a subsequent trial. *See* G.S. 8-58.12 & .13; *see also Simons v. Georgiade,* 55 N.C. App. 483, 286 S.E.2d 596, *disc. rev. denied,* 305 N.C. 587, 292 S.E.2d 571 (1982).

For these reasons, the trial judge erred in allowing defendant's motion for a directed verdict.

New Trial.

Judge BECTON concurs.

Judge HEDRICK concurs in result only.

STATE OF NORTH CAROLINA v. DON JUAN JEFFRIES

No. 8118SC1171

(Filed 1 June 1982)

1. **Rape and Allied Offenses § 6.1— insufficient evidence to support an instruction on assault on a female**

In a prosecution for second degree rape, the trial court properly failed to submit to the jury the offense of assault on a female since the State's evidence tended to show that defendant forced the prosecutrix to have intercourse against her will and defendant's evidence tended to show that the prosecutrix and he consensually engaged in sexual intercourse.

2. **Rape and Allied Offenses § 6.1— failure to instruct on assault on a female proper**

Defendant's evidence that the prosecutrix and he engaged in consensual sexual intercourse and that during the intercourse he hit her after she hit him did not support an instruction on assault on a female since defendant was indicted for second degree rape only.

3. **Criminal Law § 122.2— additional instructions upon finding jury deadlocked**

Instructions given to a jury after it had been deliberating for several hours and after the jury foreman informed the court that the jury was deadlocked in an eleven to one vote were not erroneous in that they substantially conformed to the guidelines in G.S. § 15A-1235.

4. **Criminal Law § 46.1— flight of defendant from first trial—admissible as evidence of guilt**

The trial court did not err in admitting into evidence testimony regarding the defendant's flight from his first trial since the testimony could be admitted as some evidence of guilt. The only matters presented to the jury were that defendant was earlier tried for the same offense at issue in the present case, that he had no attorney at that first trial, and that he had fled during the course of the trial. The evidence did not show that defendant was convicted, and the challenged evidence was not an instance of the prejudice so outweighing the probity as to require its exclusion. Further, defendant failed to move to suppress the exclusion of the evidence as being constitutionally required, and that is the exclusive method of challenging such evidence. G.S. § 15A-971 *et seq.*

Judge BECTON concurring in the result.

APPEAL by defendant from *Rousseau, Judge.* Judgment entered 13 March 1981 in Superior Court, GUILFORD County. Heard in the Court of Appeals on 27 April 1982.

Defendant was charged in a proper bill of indictment with second degree rape. A jury found defendant guilty as charged,

and the court entered a judgment imposing a prison sentence of no more than twenty-five nor less than twenty years. Defendant appealed.

Attorney General Rufus L. Edmisten, by Special Deputy Attorney General Ann Reed, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Nora B. Henry, for defendant appellant.

HEDRICK, Judge.

[1] By his first assignment of error, defendant argues that "[t]he trial court committed reversible error . . . when it withdrew the possible verdict of assault on a female from the jury's consideration." Defendant argues that there was evidence of his commission of assault on a female, and that such offense was a lesser included offense which should have been submitted to the jury.

> If all the evidence tends to show that the crime charged in the bill of indictment was committed, and there is no evidence tending to show commission of a crime of lesser degree, the court correctly refuses to charge on the unsupported lesser degree and correctly refuses to submit lesser degrees of the crime charged as permissible verdicts.

State v. Allen, 297 N.C. 429, 434, 255 S.E.2d 362, 365 (1979).

In the present case, the State presented evidence tending to show, *inter alia*, that on 10 December 1978, defendant grabbed Sheila Smith and pulled her onto his lap despite her telling him "No" when he beckoned her to sit with him, and despite her burning him with a cigarette; that Smith tried to break away but defendant held onto her and threw her on a bed and started kissing her and pressing his body down on her, despite her crying and her pleas that he stop; that he forcefully wrestled with Smith and, despite her continued resistance and further pleas and threats to presecute, forcibly removed Smith's pants and other clothing; that Smith continued to try to push defendant off of her and that she hit him in the face with her fist and he struck her in retaliation; and that despite Smith's continued struggling and efforts at avoiding defendant, defendant succeeded in having sexual intercourse with Smith, without Smith's consent. Defendant's evidence tended to show that on 10 December 1978 he sat on a

bed beside Smith and put his arms around her and kissed her; that she put her arms around him and responded to him; that she then consensually engaged in sexual intercourse with defendant; and that during the course of their intercourse, she hit him "up side of the head and told . . . [him] to slow down, and [he] hit her back."

The evidence in the present case presents two sets of occurrences which arguably could constitute assault on a female. The first set of occurrences consists of defendant's wrestling with Smith, kissing her, and pressing his body on hers. The question, therefore, is whether the evidence of these occurrences, coupled with defendant's evidence that Smith consented to having intercourse with defendant, is evidence of the lesser included offense of assault on a female.

Assault is a requisite element of assault on a female, *State v. Craig*, 35 N.C. App. 547, 241 S.E.2d 704 (1978), and is defined as an overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force or menace of violence must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm. *State v. Sawyer*, 29 N.C. App. 505, 225 S.E.2d 328 (1976). Although defendant's wrestling, kissing, and pressing himself against another without that other's consent may constitute assault, when such acts are merely the preliminaries to consensual sexual intercourse they can hardly suffice as an overt act of force and violence to do harm to another sufficient to put a reasonable person in fear of bodily harm. In the present case, the occurrences portrayed by defendant's evidence involve nothing more than consensual contact between Smith and defendant, prior to their act of intercourse; such contact could not constitute assault. The evidence under consideration presents a situation in which the jury could not reasonably find that defendant's intercourse with Smith was consensual and therefore that he did not commit the offense charged in the indictment, but that he did commit the lesser included offense of assault on a female; hence, with respect to the first set of circumstances, it was not error to withdraw the lesser included offense from the jury's consideration. *See State v. Lampkins*, 286 N.C. 497, 212 S.E.2d 106 (1975), *cert. denied*, 428 U.S. 909, 49 L.Ed.2d 1216, 96 S.Ct. 3220

(1976). This ruling is further bolstered by the following quote from *State v. Davis*, 291 N.C. 1, 13 229 S.E.2d 285, 293 (1976):

> [I]n prosecutions for rape . . . [,] when all the evidence tends to show a completed act of intercourse and the only issue is whether the act was with the prosecuting witness's consent or by force and against her will, it is not proper to submit to the jury lesser offenses included within a charge of rape.

If the jury believed defendant's evidence that his contact with Smith was with her consent, then it would have to find defendant not guilty of second degree rape; he could not be guilty of assault on a female.

[2] Defendant offers another set of circumstances which he argues constituted evidence of the lesser included offense of assault on a female; these circumstances, which were testified to by both the prosecutrix Smith and the defendant, are that defendant hit Smith in the face while trying to have intercourse with her after she hit him. The question this set of circumstances poses is whether defendant's evidence that he had consensual sexual intercourse with Smith and that he hit her after she hit him constitutes evidence of the lesser included offense of assault on a female.

"[O]ffenses are not the same if, upon the trial of one, proof of an additional fact is required which is not necessary to be proven in the trial of the other . . . ." *State v. Freeman*, 162 N.C. 594, 596, 77 S.E. 780, 781 (1913). The circumstances presently under consideration constitute evidence that defendant committed two separate and distinct offenses. First, there was evidence tending to show his commission of second degree rape, which, according to G.S. § 14-27.3, is vaginal intercourse with another person by force and against the will of that other person; second, there was evidence that defendant committed an assault on a female completely independent of and distinct from, as opposed to being inherent in and incident to, his forceful intercourse with Smith against her will. Proof of the assault on a female required evidence which was not necessary to the proof of second degree rape, to wit, evidence that defendant hit Smith while having intercourse with her; in its proof of second degree rape, the State did not need to rely on this evidence of defendant's blow to Smith, since there was ample evidence that he had used other

forceful measures to subdue Smith and subject her to intercourse against her will. In fact, defendant's own testimony was that he did not hit Smith until he was already having intercourse with her. Hence, the evidence under consideration is of two distinct offenses involving distinct occurrences, and is not of a greater offense and a lesser included offense. Defendant, however, was indicted only for second degree rape, and not for any distinct offense, arising from another set of acts, of assault on a female. "It is essential to jurisdiction that a criminal offense be charged in the warrant or indictment upon which the State brings the defendant to trial." *State v. Vestal*, 281 N.C. 517, 520, 189 S.E.2d 152, 155 (1972). Since there was no indictment for the separate offense of assault on a female, the court did not err in withdrawing such offense from the jury's consideration of possible verdicts. This assignment of error is overruled.

[3] Defendant next assigns error to "[t]he trial court's instruction to the jury when deadlocked; on the grounds that the instructions violated G.S. 15A-1235." The challenged instructions were given after the jury had been deliberating for several hours and the jury foreman had informed the court that the jury was deadlocked in an eleven to one vote. The court instructed the jury as follows:

> THE COURT: Well, you ladies and gentlemen, I am sure have been diligent in your deliberations. You have been conscientious, I am sure.
>
> However, you have heard all of the evidence in this case. I don't know of any reason to expect there would be any other evidence. You are intelligent jurors, and have no reason to believe that any other jurors would be more intelligent than you are.
>
> It is a juror's function to sit together and hear the evidence and go deliberate and listen to one another's viewpoints. And sometimes, after listening to one, you might readjust your thinking. That is part of the jury duty.
>
> Sometimes, we human beings jump to conclusions. After we hear from other persons and their viewpoints, we realize maybe our position is not as sound as we once thought it was.

> And I am going to ask you to continue just a little while longer, to sit together, listen to each other's viewpoints. If one or more of you feel like yours needs readjusting, that is part of a juror's duty.
>
> However, I caution each and every one of you not to compromise your convictions or do violence to your conscience. You have a duty not to violate your conscience or compromise your convictions.
>
> But I will let you deliberate a little bit longer.

If it appears to the judge that the jury has been unable to agree, the judge may require the jury to continue further deliberations and may give or repeat the following instructions:

> (a) . . . that . . . all 12 jurors must agree to a verdict of guilty or not guilty.
>
> (b) . . . that:
>
> (1) Jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;
>
> (2) Each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;
>
> (3) In the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and
>
> (4) No juror should surrender his honest conviction as to the weight or effect of the evidence solely becaue of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.

G.S. § 15A-1235. A jury may not "be advised of the potential expense and inconvenience of retrying the case should the jury fail to agree." *State v. Easterling*, 300 N.C. 594, 608, 268 S.E. 2d 800, 809 (1980). The instructions prescribed in G.S. § 15A-1235, however, need not be given verbatim whenever a jury is deadlocked; rather, such instructions are guidelines, "and the trial judge must be allowed to exercise his sound judgment to deal with the myriad different circumstances he encounters at trial."

State v. Hunter, 48 N.C. App. 689, 692-93, 269 S.E. 2d 736, 738 (1980).

The challenged instructions in the present case substantially conform to the guidelines in G.S. § 15A-1235. This assignment of error has no merit.

Defendant also assigns as error "[t]he trial court's withdrawal of the possible verdict of assault on a female; on the grounds that this coerced a verdict." As previously discussed, there was nothing improper about the court's withdrawal of such possible verdict. The absence of error obtains even though the withdrawal was done while the jury was deadlocked and even though the withdrawal might have expedited the jury's arriving at a unanimous verdict. This assignment of error has no merit.

In his next assignment of error, defendant argues that the "trial judge's miscellaneous remarks and questions urged the jury to rush its deliberations." Defendant contends that the court's telling the jury that this case was the last jury case for the week and that 5:00 was the "normal" closing hour, and his asking, from time to time, how the deliberations were progressing created a coercive and prejudicial climate which pressured the jurors into reaching a verdict. These remarks and inquiries were not coercive, but were consonant with the judge's responsibility for monitoring the jury's progress. The assignment of error is overruled.

[4] Finally, defendant assigns as error "[t]he admission into evidence testimony regarding the defendant's first trial and flight therefrom; on the grounds that the evidence arose in circumstances wherein defendant's rights guaranteed by the Sixth and Fourteenth Amendments to the U.S. Constitution were violated."

Under this assignment of error, defendant first argues that admission of the evidence about defendant's flight from his first trial presented to the jury the fact that he was convicted when first tried on the charge at issue in the present case, and that the evidence of his conviction at the first trial was improperly admitted since the first conviction was set aside on the grounds that defendant had erroneously been denied his right to counsel.

The numerous exceptions upon which this assignment of error is based, however, which relate to both evidence and the court's recapitulation thereof, disclose that the only matters presented to the jury were that defendant was earlier tried for the same offense at issue in the present case, that he had no attorney at that first trial, and that he fled during the course of the trial. There was nothing before the jury to indicate whether the trial resulted in a conviction of defendant, or his acquittal, or a mistrial. Hence, such evidence did not constitute the State's using evidence of a prior uncounselled conviction. The evidence did not show that defendant was convicted, nor was it so intended; rather, the evidence was presented solely to show that defendant fled from the first trial.

Defendant's second argument is that the probative value, on the issue of defendant's guilt for second degree rape, of the evidence of his flight from the first trial on such offense was outweighed by its prejudicial effect, particularly in light of the fact that he was without counsel in the trial from which he fled.

" '[E]ven relevant evidence may . . . be subject to exclusion where its probative force is comparatively weak and the likelihood of its playing upon the passions and prejudices of the jury is great. . . .' " *State v. Bullock*, 28 N.C. App. 1, 6, 220 S.E. 2d 169, 172 (1975), *cert. denied and appeal dismissed*, 289 N.C. 299, 222 S.E. 2d 699 (1976).

> It is well established in this State [however] that evidence of flight of an accused may be admitted as some evidence of guilt. . . .
>
> . . . [S]uch evidence . . . may be considered with other facts and circumstances in determining whether all the circumstances amount to an admission of guilt or reflect a consciousness of guilt . . . . An accused may explain admitted evidence of flight by showing other reasons for his departure or that there, in fact, had been no departure.

State v. Murvin, 304 N.C. 523, 527, 284 S.E. 2d 289, 292 (1981). "Even though the evidence of flight may disclose the commission of a separate crime by defendant, it is nonetheless admissible." *State v. Jones*, 292 N.C. 513, 526, 234 S.E. 2d 555, 562 (1977).

The challenged evidence in the present case is not an instance of the prejudice so outweighing the probity as to require its exclusion. That the evidence of flight from the trial may be explainable in terms other than the inference that defendant was conscious of his guilt goes only to the weight of such evidence and not its admissibility.

The final argument under this assignment of error is that the State has not demonstrated that defendant's flight from the first trial was not induced by defendant's fear of having to stand trial without an attorney, and, hence, such evidence is inadmissible fruit of a Sixth Amendment violation in that it is tantamount to an admission by defendant induced by a denial of his right to counsel.

This argument by defendant calls for the suppression of the flight evidence on the grounds that its exclusion is constitutionally required. The exclusive method of challenging evidence on such grounds is a motion to suppress made in compliance with the procedural requirements of G.S. § 15A-971 *et seq. State v. Conard*, 54 N.C. App. 243, 282 S.E. 2d 501 (1981). Those procedural requirements state that the motion to suppress must be made before trial, except in certain exceptional circumstances, G.S. § 15A-975; that the judge may summarily deny the motion to suppress if the motion does not allege a legal basis for the motion, G.S. § 15A-977(c)(1); that the motion must state the grounds upon which it is made and must be accompanied by an affidavit containing facts supporting the motion, G.S. § 15A-977(a); and that motions not disposed of summarily must be determined after the judge conducts a hearing and finds facts. G.S. § 15A-977(d). "The burden is on the defendant to demonstrate that he has made his motion to suppress in compliance with the procedural requirements of G.S. § 15A-971 *et seq.*; failure to carry that burden waives the right to challenge evidence on constitutional grounds." *State v. Conard, supra* at 245, 282 S.E. 2d at 503.

The record discloses no motion to suppress the flight evidence, much less one informing the trial court of its "fruit of a Sixth Amendment violation" grounds. The trial court was not alerted so as to conduct a hearing on defendant's contentions, and, hence, the State was without an opportunity to present any evidence that defendant's flight was not induced by the fact that

he was being tried without a lawyer, *e.g.* evidence that defendant's plans to flee were made prior to his knowing he would not have counsel. This constitutional theory of defendant cannot now be the basis of a finding of error, and defendant's final assignment of error is overruled.

We hold defendant had a fair trial free of prejudicial error.

No error.

Judge HILL concurs.

Judge BECTON concurs in the result.

Judge BECTON, concurring in the result.

Being bound by authoritative decisions of this Court and of our Supreme Court which hold that the fact that a defendant does not flee immediately "after the commission of a crime goes only to the weight of the evidence and not its admissibility," *State v. Murvin*, 304 N.C. 523, 527, 284 S.E. 2d 289, 292 (1981), I concur in the result. *See also State v. Self*, 280 N.C. 665, 187 S.E. 2d 93 (1972) (flight sixteen days after crime held to be competent) and *State v. DeBerry*, 38 N.C. App. 538, 248 S.E. 2d 356 (1978) (flight from courtroom when case called for trial held to be competent).

I write this concurring opinion to point out that the probative value of flight evidence has been seriously questioned.

> Its probative value as circumstantial evidence of guilt depends upon the degree of confidence with which four inferences can be drawn; (1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged. *See generally Miller v. United States*, 116 U.S. App. D.C. 45, 48, 320 F. 2d 767, 770 (1963); 1 J. Wigmore, Evidence § 173, p. 632 (3d ed. 1940). The use of evidence of flight has been criticized on the grounds that the second and fourth inferences are not supported by common experience and it is widely acknowledged that evidence of flight or related con-

duct is 'only marginally provative as to the ultimate issue of guilt or innocence.'

United States v. Myers, 550 F. 2d 1036, 1049 (5th Cir. 1977), *cert. denied* 439 U.S. 847, 58 L.Ed. 2d 149, 99 S.Ct. 147 (1978). *See also United States v. Jackson*, 572 F. 2d 636, 639-40 (7th Cir. 1978), and *United States v. Foutz*, 540 F. 2d 733, 740 (4th Cir. 1976). Recently, the Fourth Circuit in *United States v. Beahm*, 664 F. 2d 414 at 419 (4th Cir. 1981) *quoting United States v. Foutz*, 540 F. 2d at 740, stated: " 'The inference that one who flees from the law is motivated by guilt is weak at best. . . .' " I conclude with an older and more elaborate statement by the United States Supreme Court in *Wong Sun v. United States*, 371 U.S. 471, 483 n. 10, 9 L.Ed. 2d 441, 452 n. 10, 83 S.Ct. 407, 415 n. 10 (1963):

> [W]e have consistently doubted the probative value in criminal trials of evidence that the accused fled the scene of an actual or supposed crime. In *Alberty v. United States*, 162 U.S. 499, 511, this Court said: ". . . it is not universally true that a man, who is conscious that he has done a wrong, 'will pursue a certain course not in harmony with the conduct of a man who is conscious of having done an act which is innocent, right and proper; since it is a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses. Nor is it true as an accepted axiom of criminal law that the wicked flee when no man pursueth, but the righteous are as bold as a lion.' "

DELMER TAYLOR v. GREENSBORO NEWS COMPANY

No. 8118SC986

(Filed 1 June 1982)

Libel and Slander § 16— political candidate reported as having served prison term—summary judgment for newspaper proper

In an action in which plaintiff, a candidate for State Senate, had been inaccurately reported as having served a prison term by defendant newspaper, summary judgment for defendant was properly entered where plaintiff, as a candidate for public office, was a public figure, and where the evidence failed

to show either "actual malice" or actual knowledge of falsity, reckless disregard for the truth, or a high degree of awareness of probable falsity.

APPEAL by plaintiff from *Collier, Judge.* Order entered 18 June 1981 in Superior Court, GUILFORD County. Heard in the Court of Appeals 30 April 1982.

Plaintiff brought this defamation action against defendant, alleging that an article published in the 26 April 1978 *Greensboro Daily News* contained a statement about plaintiff, then a candidate for public office, which was false and libelous *per se.* After the pleadings were joined, plaintiff took interrogatories of defendant. Defendant then filed a motion for summary judgment which was supported by affidavits. Plaintiff also moved for summary judgment, and filed an affidavit in support of his motion. Prior to hearing on the parties' motions for summary judgment, plaintiff and defendant stipulated to the facts of the case, only for the purposes of these motions. The facts are best summarized by reproducing in full the parties' stipulations, as follows:

STIPULATED FACTS (Filed June 18, 1981)

The facts in this case, only for the purpose of this motion for summary judgment, are hereby stipulated by the parties. The pleadings, interrogatory answers, affidavits and Delmer Taylor's deposition show:

1. On June 9, 1971, in the United States District Court in Greensboro, North Carolina, before Judge Edwin Stanley, Delmer Taylor pled no contest to a charge of filing false income tax returns. He was sentenced on December 3, 1971, and ordered to pay a $5,000.00 fine, was sentenced to serve six months in federal prison and was ordered to report to the Federal Marshall on December 27, 1971. On December 9, 1971, the Court ordered the sentence theretofore entered to be stricken and ordered that Delmer Taylor's sentence be suspended and that he be placed on probation in view of the fact that he had paid all back taxes and penalties to the Internal Revenue Service and had paid the $5,000.00 fine. The entry of the judgments by Judge Stanley on December 3, 1971 and December 9, 1971 were made in open court and were reflected in the Court files docket sheet as part of the

public record on file in the office of the Clerk of the United States District Court in Greensboro, North Carolina.

2. The Greensboro Record and the Greensboro Daily News published brief reports of the sentencing. These 1971 stories (Exhibit 2 to the Hackney affidavit) were placed in the Greensboro News Company library clipping file.

3. The later action taken by Judge Stanley on December 9, 1971 in striking its December 3, 1971 judgment and placing Delmer Taylor on probation on certain conditions was not the subject of a news story, and was not in the Greensboro News Company library clipping file. Delmer Taylor did not serve any time in prison.

4. In or about February, 1978, Delmer Taylor filed as a candidate in the Democratic primary for the North Carolina State Senate. He was a candidate for public office at all times pertinent to the alleged libel in this case.

5. On Friday afternoon, 21 April 1978, there was published in the Greensboro Record an editorial written by William Cheshire, entitled, "For the General Assembly," in which it was commented: "Delmer Taylor's campaign is not enhanced any by the six months he served in federal prison for tax evasion." The source of Mr. Cheshire's information was the clipping file on Delmer Taylor in the Greensboro News Company library. Unknown to Mr. Cheshire, the observation that Mr. Taylor had served time was incorrect.

6. Mr. Cheshire was employed as editorial page editor of The Greensboro Record from January 13, 1975 until April 31, 1978, when he resigned to accept a job as editor of the Charleston Daily Mail, Charleston, West Virginia. At all times pertinent to this case, he was employed in the capacity of editorial page editor of the Record. He had no responsibility for the Daily News, including Daily News reporters or news staff.

7. Following publication of the Record editorial, Mr. Cheshire received a telephone call from Ogden Deal on that Friday night, 21 April. Mr. Deal, [sic] told Mr. Cheshire it was his understanding or belief that Delmer Taylor had not been in prison. Mr. Cheshire told Mr. Deal he had evidence to the

contrary. Mr. Deal furnished no additional information to Mr. Cheshire other than his statement that he understood or believed Delmer Taylor had not been in prison.

8. On Saturday, 22 April 1978, Delmer Taylor telephoned Mr. Cheshire at his home and denied that he had ever been in prison, requesting a retraction by Mr. Cheshire, but furnishing no additional information to Mr. Cheshire. Mr. Cheshire replied that he had information to the contrary and would not retract his article. Mr. Taylor repeated his denial, but gave no facts beyond the general denial.*

9. Mr. Cheshire received no information that caused him to change his belief in the accuracy of his statement concerning Delmer Taylor having spent time in prison. He did not bring the telephone calls to anyone else's attention. He did not then check the Court file on Delmer Taylor in the Office of the Clerk of United States District Court in Greensboro, North Carolina.

10. On Tuesday, 25 April 1978, Mr. Taylor began running radio spots on WBIG, WCOG and WEAL. These were general advertisements for his campaign, but they included at the end a statement by his wife, Virginia Taylor, denying that Delmer Taylor had ever spent time in prison. No further information was given. The full text of the radio commercials (they were the same on all three stations) is attached to Mr. Taylor's deposition as Exhibit 6. The commercials ran for one week, beginning April 25.

11. Also on Tuesday, 25 April 1978, Mr. Taylor placed advertising with Greensboro News Company, asking that the advertising be run immediately in both the Daily News and the Record; however, due to the usual scheduling delays the advertising could not commence running until 28 April 1978, which commencement date was reflected in the contract of 25 April 1978. The ads contained an insert at the bottom denying that Delmer Taylor had never [sic] been in prison, and "defying" the Record to prove that he had. The ads did com-

* Although Mr. Cheshire recalls the telephone call from Ogden Deal, he has no recollection of the Taylor call. Nevertheless, for purposes of this summary judgment motion we presume it to be true.

mence running on 28 April 1978 in accordance with the terms of the contract of 25 April 1978.

12. The Greensboro News Company advertising department does not customarily or ordinarily communicate or correspond with the Greensboro Daily News staff, and the contents of Delmer Taylor's ad were not communicated to the Greensboro Daily News staff.

13. At all times pertinent to this controversy, Brent Hackney was a reporter for the Greensboro Daily News. He did not answer to the editorial page staff of The Greensboro Record, including Mr. William Cheshire, or to the Greensboro News Company advertising department.

14. On Tuesday, 25 April 1978, Mr. Hackney worked on the Daily News article, to be published the following day, entitled "County Politics Changed" (attached to the Hackney affidavit as Exhibit 1). He did not hear or hear about Delmer Taylor's radio commercial, which began running that day. Upon arriving at work, Mr. Hackney spent the day in the office working on articles, largely including the county politics article which was to run the next day.

15. Mr. Hackney's story, which ran on Wednesday, 26 April 1978, contained on the third page this comment about Delmer Taylor: "Taylor, founder and former president of Delta Plating Co., served a brief federal prison sentence in 1972 after pleading no-contest to filing false income tax returns." That statement was incorrect.

16. Mr. Hackney had read the 21 April 1978 Record editorial by Mr. Cheshire, but he never knew, prior to publication of his own article on 26 April, that anyone had denied to Mr. Cheshire the accuracy of the Cheshire editorial. In preparing his story, he checked the Greensboro News Company library clipping file concerning Mr. Taylor, where he found the 1971 news stories reporting Mr. Taylor's original conviction and sentencing to six months in prison. These 1971 articles were the source for Mr. Hackney's comment about Mr. Taylor's prison time. When his story was published on 26 April 1978, Mr. Hackney did not know his comment was incorrect, and he did not know Mr. Taylor or

anyone else had ever denied to any person or in any way that Mr. Taylor had in fact served time. At no time prior to the printing of his article on 26 April 1978 did Mr. Hackney check the Court file on Delmer Taylor in the office of the Clerk of the United States District Court in Greensboro, North Carolina.

17. On the same day the Daily News article was published (26 April 1978), a Record reporter, Jim Schlosser, telephoned Delmer Taylor stating he had heard the radio ads of Mr. Taylor's and asked him about the story concerning his having been in prison. Mr. Taylor denied the story about having served time in prison.

18. On 26 April 1978, Mr. Cheshire did check the Court files. He saw the record of the ultimate striking of Mr. Taylor's sentence and the new suspended sentence, whereupon he prepared a correction to his original editorial and had it published in that afternoon's Record (Cheshire affidavit, Exhibit 2). On that same day, Mr. Hackney learned of his error based on someone's review of the records at the United States District Courthouse in Greensboro, and he prepared a correction which was run in the next edition of the Daily News (27 April 1978) (Hackney affidavit, Exhibit 3).

19. At the times pertinent to this case (the month of April, 1978), The Greensboro Record and the Greensboro Daily News were entirely separate as to their news and editorial functions. They shared only the advertising, circulation, production and business and accounting departments and library files. These departments had nothing to do with the preparation or review of editorials or news stories, and specifically had nothing to do with Mr. Hackney's Daily News story involving Delmer Taylor.

20. The staffers of the editorial departments of the two newspapers occupied separate offices. The editorial page editors (Mr. Cheshire, from the Record) operated independently of each other, and independently from the reporters and news staffs of both papers.

21. The reporters and news staffs of both newspapers worked under separate supervision, independently from each

other, and independently from the editorial departments of both papers. The Record and Daily News reporters had desks at opposite ends of the same large room at Greensboro News Company, separated by a number of desks with video display terminals, used by the copy editing staffs, in the center of the room.

22. Specifically as to Mr. Hackney's Daily News article, the chain of involvement with and responsibility for that article, from its inception through its publication was:

a. The article was written by Mr. Hackney on 25 April 1978;

b. It was reviewed the same day by his immediate supervisor, Mr. Nat Walker, city-state editor for the Greensboro Daily News;

c. The article then went to Mr. Darwin Honeycutt, copy editor responsible for layout for the Greensboro Daily News on the same day, for a review for purposes of determining where on the assigned page of the newspaper the article should be placed;

d. It would then have been reviewed by a copy editor on the same day, whose function was to prepare a headline, and to review the article for grammatical errors and the like. Defendant cannot determine who the copy editor would have been.

e. Typically, the article would then go to Mr. Hubert Breeze, who was chief of the copy desk. Mr. Breeze was on vacation, however, and if the article was reviewed at that level, it would have gone to his stand-in, Mr. George Hord, for an overall review.

f. Finally, the article was reviewed on the same day by Mr. Henry Coble, Assistant Managing Editor of the Greensboro Daily News. Mr. Coble was the last person who reviewed the article before it went to press. It then went through the process of typesetting and printing for the next morning's newspaper.

All of these men were on the Greensboro Daily News staff. They did not work for, they were not responsible for,

> and they were not answerable to the Record, None [sic] of them knew that any part of the Daily News story involving Delmer Taylor was incorrect. None of them knew that Delmer Taylor had denied that he spent time in prison. None were responsible for or answerable to Mr. Cheshire, the editorial page editor of the Record. None had heard from any source—Mr. Cheshire, the radio, or otherwise—that Delmer Taylor had denied the Record editorial. None knew that Delmer Taylor had placed any advertising copy with the Greensboro News Company advertising department. As members of the Greensboro Daily News news staff, they maintained an independence from the advertising function of the paper, and they did not, either customarily or on this occasion, communicate with the advertising department regarding news stories or advertising copy.

From Judge Collier's order granting defendant's motion for summary judgment and denying plaintiff's motion for summary judgment, plaintiff appeals.

Anne R. Littlejohn, for plaintiff-appellant.

Smith, Moore, Smith, Schell & Hunter, by Richard W. Ellis and Alan W. Duncan, for defendant-appellee.

WELLS, Judge.

The dispositive question before us is whether defendant's G.S. 1A-1, Rule 56(c) motion was properly granted. In its recent decision in *Lowe v. Bradford*, --- N.C. ---, 289 S.E.2d 363 (1982), our Supreme Court reiterated the rules regarding the burden of proof upon a motion for summary judgment, as follows:

> A party moving for summary judgment may prevail if it meets the burden (1) of proving an essential element of the opposing party's claim is nonexistent, or (2) of showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E. 2d 419 (1979); *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 209 S.E. 2d 795 (1974). Generally this means that on "undisputed aspects of the opposing evidential forecast," where there is no genuine issue of fact, the moving party is entitled to judgment

as a matter of law. 2 McIntosh, *North Carolina Practice and Procedure* § 1660.5, at 73 (2d ed. Supp. 1970) . . . . .

> If the moving party satisfies its burden of proof, then the burden shifts to the non-moving party to "set forth *specific facts* showing that there is a genuine issue for trial." Rule 56(e), Rules of Civil Procedure (emphasis added). The non-moving party "may not rest upon the mere allegations of his pleadings." *Id.*

Within these well-established rules of procedural law, we now turn to the substantive law of defamation. In the seminal case of *New York Times Co. v. Sullivan*, 376 U.S. 254, 11 L.Ed.2d 686, 84 S.Ct. 710 (1964), a Montgomery, Alabama City Commissioner whose official duties included supervising the Montgomery Police Department, brought a civil libel action against defendant, alleging that the *New York Times* had published an advertisement which contained false allegations of brutal conduct by the Montgomery police against civil rights activists. Although Sullivan's name was not specifically mentioned in the advertisement, he contended that the libel had in fact damaged his professional reputation. Weighing the right of an individual not to be libeled against the First Amendment's protection of freedom of the press, especially in light of the public's right of vigorous debate as to the conduct of public officials in the performance of their duties, the Supreme Court held:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct *unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.* (Emphasis added).

Later cases have shown that this basic approach is not limited to public officers or to the performance of official duties, or even to conventional civil libel suits. *See* Annot., 20 A.L.R.3d 988. In *Garrison v. Louisiana*, 379 U.S. 64, 13 L.Ed.2d 125, 85 S.Ct. 209 (1964), a district attorney was convicted for criminal libel of Louisiana state judges. The Supreme Court held that the rule applies equally to criminal and civil libel suits, and that "The New York Times rule is not rendered inapplicable merely because an

official's private reputation, as well as his public reputation, is harmed."

In *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 18 L.Ed. 2d 1094, 87 S.Ct. 1975 (1967), *reh. denied*, 389 U.S. 889, 19 L.Ed. 2d 197, 198, 88 S.Ct. 11, 12 (1967), the Supreme Court extended the application of the *New York Times* rule to include "public figures" as well as public officials. Plaintiff Butts, a well-known football coach and university athletic director, was accused in a newspaper article of "fixing" the outcome of a football game. Plaintiff Walker, a politically prominent private citizen, was alleged to have encouraged the use of violence during a race riot at the University of Mississippi. The Court characterized those plaintiffs as public figures because:

> [B]oth Butts and Walker commanded a substantial amount of public interest at the time of the publications; both, in our opinion, would have been labeled "public figures" under ordinary tort rules. (Citation omitted). Butts may have attained that status by position alone and Walker by his purposeful activity amounting to a thrusting of his personality into the "vortex" of an important public controversy, but both commanded sufficient continuing public interest and had sufficient access to the means of counterargument to be able "to expose through discussion the falsehood and fallacies" of the defamatory statements.

In *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 19 L.Ed. 2d 248, 88 S.Ct. 197 (1967), a Clerk of Court alleged that he was libeled in editorials published during his reelection campaign which criticized his official conduct, and again, the Supreme Court applied the *New York Times* rule.

Finally, in *Patriot Co. v. Roy*, 401 U.S. 265, 28 L.Ed. 2d 35, 91 S.Ct. 621 (1971), defendant published a column referring to plaintiff, a candidate in the New Hampshire Democratic Party primary for the U.S. Senate, as a "former small-time bootlegger." The Court stated that it was unnecessary to characterize plaintiff as either a public figure or a public official, since, "That New York Times itself was intended to apply to candidates, in spite of the use of the more restricted "public official" terminology, is readily apparent from that opinion's text and citations to case law."

Given such precedent, we find that at the time of this incident, the *New York Times* standard of liability clearly applied to plaintiff, a candidate for public office. *See Patriot Co. v. Roy*, supra.

Our next level of inquiry is whether the materials before the trial court conclusively show that plaintiff would be unable to produce evidence of "actual malice" at trial, entitling defendant to summary judgment. Plaintiff relies on the case of *Hall v. Publishing Co.*, 46 N.C. App. 760, 266 S.E.2d 397 (1980), to support his argument that summary judgment for defendant was improperly granted. However, the stipulations of facts in this case distinguish it from *Hall*, supra.

Under the "actual malice" test, a prevailing plaintiff must prove, by clear and convincing evidence, that the false statement was made with either actual knowledge of falsity, reckless disregard for the truth, or a high degree of awareness of probable falsity. *Gertz v. Welch*, 418 U.S. 323, 41 L.Ed.2d 789, 94 S.Ct. 2997 (1974); *Garrison v. Louisiana*, supra; *St. Amant v. Thompson*, 390 U.S. 727, 20 L.Ed.2d 262, 88 S.Ct. 1323 (1968). Applying the "actual knowledge of falsity" test, Stipulations of fact 14 and 16 make it clear that reporter Brent Hackney did not know that plaintiff had never served time in prison. According to Stipulation 22, no one with management authority over the article knew that the statement was incorrect. Under the "reckless disregard for the truth" basis for liability, Stipulations 3, 14, 16 and 22 show that Hackney and his editors at the *Greensboro Daily News* had not learned from any source that plaintiff's sentence had been modified or that plaintiff had not served time in prison. Thus, it appears that plaintiff relies on the "high degree of awareness of probable falsity" standard, arguing that the close relationship between the *Greensboro Record* and the *Greensboro Daily News* implies that actual notice to the *Record* also constitutes constructive notice to the *Daily News*. Stipulations 12, 13, 19, 20, 21 and 22 show that the *Greensboro Record* and the *Greensboro Daily News* are separate entities, independent of each other in reporting and editing, and further, that their joint advertising department does not customarily, and did not on this occasion, communicate with the news staff about the content of advertising copy. Thus, there is no basis in fact to support an inference of constructive notice to the *Daily News*.

Given such stipulated facts, we are persuaded that defendant has shown that an essential element of plaintiff's claim, *actual malice* by defendant, is nonexistent, and that defendant is entitled to judgment as a matter of law. *See Lowe v. Bradford*, supra.

For the reasons previously stated, we also find that the trial court properly denied plaintiff's motion for summary judgment.

The order of the trial court must be and is

Affirmed.

Judges WEBB and WHICHARD concur.

AMERICAN TRAVEL CORPORATION v. CENTRAL CAROLINA BANK & TRUST COMPANY

No. 8110SC753

(Filed 1 June 1982)

1. Courts § 9.4— denial of summary judgment—summary judgment by second judge improper

In a suit against a bank alleging the bank's negligence in accepting checks for deposit without proper endorsement and conversion of the checks in which plaintiff's motion for summary judgment on the issue of liability was denied by one superior court judge, a second judge could not thereafter allow plaintiff's subsequent motion for summary judgment on the issues of liability and damages.

2. Banks and Banking § 11.1; Uniform Commercial Code § 33— unauthorized endorsement of checks—ratification

In a travel corporation's action against a bank for the conversion of checks by payment pursuant to unauthorized endorsements, the evidence on motion for summary judgment presented a genuine issue of material fact as to whether plaintiff ratified the unauthorized endorsements on the checks. G.S. 25-3-404.

APPEAL by defendant from *Britt, Judge.* Order entered 5 January 1981 and judgment entered 6 January 1981 in Superior Court, WAKE County. Heard in the Court of Appeals 5 April 1982.

The circumstances giving rise to this litigation evolved from an agreement between plaintiff, American Travel Corporation

(hereinafter ATC), and Ralph E. Breshears, who was, at the time of the agreement, president and group sales director of ATC. ATC was engaged in the business of arranging and promoting both retail and group sales of travel and travel planning services. On 12 June 1974, the parties executed an agreement whereby Mr. Breshears purchased the sales rights and income for and from ATC's group travel accounts. Mr. Breshears became the exclusive soliciting agent for the group travel accounts and was entitled to receive monthly all group travel gross profits (gross proceeds paid to ATC less all related expenses incurred by ATC). In the event that expenses exceeded receipts, Mr. Breshears was responsible for reimbursing ATC for the difference. Mr. Breshears leased space in the main ATC office; maintained a "house account" for expenses incurred in his business operations; and was permitted to use the title " 'President, American Travel' for good will and in furtherance of the performance of this Agreement," such use to be "titular only and will not include any right whatever to pledge the credit, transact business or incur liability on the part of American Travel."

In late 1975 Mr. Breshears met with John C. Lennon, Jr., Vice President and Raleigh City Executive of Central Carolina Bank and Trust Company (hereinafter CCB), to discuss the possibility of that bank's role in extending credit or otherwise providing financial assistance to Breshears Enterprises, the company through which Mr. Breshears was conducting his business. Howard E. Hentz, Vice President of American Defender Life Insurance Company, was present at one of the initial meetings between Mr. Breshears and Mr. Lennon. American Defender held the controlling interest in ATC, and Mr. Hentz participated in the negotiations in order to verify Mr. Breshears's need for operating capital to continue the group travel aspects of ATC and to explain the relationship between Mr. Breshears and ATC. As a result of these negotiations, Mr. Breshears obtained a line of credit with CCB, and ATC established a checking account with that bank. Mr. Breshears's name did not appear on the corporate resolutions or the signature cards pertaining to this account.

Between January of 1977 and April of 1978, approximately sixty-one checks made payable to ATC were endorsed in some manner by Mr. Breshears and deposited in the CCB account of Breshears Enterprises. For the most part the endorsements were

made with a stamp consisting of the words, "American Travel Corp. For Deposit Only To Central Carolina Bank Holly Park Branch ACCT. --- ." The account number in each case was the account number at CCB for a Breshears Enterprises, Inc. account. On 8 April 1978, ATC unilaterally terminated Breshears's relationship with ATC, claiming that he had breached the terms of the 12 June 1974 agreement. Shortly thereafter ATC filed suit against CCB, alleging the bank's negligence in accepting checks for deposit without proper endorsement and conversion of the checks. ATC sought damages in the amount of $345,313.91.[1]

In its answer, CCB denied that the endorsements on the subject checks were forged or unauthorized and further defended on the grounds that Mr. Breshears, as president of ATC, had apparent authority to transact business on behalf of ATC, upon which authority CCB relied; that with knowledge of the fact that Mr. Breshears was negotiating checks made payable to ATC, ATC negligently failed to inform CCB that Mr. Breshears allegedly did not have authority to act on its behalf; and that the proceeds of any such checks had been credited to or paid for the benefit of ATC and others entitled to receive benefits therefrom, resulting in no damage to ATC.

Plaintiff moved for partial summary judgment on the issue of liability, which motion was denied by order signed and dated 13 June 1980. On 4 December 1980, defendant moved for summary judgment, and pursuant to Rule 56(c) of the North Carolina Rules of Civil Procedure, plaintiff again moved for summary judgment. By order dated 6 January 1981, Judge Britt denied defendant's motion and granted plaintiff's motion, allowing plaintiff damages of $356,578.49 (the amount representing the total of the allegedly converted checks), $26,800.00 (pursuant to N.C.G.S. 75-16), and $3,350.00 in attorneys' fees.

Defendant appeals from the granting of plaintiff's motion and the denial of its own motion for summary judgment.

1. ATC, in its original complaint, under similar facts and allegations, sought damages in the amount of $107,606.65 from Capitol National Bank. This suit against CNB was later dismissed without prejudice.

Reynolds & Howard, by Ted R. Reynolds and E. Cader Howard, for plaintiff appellee.

Stubbs, Cole, Breedlove, Prentis & Poe, by Richard F. Prentis, Jr., for defendant appellant.

Edmund D. Aycock, General Counsel, for The North Carolina Bankers Association, amicus curiae.

Sanford, Adams, McCullough & Beard, by E. D. Gaskins, Jr. and William George Pappas, for United Carolina Bank, amicus curiae.

MARTIN (Harry C.), Judge.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

[1] Under the authority of *Carr v. Carbon Corp.*, 49 N.C. App. 631, 272 S.E. 2d 374 (1980), *disc. rev. denied*, 302 N.C. 217 (1981), a motion for summary judgment denied by one superior court judge may not be allowed by another superior court judge on identical legal issues. *See also Biddix v. Construction Corp.*, 32 N.C. App. 120, 230 S.E. 2d 796 (1977). This rule is based on the premise that no appeal lies from one superior court judge to another. Moreover, as pointed out in *Carr*, to allow an unending series of motions for summary judgment "would defeat the very purpose of summary judgment procedure, to determine in an expeditious manner whether a genuine issue of material fact exists and whether the movant is entitled to judgment on the issue presented as a matter of law." 49 N.C. App. at 634, 272 S.E. 2d at 377.

The above-stated rule does not apply to interlocutory orders given in the progress of the cause. *Id.* Plaintiff contends that because it first moved for partial summary judgment on the issue of liability, the order denying the motion was interlocutory and the subsequent motion for summary judgment on the issues of liability and damages was properly granted. We disagree. "An order is merely interlocutory if it does not determine *the issue* but directs some further proceeding preliminary to a final decree." *Id.* at 633, 272 S.E. 2d at 376 (emphasis ours). Whereas an order denying summary judgment on the issue of liability may be interlocutory in the sense that it is not immediately appealable, "[s]uch a ruling is determinative as to the issue presented." *Id.* In

his order denying plaintiff's motion for summary judgment, Judge Preston determined as a matter of law that plaintiff was not entitled to judgment on the issue of liability. *Yount v. Lowe*, 288 N.C. 90, 218 S.E.2d 563 (1975). The issue may not be relitigated by way of a second motion for summary judgment before a different judge. The trial court erred in granting summary judgment for plaintiff.

We believe that both the language and the policy behind N.C.R. Civ. P. 56 contemplate a single hearing on a motion for summary judgment involving the same case on the same legal issues. Rule 56(c) provides that judgment shall be rendered if pleadings and other supporting materials 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." (Emphasis ours.) Rule 56(f) permits the opposing party to move for additional time to obtain affidavits or complete discovery essential to justify his opposition. Moreover, "[o]rdinarily it is error for a court to hear and rule on a motion for summary judgment when discovery procedures, which might lead to the production of evidence relevant to the motion, are still pending and the party seeking discovery has not been dilatory in doing so." *Conover v. Newton*, 297 N.C. 506, 512, 256 S.E.2d 216, 220 (1979). Generally, motions for summary judgment should not be decided until all parties are prepared to present their contentions on all the issues raised and determinable under Rule 56. Piecemeal litigation of motions for summary judgment is to be avoided.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

[2] Defendant argues that it is entitled to summary judgment based on the issue of ratification. We note at the outset that plaintiff is in error in assuming that defendant must have acted in a commercially reasonable manner before being permitted to take advantage of this defense. While it is true that a bank must act in good faith and in accordance with reasonable commercial standards in order to raise a negligence defense under N.C.G.S. 25-3-406, N.C.G.S. 25-3-404 does not require such a showing:

> Unauthorized signatures.—(1) Any unauthorized signature is wholly inoperative as that of the person whose name is signed unless he ratifies it or is precluded from denying it . . . .

(2) Any unauthorized signature may be ratified for all purposes of this article.

The facts of this case, in addition to raising issues of preclusion or estoppel, raise a separate issue of ratification under an agency theory.

Under N.C.G.S. 25-3-419 an instrument is converted when it is paid over a forged or unauthorized endorsement. Logically, when an unauthorized signature is ratified, it becomes authorized and conversion is no longer possible. Ratification is defined as "the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him." Restatement (Second) of Agency § 82 (1958). "Ratification requires intent to ratify plus full knowledge of all the material facts." *Contracting Corp. v. Bank of New Jersey*, 69 N.J. 352, 361, 354 A.2d 291, 296 (1976). It "may be express or implied, and intent may be inferred from failure to repudiate an unauthorized act . . . or from conduct on the part of the principal which is inconsistent with any other position than intent to adopt the act." *Id.* Upon a showing of ratification, defendant would be entitled to judgment as a matter of law. *Id.*

In support of its defense of ratification, defendant offers the following:

1. Mr. Breshears testified that at the time of the initial meetings with CCB, he was not operating under the terms of the 12 June 1974 contract and had never intended to do so. About a month after the contract was signed, he "wrote to Mr. Hentz and explained to him that certain things were not correct and were not feasible to even conduct business . . . and how we would have to operate. I did not tell this to CCB at the time of the meeting in 1976 or at any time, until two years later."

2. The same bookkeeper worked for the Group Travel division and ATC.

3. Beginning in 1976 a series of memos from Mr. Hentz to Mr. Breshears indicated that ATC was concerned that Mr. Breshears was making unauthorized use of his position as president. A memorandum dated 8 September 1977 stated that:

> There may have been previous occasions where remittances from customers of American Travel have become deposited, or co-mingled in accounts not held in the name and control of American Travel Corporation. *Specifically, to the account of Breshears Enterprises, Inc. . . . This memorandum is not to question motives nor condemn specific past practices;* but in the conduct of all future business in behalf of American Travel Corporation the following guidelines must be invariably observed. [Emphasis ours.]

Not until after April 1978 was CCB made aware of the practices which ATC felt, in 1977, that it could not condemn.

Based on the foregoing, we can conclude that ATC had full knowledge of all the material facts with respect to Mr. Breshears's actions. However, to constitute ratification as a matter of law, the conduct must be consistent with an intent to affirm the unauthorized act and inconsistent with any other purpose. Restatement (Second) of Agency § 83 (1958). While it may be inferred that ATC's decision to postpone notifying the bank or dismissing Mr. Breshears was a calculated effort to overlook any alleged wrongdoing in order to reap the benefits of Mr. Breshears's business acumen, such inference raises questions of fact best left for jury determination. Defendant is therefore not entitled to summary judgment on the issue of ratification.

As a matter of law plaintiff is not entitled to recover the proceeds of check 36C. ATC drew this check, in the amount of $19,000, payable to CCB. Shortly after depositing the check in a Breshears Enterprises account, Mr. Breshears apologized to Mr. Hentz for the mistake and repaid the amount to ATC. Both Mr. Hentz and plaintiff's bookkeeper admitted that the amount had been repaid. Defendant is entitled to partial summary judgment with respect to plaintiff's claim based upon check 36C.

Motion To Set Aside Entry Of Default

Finally, defendant assigns as error the trial court's granting of plaintiff's motion to set aside entry of default against plaintiff on defendant's counterclaim for recoupment, which defendant alleges was a claim for affirmative relief to which no reply was filed.

Defendant's claim was denominated a "Second Defense and/or Equitable Set Off, Recoupment, or Counterclaim Based Upon Unjust Enrichment." We agree with plaintiff that the gravamen of defendant's claim is that plaintiff's damages should be reduced to the extent that the proceeds of the converted checks have been paid for the benefit of American Travel or others. Rather than seeking an affirmative recovery, defendant is seeking to mitigate plaintiff's damages.

To summarize our holding:

We affirm the setting aside of the entry of default against the plaintiff on defendant's second defense.

We reverse Judge Britt's summary judgment in favor of the plaintiff.

Defendant is entitled to summary judgment with respect to check 36C.

In all other respects we affirm the denial of summary judgment to the defendant.

Chief Judge MORRIS and Judge CLARK concur.

STATE OF NORTH CAROLINA v. FRED D. WILSON

No. 817SC1091

(Filed 1 June 1982)

1. **Criminal Law § 92.4— motion for joinder of offenses timely made**

Defendant's contention that the State's motion for joinder was not timely made because it was not made prior to arraignment can be rejected on two bases: (1) the provisions of G.S. 15A-952 apply only to motions for joinder made by a defendant, and (2) it is within the discretion of the trial judge to permit pretrial motions to be filed at a later time than set out in the statute. G.S. 15A-952(b).

2. **Criminal Law § 92.3— offenses separate and distinct—joinder improper**

Where defendant was charged in separate bills of indictment with two separate instances of obtaining money under false pretenses, the two cases

against him were improperly joined for trial under G.S. 15A-926(a) since the offenses for which defendant was tried were separate and distinct and not a part of "a single scheme or plan."

3. **Criminal Law § 33.2— evidence of civil judgments against defendant—competent as evidence of motive and intent to commit crime**

Evidence of seven civil judgments docketed against defendant in the total principal amount of $9,357.80 was competent to show defendant's financial motive and intent to commit the two crimes of obtaining money under false pretenses with which defendant was charged.

4. **Criminal Law § 33.3— obtaining money by false pretenses—evidence of similar representation to other parties—admissible to show intent**

In a prosecution for obtaining money under false pretenses, evidence that defendant previously had represented to some five other parties that he would help them obtain houses, and that they had neither obtained houses nor received the money back, was relevant to show defendant's fraudulent intent and his similar transactions with the prosecuting witnesses.

Judge BECTON concurring in the result.

APPEAL by defendant from *Brown, Judge.* Judgment entered 10 June 1981 in Superior Court, EDGECOMBE County. Heard in the Court of Appeals 10 March 1982.

Defendant was charged in separate bills of indictment with obtaining money under false pretenses from Robert E. Whitehead and Stella Whitehead and from Fannie E. Whitaker. The evidence for the State tended to show that in July of 1979 defendant contacted Stella and Robert Whitehead with regard to assisting them in obtaining a home. He informed the Whiteheads that it would be necessary for them to pay him a $950.00 deposit or downpayment, which would be applied to the purchase price or the cost of their house and lot when obtained. A written contract was signed by defendant and the Whiteheads, and in a series of partial payments, the Whiteheads paid the $950.00 deposit to defendant. Defendant informed the Whiteheads that he would try to assist them in finding a suitable lot for their house, but that they should also attempt to locate a suitable lot. Defendant informed the Whiteheads that he would take care of arranging the financing and construction of their home. The Whiteheads inquired of defendant what would happen to their deposit or downpayment in the event they changed their minds about wanting a home, and defendant told them that under such circumstances, the deposit would be refunded to them. Thereafter, the Whiteheads began looking for a suitable lot and on several occasions discussed the

matter with defendant. In January, 1980, defendant attempted to discuss with the Whiteheads the possibility of helping them buy a farm. After that discussion, the Whiteheads determined that they were not interested in dealing with the defendant any further and requested that he refund their $950.00 deposit. Defendant failed and refused to return the deposit or any portion of it to the Whiteheads. The Whiteheads never obtained a house or lot as a result of their association or dealings with the defendant.

State's evidence also tended to show a similar course of dealings between defendant and Fannie Whitaker Savage. Mrs. Savage also sought to obtain a refund of her $950.00 downpayment from defendant but was not able to obtain any portion of it.

Other evidence offered by the State tended to show that Planters National Bank's records indicated checking accounts in the name of F. D. W. Insurance Agency and Atlantic Mobile Homes; that the defendant was the only person authorized to write checks on those accounts; and that during the months of June, July and August, 1979, these accounts had extremely low balances, with only one deposit in the amount of $200.00 having been made to either of those accounts during that three month period. The State also presented evidence that tended to show the existence of outstanding civil judgments on record in the office of the Clerk of Superior Court of Edgecombe County against the defendant totaling approximately $9,358.00.

The State also presented the testimony of five witnesses who testified that they had had dealings with the defendant similar to those testified to by the Whiteheads and Mrs. Savage, and that they had not been able to either obtain a house or a lot through the efforts of the defendant or to obtain a refund of their downpayment.

Defendant's evidence consisted of testimony, including his own, which tends to show defendant's good faith efforts and intent to fulfill his contractual obligations to the Whiteheads and Mrs. Savage, to show his good character, and to show that he had entered into and fulfilled similar contracts with a number of other persons.

On rebuttal, the State presented Jesse Baker, who testified that in Edgecombe County District Court on 28 August 1979, he

heard defendant testify that defendant had deposited the money he received from the Whiteheads in defendant's F. D. Wilson Insurance Company account at Planters National Bank in Rocky Mount.

The jury returned verdicts of guilty as charged in both cases. From the judgment entered on the verdicts, defendant has appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General George W. Lennon, for the State.

Edward B. Simmons, for defendant-appellant.

WELLS, Judge.

[1] In his first assignment of error, defendant contends that the trial court erred in granting the State's motion to join the two charges for trial, over his objection. Defendant first contends that the State's motion was not timely because it was not made prior to arraignment, citing the provisions of G.S. 15A-952 in support of this argument. The record shows that defendant was arraigned on both charges on 16 February 1981, when he entered a plea of not guilty. The State's motion for joinder was filed on 4 June 1981. The motion was heard and granted on 8 June 1981, the day the trial began. We reject defendant's contention on two bases: first, the provisions of the cited statute apply only to motions for joinder made by a defendant; second, it is within the discretion of the trial judge to permit pre-trial motions to be filed at a later time than set out in the statute. *See* G.S. 15A-952(b).

[2] Defendant next contends that the two cases against him were improperly joined for trial. G.S. 15A-926, in pertinent part, provides as follows:

> § 15A-926. Joinder of offenses and defendants—(a) Joinder of Offenses.—Two or more offenses may be joined in one pleading or for trial when the offenses, whether felonies or misdemeanors or both, are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan. Each offense must be stated in a separate count as required by G.S. 15A-924.

Because of the many-faceted factual situations confronting trial judges on joinder motions by the State, it is difficult to lay down hard and fast joinder rules; hence, our appellate courts have generally held that joinder motions are properly decided in the sound discretion of the trial court. The statutory criteria is not without meaning, however, and where there is a serious question of prejudice resulting from consolidation for trial of two or more offenses, the appropriate function of appellate review is to determine whether the case meets the statutory requirements. The following statement of our Supreme Court in *State v. Clark*, 301 N.C. 176, 270 S.E. 2d 425 (1980), provides guidance for our decision here:

> In ruling upon a motion for joinder, the trial judge should consider whether the accused can be fairly tried upon more than one charge at the same trial. If such consolidation hinders or deprives the accused of his ability to present his defense, the cases should not be consolidated. *State v. Davis*, 289 N.C. 500, 223 S.E. 2d 296 (1976), [*death penalty vacated*, 429 U.S. 809, 50 L.Ed. 2d 69, 97 S.Ct. 47 (1976).] In determining whether defendant has been prejudiced, the question posed is whether the offenses are so separate in time and place and so distinct in circumstances as to render a consolidation unjust and prejudicial to an accused. *State v. Greene*, 294 N.C. 418, 241 S.E. 2d 662 (1978). However, it is well established that the motion to join is addressed to the sound discretion of the trial judge and his ruling will not be disturbed absent a showing of abuse of discretion. *State v. Davis*, supra; *Dunaway v. United States*, 205 F. 2d 23 (D.C. Cir., 1953). In the instant case, all of the matters out of which the joined cases grew occurred on the same afternoon of the same day and each was perpetrated according to a common *modus operandi*. Thus, the facts of this case meet the statutory requirements for joinder, and the record shows that the respective charges are not so distinct in time and circumstances as to prejudicially hinder or deprive defendant of his ability to defend any one of the charges.

In *State v. Greene*, relied on by the court in *Clark*, the court emphasized the transactional requirement implicit in the statute. We quote in pertinent part:

G.S. 15A-926 differs from its predecessor in that it does not permit joinder on the basis that the acts were of the same class of crime or offense when there is no transactional connection, and in that it contains new language permitting joinder of offenses or crimes which are based on a series of acts or transactions "constituting parts of a single scheme or plan." See, G.S. 15A-926, Official Commentary.

In *Clark*, *Greene*, and *Davis*, a brief time interval between offenses is a common denominator. In *Clark*, all of the offenses occurred on the same afternoon, one following soon after the other. In *Greene*, the two offenses occurred within a time span of three hours. In *Davis*, the four offenses occurred within a time span of approximately two and one-half hours. In *State v. Frazier*, 280 N.C. 181, 185 S.E. 2d 652 (1971), *death penalty vacated*, 409 U.S. 1004, 34 L.Ed. 2d 295, 93 S.Ct. 453 (1972), the offenses took place within a time span of three hours. In *State v. Old*, 272 N.C. 42, 157 S.E. 2d 651 (1967), the three offenses took place within two hours. In resolving the issue in these cases, the Court has described the transaction as "all parts of a continuing program of action", *Frazier*, supra; and "entire episode", *Olds*, supra; "entire series of events comprising the four crimes", *Davis*, supra; and "whole affair", *Greene*, supra; *compare State v. Bracey*, 303 N.C. 112, 277 S.E. 2d 390 (1981).

The evidence in the case now before us shows that the contract with the Whiteheads was entered into on 19 July 1979, while the contract with Whitaker was entered into on 10 August 1979, almost three weeks later. While the two offenses for which defendant was tried have common characteristics, the present statute, as the Court pointed out in *Greene*, does not allow joinder on the basis that the offenses charged are of the same class of crime. The offenses for which defendant was tried were separate and distinct, not part of "a single scheme or plan". We hold that the necessary transactional connection was not present in these cases and that joinder was improper as a matter of law. *See State v. Silva*, 304 N.C. 122, 282 S.E. 2d 449 (1981).

[3] Defendant also assigns error to the admission, over defendant's objection, of evidence of seven civil judgments docketed against the defendant in the total principal amount of $9,357.80. While in *State v. Dula*, 204 N.C. 535, 168 S.E. 836 (1933), our

Supreme Court stated that: "It is generally held that 'a judgment in a civil action is not admissible in a subsequent criminal prosecution although exactly the same questions are in dispute in both cases, for the reason that the parties are not the same, and different rules as to the weight of the evidence prevail,' " this rule does not apply to the facts of the case at bar. In *Dula*, pleadings and a civil judgment entered against defendant were erroneously admitted to prove the same facts necessary to obtain a criminal conviction against the defendant. However, in this case, by introducing the civil judgments against defendant, the State was attempting not to prove the truth of the facts underlying the civil judgments, but to show defendant's financial motive and intent to commit the crimes with which he was charged. Under *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954), this was permissible, and this assignment is overruled.

[4] In his next assignment of error, defendant argues that the trial court erred in allowing the State to present evidence that defendant had made representations to other parties that he would assist them in obtaining housing and that those parties did not obtain houses.

To be relevant, evidence must have some logical tendency to prove a fact at issue in the case. 1 Stansbury's N.C. Evidence, § 77 (Brandis Rev. 1973). "[E]vidence is competent and relevant if it is one of the circumstances surrounding the parties, and necessary to be known, to properly understand their conduct or motives, or if it reasonably allows the jury to draw an inference as to a disputed fact." *State v. Arnold*, 284 N.C. 41, 199 S.E. 2d 423 (1973).

One of the essential elements of the crimes with which defendant was charged was intent to cheat and defraud *at the time* defendant represented to the Whiteheads and to Fannie Whitaker that he would assist them in obtaining houses. *See* G.S. 14-100; *State v. Cronin*, 299 N.C. 229, 262 S.E. 2d 277 (1979). Evidence that defendant previously had represented to some five other parties that he would help them obtain houses, and that they had neither obtained houses nor received their money back, was relevant to show defendant's fraudulent intent in his transactions with the Whiteheads and Mrs. Savage. *See State v. Breeze*, 26 N.C. App. 48, 214 S.E. 2d 802 (1975); *cert. denied*, 287 N.C. 665,

216 S.E. 2d 908 (1975)). Such relevant evidence is not rendered inadmissible merely because it may show the commission of a separate offense.

> Where a specific mental intent or state is an essential element of the crime charged, evidence may be offered of such acts or declarations of the accused as tend to establish the requisite mental intent or state, even though the evidence discloses the commission of another offense by the accused.

State v. McClain, supra; *see also State v. Arnold*, supra; *State v. Smoak*, 213 N.C. 79, 195 S.E. 72 (1937); *Henderson v. Finance Co.*, 273 N.C. 253, 160 S.E. 2d 39 (1968). We hold that the trial court properly admitted evidence of defendant's previous transactions, and overrule this assignment of error.

Due to improper joinder of these cases for trial, there must be a new trial in both cases.

New Trial.

Judge HILL concurs.

Judge BECTON concurs in the result.

Judge BECTON concurring in the result.

For the reasons stated by the majority, I, too, believe the defendant is entitled to a new trial. However, I write this concurring opinion because prejudicial error was committed, in my opinion, when (a) the trial court admitted evidence that defendant made representations to other parties that he would assist them in obtaining housing and that these parties did not obtain houses; and (b) the trial court admitted evidence relating to civil judgments against the defendant.

I believe the evidence relating to defendant's prior similar dealings with other parties should have been excluded. Generally, the State cannot offer evidence tending to show that the accused has committed another distinct, independent, or separate offense even though the other offense is of the same nature as the crime charged. *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954);

State v. Jeffries, 117 N.C. 727, 23 S.E. 163 (1895). It is true that in certain cases evidence of prior offenses is competent to show knowledge or intent on the part of the defendant; however, the prior offenses must have been committed at or near the time of the offense charged. *See State v. Gammons*, 258 N.C. 522, 128 S.E. 2d 860 (1963), wherein our Supreme Court held, in a trial for assault with intent to commit rape, that evidence that the defendant had committed a similar offense two years earlier was inadmissible for any purpose. Some of the evidence admitted in this case dealt with defendant's representations to other parties occurring two or more years prior to the representations made in the case at bar. On the basis of the rule enunciated in *McClain* and *Gammons*, I believe the evidence to which the defendant excepted in this case was inadmissible.

The State also presented evidence of seven civil judgments docketed against the defendant in the total principal amount of $9,357.80. Significantly, two of the civil judgments were in favor of Elsie B. Wade and William Henry Smith, both of whom testified that they had dealt with the defendant previously with regard to defendant assisting them in obtaining housing, but that they had not obtained houses as a result of their prior dealings with the defendant. "It is generally held that a 'judgment in a civil action is not admissible in a subsequent criminal prosecution although exactly the same questions are in dispute in both cases, for the reason that the parties are not the same, and different rules as to the weight of the evidence prevail.'" *State v. Dula*, 204 N.C. 535, 536, 168 S.E. 836, 836-37 (1933). The admission of a civil judgment in this case, especially those in favor of Elsie Wade and William Smith, violated this rule and constitute prejudicial error in my view.

For the foregoing reasons, I believe evidence of similar prior dealings with other parties and the evidence relating to civil judgments against the defendant should not be admitted at the retrial.

IN RE: BRIDGET COLLEEN HUBER, JUVENILE

No. 812DC752

(Filed 1 June 1982)

1. Infants § 4— neglected juvenile—constitutionality of statute

The definition of a "neglected juvenile" in G.S. 7A-517(21) is not unconstitutionally vague; furthermore, the statute does not violate equal protection provisions since its classification of neglected children is founded upon reasonable distinctions, affects all persons similarly situated without discrimination, and has a reasonable relation to the public peace, welfare and safety.

2. Infants § 4; Parent and Child § 6.3— neglect of child—failure to provide necessary medical care

In a proceeding instituted by a county department of social services to obtain custody of a child from its mother, the evidence was sufficient to support a finding that the child was a "neglected child" within the meaning of G.S. 7A-517(21) where it tended to show that the child has a severe speech defect which can be treated by medical or other remedial care; the child also has a hearing defect; facilities are available in the county for the treatment and care of the child without expense to her or her mother, but her mother has refused to allow the child to receive this necessary medical and remedial care; without treatment the child will not be educated to her full potential, will suffer emotionally by being unable to communicate with other persons, and will probably be unable to read; and all of these problems may be overcome with proper treatment and therapy.

APPEAL by respondent mother from *Bennett, Lanning* and *Jones, Judges.* Orders filed 11 and 17 February 1981, 6 and 18 March 1981, 8 and 14 April 1981, and 10 June 1981 in District Court, MECKLENBURG County. Heard in the Court of Appeals 30 March 1982.

The facts and procedural posture of this case are as follows:

1. Petitioner, Mecklenburg County Department of Social Services (DSS), filed a petition on 8 May 1980 alleging that Bridget Colleen Huber was a dependent child and/or a neglected child under N.C.G.S. 7A-517(21). At this time her mother, Kathy Huber Hazelwood, was incarcerated in the Mecklenburg County Jail. Bridget was residing with Richard Allen Hazelwood, to whom she was not related by blood or marriage and who did not have the resources to care for Bridget. The petition further alleged that Bridget suffered from a serious speech defect which

had not been evaluated or treated. Bridget was placed in the temporary custody of DSS, and after a five-day hearing, by order dated 16 May 1980, the court returned custody to the mother, who was then present. DSS took a voluntary dismissal of the 8 May petition.

2. DSS filed a second petition on 13 November 1980, alleging, *inter alia:*

> 1. That since at least October 14, 1980 the child has resided with her mother and step father at their place of business which is variously known as "E. S. Inc. Escort Service" and "Pleasure Playmates" and which is located in Room C-23 of the Airport Office Center on Wilkinson Boulevard in the city of Charlotte, N.C. Further, that the office consists of a single room of approximately 10 feet by 12 feet with no windows. Further, that the only toilet facilities are in a public restroom down the hall.
>
> 2. That the child's mother and step-father are in the business of providing women, including the child's mother, to male "clients", occasionally for lewd and immoral purposes. Further, that clients are given the option of meeting female employees of Pleasure Playmates at the office on Wilkinson Boulevard where the child resides or at a location of their choice.
>
> . . . .
>
> 4. That the family has been evicted from the office, effective November 15, 1980 and had, as of November 12, 1980, packed their vehicle with their belongings and are apparently preparing to move from the office. Further, that the family has been the subject of extensive investigation by the City Police Vice Squad and at least one attempted arrest has been made on the premises of the office at which the family is residing.
>
> . . . .
>
> 6. That the child has a severe speech defect for which she has not received remedial aid, despite the fact that that same untreated defect was, *inter alia,* the subject of a Juvenile Petition filed in the Mecklenburg County District

Court on May 18, 1980 and which was subsequently dismissed.

Again, by nonsecure custody order, Bridget was placed in the custody of DSS. An adjudicatory hearing was held 3 December 1980. The court found as facts that Bridget had a serious speech defect and a hearing loss; that her mother and stepfather had done nothing to assist the child in obtaining therapy; and that "the child's combined handicaps will significantly hinder her ability to obtain an education even to the degree mandated by State Law. The child runs a substantial risk of suffering educational and emotional damage as a direct result of the failure to remedy or otherwise compensate for the speech and hearing problems." The court further found that there was "no clear and convincing evidence to support the allegations of the Juvenile Petition herein except the allegations pertaining to the substantial speech defect and lack of treatment thereof." The court concluded that Bridget was a neglected child as defined by N.C.G.S. 7A-517(21) and ordered that she remain in the physical and legal custody of DSS. However, on 10 December 1980, Bridget was returned to the physical custody of her mother.

Following a dispositional hearing held 30 December 1980, the court ordered physical custody to remain with the mother, who was, in turn, ordered to cooperate fully with DSS in a regime of speech therapy and in a preschool program. On 10 February 1981 respondent Kathy Huber Hazelwood appealed from this order.

3. On 5 March 1981, while the appeal was pending, DSS filed a third petition, alleging, *inter alia*, that Bridget had been terminated from the day-care program; that her mother had not kept an appointment with the speech and hearing center; and that "on several occasions in January, 1981 and on Monday, March 2, 1981 the child was with her parents at the Waffle House . . . between the hours of 2:00 and 5:00 a.m. and on one or more occasions the child's stepfather repeatedly hit the child in the face with his hands, required the child to eat food when she stated she was sick to her stomach and disciplined the child when she vomited." The court issued a nonsecure custody order, placing Bridget in the physical custody of the DSS. Following a hearing, the court, by order filed 8 April 1981, concluded that "the facts found herein are compelling reasons for this Court to enter an order affecting

the custody and placement of Bridget Colleen Huber in order to effectuate the best interest of the child," and that it was in the child's best interest to remain in the physical and legal custody of DSS.

4. Pursuant to Judge Bennett's order, the matter was scheduled for hearing before Judge Jones on 4 May 1981. During the course of an in-chambers conference, Judge Jones stated that he intended to treat the third juvenile petition as one seeking a modification of the dispositional order which resulted from the 30 December 1980 hearing; that he saw no need for a further hearing; that sufficient evidence had already been presented on the subject of modification; and that he intended to enter an order based on the existing record. An order to this effect was filed 10 June 1981.

Ruff, Bond, Cobb, Wade & McNair, by Moses Luski, for petitioner appellee.

Williams & Parker, by John J. Parker III, for the Guardian ad Litem, John J. Parker III, appellee.

James, McElroy & Diehl, by William K. Diehl, Jr., for respondent appellant.

MARTIN (Harry C.), Judge.

[1] Kathy Huber Hazelwood, mother of Bridget Colleen Huber, raises three basic arguments upon appeal. She first contends that the definition of a "neglected juvenile" as contained in N.C.G.S. 7A-517(21) is unconstitutional on its face and as applied to the facts of this case. We do not agree.

The analysis of the law by Judge Vaughn in *In re Biggers*, 50 N.C. App. 332, 274 S.E.2d 236 (1981), is applicable. In *Biggers*, the Court was faced with a constitutional challenge to the definition of "neglected child" within the meaning of N.C.G.S. 7A-289.32(2). That statute refers to N.C.G.S. 7A-278.4 (repealed effective 1 January 1980) for the definition of "neglected child." The definitions in N.C.G.S. 7A-278.4 and 7A-517(21) are substantially identical. In *Biggers*, we find:

> Our Supreme Court has enunciated the principles of the vagueness doctrine as follows:

> A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law . . . . Even so, impossible standards of statutory clarity are not required by the constitution. When the language of a statute provides adequate warning as to the conduct it condemns and prescribes boundaries sufficiently distinct for judges and juries to interpret and administer it uniformly, constitutional requirements are fully met. *United States v. Petrillo, 332 U.S. 1, 91 L.Ed. 1877, 67 S. Ct. 1538.*

In re Burrus, 275 N.C. 517, 531, 169 S.E.2d 879, 888, (1969), *aff'd*, 403 U.S. 528, 91 S. Ct. 1976 (1971) (citations omitted). A statute must be examined in light of the circumstances in each case, and respondent has the burden of showing that the statute provides inadequate warning as to the conduct it governs or is incapable of uniform judicial administration. *State v. Covington*, 34 N.C. App. 457, 238 S.E. 2d 794, *review denied*, 294 N.C. 184, 241 S.E. 2d 519 (1977) . . . .

Our Court has not found it difficult to give a precise meaning to this definition of a neglected child in particular cases by analyzing the factual circumstances before it and weighing the compelling interests of the State with those of the parents and child. *In re Cusson*, 43 N.C. App. 333, 258 S.E.2d 858 (1979); *In re McMillan*, 30 N.C. App. 235, 226 S.E.2d 693 (1976). *See also In re Yow*, 40 N.C. App. 688, 253 S.E.2d 647, *review denied*, 297 N.C. 610, 257 S.E.2d 223 (1979). Viewed in this light, G.S. 7A-289.32(2) is not vague because the terms used in G.S. 7A-278(4) are given a precise and understandable meaning by the normative standards imposed upon parents by our society, and parents are, therefore, given sufficient notice of the types of conduct that constitute child neglect in this State. *See* 17 Ariz. L. Rev. 1055, 1070 (1975).

50 N.C. App. at 340-41, 274 S.E.2d at 241-42. We hold the statutory definition is not unconstitutional by reason of vagueness. *See also In re Clark*, 303 N.C. 592, 281 S.E.2d 47 (1981).

Nor does it violate constitutional safeguards as to equal protection. Again, *Biggers* is authority to overcome respondent's challenge on this ground. The classification of neglected children by the statute is founded upon reasonable distinctions, affects all persons simlarly situated without discrimination, and has a reasonable relation to the public peace, welfare and safety. *In re Moore*, 289 N.C. 95, 221 S.E. 2d 307 (1976).

[2] There is substantial competent evidence in the record to support the conclusion of the court that Bridget was a neglected child or juvenile within the meaning of N.C.G.S. 7A-517(21). The statute provides that if a child is not provided necessary medical care, it is neglected. All the evidence shows that Bridget has a severe speech defect which can be treated by medical or other remedial care. She also has a hearing defect. Facilities are available in Mecklenburg County for the treatment and care of Bridget without expense to her or her mother. Although the Department of Social Services has made efforts to have Bridget examined, evaluated and treated at these facilities, her mother refuses to allow her daughter to receive this necessary medical and remedial care. It is not the presence of the defects in the child that cause her to be neglected. It is the failure of the mother to allow Bridget to receive necessary medical and remedial care and treatment. Without treatment Bridget will suffer serious and permanent harm. She will not be educated to her full potential; she will suffer emotionally by being unable to communicate with other persons; she will probably be unable to read. All of these problems may be overcome with proper treatment and therapy. Yet, Bridget's mother refuses to permit her to receive this opportunity to progress toward her full development. Certainly the child is neglected. To deprive a child of the opportunity for normal growth and development is perhaps the greatest neglect a parent can impose upon a child. The facts of this case are well within those of *In re McMillan*, 30 N.C. App. 235, 226 S.E.2d 693 (1976). *McMillan* involved charges of neglect for failing to enroll children in public schools. The Court held that children deprived of their opportunity to a basic education were neglected within the meaning of the statute. The statute is not unconstitutional as applied to the facts of this case.

Respondent objects to further proceedings in the district court after notice of appeal was entered in this case. This argu-

ment is groundless. The clear language of N.C.G.S. 7A-668 allows temporary orders affecting the custody or placement of the juvenile as the judge determines to be in the best interest of the juvenile or the state. Although N.C.G.S. 1-294 states the general rule regarding jurisdiction of the trial court pending appeal, it is not controlling here, where there is a specific statute addressing the matter in question. *See Hughey v. Cloninger*, 297 N.C. 86, 91, 253 S.E.2d 898, 906 (1979). Bridget's case falls squarely within the purposes for which the General Assembly adopted N.C.G.S. 7A-668. Without authority of the district court to provide for the treatment of Bridget pending appeal, a recalcitrant party could frustrate the efforts of the court to provide for her best interests by simply entering notice of appeal. The law is not so foolish. *In re Craddock*, 46 N.C. App. 113, 264 S.E.2d 398 (1980), is sound authority supporting our holding. Our Court held that the district court had authority to enter an order changing custody of a child while an appeal was pending in the case. The statute at that time was N.C.G.S. 7A-289 (which was replaced by N.C.G.S. 7A-668, 1 January 1980), but it was substantially identical to the present act. N.C.G.S. 1-294 and the cases decided thereunder control further action by the trial court in general pending appeal, but with respect to proceedings concerning infants the rule is appropriately different. Infants require, and are entitled to, the uninterrupted protection of the courts.

Respondent's argument on the third issue sought to be presented is not supported by proper assignments of error. The argument is broadside and does not specify in what respects the trial judge erred in the proceeding. *See Adams v. Dept. of N.E.R.*, 295 N.C. 683, 249 S.E.2d 402 (1978). The argument does not comply with either Rule 10(a) or 28(a) of the North Carolina Rules of Appellate Procedure, and the argument is subject to dismissal. Nevertheless, we have carefully reviewed the record as best we could with respect to the matters respondent attempts to argue and find no prejudicial error. The record shows that the court complied with the policy of the juvenile statute by selecting the least restrictive disposition. N.C. Gen. Stat. § 7A-646 (1981). It was only after the abject failure of respondent that the court adopted the only means available to it to promote the best interests of Bridget. *Hughes, In re*, 50 N.C. App. 258, 273 S.E.2d 324 (1981).

Affirmed.

Judges MARTIN (Robert M.) and WHICHARD concur.

STATE OF NORTH CAROLINA v. RONALD T. JONES AND MICHAEL A. JONES

No. 818SC1194

(Filed 1 June 1982)

1. **Criminal Law § 92.1— consolidation of defendants' trials proper**

In a prosecution for larceny of an automobile and armed robbery, consolidation of the trials of both defendants was proper and each defendant's election to testify did not deny the other his right to remain silent where the testimony of each defendant was entirely consistent and there was no unfair compulsion on either defendant to testify in his own defense.

2. **Criminal Law § 34.6— evidence of pending charges against defendants—properly admitted to show intent**

In prosecutions for larceny of an automobile and armed robbery, the trial court properly admitted evidence of ten other pending charges against each defendant for possession or receiving stolen goods since the presence of the unrelated items of stolen property found in one defendant's apartment negated their defense that stolen money was found in a ditch and since evidence of the other offenses tended to establish that the defendants, acting together, had the requisite felonious intent.

3. **Criminal Law § 15.1— pretrial publicity—denial of change of venue**

The defendants failed to meet their burden of showing an abuse of discretion by the trial court in the denial of their motions for change of venue because of publicity about their trial where the defendants neither showed nor alleged that potential jurors would base their conclusions and verdicts upon pretrial publicity and preconceived impressions.

4. **Constitutional Law § 31— indigent defendant—denial of funds for private investigator**

In prosecutions for larceny of an automobile and armed robbery, it was not prejudicial error for the trial court to refuse to appoint a private investigator where there was no showing of evidence which, if developed by an investigator, would show a reasonable likelihood that someone other than defendants committed the armed robbery and larceny in question.

5. **Constitutional Law § 31— identity of possible confidential informant—disclosure not required**

The trial court did not err in refusing to require the State to identify an informant who defendants contended alerted the State to search one defend-

ant's apartment where (1) there was no evidence in the record that an informant was involved in the case, and (2) even if an informant was found to exist, defendants did not show that the informant's testimony was essential to their receiving a fair trial or that his testimony was material to their defense.

APPEAL by defendants from *Tillery, Judge.* Judgment entered 3 June 1981 in Superior Court, LENOIR County. Heard in the Court of Appeals 27 April 1982.

The defendants, Ronald T. Jones and Michael A. Jones, were charged with larceny of an automobile and armed robbery. Both defendants pleaded not guilty and were found guilty as charged by the jury. The defendants were each sentenced to a minimum and maximum of one year of imprisonment for larceny of an automobile and to a maximum of 25 years, minimum of 22 years on the armed robbery charge. From this judgment, defendants appealed.

The State's evidence tended to show that on 9 December 1980 the Bank of North Carolina on Highway 258 in Lenoir County was robbed by two men wearing ski masks. The State's evidence was that two armed men took money, which included "bait money," and money marked by dye from the bank and left in an automobile. State's witness indicated the automobile was seen leaving the bank and later turning down a dirt path near Waldo Village Apartments. The fingerprint of defendant Michael A. Jones was found on the gear shift lever of the automobile found on the dirt path. State's evidence shows that on December 10, 1980 officers from the Lenoir County Sheriff's Department went to defendant Michael Jones' apartment in Waldo Village to search it and arrest Michael Jones. Ronald Jones was seen leaving the area and was followed to a grocery store parking lot where he was stopped, searched and arrested after a bill was found on him which appeared to have dye on it similar to that used at the bank.

A search of Michael Jones' apartment was made which revealed money dyed similarly to that used by the bank and with serial numbers matching the bank's bait money; other items found included guns, and items similar to those used in the bank robbery, together with personal property identified by State's witnesses at trial as belonging to those State's witnesses and having been stolen from them at some earlier time.

The State's evidence also showed that the automobile found parked on the dirt path had been stolen from a hospital parking lot near Kinston from Douglas and Janet Bostic on the day of the robbery. The ignition mechanism was missing from the vehicle when it was discovered on the dirt path. An ignition mechanism was discovered in a trash can in Michael Jones' apartment, which according to a professional locksmith, was the one which had been removed from the Bostic's station wagon.

The defendant Ronald Jones testified that he had found the money and personal property which officers found in Michael Jones' apartment. Ronald Jones said the items were found on the morning of December 10, 1980 in a ditch near Michael Jones' apartment and that he had removed the items from the ditch and taken them inside Michael Jones' apartment where they were both staying that day. Michael Jones testified that Ronald Jones had found the money in the ditch and that his fingerprint found on the automobile gear shift lever had been placed there when he was walking down the path on the day of the robbery and had seen the unoccupied automobile. Defendants' witnesses corroborated the defendant Michael Jones' testimony that he was at the grocery store about the time of the robbery and the defendants each corroborated the other's testimony.

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

T. Dewey Mooring, Jr., for defendant-appellant Ronald T. Jones.

Perry, Perry & Perry by Dan E. Perry, for defendant-appellant Michael A. Jones.

MARTIN (Robert M.), Judge.

[1] By their first assignment of error, defendants contend that the trial court erred in consolidating their trials. Each contends that the other's election to testify effectively denied his own right to remain silent. We find no merit in this assignment.

Ordinarily, the decision to join the charges against two or more defendants for trial is within the sound discretion of the trial judge and will not be disturbed on appeal absent an abuse of discretion. *State v. Porter*, 303 N.C. 680, 281 S.E. 2d 377 (1981);

State v. Smith, 291 N.C. 505, 231 S.E. 2d 663 (1977). Absent a showing that a joint trial has deprived an accused of a fair trial, the exercise of the court's discretion will not be disturbed on appeal. *Id.; State v. Fox*, 274 N.C. 277, 163 S.E. 2d 492 (1968). Such prejudice arises most often where the defendants offer antagonistic defenses, *State v. Alford*, 289 N.C. 372, 222 S.E. 2d 222, *death sentence vacated* 429 U.S. 809, 50 L.Ed. 2d 69, 97 S.Ct. 46 (1976), or where one defendant has made a confession which is inadmissible against the other, *State v. Fox, supra.* In this case the testimony of each defendant was entirely consistent, not antagonistic. There was no unfair compulsion on either defendant to testify in his own defense. Consolidation was proper and no abuse of discretion was shown. Defendants' first assignment of error is overruled.

[2] The defendants next argue that the trial court erred in denying their motions *in limine* to prevent reference during trial to ten other pending charges against each defendant for possession or receiving stolen goods. We also consider defendants' seventh assignment of error, in which they contend that these unrelated items of stolen property were improperly admitted into evidence. We diasgree. Our Supreme Court has stated the rule pertaining to such references as follows:

> While the general rule is that in a prosecution for a particular crime, the state cannot offer evidence tending to show that the accused has committed another distinct, independent, or separate offense, the rule is subject to certain exceptions. One of those exceptions is that where a specific mental intent or state is an essential element of the crime charged, evidence may be offered of such acts or declarations of the accused as tend to establish the requisite mental intent or state, even though the evidence discloses the commission of another offense by the accused. *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954); *accord, State v. Tate*, 294 N.C. 189, 239 S.E. 2d 821 (1978); *State v. Williams*, 292 N.C. 391, 233 S.E. 2d 507 (1977).

State v. King, 301 N.C. 186, 191-92, 270 S.E. 2d 98, 101 (1980). In robbery, as in larceny, the taking of the property must be with the felonious intent permanently to deprive the owner of his property. *State v. Smith*, 268 N.C. 167, 150 S.E. 2d 194 (1966). Thus in-

tent was an essential element of the crimes charged in this case which the State had to prove.

The defendants denied such intent, offering as their defense to the robbery charges that the stolen money was found in a ditch behind Michael's apartment and that they intended to turn it over to the authorities. Here, the presence of the unrelated items of stolen property found in Michael's apartment negated this defense and tended to establish that the defendants, acting together, had the requisite felonious intent. Thus this evidence was competent and properly admissible on the issue of defendants' felonious intent. Further the trial court gave a clear limiting instruction to the jury on the purpose of this evidence. For these reasons the trial court properly refused to grant the pretrial motions *in limine* and overruled defendants' objections to this evidence.

[3] In their third assignment of error defendants argue that the trial court abused its discretion in denying their motions for a change of venue because publicity about the trial made it impossible for them to obtain a fair trial in Lenoir County. In support of their argument, they cite an excerpt from the Kinston Daily Free Press newspaper which reported that the defendants were charged with the robbery and larceny; the circumstances of the robbery; the alleged use of the station wagon in the robbery; the circumstances of their arrests; the fruits of the search of Michael's apartment; that Michael was also charged with another robbery and two counts of kidnapping; and that both defendants faced charges of 10 counts of possession and receiving stolen goods in connection with other robberies.

North Carolina law authorizes the trial court, upon motion of a defendant, to transfer a criminal trial to another county or order a special venire if it determines that "there exists in the county in which the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial." N.C. Gen. Stat. § 15A-957. Such a determination is addressed to the sound discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. *State v. Oliver*, 302 N.C. 28, 37, 274 S.E. 2d 183, 189 (1981).

> The burden of proof in a hearing on a motion for change of venue is upon the defendant . . . . In order to prevail, the

> defendant must show that there is a reasonable likelihood that the prejudicial publicity complained of will prevent a fair trial. (Citations omitted.)

State v. McDougald, 38 N.C. App. 244, 248, 248 S.E. 2d 72, 77-78 (1978), *appeal dismissed*, 296 N.C. 413, 251 S.E. 2d 472 (1979).

Here defendants failed to meet their burden of showing an abuse of discretion by the trial court. There was no showing that this one article denied defendants a fair and impartial jury. As this Court said in *State v. McDougald* at 251, 248 S.E. 2d 79:

> Inevitably cases of great public interest will receive thorough coverage by the press and electronic news media, and potential jurors will often be aware of such cases due to this news coverage. A defendant has not borne his burden of showing that he will be denied an impartial jury solely by introducing evidence that his case has received widespread news coverage or that some prospective jurors have been exposed to such coverage and formed or expressed opinions based upon their exposure. The defendant must additionally show, that it is reasonably likely that prospective jurors will base their conclusions in his case upon pretrial information rather than evidence introduced at trial and would be unable to put from their minds any previous impressions they may have formed.

Here the defendants have not shown or alleged that potential jurors would base their conclusions and verdicts upon pretrial publicity and preconceived impressions. There is no evidence that the jurors who were seated based their verdicts on anything other than the evidence presented at trial. Therefore, the trial court did not abuse its discretion in denying the defendants' motions for change of venue and this assignment of error is without merit.

[4] The defendants in their fifth assignment of error contend that the trial court erred in denying them funds with which to hire a private investigator. Ronald moved the court for these funds contending that such assistance was needed to help locate a witness, Herman Johnson, to interview potential witnesses, to investigate the background of the jury venire and to research pretrial publicity of the case.

Our Supreme Court has fully considered this issue on numerous occasions in *State v. Easterling*, 300 N.C. 594, 268 S.E. 2d 800 (1980); *State v. Montgomery*, 291 N.C. 91, 229 S.E. 2d 572 (1976); and *State v. Tatum*, 291 N.C. 73, 229 S.E. 2d 562 (1976). The gist of these cases is that "an indigent defendant's constitutional and statutory right to a State appointed investigator arises only upon a showing that there is a reasonable likelihood that such an investigator would discover evidence which would materially assist defendant in the preparation of his defense." *State v. Alford*, 298 N.C. 465, 469, 259 S.E. 2d 242, 245 (1979). Moreover, these cases conclude "that the appointment of experts to assist an indigent in his defense depends really upon the facts and circumstances of each case and lies, finally, within the discretion of the trial judge." *State v. Gray*, 292 N.C. 270, 277, 233 S.E. 2d 905, 910-11 (1977).

Here as in *Alford, supra*, there is no showing of evidence which, if developed by an investigator, would show a reasonable likelihood that someone other than defendants committed the armed robbery and larceny of the Bostic's station wagon. Even if the investigator could have located Herman Johnson, a juvenile who had lived at Michael's apartment, at most Johnson could only have corroborated defendants' testimony, which the jury chose not to believe. It was not prejudicial error for the trial court to refuse to appoint a private investigator on the facts of this case.

[5] The defendants' in their eighth assignment of error contend that the trial court erred in refusing to require the State to identify the informant who alerted the State to search the residence of Michael Jones. The defendants assert that "[b]y the very nature of the knowledge passed to the law enforcement officials, it is likely that the informant was a participant in the bank robbery and therefore defendant[s] should be informed as to his or her identity." We disagree.

There is no evidence in the record that an informant was involved in this case. The application for the search warrant for Michael's apartment does not mention an informant or refer to facts obtained from an informant. The application merely cites the facts of the bank robbery, the fact that the station wagon used in the robbery was abandoned near Waldo Village, the fact that Michael's fingerprint was found on the gearshift and the fact that

Michael lived in Waldo Village. There was no evidence, except for defendants' assertion, that an informant was involved in this case. Further even if an informant was found to exist, defendants have not shown that the informant's testimony was essential to their receiving a fair trial or that his testimony was material to their defense. *State v. Ketchie*, 286 N.C. 387, 211 S.E. 2d 207 (1975); *State v. Warren*, 35 N.C. App. 468, 241 S.E. 2d 854, *disc. rev. denied*, 295 N.C. 94, 244 S.E. 2d 262 (1978). Thus this assignment of error is without merit and is overruled.

We have carefully considered defendants' remaining assignments of error and find them to be without merit and thus overruled. Defendants had a fair trial free from prejudicial error.

No error.

Judges VAUGHN and ARNOLD concur.

PEARL SAINTSING, INDIVIDUALLY: AND PEARL SAINTSING, ADMINISTRATOR OF THE ESTATE OF GLADYS SAINTSING v. NORMAN E. TAYLOR AND EVELYN L. TAYLOR

No. 8119SC979

(Filed 1 June 1982)

1. Attorneys at Law § 5— attorney's prior representation of one defendant—refusal of court to remove attorney

The trial court did not err in failing to remove plaintiffs' attorney because he had previously represented the feme defendant in a divorce action against the male defendant where plaintiffs knew of the attorney's previous representation of the feme defendant and plaintiffs and the feme defendant agreed to the attorney's representation of plaintiffs in this action.

2. Rules of Civil Procedure § 15.1— amendment of complaint—short time for response to amendment

The trial court did not abuse its discretion in permitting plaintiffs to amend their complaint and in refusing to allow defendant thirty days to respond to the amended complaint where defendant did not assert that he was in any way prejudiced because of the amendment or the short time for response. G.S. 1A-1, Rule 15(a).

3. **Criminal Law § 99.4— court's remark in ruling on objection—no expression of opinion**

The trial judge did not express an opinion on the evidence when, in ruling on an objection to a question asked of plaintiffs' witness, he stated, "You're going to object to every question, aren't you?" where defense counsel objected 42 times during the direct examination of the witness, and it appears that the court may have been trying to determine whether defense counsel would accept a continuing objection to the testimony so as to avoid the consistent interruptions.

4. **Trust § 20— parol trust—instructions on interest of each party**

The trial court properly instructed the jury that if a parol trust were found to exist the parties would each own a one-fourth interest in the property in question where the evidence supported either a finding that the four parties owned the property in equal shares or that no parol trust existed for plaintiffs.

5. **Trusts § 20— parol trust—foster parent and child—failure to instruct on presumption of gift**

In an action to establish a parol or resulting trust, the trial court did not err in failing to instruct the jury that a presumption of gift existed because plaintiffs were the foster parents of the feme defendant, even if such presumption exists between a foster parent and child, where the court correctly charged that the burden was on plaintiffs to establish the trust by clear, strong and convincing proof, and defendants made no special request for such an instruction.

APPEAL by defendant Norman E. Taylor from *Wood, Judge.* Judgment entered 17 April 1981 in Superior Court, RANDOLPH County. Heard in the Court of Appeals 29 April 1982.

Pearl Saintsing and Gladys Saintsing brought this action on 28 March 1980 alleging partial ownership of the house and lot located at 340 Marmaduke Circle in Asheboro on the theory that defendants held legal title to the property as trustees for all four parties pursuant to either a parol trust or a resulting trust. Pearl and Gladys Saintsing were the foster mothers of the defendant Evelyn L. Taylor, having raised and supported her from her fourth birthday until she married and became self-supporting as a nurse-anesthetist. Evelyn L. Taylor completed her nurse's training and became a nurse anesthetist in October 1956. She and Norman E. Taylor were married 8 December 1956. One child, Norman E. Taylor, II, was born of their marriage on 25 March 1959. Evelyn L. Taylor and Norman E. Taylor were divorced 18 October 1980.

Pearl Saintsing was born 25 March 1907 and was at the time of the trial 74 years old. Gladys Saintsing, her sister, died 11 Jan-

uary 1980 at the age of 78. Pearl Saintsing has never been married. Pearl Saintsing qualified as Administrator of the Estate of Gladys Saintsing on 14 January 1981. By order entered 21 January 1981 pursuant to Rule 25(a), N.C. Rules Civ. Proc., Pearl Saintsing was in her capacity as administrator substituted for Gladys Saintsing as a party plaintiff. On 6 February 1981 Pearl Saintsing, acting as administrator of the estate of Gladys Saintsing, formally adopted the complaint. Pearl Saintsing is the only heir of Gladys Saintsing.

Evelyn L. Taylor filed no answer to the complaint and was not represented by counsel. Plaintiffs elected not to take a default judgment against Evelyn Taylor and proceeded to trial against both defendants.

Plaintiffs' evidence tended to show that Pearl Saintsing was seriously injured in an automobile accident on 29 May 1960. While she was recuperating Norman E. Taylor suggested that she and Gladys Saintsing move into the home where he, Evelyn Taylor and their infant son were then living in Greensboro. When Mr. Taylor wanted to buy a lot and build a house, Pearl Saintsing agreed to sell her home in Lexington and turn the proceeds over to Mr. Taylor to buy the property. The agreement, which Gladys Saintsing and Mrs. Taylor approved, was that Pearl Saintsing would sell her home, give the money to Norman E. Taylor, he in turn would use those funds to purchase a lot and build a house, the Taylors and the Saintsings would live together as a family, the home would belong to all four parties (i.e., Pearl and Gladys Saintsing; Norman E. and Evelyn L. Taylor), title to the property would be held in the name of the Taylors for convenience; and the Saintsings would keep the house and look after the baby while Mr. and Mrs. Taylor worked and contributed to the living expenses of the family. Pearl Saintsing thereupon sold her home in Lexington for four thousand dollars ($4,000.00) and gave the money to Mr. Taylor. Mr. and Mrs. Taylor used the money to buy a lot on Farmington Drive in Greensboro and proceeded to build a house on it. The house was completed and the parties moved into it in January 1961. The Saintsings cared for Eddie Taylor, contributed to the family living expenses and purchased furniture for the new house. In 1963 it was decided to sell the home in Greensboro and move to Asheboro. The house at 340 Marmaduke Circle in Asheboro was acquired subject to the same understand-

ing that, as Pearl Saintsing stated, "It would belong to all four of us in their name." Proceeds from sale of the house in Greensboro were applied to the purchase price of the Asheboro house. In addition approximately six thousand dollars ($6,000.00) of funds received by Pearl Saintsing in settlement of her injury claim were used in making the down payment and the existing loan on the property was assumed. After the parties moved to Asheboro the Saintsings continued caring for Eddie Taylor until he was old enough to care for himself and made substantial contributions to the family's living expenses. About 1967 it was discovered that the house at 340 Marmaduke Circle encroached upon the adjoining lot. As a result a triangular lot having 15 feet of street frontage was purchased from Cleron and Celia Elliott. The deed was dated 29 September 1967 and was made to Mr. and Mrs. Taylor. Gladys Saintsing gave Mr. Taylor Six Hundered Dollars ($600.00) to pay for the extra lot. The Saintsings first learned that Mr. Taylor was taking the position that they had no ownership interest in the property after he and Mrs. Taylor separated. This lawsuit was filed after they learned Mr. Taylor was taking that position.

Norman E. Taylor denied making any agreement to hold title to any of the properties for the benefit of Pearl and Gladys Saintsing and testified that he and Mrs. Taylor supported the Saintsings. By his testimony he contradicted in all material respects the evidence introduced by plaintiffs pertaining to the agreement and circumstances under which the properties in Greensboro and Asheboro were acquired.

The trial court denied defendant Norman Taylor's motion to dismiss at the close of plaintiffs' evidence and his motion for a directed verdict at the close of all the evidence. The jury determined that both a parol and a resulting trust existed and found that Pearl Saintsing and the Estate of Gladys Saintsing each had a 25% undivided interest in the disputed property. From this judgment defendant Norman E. Taylor appealed.

Haworth, Riggs, Kuhn, Haworth and Miller, by John Haworth for plaintiff-appellees.

Ottway Burton for defendant-appellant Norman E. Taylor.

MARTIN (Robert M.), Judge.

[1] The defendant Norman Taylor first argues that the trial court erred in failing to remove plaintiff's attorney. Plaintiff's attorney John Haworth had previously represented Evelyn Taylor in a divorce action against defendant Norman Taylor. Norman Taylor argues that he was prejudiced by Mr. Haworth's representation of the plaintiffs in this case and that there was such an "obvious conflict of interest in it that it is obvious even to a layman." This conflict is not obvious to this Court and defendant cites no authority in support of it. We agree with the trial judge that defendant has no standing to complain of a conflict. The plaintiffs in this case knew of Attorney Haworth's previous representation of Evelyn Taylor and both Evelyn Taylor and the plaintiffs agreed to Haworth's representation of plaintiffs in this action. This assignment of error is without merit.

[2] The defendant in his second and fourth assignments of error contends that the trial court erred in refusing to allow him thirty days to respond to plaintiffs' amended complaint and erred by allowing into evidence a deed pursuant to this amended complaint. We disagree with defendant.

On 2 April 1981 plaintiffs served on defendant a motion to amend the complaint. The purpose of the motion was to include in the complaint allegations of ownership of the pie-shaped lot adjoining 340 Marmaduke Circle which had been purchased to eliminate an encroachment. The motion was filed and heard on 6 April 1981 and the order granting the amendment was entered on 13 April 1981. The defendants could file a responsive pleading on or before 17 April 1981 or the beginning of the trial, whichever occurred first.

It is well-settled in North Carolina that leave to amend should be freely given pursuant to N.C. Gen. Stat. § 1A-1, Rule 15. The burden is on the party objecting to the amendment to satisfy the trial court that he would be prejudiced thereby. *Vernon v. Crist*, 291 N.C. 646, 231 S.E. 2d 591 (1977), *Watson v. Watson*, 49 N.C. App. 58, 270 S.E. 2d 542 (1980). Further the motion to amend is properly addressed to the discretion of the trial court who must weigh the motion in light of the attendant circumstances. *Gladstein v. South Square Assoc.*, 39 N.C. App. 171, 249 S.E. 2d 827 (1978), disc. rev. denied, 296 N.C. 736, 254 S.E. 2d

178 (1979). In this case the defendant did not assert that he was in any way prejudiced because of the amendment or the short time for response. In addition N.C. Gen. Stat. § 1A-1, Rule 15(a) provides specifically that the court can order a response to an amended pleading in more or less than thirty days. We can find no prejudice suffered by defendant and no abuse of discretion on the part of the trial judge in this case. Defendant's assignments of error are therefore overruled.

Defendant asserts in his fifth assignment of error one hundred and one exceptions to the trial Court's evidentiary rulings on the testimony of Pearl Saintsing. Defendant, however, only presents a specific argument and cites authority for Exception No. 50. We therefore deem his other one hundred exceptions to be abandoned pursuant to Rule 28(b)(3), N.C. Rules App. Proc.

[3] The defendant in exception No. 50 contends that the trial court expressed an opinion in violation of Rule 51(a), N.C. Rules Civ. Proc. during the following exchange:

> "Did Mr. Taylor make any statement to you about whether he had used any of that money that you had given him in connection with the purchase of the home here in Asheboro, Ms. Saintsing?
>
> MR. BURTON: I OBJECT. She's answered that question.
>
> COURT: OVERRULED. You're going to object to every question, aren't you?
>
> EXCEPTION. THIS IS DEFENDANT NORMAN EDWARD TAYLOR'S EXCEPTION NO. 50.
>
> MR. BURTON: Not every question.
>
> COURT: Just let the record show so that we don't have the interruption that he is objecting to all of these questions.

Generally Rule 51(a), N.C. Rules Civ. Proc., does not apply to the judge's charge alone, but prohibits the trial judge from making comments at any time during the trial which amount to an expression of opinion as to what has or has not been shown by the testimony. *Galloway v. Lawrence*, 266 N.C. 245, 145 S.E. 2d 861 (1966). The trial judge must abstain from conduct or language which tends to discredit or prejudice a litigant or his cause to the jury. *State v. Carter*, 233 N.C. 581, 65 S.E. 2d 9 (1965). The criteria for determining whether the court has deprived a party of his right to a fair trial by improper comments in the hearing of

the jury is the probable effect on the jury. *Worrell v. Hennis Credit Union*, 12 N.C. App. 275, 182 S.E. 2d 874 (1971).

At this point in the trial, defendant's attorney had objected forty-two times during the direct examination of Pearl Saintsing. The court properly could have been trying to determine whether defense counsel would accept a continuing objection to the testimony rather than the consistent interruptions. While the court's remark was somewhat harsh, we cannot say that, standing alone, it was prejudicial. *See State v. Frazier*, 278 N.C. 458, 180 S.E. 2d 128 (1971). Further the trial court gave the following instruction to the jury during the trial and another similar instruction during the charge to the jury:

> I instruct you that the law as indeed it should requires the Presiding Judge to be impartial. You're not to draw any inference from any ruling that I've made or any inflection in my voice or any question that I've asked or any remarks such as I made to Mr. Burton in sustaining an objection to a leading question that I—or of Mr. Haworth or anybody else in this courtroom, or anything else that I may have said or done during this trial that I have an opinion or have intimated an opinion as to whether any part of the evidence should be believed or disbelieved, as to whether any fact has or has not been proved or as to what your findings ought to be. It's your exclusive province to find the true facts of this case and to render a verdict reflecting the truth as you find it when the time comes. I instruct you to completely disregard the remark that I made a few minutes ago or any other remarks or anything else I've done, if my demeanor hasn't been right during the course of this trial or at any time to strike that and not consider that as reflecting on either party in this law suit. All right.

Thus defendant was not prejudiced by the judge's remark. This assignment of error is without merit and is overruled.

[4] Defendant in his fourteenth and twenty-fourth assignments of error asserts that the trial judge erroneously instructed the jury that if a parol trust were found to exist the parties would each own a one-fourth interest in the property. The allegations in plaintiffs' complaint and all of plaintiffs' evidence tends to show that the parties owned the property in equal shares. Pearl Saintsing testified that, " . . . [i]t would be to all four of us, but it would be put in their names for best convenience . . . . I own 1/4

of the property, and Evelyn 1/4 of it. I mean, Gladys a 1/4, Evelyn and Norman 1/4. I think it should be divided equally. We got just as much in it as they have." Evelyn Taylor testified as follows:

> There was never any—really any controversy—any objection because it was said that it would be put in our names because it would be more convenient for us to go get the loan because we were much younger than those two, than Pearl and Gladys were.
>
> Q. Was there any discussion had about whose property it would be?
>
> A. Well, this was our home. I mean, it was considered to be all four of our homes.
>
> * * *
>
> It was my understanding—it was understood and agreed upon from all parties that the home would belong to Norman Taylor, Evelyn Taylor, Gladys Saintsing and Pearl Saintsing.

The defendant, on the other hand, denied that the Saintsings had any ownership interest in the disputed property. The evidence presented supported either a finding that the parties owned the property in equal shares or that no parol trust existed for plaintiffs. Thus the court properly followed the rule stated in *Johnson v. Massengill*, 280 N.C. 376, 384, 186 S.E. 2d 168, 174 (1972) that, "[t]he issues to be submitted to the jury are those raised by pleadings and supported by the evidence." Further even if an issue of fact existed concerning the ownership percentages, the defendant waived his objections thereto by failing to demand the submission of that issue to the jury pursuant to Rule 49(c), N.C. Rules Civ. Proc. Thus, these assignments of error are without merit and are overruled.

[5] In defendant's assignments of error numbers seventeen through twenty and twenty-six, he asserts that the trial judge erred in failing to instruct the jury that a presumption of gift existed because the Saintsings were Evelyn Taylor's foster parents. Assuming that such a presumption would exist between a foster parent and child, the defendant never requested such an instruction. Because the trial court correctly charged that the burden is on plaintiffs to establish the trust by clear, strong, and convincing

proof, the failure of the court to charge on the burden of overcoming the presumption of fact that the conveyance was a gift or advancement will not be held prejudicial in the absence of a special request. *Waddell v. Carson*, 245 N.C. 669, 97 S.E. 2d 222 (1957); 13 Strong's N.C. Index 3d Trusts § 17 (1978). Thus defendant's assignments of error are without merit and are overruled.

We have carefully examined defendant's fifteenth and twenty-third assignments of error and find them to be totally without merit and overruled. Defendant in his remaining assignments of error asserts no authority for his positions and under Rule 28(b)(3), N.C. Rules App. Proc., his exceptions should be taken as abandoned. Nonetheless we have carefully examined each of these assignments of error and find them to be without merit.

Defendant had a fair trial free from prejudicial error.

No error.

Judges VAUGHN and ARNOLD concur.

IN THE MATTER OF: JOHN ROBERT BRADLEY, JOSEPH CHARLES BRADLEY

No. 8128DC909

(Filed 1 June 1982)

1. Appeal and Error § 3— constitutionality of statute not raised in lower court

Where the trial court did not rule on the constitutionality of G.S. § 7A-289.32(4) in a proceeding to terminate parental rights, the appellate court would not rule on its constitutionality.

2. Evidence § 29— termination of parental rights—prison records properly admitted into evidence

In a proceeding to terminate parental rights, the trial court did not err in admitting an authenticated copy of a Department of Correction document reclassifying respondent's status as a prisoner and disclosing that respondent had been removed from the work-release program for having returned therefrom in a highly intoxicated condition since this was a relevant and properly certified copy of an official record and was admissible. G.S. § 8-34.

3. Parent and Child § 1— termination of parental rights—forfeiting ability to pay support by own misconduct

In a proceeding to terminate parental rights, the trial court did not err in concluding that respondent failed to pay a reasonable portion of the cost of care of the minor children where respondent was incarcerated in the North Carolina Prison System, and respondent had the opportunity to participate in the work-release program but was removed from the program due to his violation of prison regulations by returning from the work-release program in an intoxicated condition. Where the parent has an opportunity to provide for some portions of the cost of care of the child, and forfeits that opportunity by his or her own misconduct, such parent will not be heard to assert that he or she has no ability or means to contribute to the child's care and is therefore excused from contributing any amount.

Judge BECTON dissenting.

APPEAL by respondent from *Fowler, Judge.* Order entered 25 June 1981 in District Court, BUNCOMBE County. Heard in the Court of Appeals on 8 April 1982.

This appeal arises out of a petition by the Buncombe County Department of Social Services to terminate the parental rights, of any and all respondents, over infants John and Joseph Bradley. Robert Bradley, respondent, filed an answer and contested any proceeding to terminate his parental rights over the children. An evidentiary hearing was conducted in District Court on 21 May 1981, and the court thereafter made findings of fact and conclusions of law, including the conclusions that there were grounds under G.S. § 7A-289.32(4) for termination of the parental rights of respondent, and that it was in the best interest of the minor children that respondent's parental rights be terminated. From an order terminating respondent's parental rights to the minor children, respondent appealed.

Stanford K. Clontz, for petitioner appellee.

Pisgah Legal Services, by Roger Theodore Smith, for respondent appellant.

Attorney General Rufus L. Edmisten, by Assistant Attorneys General Henry T. Rosser, Blackwell M. Brogden, Jr. and Robert E. Cansler, amicus curiae.

HEDRICK, Judge.

[1] In his first two arguments for reversal, respondent contends that G.S. § 7A-289.32(4) violates the due process clause of the United States Constitution in that it invades "constitutionally protected parental rights by means which are not the 'least drastic' " and in that it "is overbroad." These two assignments of error are purportedly based on Exception 9, which is to the conclusion of law

> [t]hat grounds for termination of the parental rights of Respondent Bradley are found to exist under General Statute Section 7A-289.32(4), in that Respondent failed to pay any portion of the cost of care of the minor children since June, 1979, a continuous period of approximately eighteen (18) months next preceding the filing of the Petition; and Respondent's failure to contribute to the cost of care of the minor children is not reasonable under the circumstances in that Respondent [who is a convict in the custody of the North Carolina Department of Correction] would have had the opportunity to provide financial support to the children through participation in the work-release program had he not lost this privilege due to his own misconduct,

and Exception 11, which is to the judgment. These exceptions do not raise the constitutionality of the statute. Insofar as this record is concerned, the trial judge did not rule on the constitutionality of G.S. § 7A-289.32(4); thus, this court will not rule on its constitutionality. *See* State *ex rel. Commissioner of Insurance v. North Carolina Rate Bureau*, 300 N.C. 381, 269 S.E. 2d 547 (1980). However, *see In re Clark*, 303 N.C. 592, 605, 281 S.E. 2d 47, 56 (1981), where our Supreme Court found "no constitutional defect for vagueness in G.S. 7A-289.32(4)."

[2] By Assignment of Error Number 6, based on Exception Number 6, respondent contends that the court erred in admitting into evidence respondent's prison records. "It has long been the law in this State that original official records are admissible into evidence when properly authenticated, for purposes of proof of matters relevant to the information contained in the official record." *State v. Joyner*, 295 N.C. 55, 62, 243 S.E. 2d 367, 372 (1978). Copies of official writings, recorded or filed as records in a public office, are as competent evidence as the original when cer-

tified by the keeper of such writing under the seal of his office when there is such seal, or under his hand when there is no seal, unless the court shall order the production of the original. G.S. § 8-34. The record challenged in the present case was an authenticated copy of a Department of Correction document reclassifying respondent's status as a prisoner and disclosing that respondent had been removed from the work release program for having returned therefrom in a highly intoxicated condition. This evidence was a relevant and properly certified copy of an official record and was admissible. The assignment of error is without merit.

[3] In his last assignment of error, respondent argues that "[t]he Court erred in concluding that Respondent Bradley failed to provide any reasonable support while he was incarcerated, in that it is unreasonable to require a prisoner to provide financial support while he is in the custody of the Department of Corrections."

G.S. § 7A-289.32(4) provides the following as a ground upon which parental rights may be terminated:

> The child has been placed in the custody of a county department of social services, a licensed child-placing agency, or a child-caring institution, and the parent, for a continuous period of six months next preceding the filing of the petition, has failed to pay a reasonable portion of the cost of care for the child.

The court made unchallenged findings of fact that the minor children had been in the custody of the Buncombe County Department of Social Services since July 1974, that respondent had failed to pay any portion of the cost of care for the minor children since June 1979, and "[t]hat while incarcerated in the North Carolina Prison System, Respondent had the opportunity to participate in the work-release program but was removed from the program due to his violation of prison regulations, *viz.* returning from the work-release program in an intoxicated condition." The inquiry, therefore, is whether these findings of fact support the court's conclusion that respondent failed to pay a reasonable portion of the costs of care of the minor children.

In determining what is a "reasonable portion," the parent's ability to pay is the controlling characteristic. *In re Clark, supra.*

> A parent is required to pay that portion of the cost of foster care for the child that is fair, just and equitable based upon the parent's ability or means to pay. What is within a parent's "ability" to pay or what is within the "means" of a parent to pay is a difficult standard which requires great flexibility in its application.

In re Clark, supra at 604, 281 S.E. 2d at 55.

In the present case, respondent paid nothing for the children's care over the relevant time period. This nonpayment would constitute a failure to pay a "reasonable portion" if and only if respondent were able to pay some amount greater than zero. The trial court did not err in concluding that he was so able. Where, as here, the parent had an opportunity to provide for some portion of the cost of care of the child, and forfeits that opportunity by his or her own misconduct, such parent will not be heard to assert that he or she has no ability or means to contribute to the child's care and is therefore excused from contributing any amount. This assignment of error is overruled.

In the trial we find

No error.

Judge HILL concurs.

Judge BECTON dissents.

Judge BECTON dissenting:

The majority decides the reasonableness of Robert Bradley's non-payment of support solely upon its review, and acceptance, of the Department of Correction's finding that Robert Bradley, the respondent, violated a prison regulation which resulted in the loss of his work-release privilege. Specifically, the majority states:

> Where, as here, the parent had an opportunity to provide for some portion of the cost of care of the child, and forfeits that opportunity by his or her own misconduct, such parent will not be heard to assert that he or she has no ability or means to contribute to the child's care and is therefore excused from contributing any amount.

Ante, p. 4-5. In a proceeding to terminate parental rights, our courts should not, in my view, summarily accept the Department of Correction's (or any employer's) judgment relating to a parent's ability to remain gainfully employed. A judgment that Bradley failed to comply with prison regulations resulting in the loss of his work-release privilege should not, *ipso facto*, dispose of the issue before the court—i.e., whether Bradley should be denied his "parental rights." Neither *In Re Clark*, 303 N.C. 592, 281 S.E. 2d 47 (1981), nor *In Re Biggers*, 50 N.C. App. 332, 274 S.E. 2d 236 (1981), which the majority cites, mandates that. Realizing that an inmate of a North Carolina correctional facility " 'upon being considered for honor grade status, or work release, is not entitled, either under the State or Federal Constitutions, to procedural due process rights,' " *Goble v. Bounds*, 13 N.C. App. 579, 582, 186 S.E. 2d 638, 640 (1972), *affirmed* 281 N.C. 307, 188 S.E. 2d 347 (1972), and that an employer can terminate an employee for almost any reason, except a constitutionally impermissible reason, I dissent.

No one disputes that Bradley's interest in retaining his parental rights is substantial. "A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is . . . a commanding one." *Lassiter v. Department of Social Services of Durham County*, 452 U.S. 18, 27, 68 L.Ed. 2d 640, 650, 101 S.Ct. 2153, 2160 (1981). *See also Clark*, 303 N.C. at 600, 281 S.E. 2d at 53. That is why "[t]he burden of DSS [the Department of Social Services] on the merits of the petition is a heavy one." *In re Clark*, 303 N.C. at 604, 281 S.E. 2d at 55. The burden on DSS to prove facts which would support termination is by "clear, cogent and convincing evidence." G.S. 7A-289.30(e).

In this case, there was no testimony at the parental rights termination hearing regarding Bradley's circumstance in prison, detailing why he was terminated from work-release, or indicating when he would again be eligible for work-release or for parole. The trial court based its decision to terminate Bradley's parental rights solely on its examination of the *records* of the Department of Correction which were submitted by DSS. Again, a court should not substitute the judgment of the Department of Correction regarding an inmate's ability to follow prison regulations for its determination of whether the inmate should retain his parental rights.

In my view, the parental rights termination proceeding was inadequate to determine the question presented. The risk of an erroneous deprivation of parental rights is clearly present when the trial court acts on unexplained Department of Correction records. In this regard I do not believe that the findings of fact support the trial court's conclusion that Bradley failed to pay a reasonable portion of the cost of care of his minor children.

Bradley's attorneys, in their brief, aptly expressed my more fundamental difference with the majority by raising the following questions: (1) Was the $801.07 that Bradley contributed while in custody a "reasonable portion" for the time period involved? (2) Because Bradley's "ability to pay" was contingent upon his ability to retain his work-release status, should the extreme consequence of loss of parental rights befall him for losing such status? (3) If, as a prisoner, Bradley has no earning power at all, should not the "ability to pay" standard mean that he is not required to make any contributions at all until he regains some means of earning money? (4) If Bradley's prison status were soon to change, (for example, if he were to retain his work-release privilege or be paroled), should not requirements of payment be suspended until an "ability to pay" exists?

Simply put, I believe that the element of "willfulness" has to be read into G.S. 7A-289.32(4); otherwise, the State could terminate the rights of *every parent* who is fired or whose nonpayment of support for the six-month statutory period is unintentional, inadvertent, or beyond that parent's control.

In my view, it was error as a matter of law for the trial court to terminate Bradley's parental rights on the facts of this case. Further, I do not believe the findings by the trial court support the conclusion that Bradley failed to pay a reasonable portion of the cost of care of his minor children. Moreover, at the very least, the trial court failed to apply the *Biggers* "ability to pay" standard with the "great flexibility" envisioned by our Supreme Court in *Clark*.

I would, therefore, reverse the decision of the trial court.

TRIANGLE AIR CONDITIONING, INC. v. THE CASWELL COUNTY BOARD OF EDUCATION

No. 8117SC408

(Filed 1 June 1982)

1. Contracts § 27— action for additional compensation—presentation of claim to architect

In an action to recover additional compensation for construction work on a school building because of increased expense from a substantial delay in construction which was the fault of other contractors, plaintiff's forecast of evidence was sufficient to show that it complied with a contract requirement that it present a claim for increased costs to the architect within twenty days of the occurrence of the event giving rise to the claim.

2. Contracts § 18.1— action for additional compensation—waiver of change order requirement

In an action to recover additional compensation for construction work because of increased expense from a substantial delay in construction, the forecast of evidence was sufficient to permit the jury to find that defendant waived a contract requirement of a change order for plaintiff to receive additional compensation where it tended to show that plaintiff made two written requests for additional compensation to which defendant made no reply; the architect discussed the request for extra compensation with defendant and plaintiff's bonding company and was told by the bonding company that it would handle the request; the architect did not make any recommendations to defendant with regard to plaintiff's request for extra compensation because defendant did not request it but told plaintiff the bonding company would handle the request; and plaintiff completed the work after it received a letter from its bonding company because it "had no choice" but to do so or "suffer other damages beyond increased costs."

3. Arbitration and Award § 1— agreement for arbitration—necessity for demand by one party

The provisions of a contract for heating and air conditioning work in an addition to a school did not require arbitration unless one of the parties demanded it.

4. Contracts § 18.1— acceptance of contract price—no waiver of claim for additional compensation

Plaintiff did not waive its claim for additional compensation under a contract by accepting payment of the original contract price where the contract provided that acceptance of final payment would constitute a waiver of all claims except those previously made in writing and still unsettled, and all the evidence showed that plaintiff had previously made a claim in writing which was unsettled at the time it accepted payment of the original contract price.

APPEAL by plaintiff from *Long, Judge.* Judgment entered 3 February 1981 in Superior Court, CASWELL County. Heard in the Court of Appeals 8 December 1981.

This action grew out of the construction of an addition to Pelham Elementary School in Caswell County. The plaintiff entered into a contract with the defendant under which it was to be paid $66,217.00 to furnish materials for and do the heating, air conditioning, and ventilation work on the project. There were three other prime contractors. The contract provided that construction would commence on 1 January 1976 and be completed by 1 October 1976. The parts of the contract pertinent to this action provide:

"2.2 ADMINISTRATION OF THE CONTRACT

2.2.1 The Architect will provide general Administration of the Construction Contract, including performance of the functions hereinafter described.

* * *

2.2.7 Claims, disputes and other matters in question between the Contractor and the Owner relating to the execution or progress of the Work or the interpretation of the Contract Documents shall be referred initially to the Architect for decision which he will render in writing within a reasonable time.

* * *

2.2.10 Any claim, dispute or other matter that has been referred to the Architect, . . . shall be subject to arbitration upon the written demand of either party . . . .

* * *

2.2.14 The Architect will prepare Change Orders in accordance with Article 12 . . . .

* * *

7.10 ARBITRATION

7.10.1 All claims, disputes and other matters in question arising out of, or relating to, this Contract . . . shall be decided by arbitration in accordance with the Construction Industry

Arbitration Rules of the American Arbitration Association then obtaining unless the parties mutually agree otherwise. This agreement to arbitrate shall be specifically enforceable under the prevailing arbitration law . . . .

7.10.2 Notice of the demand for arbitration shall be filed in writing with the other party to the Contract and with the American Arbitration Association, and a copy shall be filed with the Architect. The demand for arbitration shall be made within the time limits specified in Subparagraphs 2.2.10 and 2.2.11 where applicable, and in all other cases within a reasonable time after the claim, dispute or other matter in question has arisen . . . .

* * *

9.7 SUBSTANTIAL COMPLETION AND FINAL PAYMENT

* * *

9.7.6 The acceptance of final payment shall constitute a waiver of all claims by the Contractor except those previously made in writing and still unsettled.

* * *

12.1 CHANGE ORDERS

12.1.1 The Owner, without invalidating the Contract, may order Changes in the Work within the general scope of the Contract consisting of additions, deletions or other revisions, the Contract Sum and the Contract Time being adjusted accordingly. All such Changes in the Work shall be authorized by Change Order, and shall be executed under the applicable conditions of the Contract Documents.

12.1.2 A Change Order is a written order to the Contractor signed by the Owner and the Architect, issued after the execution of the Contract, authorizing a Change in the Work or an adjustment in the Contract Sum or the Contract Time. Alternatively, the Change Order may be signed by the Architect alone, provided he has written authority from the Owner for such procedure and that a copy of such written authority is furnished to the Contractor upon request. A Change Order may also be signed by the Contractor if he

agrees to the adjustment in the Contract Sum or the Contract Time. The Contract Sum and the Contract Time may be changed only by Change Order.

* * *

12.2 CLAIMS FOR ADDITIONAL COST

12.2.1 If the Contractor wishes to make a claim for an increase in the Contract Sum, he shall give the Architect written notice thereof within twenty days after the occurrence of the event giving rise to such claim. This notice shall be given by the Contractor before proceeding to execute the Work . . . . No such claim shall be valid unless so made. If the Owner and the Contractor cannot agree on the amount of the adjustment in the Contract Sum, it shall be determined by the Architect. Any change in the Contract Sum resulting from such claim shall be authorized by Change Order."

In the complaint filed in this action the plaintiff alleged that the parties had executed the contract; that the plaintiff had been delayed in completing the project through no fault of its own until 30 September 1977 at an increased cost of $12,000.00. Plaintiff prayed for $12,000.00 in damages. The defendant filed an answer in which it denied the material allegations of the complaint. As affirmative defenses, it pled that any damage to the plaintiff was caused by the delay of other contractors and not the defendant; that the defendant was not liable therefor; that no change order had been issued for the extension of time; that plaintiff had not given timely notice of its increased expenses due to the extension of the time for completing the contract; and that plaintiff had waived any claim for further compensation by accepting final payment.

At the hearing on the motion for summary judgment, the court had before it the pleadings, a deposition of the architect who supervised the project, an affidavit of the plaintiff's president, an affidavit by the plaintiff's accountant, and certain correspondence relative to the project. George McCallum Smart testified by deposition that he was the architect for the project, that the original contract time for completing the project was 273 days, but through the fault of contractors on the project other than the plaintiff, the project was completed in 733 days. He

testified he had received letters from the plaintiff requesting "financial assistance because of the delay." He identified letters which were written to him by the plaintiff. He testified further that he mentioned the request for additional compensation to the defendant and United States Fidelity and Guaranty Company, which was the surety on the plaintiff's performance bond. The bonding company replied to the architect that it did not "see any problems" with the plaintiff's request and that they would handle it. The architect did not make a recommendation to the defendant regarding the plaintiff's claim for extra compensation because the defendant did not ask for a recommendation. He testified he did not render a written decision on any claim for plaintiff nor has plaintiff demanded arbitration. Correspondence was introduced into evidence which showed that on 18 November 1976 the plaintiff's attorney wrote the defendant notifying it that the plaintiff had incurred additional costs on account of the delay but had not received a change order, that on 8 February 1977 he wrote the architect saying the plaintiff would proceed with work on the project upon satisfactory assurance the plaintiff would be paid for the increased costs. On 9 February 1977 the architect wrote to the plaintiff requesting a breakdown as to the additional costs. The United States Fidelity and Guaranty Company by letter dated 23 February 1977 demanded that the plaintiff complete the project. On 18 October 1977 the plaintiff wrote the architect in regard to the disbursement of funds. The plaintiff stated that the application for funds stated the job was 100% complete. The plaintiff said, however, that due to the long delay, the costs of materials and labor had increased and asked for help from the architect in getting additional compensation.

Bobby R. Weathers, president of plaintiff, stated in an affidavit that he had requested the plaintiff's attorney to give notice to the defendant of the increased costs and that he had not heard from defendant in this regard. He stated that the work was completed as a result of the letter from United States Fidelity and Guaranty Company because if it had done otherwise, the plaintiff would have suffered "other damages beyond increased costs." He stated that the costs increased in the amount of $12,000.00. He stated further the defendant entered into arbitration with the contractor who caused the delay without notifying the plaintiff or giving it a chance to recover its increased costs.

Robert R. Privette, a certified public accountant, made an affidavit as to the method of calculating the extra expense to the plaintiff.

The plaintiff appealed from the entry of summary judgment for the defendant.

J. Michael Weeks for plaintiff appellant.

W. Osmond Smith for defendant appellee.

WEBB, Judge.

[1] The forecast of evidence in this case is that the plaintiff and the defendant entered into a written contract under the terms of which the plaintiff was to furnish material and perform certain work on the improvements to a school building. There was a substantial delay in the construction of the building which was not the fault of the plaintiff. This delay caused increased expense to the plaintiff. The plaintiff requested additional compensation by letters to the defendant and the architect. The plaintiff at one point threatened to stop work unless it received a promise for an adjustment in the contract price. Subparagraph 12.1.2 of the contract provides for a change in the time for the completion of the contract by written change order. The defendant did not follow the provisions of subparagraph 12.1.2 but through the architect and the plaintiff's bonding company insisted that the plaintiff complete its part of the contract at a greatly increased time and increased expense. The defendant contends the plaintiff is not entitled to additional compensation because it did not follow the contract provisions in pursuing its claim for additional compensation. The defendant says specifically that the plaintiff did not abide by the requirement of subparagraph 12.2.1 of the contract by presenting a claim for increased costs to the architect within twenty days of the occurrence of the event giving rise to the claim and a written change order authorizing the payment of additional compensation was not issued as required by this subparagraph. Under the evidence as forecast we cannot say the plaintiff did not present a claim for increased costs within 20 days of the occurrence of the event giving rise to the claim. The defendant contends the notice should have been given within 20 days of 1 October 1976 which was the completion date specified in the contract. The first written notice was given 49 days later on

18 November 1976. The event which gave rise to the plaintiff's demand was the delay in the construction. It did not occur on a specific date. We hold that under the forecast of evidence in this case that the plaintiff complied with the notice requirement of subparagraph 12.2.1.

[2] Subparagraph 12.2.1 also requires that the plaintiff have a change order to get an increase in compensation. No change order was given. Parties to a contract may by their conduct waive the requirements of a contract. *See General Specialties Co. v. Teer Co.*, 41 N.C. App. 273, 254 S.E. 2d 658 (1979); *Grading Co. v. Construction Co.*, 27 N.C. App. 725, 221 S.E. 2d 512 (1975); and *Graham and Son, Inc. v. Board of Education*, 25 N.C. App. 163, 212 S.E. 2d 542 (1975). In this case the forecast of evidence is that the defendant did not issue a change order when the plaintiff was required to extend its performance under the contract for a very substantial period of time. Thus, the defendant did not follow the provisions of subparagraph 12.1.2 in requiring a change in the time for performing the contract. The plaintiff made two written requests for additional compensation to which the defendant made no reply. The architect testified that he discussed the request for extra compensation with the defendant and the plaintiff's bonding company and was told by the bonding company they would handle it. The architect testified further that he did not make any recommendation to the defendant in regard to the plaintiff's request for extra compensation because the defendant did not request it but he told the plaintiff the bonding company would handle it. The plaintiff's president testified that the plaintiff completed the work after it received the letter from United States Fidelity and Guaranty Company because "he had no choice" but to do so or "suffer other damages beyond increased costs." We hold that if the plaintiff offers this testimony without contradiction at trial, it will be entitled to a jury instruction that the defendant waived the requirement of a change order for the plaintiff to receive additional compensation.

[3] The defendant also contends the plaintiff cannot proceed in this action because under the contract they are bound to submit the claim to arbitration. Subparagraphs 2.2.10 and 7.10.1 and 7.10.2 of the contract deal with the arbitration of claims under the contract. Subparagraph 2.2.10 says there will be arbitration upon the demand of either party. Subparagraph 7.10.1 provides for the

procedure for arbitration and subparagraph 7.10.2 says the demand for arbitration must be made within the time limits specified in subparagraphs 2.2.10 and 2.2.11 and in all other cases within a reasonable time after the claim arose. We do not believe the contract requires arbitration unless one of the parties demands it. In this case neither party demanded arbitration. We hold the parties were not bound to arbitrate.

[4] The defendant contends further that by accepting payment of $66,217.00 which was the original contract price, the plaintiff waived all other claims. Subparagraph 9.7.6 provides the acceptance of final payment shall constitute a waiver of all claims except those previously made in writing and still unsettled. All the evidence shows the plaintiff had previously made a claim in writing which was unsettled at the time it accepted the final payment of the original contract price. The plaintiff did not waive its claim by accepting this payment.

For the reasons stated in this opinion, we reverse the summary judgment in favor of the defendant and remand the case for trial.

Reversed and remanded.

Judges VAUGHN and HILL concur.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION AND THE PUBLIC STAFF v. SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY

No. 8110UC929

(Filed 1 June 1982)

1. Telecommunications § 1.2— telephone rates—revenues from advertising in yellow pages

Revenues received by a telephone company from advertising in the yellow pages of its telephone directory were properly considered by the Utilities Commission in establishing rates for the telephone company. G.S. 62-30; G.S. 63-32.

2. Appeal and Error § 9— moot question

A telephone company's challenge to the rate of return on common equity allowed by the Utilities Commission was rendered moot when, pending the appeal of this case, the Commission in another case approved an additional rate increase and a higher rate of return on common equity for the telephone company.

APPEAL by Southern Bell Telephone Company from the North Carolina Utilities Commission. Order entered 15 April 1981. Heard in the Court of Appeals 9 April 1982.

Southern Bell (Bell) applied to the Utilities Commission (Commission) for a general rate increase of $68,174,088 in its annual rates and charges. Following hearings, the Commission issued its order granting Bell an increase of $41,281,000 annually. Bell excepted to those portions of the Commission's order dealing with the allowed rate of return and with the disposition of revenues from Bell's yellow page advertising.

Thomas K. Austin, for the North Carolina Utilities Commission—Public Staff, intervenor-appellee.

Hunton and Williams, by Robert C. Howison, Jr., R. Frost Branon, Jr. and Gene V. Coker, for Southern Bell Telephone and Telegraph Company, defendant-appellant.

WELLS, Judge.

[1] In computing their gross revenues and expenses for the purposes of this rate case, Bell excluded the investment, revenues, and expenses associated with or resulting from advertisements placed by professional and business subscribers in the classified section of Bell's various telephone directories. The classified directory has acquired the title of and is generally referred to as the yellow pages. In its order, the Commission found and concluded that these revenues should be considered for rate-making purposes. In one of their assignments of error, Bell contends that the Commission's findings and conclusions on this issue were erroneous in that (1) the Commission exceeded its authority and (2) its findings on this issue were not supported by competent, material, and substantial evidence.

To put this question in clear focus, we quote in full the Commission's findings and conclusions on this issue, as follows:

FINDINGS OF FACT

. . .

9. The revenues, expenses, and net operating income of the Company's Directory Advertising Operations are properly includable in the cost of service in this proceeding.

. . . .

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 9

The evidence for this finding is contained in the testimony of Company witnesses Turner and Thomas and Public Staff Witness Daniel.

Company witness Turner eliminated $6,894,000 of net operating income applicable to directory advertising operations from his determination of net operating income for ratemaking purposes. He stated that he had made this adjustment on the recommendation of Company witness Thomas.

Company witness Thomas stated this adjustment is appropriate in view of the present competitive environment. He stated that at the federal level there is the clear intent that we eliminate, insofar as possible, cross-subsidies among services.

Public Staff witness Daniel testified that the elimination of directory advertising is both inequitable and unjustified. To separate the operations of directory advertising from utility operations permits the Company to realize revenue directly related to the operations of a public utility but which will not be considered in establishing rates. Witness Daniel did not reflect the impact of the adjustment to directory advertising proposed by Company witness Turner in developing the test year cost of service.

The Commission recognizes that there is a movement toward the separation of ancillary services from the regulated area in the telephone industry. It also recognizes that competitive pressures may eventually be a factor in the marketing of directory advertising by Southern Bell in its North Carolina operations; however, based on the evidence presented, there is presently no substantial competition pos-

ing a threat to Southern Bell's advertising market in North Carolina. Moreover, none appears to be on the horizon. The classified directory, in which advertising appears, is an integral part of providing adequate telephone service; thus, the absence of the classified directory would diminish the value of telephone service to the Company's customers. Finally, this Commission has consistently over the years included directory advertising revenues and costs in determining Southern Bell's total cost of service.

Based on the foregoing and the entire evidence of record, the Commission concludes that revenues and costs associated with Southern Bell's directory advertising operations should be included in the test year for purposes of this proceeding.

The standard of judicial review of orders of the Utilities Commission is set forth in G. S. 62-94, as follows:

§ 62-94. Record on appeal; extent of review.

(a) On appeal the court shall review the record and the exceptions and assignments of error in accordance with the rules of appellate procedure, and any alleged irregularities in procedures before the Commission, not shown in the record, shall be considered under the rules of appellate procedure.

(b) So far as necessary to the decision and where presented, the court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action. The court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision *if the substantial rights of the appellants* have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:

(1) In violation of constitutional provisions, or

(2) In excess of statutory authority or jurisdiction of the Commission, or

(3) Made upon unlawful proceedings, or

(4) Affected by other errors of law, or

(5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted, or

(6) Arbitrary or capricious.

(c) In making the foregoing determinations, the court shall review the whole record or such portions thereof as may be cited by any party and due account shall be taken of the rule of prejudicial error. The appellant shall not be permitted to rely upon any grounds for relief on appeal which were not set forth specifically in his notice of appeal filed with the Commission.

(d) The court shall also compel action of the Commission unlawfully withheld or unlawfully or unreasonably delayed.

(e) Upon any appeal, the rates fixed or any rule, regulation, finding, determination, or order made by the Commission under the provisions of this Chapter shall be prima facie just and reasonable. (Emphasis added.)

The threshold question is whether the Commission exceeded its authority or jurisdiction by including yellow pages advertising revenues for rate-making purposes. While the Commission's grant of authority is wholly statutory, and it may exercise only such authority as has been delegated by the General Assembly, its statutory grant of authority is both broad and comprehensive. *See* G.S. 62-30 and 62-32.[1]

Two aspects of the yellow pages question quickly emerge on the record before us: (1) Bell has historically included revenues from yellow pages advertising in its revenues for rate-making purposes, and (2) its basic premise for its proposal to exclude

1. § 62-30. General powers of Commission.—The Commission shall have and exercise such general power and authority to supervise and control the public utilities of the State as may be necessary to carry out the laws providing for their regulation, and all such other powers and duties as may be necessary or incident to the proper discharge of its duties. § 62-32. Supervisory powers; rates and service.—(a) Under the rules herein prescribed and subject to the limitations hereinafter set forth, the Commission shall have general supervision over the rates charged and service rendered by all public utilities in this State. (b) The Commission is hereby vested with all power necessary to require and compel any public utility to provide and furnish to the citizens of this State reasonable service of the kind it undertakes to furnish and fix and regulate the reasonable rates and charges to be made for such service.

them in this case is that the yellow pages are a competitive activity and therefore Bell should not be required to continue to include such revenues for rate-making purposes. There was no suggestion by Bell that the classified directory does not serve an important or essential function to Bell's telephone subscribers.

The evidence on this question consisted of the testimony of Alan E. Thomas, Bell's Vice-President for North Carolina operations, Roderick G. Turner, Jr., Bell's accounting witness, and Donald E. Daniel, Assistant Director of the Accounting Division of the Public Staff.[2] On direct examination, Mr. Thomas' testimony on this question was extraordinarily brief, taking up but sixteen lines in the transcript. Mr. Thomas stated that in its filing in this case, Bell had made significant changes in the manner in which it had computed its revenue requirements,[3] and that one of these changes was to eliminate all revenues, expenses, and investment attributable to yellow page advertising. Mr. Thomas' sole justification for this change is that it was appropriate in the present competitive environment to separate from the regulated portions of Bell's operations competitive services such as the yellow pages. Mr. Thomas stated that the language of the Federal Communication Commission's Second Computer Inquiry Order[4] reflects the clear intent that "we [Bell] eliminate insofar as possible cross-subsidies among services". On cross-examination, Mr. Thomas discussed this question at some length. Generally, his cross-examination testimony on this point may be summarized as emphasizing four aspects of yellow page operations and function: (1) the tele-communication industry is undergoing significant changes in the direction of a more competitive environment; (2) yellow page advertising does not enjoy a monopoly position, but must compete with other forms of advertising; (3) Bell should be allowed to compete as freely as possible for such revenues, and

2. The Public Staff of the North Carolina Utilities Commission is charged with the duty of intervening in all Utilities Commission general rate cases on behalf of the using and consuming public. G.S. 62-15.

3. A term generally used to encompass revenues necessary to (1) meet all reasonable expenses of operation and (2) to meet the cost of capital, including a reasonable return on its investment.

4. Amendment of Sec. 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), dealing with the Deregulation of Terminal Equipment and Enhanced Services, 46 Fed. Reg. 5984 (1981) (to be codified at 47 C.F.R. Part 64).

(4) that yellow page operations have not historically been regulated in the same manner as basic telephone service.

Mr. Daniel's testimony on the question, in summary, was to the effect that telephone customers provide the market for yellow page advertising, that yellow pages cannot justifiably be separated from the overall provision of telephone service, and that the exclusion of yellow page revenues would result in higher rates for telephone service.

Mr. Daniel's testimony, and that of Bell's accounting witness, Roderick G. Turner, Jr., make it clear that the elimination of yellow pages revenues in this case would require an additional $14,000,000 in annual gross revenues from Bell's North Carolina customers.

It is appropriate to note at this point that Bell has the burden of showing that the changes in accounting for yellow pages revenues, proposed in this case, are just and reasonable. G.S. 62-75. The Commission's order in this case, as it relates to the question of yellow page advertising revenues, requires Bell to do no more than they did voluntarily and without objection for over half a century. This would seem to be strong evidence of the reasonableness of this accounting practice and rate-making principle. *Utilities Commission v. R.R.*, 256 N.C. 359, 124 S.E. 2d 510 (1962). The Commission did not rest, however, in asserting its authority over these disputed revenues, by simply reaching the conclusion that Bell had not carried its burden of showing, in this case, that the practice it had adherred to for so very long with respect to these revenues was no longer just and reasonable; the Commission went further, and concluded that Bell's classified directory was an essential aspect of telephone service generally. We are persuaded that in making this judgment, the Commission was clearly acting within its authority under G.S. 62-30 and 32. Accepting such judgment to be within the Commission's authority and duty, we are persuaded that the Commission correctly concluded that the classified directory advertising revenues should continue to be accounted for in establishing just and reasonable rates for Bell in North Carolina.

While we recognize the concern of Bell that it be able to deal with the emerging competitive environment in the telecommunications industry, we also recognize that we cannot substitute

our judgment for that of the Commission. In support of its argument, Bell has cited two decisions of the Courts of sister states: the opinion of the New Mexico Supreme Court in *Corporation Commission v. Mountain States Telephone and Telegraph Co.*, 84 N.M. 298, 502 P. 2d 401 (1972); and an order of the Superior Court of Fulton County, Georgia, in *Southern Bell Telephone and Telegraph Company v. Georgia Public Service Commission*, Case No. C-75044, order entered 21 September 1981. Both of those courts reached the conclusion that the publication of a classified directory was not essential to the furnishing of telephone service. A careful reading of the decision of the New Mexico Court and the order of the Georgia Court would indicate that in those cases, the Court simply substituted its judgment for that of the regulatory agency, which in each case had reached an opposite judgment. Under our standards of appellate review, this Court is not at liberty to substitute its judgment for that of the Utilities Commission. *See Thompson v. Board of Education*, 292 N.C. 406, 233 S.E. 2d 538 (1977). The Commission's findings and conclusions, being supported as they are by competent, material, and substantial evidence, considering the whole record, and taking into account any contradictory evidence or evidence from which conflicting inferences could be drawn, must be affirmed. *Thompson, supra.*

[2] In a separate assignment of error, Bell has challenged the rate of return on common equity allowed by the Commission in this case. The rate of return which Bell contends is confiscatory and unlawful is 13.5 percent. Pending the appeal of this case, the Commission, on 3 March 1982, entered its order in Docket Number P-55, Sub 794, in which it granted Bell an additional annual rate increase of $66,853,744, in which order the Commission approved a rate of return on common equity of 15.50 percent. Such action by the Commission renders this assignment of error moot in this case. We therefore do not consider it. *See Utilities Commission v. Southern Bell Telephone Co.*, 289 N.C. 286, 221 S.E. 2d 322 (1975).

For the reasons stated herein, the order of the Utilities Commission is

Affirmed.

Judges MARTIN (Harry C.) and WHICHARD concur.

CLEMENT BROTHERS COMPANY, INC. v. NORTH CAROLINA DEPARTMENT OF ADMINISTRATION AND APPALACHIAN STATE UNIVERSITY

No. 8110SC870

(Filed 1 June 1982)

1. **Contracts § 30— construction contract—refusal of stop order for bad weather—arbitrariness—remission of mitigated damages**

Where an addendum to a contract for construction of a dam and water reservoir provided for construction shutdowns with the mutual consent of the parties because of severe winter weather conditions, plaintiff received a stop order to suspend its operations temporarily during adverse weather conditions in the winter of 1971-72, and the parties stipulated that the weather conditions were substantially the same during the winter of 1971-72 and the two following winters, defendants acted arbitrarily and capriciously in notifying plaintiff in August and November 1972 that it would permit no further shutdowns because it was concerned about the project conclusion date, and the trial court properly required defendants to remit a portion of the liquidated damages which had been assessed against plaintiff for tardy completion of the project.

2. **Contracts § 12— interpretation of contract—payment for wasted materials**

In an action arising out of a contract for construction of a dam and reservoir, the trial court properly determined that plaintiff was not entitled to compensation for rock excavated from the quarry area but wasted because it was not suitable for use in the dam embankment at the unit price for common excavation since paragraphs of the contract providing that there would be no separate payment for waste excavation controlled over the more general provisions which defined common excavation to include the "removal and disposal of all other materials from the project site which is not classified as rock or structural excavation."

APPEAL by plaintiff and defendants from *Godwin, Judge.* Summary judgment entered 9 June 1981 in Superior Court, WAKE County. Heard in the Court of Appeals 5 April 1982.

This action arises out of a contract for construction of a dam and reservoir to provide water for Appalachian State University in Boone. After being assessed liquidated damages of $89,400 for the tardy completion of its portion of the project, plaintiff-contractor appealed the assessment to the State Department of Administration. At the hearing before the Secretary of the Department, plaintiff protested the liquidated damages assessment and claimed it was entitled to payment for excavation of material which was not suitable for use as rock in the dam structure and to payment for the cost of labor inefficiency that resulted from defendants' requiring plaintiff to work during periods of winter weather. After plaintiff's claims were denied by the Secretary, it then filed a complaint in Superior Court re-

questing the same relief it had sought from the Department of Administration. Defendants filed an answer denying that plaintiff was entitled to the relief requested. Both parties moved for summary judgment. The parties entered into a stipulation of the facts. After a hearing on the motions, the court made extensive findings of fact, based upon the stipulated facts, and allowed defendants' motion for summary judgment on the claim for excavated materials and for the cost of labor inefficiencies and allowed plaintiff's motion for partial summary judgment on the liquidated damages issue.

Attorney General Edmisten by Special Deputy Attorney General T. Buie Costen for the State, defendant appellant-appellee.

Griffin, Cochrane & Marshall by Harry L. Griffin, Jr., and Bowman S. Garrett, Jr.; Everett, Creech, Hancock & Herzig by William G. Hancock for plaintiff appellant-appellee.

CLARK, Judge.

DEFENDANTS' APPEAL

[1] Defendants contend that the court erred in granting plaintiff's motion for partial summary judgment which required that defendants remit part of the liquidated damages assessed against plaintiff. This issue involves an interpretation of the provisions of Addendum No. 3 to the Contract between the parties, which reads as follows:

"SECTIONS III, IV, V, VI, VII, VIII, IX, AND X:

The time of 540 days for completion of the above listed sections of the project has brought objections from various contractors who are concerned over the bad winter weather.

In lieu of extending the time of completion for those Sections of the Project the following will govern this phase of the work:

'With the mutual consent of the Contractors and the Engineers, in event of winter weather conditions which are not in the best interest of the Owner and Contractor a stop-order will be issued until such time as working conditions im-

prove to a point that the work can be resumed to the mutual benefit of all parties. This stop-order shall be issued only on severe winter weather conditions. The time the stop-order is in effect will not be included in the Contractors [*sic*] calendar days time for completion of the project.' "

Plaintiff requested and received a stop order to suspend its operations temporarily during adverse weather conditions in the winter of 1971-72. A series of letters was transmitted between the parties concerning a shutdown for bad weather during the winter of 1972-73. In August 1972, defendants advised plaintiff that it was to proceed with construction of the dam to meet the 30 May 1973 completion date and that no further shutdowns would be allowed. Although the record is not clear on this point, it appears that the August letter was not in response to a request for a shutdown by plaintiff, but the result of defendants' concern that the project was behind schedule. In November 1972, plaintiff was denied a stop order for the winter of 1972-73. From the defendants' course of conduct, plaintiff did not request a shutdown for the winter of 1973-74, believing any such request would be futile. The parties stipulated that the weather conditions were substantially the same in all three of the winters in question. Plaintiff was assessed liquidated damages of $89,400 for 447 days of downtime.

Defendants contend that their refusal to grant shutdowns during the winter seasons was not arbitrary but was in compliance with the contract provisions requiring "mutual consent" before a stop order was issued. The trial court, however, disagreed, concluding as a matter of law that:

"4. Defendants' action in advising plaintiff in August and November, 1972, that no further arrangement would be made for work stoppage was arbitrary and not in accordance with contract requirements that reasonable consideration be given by both parties to a work stop order in the event of severe winter weather conditions not in the best interest of both parties.

5. Material issues of fact exist as to the severity of winter weather conditions and their duration during 1972-73 and 1973-74 which plaintiff and defendants are entitled to have determined by further proceedings in this cause. Plain-

tiff is entitled to remission of liquidated damages for any such period of severe winter weather conditions during 1972-73 and 1973-74 which may be established in such proceedings and defendants are entitled to credit that portion of additional 135-day time extension at the project's end which was granted by reason of such winter weather conditions against any period so established."

Our courts have held that the heart of a contract is the intention of the parties, which is to be determined from the language, the purposes and the subject matter of the contract and from the situation of the parties at the time the contract was executed. Any ambiguity in a written contract is to be construed against the party who prepared the instrument. *Adder v. Holman & Moody, Inc.*, 288 N.C. 484, 219 S.E. 2d 190 (1975). The language of the addendum itself reveals that contractors who were bidding on the water reservoir project were concerned about the effect the severe winter weather in Boone would have upon the construction. Therefore, defendants agreed to the addendum which provided for shutdowns with the mutual consent of the parties. While defendants were not required to grant a stop order simply because plaintiff requested it, the addendum would be of no value whatsoever if the defendants could unilaterally and unreasonably refuse to grant stop orders when there were severe winter weather conditions. The effect of such an interpretation would be to defeat the purpose for which the addendum was executed. Plaintiff and other bidders relied upon the language in the addendum that stop orders would be permitted under severe weather conditions and prepared their contract bids accordingly. We hold that defendants' notification to plaintiff in August and November 1972 that it was concerned about the projected completion date and would allow no further shutdowns was arbitrary and capricious. We can find no rational basis for defendants' granting a shutdown one winter while refusing it the following equally severe winter. *See Missouri Roofing Co. v. United States*, 357 F. Supp. 918 (E.D. Mo. 1973); *DeArmas v. United States*, 70 F. Supp. 605 (Ct. Cl. 1947); Annot., 85 A.L.R. 3d 1085 (1978).

The court properly granted plaintiff's motion for partial summary judgment on this issue.

PLAINTIFF'S APPEAL

[2] Plaintiff assigns as error the court's determination that plaintiff was not entitled to compensation for material excavated and wasted from the quarry area at the unit price for common excavation and its granting of defendants' motion for summary judgment with respect to the excavated material. Plaintiff argues that during the excavation of the quarry to obtain rock suitable for placement in the dam embankment, it removed not only overburden and rock for the embankment, for which it was paid, but also other rock material for which it has not been compensated. Plaintiff contends that it is entitled to compensation for this material under the terms of the contract specifications. This material was found beneath the overburden and was not suitable for placement in the embankment but was hauled off and wasted. The contract required plaintiff to excavate three types of material, for which it would be paid varying amounts: common excavation, rock excavation and structural excavation.

Plaintiff contends that the wasted material should be classified as common excavation, which is defined by paragraph 2.3.03-a. of the contract as follows:

> "Common excavation shall consist of and include all earth, clay, sand, silt, gravel, hard and compacted materials such as hardpan, loosely cemented gravel, soft or disintegrated rock and similar materials that can be removed by hand, heavy ripping equipment, or common earthmoving equipment such as tractor-drawn scrapers, power shovels, backhoes and bulldozers and shall also include all boulders and loose rock less than one (1) cubic yard in volume. Common excavation will include removal and disposal of overburden material within the limits of the quarry and spillway as shown on the plans, removal and disposal of unsuitable foundation material from within the limits of construction of the dam, removal and disposal of material from the core trench to the top of rock, and removal and disposal of all other material from the project site which is not classified as rock or structural excavation."

In its brief plaintiff points out that the definition of common excavation includes all material from the project site that does not fall into the classifications of rock or structural excavation.

Therefore, plaintiff claims that it should be reimbursed for this material pursuant to payment rates for common excavation. The court found, however, that the definition of common excavation did not include material below overburden excavated from the quarry and spillway area. We agree.

Paragraph 2.3.03-b. of the contract states that "[a]ll loose or soft rock shall be removed without extra cost to the Owner; . . . The Contractor shall make his own arrangements for any off-site disposal of any excess earth resulting from excavation work." Further, Paragraph 2.3.08 provides:

> "b. Rock Excavation:
>
> (1) Measurement:
>
> There will be no measurement of rock excavation.
>
> (2) Payment:
>
> The costs incurred by the Contractor for rock excavation will not be paid for directly. Payment for rock excavation shall be considered as incidental to and included in the items of Rolled Rock Fill, Compacted Coarse Filter, and Compacted Fine Filter."

Paragraph 2.3.04, Disposal of Excavated Materials, states:

> "All suitable materials from required excavation shall be placed in the permanent work to the extent required to complete the project. Unsuitable materials together with all excess material shall be placed in the designation area established for waste and excess excavation. The Engineer will be the sole judge regarding the suitability of material for incorporated [*sic*] into the project."

All of these provisions indicate that the parties anticipated that there would be some waste material from the excavation which would be unsuitable for use in the reservoir area. The provisions also show that there would be no separate payment for waste excavation.

While the definition of common excavation (paragraph 2.3.03-a.) includes "removal and disposal of all other material from the project site which is not classified as rock or structural excavation," we agree with the trial court's conclusion of law that:

"1. The contract must be construed in its entirety with specific provisions relating to excavation from the quarry and spillway area controlling over the more general provisions relating to common excavation. When so construed, the contract does not require payment for this material at the unit price for common excavation."

Accord, Contracting Co. v. Ports Authority, 284 N.C. 732, 202 S.E. 2d 473 (1974).

We find that the court properly granted defendants' motion for summary judgment on this issue.

RESULT

In defendants' appeal, affirmed.

In plaintiff's appeal, affirmed.

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

STATE OF NORTH CAROLINA v. ALLEN MITCHELL MELVIN

No. 814SC1221

(Filed 1 June 1982)

1. Criminal Law § 92.1— joinder of defendants for trial proper

Under G.S. 15A-926(b)(2), in a prosecution for common law robbery, the trial judge did not err in joining all defendants for trial since the offenses charged were part of the same transaction and were so closely connected that it would be difficult to separate proof of one charge from proof of the others.

2. Criminal Law § 99.2— court's statement to jury concerning codefendants' pleas

The trial judge's statement to the jury, after the State's case in chief, concerning the pleas of the other defendants did not violate G.S. 15A-1025 concerning plea discussions of defendant and did not constitute an expression of opinion in violation of G.S. 15A-1232.

3. Robbery § 4.2— common law robbery—sufficiency of evidence

In a prosecution for common law robbery, the evidence was sufficient to go to the jury where the evidence showed that the victim's money was taken from his person against his will by violence and that, although the evidence was conflicting as to whether defendant was a principal in the first degree or a

principal in the second degree, the evidence was at least sufficient to show that defendant was present and participated in the act which was the basis of the charge against him.

Judge BECTON concurring in part and dissenting in part.

APPEAL by defendant from *Barefoot, Judge.* Judgment entered 18 June 1981 in Superior Court, SAMPSON County. Heard in the Court of Appeals 29 April 1982.

Defendant was indicted for common law robbery. He was convicted as charged and appeals from a judgment of imprisonment entered thereon.

Attorney General Edmisten, by Assistant Attorney General Elisha H. Bunting, Jr., for the State.

Warrick, Johnson & Parsons, by W. Douglas Parsons, for defendant-appellant.

HILL, Judge.

The State's evidence tends to show that on 14 November 1980, defendant was tending bar at Ronnie Parker's Pool Hall when a fight broke out between Linda Gail McNeil and co-defendant Ruth Parker. Willie Leon Frederick attempted to end the fight by placing McNeil in his car, but co-defendants James Jarvis Finch and Ronnie Parker and defendant began fighting with Frederick. During that fight, Frederick testified, defendant "grabbed me right at my backpocket and snatched my pocketbook out, so I knowed it was him, I was looking at him." However, he also testified that Ronnie Parker took his wallet which contained approximately $290 dollars. When asked whether defendant had anything to do with his wallet, Frederick replied, "Him and Ronnie were the first two big ones that came to me." He also stated he never saw defendant touch the wallet in his presence "because Ronnie had it."

Defendant's evidence tends to show that he merely attempted to break up the fight and "never heard anything about any wallet." On rebuttal, the State recalled Frederick who testified that defendant first touched the wallet when it came out and Parker put it in his back pocket.

[1] In his first argument, defendant contends that the trial judge erred in allowing the State's motion to join for trial all defendants, even though no objection to such joinder was made at trial. Nevertheless, we review defendant's assignment of error pursuant to G.S. 15A-1446(b), as he requests.

G.S. 15A-926(b)(2) states as follows:

> Upon written motion of the prosecutor, charges against two or more defendants may be joined for trial:
>
> . . . .
>
> b. When, even if all of the defendants are not charged with accountability for each offense; the several offenses charged:
>
> 1. Were part of a common scheme or plan; or
>
> 2. Were part of the same act or transaction; or
>
> 3. Were so closely connected in time, place, and occasion that it would be difficult to separate proof of one charge from proof of the others.

Whether the trials should be joint or separate is within the discretion of the trial judge, and absent a showing that joinder deprived defendant of a fair trial, the exercise of the judge's discretion will not be reviewed on appeal. *State v. Braxton*, 294 N.C. 446, 242 S.E. 2d 769 (1978); *State v. Ervin*, 38 N.C. App. 261, 248 S.E. 2d 91 (1978).

Here, the events from which all defendants were charged clearly were part of the same transaction and were so closely connected that it would be difficult to separate proof of one charge from proof of the others. We perceive no unfairness in the conduct of defendant's trial with his co-defendants. Thus, there is no error in the joinder for trial of all defendants.

[2] Defendant's second and fourth arguments assign as error the trial judge's statements to the jury after the State's case in chief as follows:

> . . . Members of the Jury, the defendants in the case that we are trying have negotiated with the State to enter please [sic] to the charges that have [been] placed against

> them. What they are doing right now is filling out the transcripts of pleas, and it will take them awhile since there are six defendants. We are going to start the next case.

Following the denial of all defendants' motions to dismiss, the judge also addressed the jury as follows:

> . . . Members of the Jury, during the interim, the defendants, Joyce Ann Parker, Lorraine Cooper, Ruth Parker, Jarvis Finch, and Ronnie Parker changed their plea of not guilty to nolo contendere. Therefore, it will be unnecessary for you to determine the guilt or innocence against those five people. In the case of Allen Melvin, the charges against him which we will pursue will be assault with attempt to inflict serious injury and common law robbery. We will proceed with those two charges against the defendant.

G.S. 15A-1025 states that "[t]he fact that the defendant or his counsel and the prosecutor engaged in plea discussions or made a plea arrangement *may not be received in evidence against or in favor of the defendant* in any criminal or civil action or administrative proceedings." (Emphasis added.) Although again defendant made no objection to the statements quoted above, we conclude that no violation of G.S. 15A-1025 occurred in the present case. No evidence of plea discussions or arrangements was offered by the State or by defendant. Further, we are not persuaded that the trial judge's statements constitute an expression of opinion in violation of G.S. 15A-1232. These assignments of error therefore are overruled.

[3] Finally, defendant contends that the trial judge erred in denying his motions to dismiss at the end of the State's case in chief. By introducing evidence following the denial of this motion, defendant waives the motion. G.S. 15-173. Although the record does not affirmatively show that defendant removed his motion to dismiss at the end of all the evidence, we nevertheless undertake to review the sufficiency of the evidence to go to the jury. *See State v. Atwood*, 290 N.C. 266, 225 S.E. 2d 543 (1976); *State v. McWilliams*, 277 N .C. 680, 178 S.E. 2d 476 (1971).

" 'Robbery at common law is the felonious taking of money or goods of any value from the person of another or in his presence against his will, by violence or putting him in fear.' " *State v.*

McWilliams, supra at 687, 178 S.E. 2d at 480, *quoting State v. McNeely*, 244 N.C. 737, 741, 94 S.E. 2d 853, 856 (1956). Both principals in the first degree and principals in the second degree are considered principals and are equally guilty. *State v. Benton*, 276 N.C. 641, 174 S.E. 2d 793 (1970). To support a conviction as a principal in the second degree,

> the State's evidence must be sufficient to support a finding that the defendant was present, actually or constructively, with the intent to aid the perpetrators in the commission of the offense should his assistance become necessary and that such intent was communicated to the actual perpetrators. The communication or intent to aid, if needed, does not have to be shown by express words of the defendant but may be inferred from his actions and from his relation to the actual perpetrators.

State v. Sanders, 288 N.C. 285, 290-91, 218 S.E. 2d 352, 357 (1975), *cert. denied*, 423 U.S. 1091 (1976). *Accord State v. Brown*, 300 N.C. 41, 265 S.E. 2d 191 (1980).

In the present case, the evidence recounted above clearly shows that Frederick's money was taken from his person against his will by violence. Although the evidence is conflicting as to whether defendant is a principal in the first degree or a principal in the second degree, the evidence is at least sufficient to show that defendant was present and participated in the act which is the basis of the charge against him. Thus, the trial judge correctly denied defendant's motion to dismiss.

For these reasons, in defendant's trial, we find

No Error.

Judge HEDRICK concurs.

Judge BECTON concurs in part and dissents in part.

Judge BECTON, concurring in part and dissenting in part.

I concur in the majority's resolution of the joinder and nonsuit issues. Believing that the majority reads G.S. 15A-1025 too narrowly and, thus, thwarts the legislative purpose underlying the enactment of G.S. 15A-1025, I dissent.

The relevant statute reads:

> The fact that the defendant or his counsel and the prosecution engaged in plea discussions or made a plea arrangement may not be received in evidence against or in favor of the defendant in any criminal or civil action or administrative proceedings.

G.S. 15A-1025. Finding that "[n]o evidence of plea discussions or arrangements was offered by the State or by defendant" and "that the trial judge's statements [do not] constitute an expression of opinion . . . " the majority concludes "that no violation of G.S. 15A-1025 occurred in the present case." Ante, p. 4. In my view, the *fact* of plea discussions and plea arrangements is inadmissible in this criminal proceeding. The obvious and primary legislative concern in enacting G.S. 15A-1025 was the prejudice that occurs when a jury is told during trial that the defendant has decided to plead guilty. The vice is in telling the jury this, not in the method by which jurors are told. And even when incriminating statements are made in the course of plea negotiations by a defendant, our Supreme Court has suggested that the incriminating statements might be inadmissible if the fact of plea bargaining has been revealed. *See State v. Jenkins*, 292 N.C. 179, 188, 232 S.E. 2d 648, 654 (1977) (dictum) ("[W]e do not think that the District Attorney's questions, which tended to impeach defendant's testimony by showing a contradictory statement, would violate the provisions of the statute *unless the fact of plea bargaining was revealed.*")

In addition to my belief that the legislature intended to keep from the jury all references to prior plea negotiations, whether by introduction of formal evidence or otherwise, I believe that there are practical reasons suggesting how the defendant was prejudiced in this case. The testimony of a witness concerning plea arrangements may not be nearly as compelling as the trial judge's statement that the defendant has negotiated with the State to plead guilty and is now filling out the transcript of plea, since, in the first instance, the witness would be subjected to cross examination and the resulting balancing process by the jury to determine the weight and credibility of the testimony.

In this case, the State put on strong and compelling evidence of defendant's guilt before resting its case. The trial judge then said to the jury:

> Members of the Jury, the defendants in the case that we are trying *have negotiated* with the State to enter please [sic] to the charges that have [been] placed against them. *What they are doing right now is filling out the transcripts of pleas,* and it will take them a while *since there are six defendants. We are going to start the next case.* [Emphasis added.]

Few things could be more prejudicial than the quoted statement by the trial judge and the following statement by the trial judge which was given when the jury returned to the courtroom:

> . . . Members of the Jury, during the interim, the defendants, Joyce Ann Parker, Lorraine Cooper, Ruth Parker, Jarvis Finch, and Ronnie Parker changed their plea of not guilty to nolo contendere. Thereafter, it will be unnecessary for you to determine the guilt or innocence against those five people. In the case of Allen Melvin, the charges against him which we will pursue will be assault with attempt to inflict serious injury and common law robbery. We will proceed with those two charges against the defendant.

Although the trial court sought, commendably, only to inform the jurors of the status of the cases being tried, the trial court, inadvertently, prejudiced the defendant by his remarks.

For the reasons stated, I believe the defendant is entitled to a new trial.

LYNDA WARSKOW STORY v. RICHARD DARRELL STORY

No. 8126DC714

(Filed 1 June 1982)

1. Divorce and Alimony § 25— award of temporary custody proper—wrong statutory provision used

The trial court did not err in awarding temporary custody to the mother where the mother's verified complaint and answer to defendant's unverified answer and counterclaim set forth facts sufficient to support the trial court's conclusion that the best interest of the child would be served by placing temporary custody of the child with plaintiff; however, the court erred in entering the award of custody under the provisions of G.S. 50B-3(a)(2) and (4) since

Chapter 50B did not become effective until after the acts of violence alleged in plaintiff's complaint. The award of temporary custody could be sustained under the provisions of G.S. 50-13.5(c)(2) and (d)(2).

2. Divorce and Alimony § 25— findings of trial court insufficient to support order of permanent child custody

The trial court erred in relying exclusively on plaintiff's verified complaint and answer and in failing to hear any testimony in determining that custody of plaintiff's minor child should be permanently awarded to her, and the trial court erred in failing to make any findings of fact to sustain its conclusion that the best interest and welfare of the child would be served by granting permanent custody to plaintiff. Even if the trial judge had exercised G.S. 1A-1, Rule 37 options for defendant's failure to comply with discovery by dismissing defendant's counterclaim for custody and refusing to allow him to oppose plaintiff's custody claim as plaintiff contends the trial judge should have done, such action would not have resolved the issue of plaintiff's fitness to have custody or obviate the need for a hearing and findings of fact on that issue.

APPEAL by defendant from *Black, Judge.* Order entered 9 February 1981 in District Court, MECKLENBURG County. Heard in the Court of Appeals 10 March 1982.

Alleging that defendant had rendered such indignities upon her as to make her condition intolerable and had constructively abandoned her by forcing her and the child to flee the family home, plaintiff filed a verified Complaint on 20 June 1979 seeking a divorce from defendant, alimony and alimony *pendente lite*, custody of the minor child of the marriage, and child support.

Defendant did not respond to the Complaint until 11 February 1980 when he filed an unverified Answer and a motion asking the North Carolina court to refuse jurisdiction on the custody issue because, before being served with the pleadings in this action, defendant had filed a similar action in Nevada where he presently resides with the child. In his Answer, defendant denied the allegations of the Complaint and counterclaimed for custody of the child on grounds of alleged adultery, sexual promiscuity, emotional instability and unfitness of plaintiff to have custody of the child.

Plaintiff filed a verified Answer to defendant's Counterclaim, denying the allegations therein, except admitting that a police officer had observed her at approximately 3:55 a.m. on 25 June 1978 sitting alone in an automobile in the middle of the road pointing a pistol at her head. She alleged, however, that this incident oc-

curred as a result of defendant's constant harrassment, adultery and brutal behavior towards her. Plaintiff further asserted that the court should not refuse jurisdiction because the child's home is in North Carolina, the child being in Nevada as a result of being abducted and taken there by defendant.

Because defendant failed to answer interrogatories or to comply with plaintiff's request for production of documents, plaintiff sought an order compelling defendant to comply with discovery. On 16 October 1980 an order was entered directing defendant to respond to six of the interrogatories which the court deemed relevant to the question of jurisdiction. Defendant was further ordered to permit plaintiff to visit the child, either in Nevada or North Carolina, at defendant's expense. The cause was continued indefinitely pending a decision by the court whether to accept jurisdiction in the matter or to defer to defendant's Nevada action.

On 12 November 1980 plaintiff moved for sanctions against defendant pursuant to G.S. 1A-1, Rule 37, for defendant's continued failure to comply with discovery and for defendant's continued denial of visitation to plaintiff despite the previous court order. Plaintiff also asked that defendant be held in civil and criminal contempt of court. An order was entered on 22 December 1980 holding defendant in civil contempt of court but deferring the question of criminal contempt until after a decision by the Nevada and North Carolina courts on the question of jurisdiction.

On 18 December 1980 the District Court of Nevada declined to exercise jurisdiction in the custody suit filed there by defendant because it found North Carolina to be the more appropriate forum.

Plaintiff's North Carolina action was then set for hearing on the custody issue. The pertinent parts of the Order which was entered by the presiding judge after that hearing follow.

FINDINGS OF FACT

. . . .

5. That the Plaintiff and the Defendant are owners as tenants-by-the-entireties of a home here in Mecklenburg

County, North Carolina, said home currently being under lease.

6. That the Defendant's failure to appear or respond to the Plaintiff's discovery is clearly a willful effort to interrupt, interfere, obstruct and delay the hearing of this matter and further, that the Plaintiff's discovery, if proper response were made, would be of great benefit to this Court in its consideration of the various issues before it, as would the Defendant's personal presence be of benefit and is practically necessary to this Court's consideration of said issues, *i.e.*, *e.g.*, it is difficult to determine how this Court can properly consider the Defendant's request for custody without his presence.

. . . .

9. That the Defendant's willful actions constitute direct criminal contempt that is willfully contemptuous of this Court.

10. That the Court, without hearing evidence beyond the facts set forth hereinabove and upon a consideration of the record and arguments and statements of counsel, finds that the best interests and welfare of the child would be best served by granting temporary, as well as permanent custody to the Plaintiff.

11. That the Defendant's actions over the past eighteen (18) months in withholding the minor child from seeing or hearing from his mother is not in the child's best interests nor is the Defendant's contemptuous actions before this court.

12. That there have been allegations of domestic violence sufficient to invoke the powers granted this Court under North Carolina General Statutes Chapter 50B.

CONCLUSIONS OF LAW

. . . .

3. That the best interests and welfare of the minor child would be best served by granting custody to the Plaintiff, who is a fit and proper person to be granted his custody.

4. That the provisions, powers and remedies of North Carolina General Statutes Chapter 50B have been properly invoked.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED as follows:

. . . .

3. That under the provisions of the contempt powers of this Court, anyone having custody or physical contact of the minor child, RICHARD ROY STORY, shall immediately and without delay bring the child before this Court.

4. That the Plaintiff is hereby granted temporary and permanent custody of the minor child and the Defendant is ordered to deliver said child to her immediately.

5. That the Court hereby declares a lien against all proceeds of the rental or lease on the property located at 6526 Carsdale Place, Charlotte, North Carolina, said proceeds shall be paid to the office of the Clerk of Superior Court of Mecklenburg County, to be distributed for the benefit of said child when appropriate to do so, and at the natural termination of said rental or lease, said property shall be immediately sequestered for the sole use of the Plaintiff and the minor child.

. . . .

Defendant appeals from this order.

Reginald L. Yates for defendant appellant.

James V. Campbell, II, for plaintiff appellee.

BECTON, Judge.

Defendant excepts and assigns error to the award of custody, both temporary and permanent, and child support, in the form of sequestration of the home, to plaintiff. We address the dispositive issues.

Temporary Custody

[1] We agree with the trial court's award of temporary custody to plaintiff; however, that award cannot be sustained on the basis

of chapter 50B of the North Carolina General Statutes. This Chapter authorizes the district courts to enter such temporary orders as may be necessary to protect a spouse or a minor child from domestic violence. G.S. 50B-3(a)(2) and (4) provide that such protective orders may grant possession of the residence to a spouse, award temporary custody of minor children and order either party to make payments for the support of the minor children. These provisions are not applicable to the present case because Chapter 50B did not become effective until 1 October 1979 and applies only to acts of domestic violence occurring on or after that date. The acts of violence alleged in plaintiff's Complaint all occurred prior to its filing in June 1979.

We sustain the award of temporary custody under other statutory provisions—G.S. 50-13.5(c)(2) and (d)(2)—which give the district courts jurisdiction to enter temporary custody and support orders for minor children. Such temporary orders may even be entered *ex parte* and prior to service of process or notice. *Brandon v. Brandon*, 10 N.C. App. 457, 179 S.E. 2d 177 (1971). Affidavits may be used as a basis for such temporary orders. *In Re Custody of Griffin*, 6 N.C. App. 375, 170 S.E. 2d 84 (1969).

In the present case, the trial court had before it plaintiff's verified Complaint and verified Answer to defendant's Counterclaim setting forth facts sufficient to support the trial court's conclusion that the best interest of the child would be served by placing temporary custody of the child with plaintiff. Defendant's Answer and Counterclaim, on the other hand, were unverified, and defendant had failed to respond to plaintiff's discovery efforts. Although it would have been better for the court to set out specific findings of fact, rather than simply stating that the order was based upon a consideration of the record before it, we nevertheless affirm the award of temporary custody in view of the court's conclusion, based upon and supported by that record, that the best interests of the child would be served by placing temporary custody with plaintiff. *Cf. MacKenzie v. MacKenzie*, 21 N.C. App. 403, 204 S.E. 2d 561 (1974) (trial court may exercise jurisdiction to award temporary custody only and defer to another state court's determination of permanent custody).

Permanent Custody

[2] While the findings of the trial court are sufficient to support an order of temporary custody, they are not sufficient to support an order of permanent custody. The law is clear in this State that a judgment awarding permanent custody must contain findings of fact in support of the required conclusion of law that custody has been awarded to the person who will best promote the interest and welfare of the child. *Montgomery v. Montgomery,* 32 N.C. App. 154, 231 S.E. 2d 26 (1977). "These findings may concern physical, mental, or financial fitness or any other factors brought out by the evidence and relevant to the issue of the welfare of the child." *Steele v. Steele,* 36 N.C. App. 601, 604, 244 S.E. 2d 466, 468 (1978). Further, an award of permanent custody may not be based upon affidavits. *In Re Griffin.* Although plaintiff's verified Complaint alleged facts which tended to show that plaintiff is a fit and proper person to have permanent custody of the child, a more reliable form of evidence would have been plaintiff's sworn testimony, subject to cross examination by defendant's attorney. Such testimony was particularly necessary in this case in view of plaintiff's admission, in her Answer to defendant's Counterclaim, to past acts of erratic and emotional behavior on her part. The trial court erred in failing to hear any testimony in the matter and in failing to make any findings of fact to sustain its conclusion that the best interests and welfare of the child would be served by granting permanent custody to plaintiff.

Plaintiff argues in her brief that no findings of fact were required to support the custody award because it was entered in conjunction with the trial court's order for sanctions against defendant. Plaintiff relies upon G.S.1A-1, Rule 37(b)(2) which empowers a trial judge, as a sanction for a party's failure to make discovery, to take as established those facts which the party failed to disclose, to refuse to allow the disobedient party to oppose designated claims, to dismiss the proceeding or any part thereof and to render a judgment by default against the disobedient party. Plaintiff contends that because defendant's failure to respond to discovery or to be present at the custody hearing precluded any inquiry into his fitness for custody, his financial ability or the needs of the child, the trial court properly dismissed defendant's counterclaim for custody, refused to allow defendant to oppose plaintiff's claim for custody, and awarded custody to

plaintiff. We cannot agree with this argument. Even if the trial court exercised the Rule 37 options alleged by plaintiff, the paramount question of the best interests of the child remained unanswered. Dismissing defendant's counterclaim for custody and refusing to allow him to oppose plaintiff's custody claim did not resolve the issue of plaintiff's fitness to have custody or obviate the need for a hearing and findings of fact on that issue. *Cf. Bowes v. Bowes*, 43 N.C. App. 586, 259 S.E. 2d 389 (1979), *disc. rev. denied*, 299 N.C. 120, 262 S.E. 2d 5 (1980) (sufficient findings of fact made to support increase in alimony to plaintiff following entry of default against defendant for failure to respond to plaintiff's request for admissions).

This Cause is remanded for the trial court's reconsideration of the issue of permanent custody. Pending the trial court's appropriate disposition of permanent custody, that portion of the order awarding temporary custody is affirmed. The judgment below is

Affirmed in part, modified in part, and remanded.

Judge WELLS and Judge HILL concur.

STATE OF NORTH CAROLINA v. ARCHIE ALLEN PERKINS, JR.

No. 8118SC1179

(Filed 1 June 1982)

1. **Larceny § 4.2— *indictment—ownership of stolen property***

An indictment alleging the larceny of the personal property of "Metropolitan YMCA t/d/b/a Hayes-Taylor YMCA Branch" was fatally defective in failing to allege ownership of the stolen property in a corporation or other legal entity capable of owning property.

2. **Criminal Law § 91.7— denial of continuance to secure presence of witnesses**

The trial court did not err in failing to grant defendant's motion for a continuance in order to secure the presence of his alleged "alibi" witnesses where defense counsel had subpoenaed the witnesses for the preceding week when the case was originally calendared for trial and had been unable to locate them prior to the trial, defendant failed to show what the testimony of the potential witnesses would be or how the lack of such testimony would be prejudicial to him, and there was no evidence that the witnesses would ever be present for trial.

3. Criminal Law § 97.2— refusal to reopen case

The trial court did not abuse its discretion in refusing to permit defendant to reopen his case to testify after the court had concluded its charge to the jury and in denying defendant's motion for a mistrial when defense counsel informed the court that he had conferred with defendant while the prosecutor was arguing to the jury and defendant then expressed a desire to testify, and defendant indicated to the trial judge that he had an alibi for the date of the crime, since defendant had been given the opportunity to present evidence, and defendant did not move to reopen his case but only moved for a mistrial.

4. Criminal Law § 114.2— instructions—reference to witness as accomplice—no expression of opinion

The trial judge did not express an opinion on defendant's guilt when he referred to a State's witness as an "accomplice" where the witness by his own testimony was an admitted accomplice, and where the instruction given was only slightly different than an instruction requested by defendant.

APPEAL by defendant from *Rousseau, Judge.* Judgment entered 2 April 1981 in Superior Court, GUILFORD County. Heard in the Court of Appeals 8 April 1982.

Defendant was charged with breaking and entering into "a building occupied by Metropolitan YMCA t/d/b/a Hayes-Taylor YMCA Branch used as recreational and educational facility located at 1101 East Market Street, Greensboro, North Carolina," and the larceny of certain items, "the personal property of Metropolitan YMCA t/d/b/a Hayes-Taylor YMCA Branch having a value of One Thousand Five Hundred Seventy-eight Dollars ($1,578.00) dollars." He was found guilty as charged and appeals from a judgment of imprisonment.

Attorney General Edmisten, by Assistant Attorney General James E. Magner, Jr., for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender James H. Gold, for defendant-appellant.

HILL, Judge.

The State's evidence tends to show that on the morning of 16 January 1981, the physical and aquatics director for the Hayes-Taylor YMCA in Greensboro, Clarence Robinson, Jr., came in early to clean up and found the building "in a disorderly fashion." Subsequently, he discovered that certain items were missing from the YMCA. Robinson testified that all the missing items "were

not under my direct custody and control. Yes, some of the items I mentioned were taken from various parts of the YMCA." Although he did not present documents to show that the missing items were present at the YMCA and belonged to the YMCA, Robinson stated that he "used all of these items in [his] work at the YMCA."

Cheyenne Henryhand testified that he was present when defendant entered the YMCA building through an open window. He stated, "After [defendant] went in the window, he came down there and opened the door and I went in." The two thereafter plundered the building. Defendant presented no evidence.

[1] On appeal, pursuant to Rule 10(a) of the North Carolina Rules of Appellate Procedure, defendant argues that the count in the indictment charging him with larceny is fatally defective because it "fails to allege ownership of the property taken either in a natural person or a legal entity capable of owning property . . . . "

"An indictment for larceny which fails to allege the ownership of the property either in a natural person or a legal entity capable of owning property is fatally defective." *State v. Roberts*, 14 N.C. App. 648, 649, 188, S.E. 2d 610, 611 (1972). *Accord State v. Thompson*, 6 N.C. App. 64, 169 S.E. 2d 241 (1969). The indictment in the present case, quoted in pertinent part above, does not allege that "Metropolitan YMCA t/d/b/a Hayes-Taylor YMCA Branch" is a corporation or other legal entity capable of owning property; nor does the name indicate that it is a corporation, nor does it indicate a natural person. *See State v. Roberts, supra; State v. Thompson, supra.* Therefore, the larceny count in this indictment is fatally defective. The remainder of our opinion is directed to the breaking and entering count of the indictment.

[2] In his second argument, defendant contends that the trial judge erred in failing to grant his motion for a continuance in order to secure the presence of his alibi witnesses.

> It is well established that a motion to continue is ordinarily addressed to the trial judge's sound discretion and his ruling thereon will not be disturbed except upon a showing that he abused that discretion. [Citations omitted.] However, when a motion to continue is based on a constitu-

tional right, the question presented is a reviewable question of law.

State v. McFadden, 292 N.C. 609, 611, 234, S.E. 2d 742, 744 (1977). Since the right to present one's defense is guaranteed by the Sixth Amendment to the United States Constitution, made applicable to the States through the Fourteenth Amendment, the denial of defendant's motion in this case presents a constitutional question.

Here, defendant's counsel had subpoenaed four persons—defendant's three sisters and his girlfriend—on behalf of defendant for the preceding week, when this case originally was calendared for trial. Although they were not located, the potential witnesses told defendant they would visit him in jail the afternoon of the day the case was called for trial. The trial judge ordered the bailiff to "call the jail and tell that if the people come inquiring of [defendant] to send them over here to the courthouse immediately," and denied defendant's motion. Defendant's counsel wrote to the potential witnesses and investigated their whereabouts through the public defender's office to no avail.

Other than characterizing them as "alibi" witnesses, defendant has not shown what the potential witnesses' testimony would be, nor has defendant shown how the lack of such testimony would be prejudicial to him. In addition, there is no evidence that defendant's sisters and girlfriend would ever be present for trial. *See State v. Davis*, 38 N.C. App. 672, 248 S.E. 2d 883 (1978). We conclude that under these circumstances, and since defendant's counsel subpoenaed the potential witnesses for the preceding week and still was unable to locate them when the case was called for trial despite the additional efforts of the trial judge, denial of the motion for a continuance was not error. This assignment of error is overruled.

[3] In his next argument, defendant contends that the trial judge erred in refusing to reopen the case at his request. After the judge had concluded his charge to the jury, defendant's counsel informed the judge that he had conferred with defendant while the prosecutor was arguing to the jury and defendant then expressed a desire to testify. Defendant addressed the trial judge as follows:

> See, Your Honor, at the time this happened, I had gotten the bus ticket the 10th of January and left the 14th and came back on the 17th. And that Sunday morning the police came in threatening me, talking about they are going to shoot if I didn't open the door, and a whole lot of my rights have been violated.

Defendant's counsel thereafter moved for a mistrial, which was denied.

It is well settled that ruling on a motion for mistrial in a criminal case rests largely in the trial judge's discretion. *State v. McCraw*, 300 N.C. 610, 268 S.E. 2d 173 (1980); *State v. Mills*, 39 N.C. App. 47, 249 S.E. 2d 446 (1978), *disc. rev. denied*, 296 N.C. 588, 254 S.E. 2d 33 (1979). "The judge must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, . . . resulting in substantial and irreparable prejudice to the defendant's case." G.S. 15A-1061. Of course, it is also within the trial judge's discretion to reopen a case and hear further evidence. G.S. 15A-1226(b). *See State v. Shelton*, 53 N.C. App. 632, 281 S.E. 2d 684 (1981). However, there is no constitutional right to have a case reopened. *Id.*

The record in the present case reveals that defendant was given an opportunity to present evidence, that he was available, and that he could have been called to testify on his own behalf. When the events summarized above unfolded, defendant did not move to reopen his case, but only moved for a mistrial. Under these circumstances, the trial judge did not abuse his discretion by refusing to allow defendant to reopen his case and testify and by denying defendant's motion for a mistrial. This assignment of error is overruled.

[4] Finally, defendant argues that the trial judge expressed an opinion on defendant's guilt when he stated that Henryhand was an "accomplice." Defendant requested, but the trial judge did not give, the following instruction:

> There is evidence which tends to show that the witness, Cheyenne Henryhand, was an *accomplice* in the commission of the crime charged in this case. An accomplice is a person who joins with another in the commission of a crime. The accomplice may actually take part in acts necessary to ac-

complish the crime or he may knowingly help or encourage another in the crime, either before or during its commission. An accomplice is considered by the law to have an interest in the outcome of the case. You should examine every part of the testimony of this witness with the greatest care and caution. If, after doing so, you believe his testimony in whole or in part, you should treat what you believe the same as any other believable evidence.

(Emphasis added.) The judge did instruct the jury as follows:

> Now, there is evidence in this case which shows that Cheyenne Henryhand was an *accomplice* in the commission of this crime; that is, the breaking or entering and larceny from the YMCA.
>
> An accomplice is a person who joins with another in the commission of a crime. An accomplice may actually take part in the acts necessary to accomplish the crime, or he 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. (And since Mr. Henryhand was an *accomplice,*) . . . you should examine every part of his testimony with the greatest care and caution.

(Emphasis added.)

By his own testimony, Henryhand was an admitted accomplice. We agree with the State that there is only a slight difference in the requested instruction and the instruction given by the trial judge. There is no error in the instruction given. This assignment of error likewise is without merit.

For the above reasons, our disposition of this case is as follows:

As to the count of larceny, judgment is

Arrested.

As to the count of breaking and entering, we find

No Error.

Judges HEDRICK and BECTON concur.

GARVIE LEE, JR. v. ROBERT HENRY JENKINS, JR.

No. 816DC939

(Filed 1 June 1982)

Judgments § 25; Rules of Civil Procedure § 60.2— failure to relieve plaintiff from judgment erroneous

In a negligence action in which plaintiff sought damages from defendant and defendant answered and counterclaimed for damages from plaintiff, the trial judge erred in failing to set aside the verdict for defendant under Rule 60(b)(1) after being advised that plaintiff's counsel was in superior court in an adjoining county and that counsel was leaving to come a distance of 85 miles for trial of the case sub judice in district court. Rule 3 of the General Rules of Practice for the Superior and District Courts, adopted pursuant to G.S. 7A-34, gives priority to superior court over district court when an attorney has conflicting engagements, and having been advised of the conflicts of plaintiff's counsel with superior court, the trial judge should have held the case open a sufficient length of time for counsel to safely travel 85 miles from one courthouse to another.

Judge HEDRICK dissenting.

APPEAL by plaintiff from *Long, Judge.* Judgment entered 21 April 1981 in District Court, BERTIE County. Heard in the Court of Appeals 27 April 1982.

Thomas L. Jones for plaintiff-appellant.

Pritchett, Cooke & Burch, by Stephen R. Burch, for defendant-appellee.

HILL, Judge.

Plaintiff's complaint alleges that defendant, through his son, was negligent in the operation of a tractor which the latter drove through a stop sign and into plaintiff's automobile, then operated by his wife, causing damage to the automobile. Defendant

answered and denied plaintiff's allegations, alleged contributory negligence and last clear chance, and counterclaimed for damages to the tractor.

When the case was called for trial, the record reveals that neither plaintiff nor his counsel was present; defendant and his counsel were present, however. The trial judge stated, "We will proceed, Mr. Burch, with your counterclaim. After plaintiff being called and there being no response and his counsel not being present, this matter is hereby dismissed with prejudice." Defendant then presented evidence on his counterclaim, and the judge charged the jury. After a twenty minute deliberation, the jury returned and announced its verdict finding plaintiff contributorily negligent and awarding defendant $3,000. Then, apparently the son of plaintiff's counsel addressed the trial judge as follows:

MR. JONES: Your Honor, may I be heard.

THE COURT: Yes, Mr. Jones.

MR. JONES: I give notice of appeal, your Honor. I'd also like to make a motion at this time.

THE COURT: All right, sir. I'll be delighted to hear from you.

MR. JONES: I'd like to make a motion to set aside the verdict based on excuse (unintelligible) from the fact that my father was tied up in criminal Superior Court this morning and that he tried to get over here and that he got hung up over there.

THE COURT: Motion is denied. Anything else, sir?

Judgment for defendant thereupon was entered, and plaintiff gave notice of appeal.

Plaintiff has set out in the record ten assignments of error but he has brought forward and argued in his brief only Assignment of Error Nos. 1,4,5,9, and 10. Therefore, Assignments of Error Nos. 2,3,6,7, and 8 are deemed abandoned.

By Assignment of Error Nos. 1, 4, 5, and 9, plaintiff contends that the trial judge erred in proceeding with the trial in his absence and in the absence of his counsel and in denying his motion "to set aside the verdict based on excuse (unintelligible) from

the fact that my father was tied up in criminal Superior Court this morning and that he tried to get over here and that he got hung up over there." Although this motion is not in form a motion for relief from a final judgment under Rule 60(b) of the North Carolina Rules of Civil Procedure, it is such in substance, and we will treat it accordingly.

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) Mistake, inadvertence, surprise, or excusable neglect . . . . " Upon hearing such a motion, it is the duty of the trial judge to make findings of fact and to determine from such facts whether the movant is entitled to relief from a final judgment. *Hoglen v. James*, 38 N.C. App. 728, 248 S.E. 2d 901 (1978); *Wynnewood Corp. v. Soderquist*, 27 N.C. App. 611, 219 S.E. 2d 787 (1975). This the trial judge did not do, and this is error.

Although not appearing in the record, it is contended by plaintiff and conceded by defendant in their briefs that the trial judge ordered a telephone call placed to the office of plaintiff's counsel, advising him that the case was ready for trial. Upon being notified that plaintiff's counsel was in superior court in an adjoining county, the judge ordered that plaintiff's counsel be called there. The trial jduge then was advised that counsel was leaving to come to Bertie County, a distance of 85 miles, for trial of the case *sub judice*.

Rule 3 of the General Rules of Practice for the Superior and District Courts, adopted pursuant to G.S. 7A-34, concerning applications for a continuance, states: "When an attorney has conflicting engagements in different courts, priority shall be as follows: Appellate Courts, Superior Court, District Court, Magistrate's Court."

Having been advised of the conflict by plaintiff's counsel with superior court, the trial judge should have held the case open a sufficient length of time for counsel to safely travel 85 miles from one courthouse to another. Certainly, the judge was aware of the presence of plaintiff's counsel in an adjoining county when the son of plaintiff's counsel advised the judge of his whereabouts as set out in that portion of the record quoted above. On the facts found within the record itself, the judge could have stricken his order

dismissing plaintiff's claim and ordered a mistrial on defendant's counterclaim. His power to so act is well established: "During the term a judgment is in fieri and the court has power prior to the expiration of the term to modify, amend, or set aside the judgment . . . notwithstanding notice of appeal." 8 Strong's N.C. Index 3d Judgments § 6, p. 19, and cases cited therein.

Plaintiff has not had his day in court. At the very least, he should have an opportunity to show excusable neglect and a meritorious defense on his Rule 60(b) motion in a proper hearing. *See Wynnewood Corp. v. Soderquist, supra.* For these reasons, the order dismissing plaintiff's claim and the judge's denial of plaintiff's motion to set aside defendant's verdict on the counterclaim are vacated and the cause is remanded for a hearing on plaintiff's relief under Rule 60(b).

Vacated and remanded.

Judge BECTON concurs in the result.

Judge HEDRICK dissents.

Judge HEDRICK dissenting.

"There is a presumption in favor of the regularity and validity of judgments in the lower court, and the burden is upon appellant to show prejudicial error." *London v. London,* 271 N.C. 568, 570, 157 S.E. 2d 90, 92 (1967). Plaintiff has appealed from the order dismissing his claim and the judgment for defendant on the counterclaim. These two judgments are presumed to be regular and valid, and the burden is on the plaintiff on appeal to show prejudicial error. This, in my opinion, he has failed to do.

With respect to the order dismissing plaintiff's claim, the majority has inexplicably vacated that order without any reference to the appeal and to the well-established rule that the order of Judge Long is presumed to be valid and proper. Rule 3 of the General Rules of Practice for the Superior and District Courts, "adopted pursuant to G.S. 7A-34," and the citation of 8 Strong's N.C. Index 3d, Judgments § 6 are wholly irrelevant to the order dismissing plaintiff's claim. The majority seems to say Judge Long had no authority to dismiss plaintiff's claim when he failed

to appear and prosecute. With this, I disagree. Because the plaintiff has failed to show error, and because the record discloses that the order is valid and proper, I vote to affirm the order dismissing plaintiff's claim.

The judgment for defendant on the counterclaim is also presumed to be valid and proper, and the majority has not said there was error in the trial resulting in the judgment on the counterclaim. I also find no prejudicial error in the trial of defendant's counterclaim. The majority seems to leave that judgment intact, and I agree.

With respect to the incongruous decision of the majority remanding the "cause" for a "hearing on plaintiff's relief under Rule 60(b)," I am confounded. In his determination to impress on the trial court his perception of fair treatment for plaintiff's lawyer and to give the plaintiff his "day in court" without regard to the well-established rules of substance and procedure, my esteemed colleague seems to have strained at a gnat and swallowed a camel. To remand the cause and order the trial court to treat the remarks of "Mr. Jones" as a Rule 60(b)(1) motion, and at the same time in essence tell the judge what facts to find and how to rule on the motion taxes my imagination as I am sure it must the imagination and credulity of the able chief district judge of the Sixth Judicial District. The plaintiff excepted to and assigned as error the denial of "Mr. Jones' " motion to set aside the "verdict" on the counterclaim. The majority decision ignores this assignment of error. The remarks of "Mr. Jones" can at best be characterized as a motion to set aside the verdict. The record does not even disclose that "Mr. Jones" was a party or representing the plaintiff or that he had any right to make any motion. The remarks were made before judgment was entered and were directed to the verdict. The motion, if it can be characterized as such, was not in writing and did not recite the number of the rule pursuant to which it was made. Since the plaintiff assigned the denial of the motion as error, it should have been handled by the majority in the appeal, and I vote to find no error in the denial of such motion.

Finally, the plaintiff had ample opportunity after the judgments were entered to make any number of post-trial and post-judgment motions including a Rule 60(b)(1) motion to be

relieved from the order dismissing his claim and the judgment on the counterclaim. He chose not to do so but to appeal to this Court immediately.

STATE OF NORTH CAROLINA v. JOHNNY BOYD TANN

No. 814SC980

(Filed 1 June 1982)

1. **Assault and Battery § 15.6— self-defense— failure to correlate evidence to reasonableness of defendant's apprehension**

In a prosecution for assault with a deadly weapon with intent to kill in which defendant claimed self-defense and there was evidence that the victim had threatened defendant's life on two occasions, the trial court erred in failing to instruct the jury as to the bearing that evidence that the victim was a violent and dangerous man might have had on the reasonableness of defendant's apprehension of death or great bodily harm.

2. **Assault and Battery § 15.6— defendant as aggressor—unavailability of self-defense—erroneous instruction**

The trial court in a felonious assault case erred in instructing the jury that self-defense was unavailable to the defendant if he was the aggressor where there was no evidence that defendant was the aggressor.

3. **Assault and Battery § 13— reputation of victim for violence—exclusion of evidence not error**

The trial court in a felonious assault prosecution did not err in limiting the scope of defense counsel's cross-examination of a police officer concerning the victim's reputation in the community for violence where no evidence of self-defense had been introduced at that time, and the court's ruling did not preclude questions regarding this subject at a later time.

APPEAL by defendant from *Barefoot, Judge.* Judgment pronounced 21 May 1981 in Superior Court, DUPLIN County. Heard in the Court of Appeals 1 March 1982.

Defendant was tried for assault with a deadly weapon inflicting serious injury. The evidence adduced at trial showed that defendant twice shot the victim, Michael Faison, during a scuffle on 13 July 1980.

Defendant and Faison were second cousins. Defendant, in the early summer of 1980, did mechanical work on Faison's automobile, but a dispute arose between the men concerning the

adequacy of the repairs. Defendant at trial recounted an incident that occurred approximately a week before the shooting in which Faison, displaying a straight razor, said: "I should hit you anyway," and "Don't mess with me, boy, I'll put a pill in you." Defendant further testified that he was forced out of his truck by Faison on the evening of 13 July 1980. Defendant said Faison brandished a pistol, pushed him against the truck, threatened him and demanded his paycheck. Faison admitted that he had a gun, but denied making it visible to defendant.

Defendant and a friend, minutes after the initial confrontation that evening, went to a convenience store in the Town of Faison called the "Friendly Mart". Michael Faison also arrived at the store and purchased gasoline. Faison approached defendant and resumed their quarrel. Faison concealed a pistol in his back pocket. He grabbed defendant and pushed him against a car. The men struggled. Defendant said that he pushed Faison back and twice shot him with a .38 caliber pistol when it appeared Faison was reaching for a gun. The first bullet entered Faison's shoulder and severed his spinal chord. There was evidence that the second bullet entered the victim's jaw as he lay on the ground, paralyzed by the first shot.

Defendant did not deny the shooting; rather, he claimed that he acted in self defense. The jury was instructed regarding self defense.

Defendant was found guilty of assault with a deadly weapon inflicting serious injury. He appeals from an order of imprisonment.

Attorney General Edmisten, by Assistant Attorney General Roy A. Giles, Jr., for the state.

Appellate Defender Adam Stein, by Assistant Appellate Defender Nora B. Henry, for defendant appellant.

MORRIS, Chief Judge.

[1] Defendant by his first assignment contends that the trial court committed reversible error by failing to instruct the jury regarding what circumstances should be considered in determining the reasonableness of defendant's apprehension of death or great bodily harm.

The reasonableness of the apprehension must be determined by the jury on the basis of all facts and circumstances as they appeared to defendant at the time of the shooting. *State v. Ellerbe*, 223 N.C. 770, 28 S.E. 2d 519 (1944).

> Among the circumstances to be considered by the jury are the size, age and strength of defendant's assailant in relation to that of defendant; the fierceness or persistence of the assault upon defendant; whether the assailant had or appeared to have a weapon in his possession; and the reputation of the assailant for danger and violence.

State v. Clay, 297 N.C. 555, 563, 256 S.E. 2d 176, 182 (1979). The trial judge told the jurors that " . . . it is for you, the jury, to determine the reasonableness of the defendant's belief from the circumstances as they appeared to him at the time." He did not, however, relate any of the circumstances enumerated in *Clay* that are to be considered in examining reasonableness.

> The chief object contemplated in the charge of the judge is to explain the law of the case, to point out the essentials to be proved on the one side and on the other, *and to bring into view the relation of the particular evidence adduced to the particular issue involved. Bird v. U.S.*, 180 U.S. 356, 45 L.Ed., 570.

(Emphasis added.) *State v. Sutton*, 230 N.C. 244, 247, 52 S.E. 2d 921, 923 (1949), *quoting State v. Friddle*, 223 N.C. 258, 25 S.E. 2d 751 (1943). It has been held that failure to correlate evidence indicating that a victim was a dangerous and violent fighting man with a defendant's plea of self defense, is error. *State v. Rummage*, 280 N.C. 51, 185 S.E. 2d 221 (1971), *State v. Riddle*, 228 N.C. 251, 45 S.E. 2d 366 (1947), *State v. Powell*, 51 N.C. App. 224, 275 S.E. 2d 528 (1981); *State v. Hall*, 31 N.C. App. 34, 228 S.E. 2d 637 (1976); *State v. Covington*, 9 N.C. App. 595, 176 S.E. 2d 872 (1970). Specific incidents tending to show the dangerous and violent character of the victim may be introduced. *State v. Johnson*, 270 N.C. 215, 154 S.E. 2d 48 (1967). Defendant testified that Faison indicated he would "put a pill in defendant" a week before the shooting, and there was evidence that Faison threatened defendant's life on the evening of 13 July before either party arrived at the scene of the shooting. When evidence tending to show the dangerous and violent character of a victim is introduced, the

court, even in the absence of a request, should instruct the jury as to the bearing defendant's knowledge thereof might have on his reasonable apprehension of death or great bodily injury. *State v. Rummage, supra; State v. Powell, supra; State v. Hall, supra.* Though the trial judge related in his summary some evidence that Faison had threatened defendant prior to the shooting, he failed to establish a relation between the previous incidents and defendant's claim of self defense; indeed, he did not directly explain and apply the law of self-defense to any of the evidence except to say that the jury "should consider . . . [w]hether or not Michael Faison had a weapon in his pocket." This was error.

Our courts, upon finding error in the failure of trial courts to correlate evidence of the victim's dangerous and violent character, have frequently deemed such error nonprejudicial and have declined to order a new trial. *State v. Rummage, supra; State v. Powell, supra; State v. Hall, supra; State v. Cole,* 31 N.C. App. 673, 230 S.E. 2d 588 (1976). We find error in the court's dereliction, but consider it unnecessary to determine whether that error alone demands that defendant be given a new trial, because defendant's second assignment, singly and in conjunction with the first, points to prejudice and grounds for reversal.

[2] Defendant contends that the trial court erred in its instructions to the effect that self defense was unavailable to the defendant if he was the aggressor. Defendant makes this assertion because the testimony of both victim and defendant point to Faison as the initial assailant.

It is clear that Faison approached defendant at the Friendly Mart, grabbed him by the shirt, and pushed him. However,

> . . . the right of self defense is only available to a person who is without fault, and if a person voluntarily, that is aggressively and willingly, enters into a fight, he cannot invoke the doctrine of self-defense unless he first abandons the fight, withdraws from it and gives notice to his adversary that he has done so.

(Citations omitted.) *State v. Marsh,* 293 N.C. 353, 354, 237 S.E. 2d 745, 747 (1977). There is no conflict of evidence as to which of the parties was the aggressor. Defendant did not start the fight. He was clearly entitled to, and did receive, an instruction on self

defense. He was, however, prejudiced by the further instruction that he could not avail himself of the doctrine of self defense if "he, Johnney Tann, used excessive force *or was the aggressor.*" See *State v. Ward*, 26 N.C. App. 159, 215 S.E. 2d 394 (1975); see *State v. Miller*, 223 N.C. 184, 25 S.E. 2d 623 (1943). We said in *Ward*, a case in which the record revealed no evidence of aggression on the defendant's part, that

> [T]here is no evidence in the record that the defendant was the aggressor . . . . Since the jury found the defendant guilty . . . , it seems likely . . . that the jury believed the defendant acted in self defense but used excessive force or that he, the defendant, was the aggressor.

State v. Ward, supra at 163, 215 S.E. 2d at 396-97. We went on to say that it could not be assumed

> . . . that the jury was more discriminating than the judge and ignored the erroneous instruction while applying the correct one.

Id. We there held, as we do here, that the error in giving the instruction regarding aggression was prejudicial.

The state urges upon us that defendant, who anticipated the confrontation, armed himself with a .38 caliber pistol, and failed to avoid the fight, was somehow responsible for causing the altercation. These observations do not in any way suggest that defendant was the provocator, however. See *State v. Spaulding*, 298 N.C. 149, 257 S.E. 2d 391 (1979).

[3] Defendant, by his third and final assignment, asserts that a ruling by the trial court limiting the scope of counsel's cross examination of Officer Alton Ray King of the Faison Police Department regarding Michael Faison's reputation in the community for violence, was erroneous. We disagree. Faison's character was not relevant unless there was evidence tending to show that the assault was committed in self defense. *State v. Turpin*, 77 N.C. 473 (1877).

> [I]n assault cases . . . when the defendant pleads and offers evidence of self defense, he may then offer . . . evidence tending to show the bad general reputation of his . . . assailant as a violent and dangerous fighting man . . . .

Nance v. Fike, 244 N.C. 368, 373, 93 S.E. 2d 443, 446 (1956). Counsel asked Officer King about Faison's reputation for violence before any evidence on the issue of self defense was introduced. Therefore, the court's ruling was proper, and did not preclude questioning regarding the subject at a later time.

We find merit in defendant's first and second assignments and accordingly must order a

New trial.

Judge VAUGHN concurs.

Judge HEDRICK concurs in result.

MARY R. (MATTHEWS) HOLT, EDGECOMBE BANKING AND TRUST COMPANY, CO—EXECUTORS OF THE ESTATE OF D. G. MATTHEWS, JR. v. MARK G. LYNCH, SECRETARY OF REVENUE OF THE STATE OF NORTH CAROLINA

No. 812SC1031

(Filed 1 June 1982)

Taxation § 27— interest on estate and inheritance taxes—not deductible as "cost of administration"

Interest on late federal estate and North Carolina inheritance taxes are not deductible as "costs of administration" under G.S. § 105-9(8) since the preemptive coverage of interest on estate and inheritance taxes is under G.S. § 105-9(5) and G.S. § 105-241.1(il), and the combined effect of those statutes does not provide for the deductibility of federal estate or North Carolina inheritance taxes.

Judge BECTON concurring in part and dissenting in part.

APPEAL by plaintiffs from *Reid, Judge.* Judgment entered 26 June 1981 in Superior Court, MARTIN County. Heard in the Court of Appeals on 6 May 1982.

This appeal arises out of the plaintiff co-executors' action to recover a refund of State inheritance tax paid by the estate of D. G. Matthews, Jr., who died testate on 26 March 1976. The relevant facts, the truth of which was stipulated by all parties, are as follows:

The taxpayer, the estate of D. G. Matthews, Jr., was liable on the federal estate tax in the total principal amount of $1,016,981.05, and, according to returns filed in 1977 and 1979, was liable on the North Carolina inheritance tax in the principal amount of $406,206.61 (such amount including a late payment penalty). With respect to the federal estate tax, the taxpayer incurred in fiscal year 1979 an additional liability for interest in the total amount of $64,272.95; this interest was the sum of (1) the interest which accrued on a late payment of that portion of the taxpayer's principal estate tax liability which was not payable in installments, and (2) the interest which accrued in 1979 on the unpaid balance of the taxpayer's federal estate tax liability, such balance being payable at the taxpayer's election in ten annual installments pursuant to I.R.C. § 6166. With respect to the North Carolina inheritance tax, the taxpayer incurred an additional liability in 1979 for interest which accrued in fiscal year 1979 in the total amount of $16,726.20; this interest represents an amount incurred by the taxpayer's late payment of a portion of his principal State inheritance tax liability. The taxpayer also paid to D. G. Matthews & Son, Inc., in fiscal year 1979, interest in the amount of $13,728.04; this interest arose on certain loans made to the taxpayer by D. G. Matthews & Son, Inc., such funds being borrowed by the taxpayer to pay some of the outstanding estate and inheritance tax liability.

The total amount of interest paid by the taxpayer in 1979 was $94,879.65. Plaintiffs now seek to reduce the taxable value of the Matthews estate by the aforementioned amount of interest paid in 1979, claiming that such amount was a deductible cost of administration of the estate; plaintiffs further claim that upon such reduction, they will be entitled to a refund of inheritance tax previously overpaid, in the amount of $6,710.94. Finally, the parties have stipulated the following with respect to the interest payments at issue:

> For purposes of accepting the annual and final accounts of the Estate of D. G. Matthews, Jr., pursuant to N.C.G.S. §§ 28A-21-1 and 28A-21-2, the Clerk of Superior Court of Martin County, acting in her capacity as Judge of the Probate Court, has audited and approved the distribution and expenditure of the taxpayer's (estate's) assets, including the interest expense incurred by the taxpayer in deferring pay-

ment of estate and inheritance taxes as stated herein and in borrowing funds from D. G. Matthews & Son, Inc. during 1979. By such audit and approval, the Clerk has accepted such expenses as being reasonably necessary for the benefit of the estate.

From summary judgment for defendant dismissing plaintiffs' claim, plaintiffs appealed.

Auley M. Crouch, III, and Jeff D. Batts, for plaintiff appellants.

Attorney General Rufus L. Edmisten, by Assistant Attorney General George W. Boylan, for the defendant appellee.

HEDRICK, Judge.

We note at the outset that plaintiffs are claiming as deductions, in calculating the State inheritance tax, the following interest expenditures: (1) interest paid on the estate's federal estate tax liability; (2) interest paid on the State inheritance tax liability; and (3) interest paid on money borrowed to pay the federal estate and State inheritance taxes; plaintiffs seek to deduct these expenditures as "costs of administration" of the estate. At oral argument, both parties agreed that, for the purposes of their deductibility in calculating State inheritance tax liability, there is no distinction in the treatment of the three kinds of interest expenditures at issue. We agree with the "all or nothing at all" theory of the parties, i.e. if any one of the kinds of interest at issue is deductible as a "cost of administration," then they all are, but if any one is not, none is.

With respect to the interest paid on the estate and inheritance taxes, the following statutes, each appearing within the same Subchapter, are relevant:

> In determining the clear market value of property taxed under this Article, or schedule [which is entitled "Inheritance Tax"], the following deductions, and no others shall be allowed:
>
> . . .
>
> (5) Estate and inheritance taxes paid to other states, and death duties paid to foreign countries.

. . .

(8) Costs of administration, including reasonable attorneys' fees.

G.S. § 105-9;

"Tax" . . . for the purposes of this Subchapter . . . include[s] penalties and interest, as well as the principal amount of such tax . . . .

G.S. § 105-241.1(il).

Under plaintiffs' argument, interest on late federal estate and North Carolina inheritance taxes would be deductible as costs of administration; by an extension of reasoning, interest on late estate and inheritance taxes paid to other states would also be deductible under the "costs of administration" provision, since such interest expenses paid to other states are qualitatively similar to interest paid on federal estate and North Carolina inheritance taxes. Hence, plaintiffs' rationale leads to the conclusion that if the deductibility of "costs of administration" were revoked by the legislature, interest on liability for other state's inheritance and estate taxes would be nondeductible. Upon such a revocation, however, such interest would still be deductible, since the deductibility of the estate's liability for other state's estate and inheritance taxes also includes, by virtue of G.S. § 105-241.1(il), the interest thereon. The deductibility of interest on estate and inheritance taxes, therefore, must arise out of the combined effect of G.S. § 105-9(5) and G.S. § 105-241.1(il). Furthermore, the principle that "words of a statute are not to be deemed merely redundant if they can reasonably be construed to add something to the statute which is in harmony with its purpose," *see Schofield v. Great Atlantic & Pacific Tea Co.*, 299 N.C. 582, 590, 264 S.E. 2d 56, 62 (1980), would be violated if G.S. § 105-9(5) and G.S. § 105-241.1(il) provided for a deduction which already existed under G.S. § 105-9(8). Hence, the required non-redundant construction of G.S. § 105-9 is that the deductibility of interest on estate and inheritance taxes arises out of *and only out of* G.S. § 105-9(5) and G.S § 105-241.1(il), and not out of G.S. § 105-9(8). G.S. § 105-9(5), however, does not provide for the deductibility of federal estate or North Carolina inheritance taxes, and, hence, for the deductibility of the interest thereon. Federal estate taxes and

presumably the interest thereon, were deductible under the former N.C. Gen. Stat. § 105-9(e) (1950), but such deductibility was repealed in 1957 N.C. Sess. Laws Ch. 1340, § 1 and is still not permitted under the present G.S. § 105-9(5). G.S. § 105-9(5) also does not allow the deductibility of North Carolina inheritance taxes, and, hence, of the interest thereon. The statutory scheme of G.S. § 105-9 does not permit the plaintiffs to deduct the interest on the federal estate and North Carolina inheritance tax liabilities.

Plaintiffs have argued that it is stipulated that the interest on those liabilities was incurred in their execution of their duties under G.S. § 28A-13-2 to settle the decedent's estate with as little sacrifice of the estate's value as is reasonable under the circumstances, and, hence, that such interest should be deductible as "costs of administration" under G.S. § 105-9(8). As discussed above, however, G.S. § 105-9(8) is unavailing for plaintiffs' interest owed on the federal estate and North Carolina inheritance taxes, because of the preemptive coverage of interest on estate and inheritance taxes under G.S. § 105-9(5) and G.S. § 105-241.1(il). This bar on deductibility based on statutory construction, however, is not applicable to interest which accrued on something other than estate and inheritance tax liability, to wit, on funds borrowed to pay such taxes. Plaintiffs could argue that such interest, which also was incurred as "being reasonably necessary for the benefit of the estate," could hardly fail to be characterized, given ordinary understandings of language, as a "cost of administration." The parties, however, have agreed that each kind of interest payment at issue should receive identical treatment in terms of their deductibility, and, hence, the interest on borrowed funds is also not deductible as a cost of administration.

Since this case presented only a question of law arising on undisputed facts, and the law has been resolved in favor of defendant, the court's granting of summary judgment for defendant is

Affirmed.

Judge HILL concurs.

Judge BECTON concurs in part and dissents in part.

Judge BECTON, concurring in part and dissenting in part.

I concur in the majority's analysis relating to interest paid on the federal estate tax liability and the State inheritance tax liability. From the majority's resolution of the issue relating to interest expense on funds borrowed to pay estate and inheritance taxes, I dissent.

Plaintiff's assertion that it was "reasonably necessary for the benefit of the estate" to borrow money to pay taxes and plaintiff's argument that the interest paid on money borrowed to pay the federal estate and State inheritance taxes are compelling. I do not agree with the "all or nothing at all" theory (ante, p. 3); no statute cited by the majority mandates such a result. The fact that the parties "have agreed that each kind of interest payment at issue should receive identical treatment . . . [and that] the interest on borrowed funds is also not deductible as a cost of administration" (ante, p. 6) is not controlling. In my view, summary judgment should not have been granted on the issue of whether the interest expense on borrowed funds is deductible as a cost of administration.

STATE OF NORTH CAROLINA v. ANSON JACOBS

STATE OF NORTH CAROLINA v. HAMP JACOBS

No. 813SC1038

(Filed 1 June 1982)

1. **Criminal Law § 92.1— consolidation of charges against the two defendants—time for motion**

A motion for joinder of charges against two defendants made at the beginning of the trial was made in apt time, and the trial court properly allowed the motion where the two defendants were charged with crimes of the same class growing out of the same criminal transaction.

2. **Assault and Battery § 14.4; Weapons and Firearms § 3— felonious assault—discharging firearm into occupied vehicle—sufficiency of evidence**

The State's evidence was sufficient for the jury on issues of defendant's guilt of assault with a deadly weapon with intent to kill inflicting serious injury and discharging a firearm into an occupied vehicle where it tended to

show that defendant joined another in arranging a meeting with the victim, carrying guns to the place of the meeting, and waiting in ambush for the victim, and that he fired the initial shot at the victim's car, notwithstanding a shot fired by the other person actually struck the victim while he was riding in the back seat of the car.

3. **Criminal Law § 112.2— charge on reasonable doubt**

The trial court's instruction that a reasonable doubt is a fair doubt based on reason and common sense "generated by the insufficiency of the evidence" encompassed failure to prove guilt not only by the absence of inculpatory evidence but also by lack of persuasiveness of the evidence presented and was a sufficient statement of the law.

4. **Criminal Law § 113.7— failure to instruct on "mere presence"**

The trial court was not required to instruct the jury that the mere presence of a person at the scene of a crime is not enough to constitute aiding and abetting or acting in concert where defendant made no request for such an instruction, and where the evidence established defendant's active participation in the crimes charged.

5. **Assault and Battery § 14.4; Weapons and Firearms § 3— felonious assault—discharging firearm into occupied vehicle—guilt as aider and abettor**

The State's evidence was sufficient for the jury on issues of defendant's guilt of assault with a deadly weapon with intent to kill inflicting serious injury and discharging a firearm into an occupied vehicle where it tended to show that defendant was present when arrangements were made by telephone for defendant and his two companions to meet the victim to settle a dispute; defendant threatened the victim over the telephone; defendant drove his companions to the meeting place; defendant waited in the car while his two companions positioned themselves by the road; defendant's two companions fired shots at the car in which the victim was riding and shots by one of the companions struck the victim; and defendant drove his companions away after the shooting.

APPEAL by defendants from *Brown, Judge.* Judgment entered 12 May 1981 in Superior Court, CARTERET County. Heard in the Court of Appeals 3 March 1982.

Defendants were indicted for assault with a deadly weapon with intent to kill inflicting serious injury, and for discharging a firearm into an occupied vehicle. The state's evidence tended to show that James Graham was shot in the back by John Haskett while Graham was riding in a Pinto automobile near the Mill Creek Community in Carteret County. Defendants Hamp and Anson Jacobs and Haskett had fought with Raymond and James Graham at the Luck Now Tavern. Hamp Jacobs and James Graham were asked to leave the bar. Evidence was adduced in-

dicating that Haskett, Anson and Hamp Jacobs later that evening telephoned Raymond Graham, Jr.'s home and arranged a meeting with the Grahams at the Old Tram Road to settle their dispute. Haskett and the Jacobs proceeded to the Tram Road in a blue Chevrolet Nova automobile driven by Anson Jacobs, where they parked on the shoulder of the highway.

John Haskett, testifying pursuant to a plea bargain, stated that he and Hamp Jacobs took rifles from the Jacobs's residence to the Tram Road meeting place. Haskett exited the vehicle and stationed himself in the ditch beside the road. Hamp Jacobs went to the other side of the road. Haskett said that Anson Jacobs crawled over the front seat, into the back seat, and down on the floorboard of the Nova. Haskett then observed a Pinto station wagon belonging to Raymond Graham, Jr. approach the area. The car passed him, then turned around and came back towards him. Raymond Graham, Jr., testified that he saw Hamp Jacobs standing beside the road holding a gun. He saw Jacobs point the gun at the car and fire a shot, before the vehicle turned around. Haskett stood up out of the ditch and shot at the back of the car as the automobile passed from the opposite direction. James Graham was seated in the right rear of the automobile. Haskett's fire hit Graham in the back, paralyzing him. Anson Jacobs drove Haskett and Hamp Jacobs away from the scene.

Defendants were found guilty of assault with a deadly weapon inflicting serious injury and of discharging a firearm into an occupied vehicle. From orders of imprisonment, defendants appeal.

Attorney General Edmisten, by Jo Anne Sanford, Special Deputy Attorney General, and Steven F. Bryant, Associate Attorney, for the state.

Carl L. Tilghman for defendant appellant Anson Jacobs.

Wheatly, Wheatly and Nobles, Jr., by John E. Nobles, Jr., for defendant appellant Hamp Jacobs.

MORRIS, Chief Judge.

Defendant Anson Jacobs argues three assignments of error. Defendant Hamp Jacobs presents seven assignments, four of which are brought forward. We will first consider the contentions

of the defendant Hamp Jacobs, then those of codefendant Anson Jacobs.

Defendant Hamp Jacob's Appeal

We call defendant's attention to the requirements of the North Carolina Rules of Appellate Procedure. Rule 28(b)(3) requires that in appellant's brief each question shall be separately stated, followed immediately by a reference to the assignments of error and exceptions pertinent to the question identified by the pages of the Record on which they appear. The fact that we consider the questions on their merit rather than dismissing the appeal is not to be taken as any indication that counsel can expect this charitable treatment in the future.

[1] Defendant argues that the court committed prejudicial error in allowing the state to join his case for trial with that of Anson Jacobs, because the state's motion for joinder came too late. He asserts, citing the case of *State v. Moore*, 41 N.C. App. 148, 254 S.E. 2d 252 (1979), that the motion was required to have been made at arraignment.

Defendants were charged with crimes of the same class, growing out of the same criminal transaction. Consolidation of the trials was proper. *State v. Mourning*, 4 N.C. App. 569, 167 S.E. 2d 501 (1969). The motion for joinder made at the beginning of trial was also in apt time. See *State v. Slade*, 291 N.C. 275, 229 S.E. 2d 921 (1976). *Moore* is inapposite, as it dealt with joinder of cases pending against the same defendant and is not authority for the proposition that a motion to consolidate the trials of more than one defendant must be made at arraignment.

[2] Defendant next contends that the court erred in submitting to the jury the issue of his guilt over motion to dismiss, as there was insufficient evidence of his commission of the offenses charged. He maintains that no evidence was adduced to show that anyone but John Haskett fired on the Pinto station wagon, but Raymond Graham, Jr.'s testimony belies that position. Moreover, a defendant who enters into a common design for a criminal purpose is deemed a party to every act done by others in furtherance of such design. *State v. Lovelace*, 272 N.C. 496, 158 S.E. 2d 624 (1968). The trial judge charged that

> for a person to be guilty of a crime, it is not necessary that he himself do all of the things necessary to constitute the crime.
>
> If two or more persons act together with a common purpose to commit an assault with a deadly weapon with intent to kill inflicting serious injury, or to discharge a firearm into an occupied vehicle, each of them is held responsible for the acts of the other done in the commission of the assault with a deadly weapon with intent to kill inflicting serious injury, or discharging a firearm into an occupied vehicle.

There was plenary evidence that Hamp Jacobs joined Haskett in arranging the meeting at the Tram Road, carrying guns to the place of ambush, and lying in wait, and that he fired the initial shot. Though the evidence suggests that Haskett actually wounded James Graham, defendant could be found equally guilty of the shooting. See *State v. Smith*, 221 N.C. 400, 20 S.E. 2d 360 (1942). The motion to dismiss was properly denied and the case correctly submitted to the jury

[3] Defendant argues that the court erred in its instruction on reasonable doubt.

> The court stated:
>
> . . . the burden is on the State to satisfy the jury from the evidence and beyond a reasonable doubt of their guilt.
>
> A reasonable doubt is not a mere possible doubt, for most things that relate to human affairs are open to some possible or imaginary doubt.
>
> A reasonable doubt is a fair doubt based on reason and common sense *generated by the insufficiency of the evidence.*

Defendant asserts that the instruction does not allow for the possibility that a reasonable doubt could be engendered by the evidence presented, only by the absence thereof.

It is well settled that the failure of a trial judge to define the term "reasonable doubt", absent a request, is not error, *State v. Potts*, 266 N.C. 117, 145 S.E. 2d 307 (1965); and "if he undertakes the definition he is not limited to the use of an exact formula." *State v. Shaw*, 284 N.C. 366, 374, 200 S.E. 2d 585, 590 (1973). A

definition that is in substantial accord with previously approved definitions will be deemed sufficient. *Id.* We call defendant's attention to *State v. Brackett*, 218 N.C. 369, 11 S.E. 2d 146 (1940), in which the Court held an instruction that referred to doubt "generated by insufficiency of proof" to be in substantial compliance with its decisions and without error. We hold that the trial judge's use of the phrase "generated by insufficiency of the evidence" renders his charge virtually identical to the instructions in *Brackett* and that it encompasses failure to prove guilt not only by the absence of inculpatory evidence, but by lack of persuasiveness of the evidence presented. In other words, the charge, when read as a whole, fully and fairly stated the law.

Defendant urges upon us the view that the court committed error in its charge by merging two "incompatible" offenses and giving inappropriate instructions regarding common purpose. Defendant was convicted of felonious assault with a deadly weapon inflicting serious bodily injury, and of discharging a firearm into an occupied vehicle. Defendant does not explain upon what basis he considers the offenses incompatible, nor can we divine his reasoning.

[4] The judge's instructions concerning common purpose were entirely appropriate. One may be found guilty of an offense if he was present at the scene of the crime and the evidence shows that he was acting together with another who did the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime. *State v. Cox*, 303 N.C. 75, 277 S.E. 2d 376 (1981), *State v. Joyner*, 297 N.C. 349, 255 S.E. 2d 390 (1979). Defendant complains that the trial judge failed to instruct the jury that "mere presence of a person at the scene of a crime is not enough to constitute aiding and abetting, or acting in concert." There is nothing in the record to indicate that defendant requested an instruction on the insufficiency of mere presence at the scene to establish complicity, nor need we determine whether the trial court was obligated to so instruct, as the evidence outlined above shows more than Hamp Jacobs's presence, and points to his active participation in the shooting. A charge pertaining to "mere presence" was simply not required. *State v. Brower*, 289 N.C. 644, 224 S.E. 2d 551 (1976).

Defendant Anson Jacobs's Appeal

[5] Defendant first assigns error to the trial court's denial of his motion for dismissal at the close of the evidence presented by the state and renewed at the close of all the evidence. He assigns error to the denial, arguing that the body of facts adduced was insufficient to sustain his conviction. We hold, on the contrary, that there was ample evidence from which the jury could find complicity in the crime.

The evidence, taken in the light most favorable to the state, shows that defendant drove his companions to the meeting place on the Tram Road, where he parked. He waited in the car while John Haskett and Hamp Jacobs positioned themselves by the road, and he conveyed them away after the shooting. The evidence shows that he was present when the fighting occurred at the Luck Now Tavern and when arrangements were made to meet at the Tram Road. Furthermore, James Graham, Jr., testified that he spoke with defendant on the telephone, and that defendant said to "come down the road, him and Hamp was going to get me and my brother had John to deal with." This evidence would permit the jury to find that defendant Anson Jacobs was present at the scene of the crime, that he shared in the criminal intent of Haskett and Hamp Jacobs, and that he rendered assistance to them in the perpetration of the offense. *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976); *see State v. Birchfield*, 235 N.C. 410, 70 S.E. 2d 5 (1952).

In defendants' trial and the judgments rendered, we find

No error.

Judges HEDRICK and VAUGHN concur.

STATE OF NORTH CAROLINA v. STEVE EDWARD HALL

No. 8126SC1072

(Filed 1 June 1982)

1. **Larceny § 8— abandonment of property subject to larceny—failure to instruct proper**

In a prosecution for misdemeanor larceny in which defendant was charged with taking stainless steel pots and pans from a building which had burned eight days previously, evidence that defendant observed other people in the building after the fire, along with contradictory evidence as to the physical condition of the personal property, was not sufficient to create a basis for the legitimate belief that the property had been abandoned, and the trial court properly refused to submit to the jury defendant's requested instructions that he would not be guilty of larceny if he believed the property had been abandoned.

2. **Larceny § 6— evidence of insurance on building not relevant to larceny conviction**

In a prosecution for larceny in which defendant was charged with taking property from a burned building, the trial court did not err in refusing to permit defendant to question a witness by voir dire with respect to the insurance that he had on the building and its contents since the extent of the fire insurance obtained prior to the fire was immaterial to the issue of whether the property has any value and since the issue was substantially answered elsewhere in the evidence.

3. **Larceny § 7.3— evidence of ownership—no variance between warrant and proof**

In a prosecution for larceny the trial court did not err in denying defendant's motion to dismiss on the ground that the evidence of ownership was at variance from the allegation of ownership in the charging warrant.

APPEAL by defendant from *Strickland, Judge.* Judgment entered 12 February 1981 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 9 March 1982.

Following a plea of guilty in District Court, defendant appealed and was tried in Superior Court for misdemeanor larceny. The State presented James P. Kaperonis who testified that he owned a place of business at 3519 Wilkinson Boulevard which is sometimes known as the Cabaret Club. On 19 October 1980 his building was damaged by fire to the extent that only the walls remained standing at the street level, with the basement level being left virtually intact. Shortly thereafter Kaperonis posted "No Trespassing" signs and secured the building by nailing plywood

over the openings on the west side leading to the basement so that the building could not be entered unless the plywood was pried off. These security measures were taken in order to protect a basement storeroom containing restaurant equipment. In the late afternoon of 27 October 1980, Kaperonis went to the Cabaret to check on the building as he had been doing twice a day. When he arrived he saw the defendant walking up the basement steps with approximately twelve stainless steel cooking and serving trays valued at $30 to $60 each. Kaperonis ordered the defendant to stop but he attempted to drive off in his car. Kaperonis fired his gun in the air and held defendant at gunpoint for twenty minutes until the police arrived. The trunk of defendant's car was found to be loaded with more trays from the storeroom and lying beside the basement door were large trays loaded with stainless steel items from the same room. Kaperonis testified that the trays were in new condition and were not dented, melted or smoke damaged in any way since the fire did not reach the storeroom where they were kept. Kaperonis stated that he never gave the defendant permission to enter his building or remove any items from it.

Defendant testified that he watched the fire at the Cabaret Club on 19 October and when he passed by at a later date, the building seemed like it had been completely destroyed and he saw people entering and exiting the building. Defendant admitted entering the building on 27 October and removing items for scrap metal. He stated that the items were either rusted or fire damaged and he thought the property had been abandoned. Defendant testified that he had gathered the property from all parts of the restaurant and did not break down the door or take off plywood to get the trays. Defendant stated that he did not notice any "No Trespassing" signs on the building.

Officer Richard M. Bumgardner testified that upon his arrival he noticed that the doors on the street level of the building had been boarded up in the past with a piece of plywood which had been torn off. He described the items in defendant's possession as being heavily damaged.

Defendant was found guilty of misdemeanor larceny. From imposition of an active prison sentence, he appealed.

Attorney General Edmisten, by Associate Attorney Wilson Hayman, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Marc D. Towler, for defendant-appellant.

ARNOLD, Judge.

[1] Defendant first argues that the trial judge erred in refusing to submit to the jury his requested instruction that he would not be guilty of larceny if he believed the property had been abandoned. Defendant is correct that property which has been abandoned by the owner cannot be the subject of larceny. See *State v. Hathaway,* 150 N.C. 798, 63 S.E. 892 (1909). The owner of personal property may relinquish his ownership by abandoning the property and thereafter title passes to the first person who next takes possession. The party relying on the defense of abandonment must affirmatively show by clear, unequivocal and decisive evidence the intent of the owner to permanently terminate his ownership of the disputed property. *State v. West,* 293 N.C. 18, 235 S.E. 2d 150 (1977).

We do not believe the evidence presented in this record would support an instruction on abandoned property. A mere eight days after defendant saw the building in question damaged by fire, he was found carrying away personal property from that building which had been boarded up and posted. The mere fact that defendant observed other people in the building after the fire, along with contradictory evidence of the physical condition of the personal property, is not enough to create a basis for the legitimate belief that the property had been abandoned. Where specific instructions requested are not supported by the evidence, the trial judge does not err in failing to give such instructions verbatim or in substance. *State v. Parrish,* 2 N.C. App. 587, 163 S.E. 2d 523 (1968), *rev'd on other grounds,* 275 N.C. 69, 165 S.E. 2d 230 (1969).

[2] Defendant next contends the trial judge erred in refusing to permit him to further question James Kaperonis after cross-examination by voir dire with respect to the insurance that he had on the building and its contents in an effort to determine whether he was fully compensated for the contents, and to determine whether the contents of the building had any remaining

value after the fire. Although other grounds for error in the court's ruling are brought forward in appellant's brief, since these were not advanced during the trial to be ruled upon by the trial judge, we do not reach these arguments for decision on appeal. *State v. Wilson*, 237 N.C. 746, 75 S.E. 2d 924 (1953).

We find no reversible error in the court's ruling on the ground which was offered at trial. Defendant is correct that the better practice is for the trial judge to allow counsel to make an offer of proof when requested. *State v. Stanfield*, 292 N.C. 357, 233 S.E. 2d 574 (1977). However, where the evidence is immaterial or substantially appears elsewhere in the record, there is no prejudicial error. *State v. Chapman*, 294 N.C. 407, 241 S.E. 2d 667 (1978). The "market value" of a stolen item is the criterion used to determine the worth of personal property which was the subject of a larceny. *State v. Dees*, 14 N.C. App. 110, 187 S.E. 2d 433 (1972). Here, Mr. Kaperonis testified that the stainless steel trays found in defendant's possession had a value of $30 to $60 each. Also defendant himself introduced into evidence his former statement to the police that he had taken the pots and pans in order to sell them for scrap metal at an aluminum plant. The extent of fire insurance obtained prior to the fire was immaterial to the issue of whether the property had any value. Furthermore, this issue was substantially answered elsewhere in the evidence. We find no error in the trial judge's ruling.

[3] Defendant argues that the court erred in denying his motion to dismiss where the evidence of ownership was at variance from the allegation of ownership in the charging warrant. We do not agree. In pertinent part, the warrant read as follows:

> And on or about the 27th day of OCTOBER 1980, in the county named above, the defendant named above after having unlawfully, willfully, and feloniously broken into and entered a building occupied by THE CABARET, PRIVATELY OWNED BY JAMES P. KAPERONIS used as PLACE OF BUSINESS located at 3519 WILKINSON BLVD., CHARLOTTE, N.C. with the intent to commit the felony of larceny, did unlawfully, willfully, and feloniously steal, take and carry away STAINLESS STEEL POTS AND PANS (KITCHEN UTENSILS) the personal property of THE CABARET having a value of $200.00 dollars in violation of G.S. 14-72.

We find no fatal variance. At trial, James Kaperonis testified that he was the owner of the building called the Cabaret Club and the property inside of that building. Since the warrant states in the same sentence that the stolen goods were "the personal property of THE CABARET" and that the Cabaret was "PRIVATELY OWNED BY JAMES P. KAPERONIS [and] used as a PLACE OF BUSINESS located at 3519 WILKINSON BLVD., CHARLOTTE, N.C.," we cannot see how defendant was misled as to the ownership of the property in question or in any way hampered in his defense. *State v. Greene*, 289 N.C. 578, 223 S.E. 2d 365 (1976).

Similarly, we also find no merit in defendant's argument that the warrant was defective because it did not allege ownership in a natural person or a legal entity capable of owning property. The warrant refers to the owner of the stolen property as "the Cabaret" which was described as "privately owned by James P. Kaperonis," obviously alleging a proprietorship capable of owning property. We find no error.

No error.

Judges CLARK and WEBB concur.

STATE OF NORTH CAROLINA v. RICKY J. SIMMONS

No. 8112SC1138

(Filed 1 June 1982)

1. Burglary and Unlawful Breakings § 5.9— breaking or entering of business premises—sufficiency of evidence

The State's evidence was sufficient to support conviction of defendant for breaking or entering of a warehouse where it tended to show that eight freezers were missing from the warehouse; a window was broken at the back of the warehouse and its screen was knocked down; footprints found around the window and on boxes that were stacked at the window closely resembled the pattern of defendant's shoes; defendant told undercover officers that a freezer he was attempting to sell had come from a break-in that he had participated in at the warehouse; and a freezer from the warehouse was recovered by officers pursuant to undercover contacts with defendant.

2. Larceny § 7.2— identity of stolen property—variance between indictment and proof

There was a fatal variance between indictment and proof where the indictment charged the larceny of eight "Imperial, heavy duty freezers, Serial Numbers: 02105, 02119, 01075, 01951, 02024, 02113, 02138, 02079" and the evidence showed that a freezer recovered by the police was an Imperial freezer with the serial number "W210TSSC-030-138."

APPEAL by defendant from *Clark, Judge.* Judgment entered 7 May 1981 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 6 April 1982.

Defendant was charged with breaking or entering and the felonious larceny of "eight (8) Imperial, heavy duty freezers, Serial Numbers: 02105, 02119, 01075, 01951, 02024, 02113, 02138, 02079, the personal property of Southern Food Service, Inc., in the custody and possession of Patterson Storage Warehouse Company, Inc., a corporation . . .." He was convicted as charged and appeals from a judgment of imprisonment.

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

Appellate Defender Adam Stein, by Assistant Appellate Defender Nora B. Henry, for defendant-appellant.

HILL, Judge.

On 12 August 1980, Hooper Hall, the manager of the "Patterson Storage Warehouse, which is an agent for Mayflower," discovered that some freezers which were stored in his warehouse were missing. He found broken glass in one of the windows at the back of the warehouse and its screen knocked down. There were footprints around the broken window and on some boxes stacked at the window that were similar to the bottoms of defendant's shoes. Hall testified that there were eight freezers missing, all "manufactured by White and maybe had a name brand of Imperial . . .." He said that about a week later one of the freezers was recovered. "[I]t had the general appearance, the same name brand, the same design, that it was white like the rest of ours and it had the name brand 'Imperial' on it and the serial number on the freezer matched the serial number on the list that we inventoried our freezers by."

Arthur Mitchell, Jr., and George H. Lewis, police undercover officers, testified that they met with defendant and another person on 14 August 1980 to arrange to purchase "some freezers that [defendant] had for sale." They discussed the terms of the sale and proceeded to 2230 Delta Drive in Fayetteville, where the freezer was located. Before they arrived at Delta Drive, Mitchell testified that defendant "stated that the freezer had come from a break in that he had participated in on, . . . at the Mayflower Warehouse and that they were for sale." They were unable to pick up the freezer at that time, however. Later that evening, the officers obtained a search warrant for the residence and outbuildings at 2230 Delta Drive and seized a 21 cubic foot freezer, serial number "#W210TSSC-030-138."

Defendant argues that the trial judge erred in denying his motions to dismiss because the evidence was insufficient to show that the seized property was the stolen merchandise and because the proof on that issue fatally varied from the indictment.

When a defendant moves for dismissal in a criminal action, the trial judge must consider the evidence in the light most favorable to the State, take it as true, and give to the State the benefit of every reasonable inference to be drawn therefrom. If there is evidence, direct or circumstantial or both, from which a jury could find that the offense charged had been committed and that defendant committed it, the motion to dismiss should be denied. *State v. Green*, 295 N.C. 244, 244 S.E. 2d 369 (1978); *State v. McNeil*, 280 N.C. 159, 185 S.E. 2d 156 (1971).

Although defendant's conviction cannot be sustained upon a "naked extrajudicial confession,"

> it is equally well settled that if the State offers into evidence sufficient extrinsic corroborative circumstances as will, when taken in connection with an accused's confession, show that the crime was committed and that the accused was the perpetrator, the case should be submitted to the jury.

State v. Thompson, 287 N.C. 303, 324, 214 S.E. 2d 742, 755 (1975), *death sentence vacated*, 428 U.S. 908, 96 S.Ct. 3215, 49 L.Ed. 2d 1213 (1976). *Accord State v. Green, supra.*

[1] In the present case, aside from defendant's confession to Mitchell and Lewis, the State presented evidence that a window was

broken at the back of the warehouse and its screen was knocked down. Footprints found around the window and on boxes that were stacked at the window were identified by one of the investigating officers as "closely resembl[ing]" the pattern of defendant's shoes. Further, there is evidence that a freezer from the warehouse was recovered by officers pursuant to undercover contacts with defendant. When coupled with defendant's statement, these "extrinsic corroborative circumstances" are sufficient for a jury to infer that the breaking or entering charged was committed and that defendant committed it.

[2] However, we agree with defendant that there is a fatal variance in the larceny count of the indictment and in the proof at trial of specifically what item or items were taken. In North Carolina, "[i]t is the settled rule that the evidence in a criminal case must correspond with the allegations of the indictment which are essential and material to charge the offense. [Footnote omitted.] The indictment controls the prosecution, and evidence not supported by the indictment is unavailing." 7 Strong's N.C. Index 3d, Indictment and Warrant § 17, p. 162.

> The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense.

Berger v. United States, 295 U.S. 78, 82, 55 S.Ct. 629, 630, 79 L.Ed. 1314, 1318 (1935). However, " '[a] variance will not result where the allegations and proof, although variant, are of the same legal signification.' [Citations omitted.] An immaterial variance in an indictment is not fatal." *State v. Craft*, 168 N.C. 208, 212, 83 S.E. 772, 774 (1914). *Accord State v. Moore*, 284 N.C. 485, 202 S.E. 2d 169 (1974).

> "Generally speaking, to constitute larceny there must be a wrongful taking and carrying away of the *personal property* of another without his consent, and this must be done with felonious intent; that is, with intent to deprive the owner of his property and to appropriate it to the taker's use fraudulently."

State v. Bowers, 273 N.C. 652, 655, 161 S.E. 2d 11, 14 (1968), *quoting State v. Griffin*, 239 N.C. 41, 45, 79 S.E. 2d 230, 232 (1953)

(emphasis added). *Accord State v. Perry*, 21 N.C. App. 478, 204 S.E. 2d 889 (1974). It is elementary that a material element in an indictment charging the offense of larceny is the identification of the "personal property" taken and carried away. Thus, a variance in the indictment and proof at trial in this regard is a material variance; further, such is a fatal variance if it hampers defendant's ability to defend himself on the charge at trial and does not insure that defendant will be protected from another prosecution for the same offense. *See Berger v. United States, supra.*

In the present case, defendant was charged in the larceny count of the indictment with taking "eight (8) Imperial, heavy duty freezers, Serial Numbers: 02105, 02119, 01075, 01951, 02024, 02113, 02138, 02079, the personal property of Southern Food Service, Inc., in the custody and possession of Patterson Storage Warehouse Company, Inc., a corporation . . .." However, the officers' inventory of the property seized at 2230 Delta Drive described a 21 cubic foot freezer, serial number "#W210TSSC-030-138." Although there is evidence that Hall matched the name brand, general appearance, and even the serial number of the recovered freezer with one of those on his inventory, the evidence only discloses that the serial number of that freezer is #W210TSSC-030-138." We can discern no proof at trial that defendant took any of the freezers identified by the serial numbers in the indictment quoted above. Under these circumstances, the *Berger* requirements have not been met. Thus, there being a fatal variance in the indictment and proof at trial on the larceny count, defendant's motion to dismiss that charge should have been granted.

For the reasons stated above, our disposition of this case is as follows:

As to the count of larceny, judgment is

Reversed.

As to the count of breaking or entering, we find

No error.

Judges HEDRICK and BECTON concur.

Leonard v. Johns-Manville Sales Corp.

MARIE R. LEONARD, ADMINISTRATRIX OF THE ESTATE OF SAMUEL L. LEONARD, DECEASED v. JOHNS-MANVILLE SALES CORPORATION, A DELAWARE CORPORATION; UNARCO INDUSTRIES, INC., AN ILLINOIS CORPORATION; GAF CORPORATION, A DELAWARE CORPORATION; ARMSTRONG CORK COMPANY, A PENNSYLVANIA CORPORATION; RAYBESTOS-MANHATTAN, INC., A CONNECTICUT CORPORATION; OWENS-CORNING FIBERGLAS CORPORATION, A DELAWARE CORPORATION; PITTSBURGH CORNING CORPORATION, A PENNSYLVANIA CORPORATION; THE CELOTEX CORPORATION, A DELAWARE CORPORATION; NICOLET INDUSTRIES, A PENNSYLVANIA CORPORATION; FORTY-EIGHT INSULATION, INC., AN ILLINOIS CORPORATION; EAGLE-PICHER INDUSTRIES, INC., AN OHIO CORPORATION; STANDARD ASBESTOS & INSULATION CO., A MISSOURI CORPORATION; OWENS-ILLINOIS, INC., AN OHIO CORPORATION; H. K. PORTER, A PENNSYLVANIA CORPORATION; NATIONAL GYPSUM CO., A DELAWARE CORPORATION; FIBREBOARD CORPORATION, A DELAWARE CORPORATION; GARLOCK, INC., A FOREIGN CORPORATION; KEENE CORPORATION, A NEW JERSEY CORPORATION; NORTH AMERICAN ASBESTOS CORPORATION, A FOREIGN CORPORATION; CAREY CANADIAN MINES, LTD., A FOREIGN CORPORATION; LAKE ASBESTOS OF QUEBEC, LTD., A FOREIGN CORPORATION; AMATEX CORPORATION, A PENNSYLVANIA CORPORATION; SOUTHERN ASBESTOS COMPANY

No. 8114SC1020

(Filed 1 June 1982)

Appeal and Error § 6.2; Attorneys at Law § 2— denial of attorney's motion for admission pro hac vice—appeal from order premature

An order of a trial judge denying plaintiff's motion to reconsider an order in which the judge denied an attorney's motion for admission pro hac vice was an interlocutory order and was not immediately appealable under N.C.G.S. 1-277(a) or 7A-27(b). Furthermore, where the court in its discretion denies a motion for admission of counsel pro hac vice such order does not involve a substantial right and is not appealable as a matter of right. N.C.G.S. 84-4.1.

APPEAL by plaintiff from *Braswell, Judge.* Orders entered 26 May 1981 in Superior Court, DURHAM County. Heard in the Court of Appeals 5 May 1982.

Plaintiff seeks to appeal from the order of the trial court denying her motion for the admission of out-of-state counsel pro hac vice pursuant to N.C.G.S. 84-4.1. On 24 February 1981, Ronald L. Motley, a South Carolina attorney, applied to the superior court for permission to appear in this case on behalf of plaintiff. Judge Braswell denied this motion, in his discretion, on 4 March 1981. Plaintiff did not except to this ruling or enter notice of appeal.

On 16 March 1981, plaintiff renewed the motion that attorney Motley be admitted pro hac vice, and alternatively requested the court to reconsider its order of 4 March 1981. Judge Braswell, in open court, denied plaintiff's motion to reconsider the order of 4 March 1981. This order was later reduced to writing and filed 29 May 1981.

By notice of appeal filed 4 June 1981, plaintiff seeks review of the court's order of 26 May 1981. Plaintiff also seeks to review the orders of the court admitting three out-of-state attorneys pro hac vice as counsel for defendants.

Haywood, Denny & Miller, by George W. Miller, Jr. and Michael W. Patrick, for plaintiff.

Crossley & Johnson, by John F. Crossley, for defendant Johns-Manville Sales Corporation.

Smith, Moore, Smith, Schell & Hunter, by McNeill Smith and Gerard H. Davidson, Jr., for defendant Raybestos-Manhattan, Inc.

Poisson, Barnhill & Britt, by Donald E. Britt, Jr., for defendant Owens-Corning Fiberglas Corporation.

C. K. Brown, Jr. for defendant The Celotex Corporation.

Maupin, Taylor & Ellis, by Armistead J. Maupin and Richard M. Lewis, for defendant Eagle-Picher Industries, Inc.

MARTIN (Harry C.), Judge.

Although plaintiff argues that on 26 May 1981 Judge Braswell again denied attorney Motley's motion for admission pro hac vice, the record on appeal does not sustain that contention. It is clear that Judge Braswell only denied plaintiff's alternative motion to reconsider the order of 4 March 1981. Plaintiff did not except to the order of 4 March 1981, and plaintiff's notice of appeal is only directed to the order of 26 May 1981.

The order of Judge Braswell denying plaintiff's motion to reconsider the order of 4 March 1981 is an interlocutory order and is not immediately appealable. *Stanback v. Stanback*, 287 N.C. 448, 215 S.E. 2d 30 (1975); *Veazey v. Durham*, 231 N.C. 357, 57 S.E. 2d 377 (1950); *Pack v. Jarvis*, 40 N.C. App. 769, 253 S.E. 2d 496 (1979). It does not come within the statutory appeals in N.C.G.S. 1-277(a) or 7A-27(d).

The court's ruling did not affect a substantial right of plaintiff. The motion to reconsider the prior order of the court was addressed solely to the discretion of the court and is not reviewable unless there has been an abuse of discretion. *Veazey, supra; Dworsky v. Insurance Co.*, 49 N.C. App. 446, 271 S.E. 2d 522 (1980). No such abuse appears in the record on appeal. We note that plaintiff is represented by the able law firm of Haywood, Denny & Miller of Durham, North Carolina. Moreover, three members of Mr. Motley's South Carolina firm of Blatt and Fales have already been admitted pro hac vice as counsel for plaintiff in this case. It appears that plaintiff has a plethora of distinguished counsel representing her.

Furthermore, where the court in its discretion denies a motion for admission of counsel pro hac vice, as Judge Braswell did here, such order does not involve a substantial right and is not appealable as a matter of right. This is so because parties do not have a right to be represented in the courts of North Carolina by counsel who are not duly licensed to practice in this state. Admission of counsel in North Carolina pro hac vice is not a right but a discretionary privilege. N.C. Gen. Stat. § 84-4.1 (1981); *In re Smith*, 301 N.C. 621, 272 S.E. 2d 834 (1981). "It is permissive and subject to the sound discretion of the Court." *State v. Hunter*, 290 N.C. 556, 568, 227 S.E. 2d 535, 542 (1976), *cert. denied*, 429 U.S. 1093, 51 L.Ed. 2d 539 (1977).

We are not inadvertent to *Holley v. Burroughs Wellcome Co.*, 56 N.C. App. 337, 289 S.E. 2d 393 (1982). In *Holley*, the Court did not consider whether the appeal was interlocutory, and it is not precedent establishing a right of appeal from an order denying a petition for admission of counsel pro hac vice.

The statement in *Hagins v. Redevelopment Comm.*, 275 N.C. 90, 102, 165 S.E. 2d 490, 498 (1969), that "[n]ormally, a litigant has a fundamental right to select the attorney who will represent him in his lawsuit . . . ." was not made in the context of a proceeding pursuant to N.C.G.S. 84-4.1. In *Hagins* plaintiff contested the appointment of a guardian ad litem to represent her, alleging that as a result she was deprived of the control of her lawsuit. The *Hagins* statement (referred to in *Holley*) is not authority for the proposition that a litigant has a right to be represented in

the courts of North Carolina by counsel who are not duly licensed to practice in this state.

The United States Constitution does not protect pro hac vice proceedings. Procedural due process is not required in the granting or denial of petitions to practice pro hac vice in the courts of another state. *Leis v. Flynt*, 439 U.S. 438, 58 L.Ed. 2d 717, *rehearing denied*, 441 U.S. 956, 60 L.Ed. 2d 1060 (1979). Mr. Motley is not duly licensed as an attorney by the State of North Carolina. Plaintiff has no right to be represented by Mr. Motley in this case. This being so, it follows that no substantial right of plaintiff was involved in the court's ruling on 26 May 1981. This also applies to plaintiff's objections to the orders allowing counsel to appear pro hac vice for defendants.

Appeal dismissed.

Chief Judge MORRIS and Judge CLARK concur.

BLANCHE BROOKS v. FLORENCE I. FRANCIS AND LAWRENCE BROTHERS COMPANY, (INC.)

No. 8110SC624

(Filed 1 June 1982)

Landlord and Tenant §§ 8.2, 8.3— injury to tenant—negligent failure to repair—contributory negligence by tenant

In an action to recover for injuries suffered by plaintiff tenant when the rear steps of the leased premises collapsed, plaintiff's forecast of evidence was sufficient to show negligence by defendants, the landlord and her managing agent, in permitting defective steps to remain on the premises when they knew, or in the exercise of ordinary care should have known, that the steps were in disrepair. However, plaintiff's forecast of evidence also showed that she was contributorily negligent as a matter of law in using the rear steps where it tended to show that plaintiff had lived at the leased premises for some eight years; plaintiff was 67 years old and had trouble walking; plaintiff knew of the condition of the steps, considered them dangerous, and made numerous complaints about them; plaintiff was injured when she left her house by the back door to hang clothes; and plaintiff knew that she could walk to the rear yard by using the front steps and that this alternate route was completely safe.

Brooks v. Francis

APPEAL by plaintiff from *Bailey, Judge*. Judgment pronounced 17 March 1981 in Superior Court, WAKE County. Heard in the Court of Appeals 10 February 1982.

Plaintiff alleged that for many months prior to 9 June 1978 she had been a tenant at 305 South Swain Street in Raleigh. Defendant Francis was the owner of the rental house, but the property was managed by defendant, Lawrence Brothers Company. Plaintiff alleged that on 9 June 1978, she was injured when she went out the back door of the residence on Swain Street and used the rear steps, which collapsed. Plaintiff had lodged several complaints with defendant Lawrence Brothers Company regarding the dangerous condition of the steps. Although Lawrence Brothers Company had painted the steps, it failed to make any substantial repairs. The complaint alleged that "[t]he Plaintiff due solely to the failure and neglect of the Defendant Lawrence Brothers, imputed to the Defendant Francis, to properly repair said rear steps and keep same in a safe condition, after complaint, as required by law, including N.C.G.S. 42-42, did cause the Plaintiff to fall and from which fall she received severe and permanent injuries. . . ." Plaintiff sought $25,000 in damages. Defendants filed an answer denying the breach of any duty to repair the steps and keep them in a safe condition, and asserting plaintiff's contributory negligence.

Both defendants moved for summary judgment. Plaintiff moved for summary judgment against defendants on all issues except the amount of damages.

Plaintiff, 67, testified by deposition that she had lived at 305 South Swain Street for nearly eight years. She had trouble walking and used a cane. She testified that the steps had been shaking for some time and that she had notified Lawrence Brothers Company of their condition on several occasions.

The house had a set of steps in the front, as well. The front steps were made of cement and were not dangerous. Plaintiff testified that she left her house by the back to hang clothes on the day she was injured, admitting that she could have used the front steps and gone around the side of the house to reach the backyard.

Evidence adduced by affidavits of the parties tended to show that the back stairs were repaired in the spring of 1977. John C.

Lawrence, President of defendant Lawrence Brothers Company, averred that the Company made necessary repairs to the back porch and steps, inspected the steps and found them to be in good condition. Plaintiff made no further complaint to Lawrence Brothers Company until after she fell, and defendant Lawrence Brothers Company was not aware of any defects in the steps at the time of plaintiff's fall. Plaintiff stated by her affidavit that following the repairs, the steps again became unsteady. She complained to an employee of Lawrence Brothers Company every time she paid the rent, but no repairs were made until after her fall. Defendant Francis, by affidavit, denied having received any notice of defective conditions on the property prior to 9 June 1978.

Plaintiff appeals from a grant of summary judgment in favor of defendants and denial of her motion for partial summary judgment.

Vaughan S. Winborne for plaintiff appellant.

Lassiter and Walker, by James H. Walker, for defendant appellee Florence I. Francis.

Johnson, Patterson, Dilthey and Clay, by Dan M. Hartzog, for defendant appellee, Lawrence Brothers Company, Inc.

MORRIS, Chief Judge.

Defendants argue, citing the common law, that summary judgment was appropriate in that they owed no duty to repair or warn plaintiff of the defective condition of the steps, and alternatively, that plaintiff was contributorily negligent as a matter of law by using the rear stairs, which she knew to be dangerous. We hold that defendants did indeed bear a duty to repair, but that plaintiff was contributorily negligent as a matter of law, barring recovery.

The rule of caveat emptor has been commonly applied by the courts of this state in the landlord tenant context. Until recently landlords have had no duty to make repairs, and have not been held liable for personal injury caused by failure to repair. *Robinson v. Thomas*, 244 N.C. 732, 94 S.E. 2d 911 (1956); *Fields v. Ogburn*, 178 N.C. 407, 100 S.E. 583 (1919). The passage of the Residential Rental Agreements Act, G.S. 42-38 to 44, created a

new standard of care owed by landlord to tenant in North Carolina, however.

> § 42-42. *Landlord to provide fit premises.*—(a) The landlord shall:
>
> . . .
>
> (2) Make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable 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.

The common law precedent cited by defendants for the proposition that a landlord is under no duty to keep rented premises in repair in the absence of an agreement relating to repairs is, because of the Act, inapposite. We have said that, "[b]y providing that a violation of statute does not constitute negligence per se, the General Assembly left intact established common law standards of ordinary and reasonable care . . . (Citations omitted.)" *Lenz v. Ridgewood Associates*, 55 N.C. App. 115, 119-20, 284 S.E. 2d 702, 705 (1981). A violation of the duty to maintain the premises in a fit and habitable condition is, therefore, evidence of negligence. See *O'Neal v. Kellett*, 55 N.C. App. 225, 284 S.E. 2d 707 (1981). We do not find those cases concerning duty to warn and negligent repair cited by defendants pertinent to the matter at hand, as G.S. 42-42(a)(2) imposes not a duty to warn, but to correct unfit conditions, see *Lenz v. Ridgewood Associates*, supra, and because repair of the rear steps negligently done was not alleged by plaintiff.

Applying ordinary rules of negligence, the evidence before the Court tends to show that defendants allowed the defective steps to remain on the premises, and that the steps created an unsafe structural defect and failed to provide the service and protection for which they were intended. It may also be gleaned from

the evidence that defendant Francis and her agent Lawrence Brothers Company knew, or in the exercise of ordinary care should have known, that the steps were in disrepair, but failed to exercise ordinary care to correct the unsafe condition.

Plaintiff's evidence, however, taken in the light most favorable to her, runs counter to the conclusion that defendants' conduct was the sole proximate cause of plaintiff's injury. Although issues of negligence, and contributory negligence, are rarely appropriate for summary judgment, *Ballenger v. Crowell*, 38 N.C. App. 50, 247 S.E. 2d 287 (1978), the uncontroverted evidence in this case indicates that plaintiff "failed to use ordinary care . . . and that want of due care was at least one of the approximate causes" of her fall. *Bogle v. Power Co.*, 27 N.C. App. 318, 322, 219 S.E. 2d 308, 311 (1975), *cert. denied*, 289 N.C. 296, 222 S.E. 2d 695 (1976). Her use of the steps rendered her contributorily negligent as a matter of law, making summary judgment in favor of defendants proper. Plaintiff lived at 305 South Swain Street for eight years. She had trouble walking. She knew of the condition of the steps, considered them dangerous, and made numerous complaints. Furthermore, she knew that she could walk to the rear yard by using the front steps, and that this alternate route was completely safe. Compare *Lenz v. Ridgewood Associates*, supra; *O'Neal v. Kellett*, supra.

> No inflexible rule can be laid down as to what constitutes contributory negligence as a matter of law, as each case must be decided on its merits. Plaintiff by her own evidence has proven herself out of court on the ground of contributory negligence.

Wallsee v. Carolina Water Company and Town of Morehead City, 265 N.C. 291, 298, 144 S.E. 2d 21, 26 (1965).

Plaintiff's evidence shows that her own negligence was a proximate cause of the mishap on the rear steps. Defendants' motions for summary judgment were properly allowed. Our decision renders it unnecessary to rule on the denial of plaintiff's motion for partial summary judgment.

The judgment of the trial court is

Affirmed.

Judges VAUGHN and MARTIN (Harry C.) concur.

STATE OF NORTH CAROLINA v. JEFFUS H. HALL

No. 8112SC1071

(Filed 1 June 1982)

1. **Larceny § 7.13— verdict of felonious larceny improper**

In a prosecution for first degree burglary and felonious larceny pursuant to the burglary, the trial court should have treated the jury's verdict of guilty of felonious larceny as a finding of guilty of misdemeanor larceny where the court in its charge did not instruct the jury to fix the value of the property but told them to find the defendant guilty of felonious larceny if they were satisfied beyond a reasonable doubt that the property was taken during the burglary or after a breaking or entering, and the defendant was found not guilty of the burglary and breaking or entering.

2. **Criminal Law § 102— offering exhibit while cross-examining State's witness— not substantive evidence—failure to give defendant last jury argument prejudicial error**

The trial court erred in not allowing the defendant to make the closing arguments to the jury where the only "evidence" the defendant put on was in using a sweatsuit to cross-examine the State's witness as to the characteristics of the sweatsuit. Since the article was not given to the jury for the purpose of their determination as to whether it impeached the witness's testimony, the sweatsuit was not offered into evidence, and under *State v. Raper*, 203 N.C. 489 (1932) and Rule 10 of the Superior and District Court Rules, it was prejudicial error to deprive the defendant of the last argument to the jury.

APPEAL by defendant from *Braswell, Judge*. Judgment entered 9 June 1981 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 9 March 1982.

The defendant was tried for first degree burglary and felonious larceny pursuant to the burglary. The defendant was found not guilty of burglary and guilty of larceny. The defendant was sentenced to ten years imprisonment. He appealed.

Attorney General Edmisten, by Assistant Attorney General Kaye R. Webb, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Lorinzo L. Joyner, for defendant appellant.

WEBB, Judge.

[1] The defendant's first assignment of error is to the court's acceptance of a verdict of guilty to felonious larceny. The State agrees with the defendant that this assignment of error has merit. In this case the court in its charge did not instruct the jury to fix the value of the property but told them to find the defendant guilty of felonious larceny if they were satisfied beyond a reasonable doubt that the property was taken during the burglary or after a breaking or entering. The defendant was found not guilty of the burglary and breaking or entering. The jury could not find him guilty of felonious larceny under these circumstances and the court should have treated the verdict as a finding of guilty of misdemeanor larceny. *See State v. Cornell*, 51 N.C. App. 108, 275 S.E. 2d 857 (1981) and *State v. Keeter*, 35 N.C. App. 574, 241 S.E. 2d 708 (1978).

[2] In his second assignment of error the defendant contends it was error not to let him make the closing argument to the jury. He contends he did not put on evidence. If the defendant put on evidence, it was through the offering of a sweatsuit as an exhibit while cross-examining a State's witness. Michael Gerard testified for the State. On cross-examination he said he saw the defendant in the yard of the person whose house was entered at the time of the breaking and entering. Mr. Gerard testified the defendant was wearing an orange sweatsuit. The following colloquy then occurred:

"Q. I believe you testified that the sweatsuit was orange on the top and bottom?

A. Right.

Q. And it had a black stripe down the sleeve?

A. No, I said it might have, I can't remember.

Q. Your memory is that it was a fully an orange sweatsuit?

A. It was a bright color, probably an orange, right.

Q. I hand you two pieces—

Court: One moment, sir. Have them marked for identification.

Q. I am sorry, I hand you what has been marked as Defendant's Exhibit 1 and 2 and ask you to examine it, Mr. Gerard.

A. (Witness complies)

Q. Have you seen those before this day?

A. Yes, these are the ones Mr. Hall was wearing.

Q. And, sir, what color would you say those pants are?

A. They are blue with orange stripes.

Q. And there isn't any black stripes on them at all is there?

A. No, sir."

From this colloquy it is apparent the defendant used an exhibit to cross-examine the State's witness as to the characteristics of the exhibit. The first question posed by this assignment of error is whether by doing so the defendant offered the exhibit into evidence. There have been several cases dealing with this question although we do not believe any are on all fours with the instant case. In *State v. Knight*, 261 N.C. 17, 134 S.E. 2d 101 (1964) our Supreme Court held that when the defendant on cross-examination had the prosecuting witness identify a television interview he had given and then showed the interview for the purpose of impeaching the witness, the defendant offered evidence. *Knight* is distinguishable from the instant case in that the television interview was shown to the jury for the purpose of impeaching the witness. In the instant case, the sweatsuit was shown to the witness and the defendant's attorney cross-examined the witness in regard to the sweatsuit in an effort to impeach him. The record shows the sweatsuit was not shown to the jury so that they might determine whether the witness was being truthful. In *State v. Baker*, 34 N.C. App. 434, 238 S.E. 2d 648 (1977) the defendant's counsel, while cross-examining the

State's witness, had the witness identify a picture of the defendant and then made a motion to introduce the picture in evidence to illustrate the testimony of the witness. The court allowed the motion. This Court held that by offering the picture into evidence, the defendant lost his right to the closing argument. In the instant case, the defendant did not make a motion to offer the sweatsuit into evidence. In *State v. Mitchell*, 17 N.C. App. 1, 193 S.E. 2d 400 (1972) the superior court ruled that before the defendant could use a photograph to illustrate the testimony of a witness who was being cross-examined, he had to offer the picture into evidence. This Court held this was not an abuse of discretion. *Mitchell* differs from this case in that the defendant in this case did not offer the sweatsuit for the purpose of impeachment but attempted to impeach the witness by cross-examining him as to the sweatsuit. In *State v. Rich*, 13 N.C. App. 60, 185 S.E. 2d 288 (1971) this Court held it was not an abuse of discretion for the superior court to refuse to allow the defendant's attorney on cross-examination to use photographs to illustrate the testimony of a witness.

From reading the above cases, we believe the proper test as to whether an object has been put in evidence is whether a party has offered it as substantive evidence or so that the jury may examine it and determine whether it illustrates, corroborates, or impeaches the testimony of a witness. If the party shows it to a witness to refresh his recollection, it has not been offered into evidence. In this case the defendant's attorney showed the sweatsuit to the witness and questioned the witness about it. It was not given to the jury for the purpose of their determination as to whether it impeached the witness. We hold the sweatsuit was not offered into evidence. The defendant should have had the last jury argument.

Since we have held that it was error to deprive the defendant of the last argument to the jury, the question is whether this was prejudicial error. In *State v. Raper*, 203 N.C. 489, 166 S.E. 314 (1932) our Supreme Court held it was reversible error not to allow the defendant to have the closing argument when he had introduced no evidence. If we are not bound to reverse under *Raper*, it is because of a change in the rules since that case was decided. At the time of *Raper*, the Rules of Practice in the North Carolina Superior Courts, 200 N.C. 843, provided in part:

"3. Opening and Conclusion.

In all cases, civil or criminal, when no evidence is introduced by the defendant, the right of reply and conclusion shall belong to his counsel.

* * *

6. Decision of Right to Conclude Not Appealable.

In any case where a question shall arise as to whether the counsel for the plaintiff or the counsel for the defendant shall have the reply and the conclusion of the argument the court shall decide who is so entitled, and, except in cases mentioned in Rule 3, its decision shall be final and not reviewable."

Rule 10 of the Superior and District Court Rules now provides:

"In all cases, civil or criminal, if no evidence is introduced by the defendant, the right to open and close the argument to the jury shall belong to him. If a question arises as to whether the plaintiff or the defendant has the final argument to the jury, the court shall decide who is so entitled, and its decision shall be final."

After *Raper* was decided, Rule 6 was combined with Rule 3 to become the new Rule 10 so that the superior court's decision as to who had the last argument on the basis of the introduction of evidence would be final. In this revision of the rules, the words "and not reviewable" were deleted. With these words deleted from the rule, we cannot hold that it is so clear that Rule 10 overrules *Raper* that we are not bound by it. We hold it was reversible error to deprive the defendant of the last argument.

The defendant has been found not guilty of felonious larceny. We hold there must be a new trial as to whether he is guilty of misdemeanor larceny.

New trial.

Judges CLARK and ARNOLD concur.

TECH LAND DEVELOPMENT, INC.; W. B. LLOYD CONSTRUCTION CO., INC. v. SOUTH CAROLINA INSURANCE COMPANY, AND THE NORTHWESTERN BANK

No. 8122SC976

(Filed 1 June 1982)

Insurance § 119— mortgage foreclosure sale—premises damaged by fire—mortgagee as purchaser—right to fire insurance proceeds

Where mortgaged property was covered by a fire insurance policy purchased by plaintiff borrower, the policy contained a standard mortgage clause assuring defendant mortgagee of payment in the event of loss and providing that payment would not be invalidated by any foreclosure or change in the title of the property, the mortgagee was the high bidder at a foreclosure sale of the property on 18 October, the property was damaged by fire on 29 October, the ten-day upset bid period fell on a Saturday and was extended to 5:00 p.m. on 30 October, no upset bid was filed, and the property was conveyed to the mortgagee on 1 November, the purchasing mortgagee was entitled to recover the entire amount of the insurance proceeds, not just the amount of the deficiency remaining after the foreclosure, since the mortgagee's bid represented the property in an undamaged state, and the mortgagee was entitled to what remained and to the money which stood in place of the lost portion of the property which it purchased.

APPEAL by plaintiff from *Collier, Judge*. Judgment entered 5 August 1981 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 29 April 1982.

The appeal is from a judgment dismissing plaintiff's action. By virtue of a settlement agreement between plaintiffs and South Carolina Insurance Company, the parties to the present action are Tech Land Development, Incorporated (Tech Land) and The Northwestern Bank (Northwestern).

On 29 June 1977, Tech Land executed a deed of trust on real estate and a building it owned in order to secure a note owed Northwestern in the amount of $175,000.00. Pursuant to the terms of the deed of trust, Tech Land purchased a fire insurance policy from South Carolina Insurance Company. The policy provided coverage on the building in the amount of $150,000.00 and on the building's contents in the amount of $35,000.00. It contained a standard mortgagee clause which provided the following:

"Loss . . . shall be payable to the mortgagee (or trustee) as provided herein, as interest may appear, and this insurance,

as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property. . . ."

Plaintiff defaulted under the terms of the deed of trust, and Northwestern initiated foreclosure proceedings. On 18 October 1978, a foreclosure sale was held. Northwestern was the high bidder at $160,000.00. Because the termination of the ten-day upset bid period fell on a Saturday, the upset bid period was extended to 5:00 p.m., 30 October 1978.

On 29 October 1978, the building was damaged by fire. Having received no upset bids by 30 October, the trustee executed a deed conveying the property to Northwestern on 1 November. There remained a deficiency on the note of $26,253.07.

On 3 July 1979, Northwestern entered into a settlement agreement with South Carolina Insurance Company for fire damage to the building of $67,449.30. Plaintiff did not participate in the settlement. Plaintiff subsequently filed suit seeking a determination as to what portion of the insurance recovery Northwestern was entitled to receive. After hearing evidence and making findings of fact, the court entered the following pertinent conclusions of law:

. . .

"2. The deficiency owed The Northwestern Bank as a result of the Deed of Trust . . . and as a result of the foreclosure proceedings on October 18, 1978, has been satisfied and extinguished by reason of the settlement between The Northwestern Bank and South Carolina Insurance Company, and the payment made to The Northwestern Bank on August 3, 1979;

3. The Northwestern Bank, as mortgagee and as owner of the property following foreclosure, is entitled to retain the sum of Sixty-Seven Thousand Four Hundred Forty-Nine and 30/100 Dollars ($67,449.30) paid by South Carolina Insurance Company to The Northwestern Bank in settlement between

South Carolina Insurance Company and The Northwestern Bank;

4. The Plaintiff, Tech Land Development, Inc., is not entitled to recover from The Northwestern Bank any amount paid to The Northwestern Bank as a result of the settlement between The Northwestern Bank and South Carolina Insurance Company."

The court dismissed plaintiff's claim.

Brinkley, Walser, McGirt, Miller and Smith, By G. Thompson Miller and Charles H. McGirt, for plaintiff appellant.

Petree, Stockton, Robinson, Vaughn, Glaze and Maready, by James H. Kelly, Jr., for defendant appellee.

VAUGHN, Judge.

Plaintiff argues that the court erred in concluding Tech Land was not entitled to any of the insurance proceeds paid to Northwestern. We disagree.

Both the mortgagor and mortgagee have an insurable interest in mortgaged property. The mortgagor's interest is in the full value of the property. He has an equitable right of redemption which may be exercised from the time of default until the expiration of the ten-day upset bid period in the event of foreclosure. The mortgagee has a separate insurable interest limited to the extent of the debt which the property secures. *Insurance Co. v. Assurance Co.*, 259 N.C. 485, 131 S.E. 2d 36 (1963); 3 Couch on Insurance 2d §§ 24:70, 24:72 (2d ed. 1960).

In the present action, the mortgaged property was covered by a fire insurance policy which plaintiff purchased from South Carolina Insurance Company. The policy contained a standard mortgage clause assuring defendant mortgagee payment in the event of loss. According to the policy, payment would not be invalidated by any foreclosure or change in the title of the property.

In North Carolina, a standard mortgage clause is considered a distinct and independent contract between the insurance company and mortgagee. *Green v. Insurance Co.*, 233 N.C. 321, 64 S.E. 2d 162 (1951). The mortgagee's rights are not impaired by a sale

of the property. Neither are they extinguished when the mortgagee itself becomes the owner of the property at the foreclosure sale. *Shores v. Rabon*, 251 N.C. 790, 112 S.E. 2d 556 (1960). The word "mortgagee" in the clause is simply a shorthand description of the party whose interest is protected. It is not a limitation to the retention of an exact status. *FNMA v. Ohio Casualty Ins. Co.*, 46 Mich. App. 587, 208 N.W. 2d 573 (1973).

We, therefore, conclude that when South Carolina Insurance Company paid Northwestern $67,449.30, Northwestern was entitled under the mortgagee clause to retain at least $26,253.07, the balance owed on the note after foreclosure. The issue is whether Northwestern was entitled to insurance proceeds in excess of the deficiency.

In similar cases from other jurisdictions, courts emphasize the sequence of events. *See* 5A J. Appleman, Insurance Law and Practice § 3403 (1970 & Supp. 1981). They distinguish between foreclosure-after-loss and foreclosure-before-loss. When insured property is damaged *prior* to foreclosure, courts allow the purchasing mortgagee to retain under the mortgage clause those proceeds amounting to any deficiency after foreclosure. The mortgagor recovers the remainder of the proceeds. *See, e.g., Nationwide Mutual Fire Insurance Co. v. Wilborn*, 291 Ala. 193, 279 So. 2d 460 (1973); *Smith v. General Mortgage Corp.*, 402 Mich. 125, 261 N.W. 2d 710 (1978). The courts conclude that once the deficiency is satisfied, the mortgagee's additional recovery of proceeds representing undamaged property would amount to unjust enrichment since its bid represented the value of *damaged* property. *See, e.g., Nationwide Mutual Fire Insurance Co. v. Wilborn*, 291 Ala. at 199, 279 So. 2d at 464.

Where the damage occurs *after* approval of the foreclosure sale and before expiration of the mortgagor's right to redeem, courts have allowed the purchasing mortgagee to recover *all* the insurance proceeds should the mortgagor fail to redeem within the time period. 5A J. Appleman, Insurance Law and Practice § 3403 (1970). The courts point out that the mortgagee's bid represented the property in an undamaged state. *See, e.g., Nationwide Mutual Fire Insurance Co. v. Wilborn, supra; City of Chicago v. Maynur*, 28 Ill. App. 3d 751, 329 N.E. 2d 312 (1975). The mortgagee is thus "entitled to what remains and to the money

which stands in place of the lost portion of the property which he purchased." *Malvaney v. Yager*, 101 Mont. 331, 54 P. 2d 135, 139 (1936).

Plaintiff argues that the present situation falls in the category of foreclosure-after-loss. Although Northwestern's bid was submitted before the building was damaged by fire, the sale was not consummated until the expiration of the upset bid period—an event occurring after loss. *See Building & Loan Assn. v. Black*, 215 N.C. 400, 2 S.E. 2d 6 (1939). During this ten-day period, Northwestern was free to request a rescission of its bid because of the interim damage to the building. *See In re Sermon's Land*, 182 N.C. 123, 108 S.E. 497 (1921). Plaintiff argues that by electing not to rescind its original bid, Northwestern offered $160,000.00 as the value of the building in its current *damaged* condition. Northwestern is, therefore, entitled to only insurance proceeds covering the deficiency after foreclosure.

We disagree with plaintiff's analysis. Northwestern's decision to proceed with the sale in no way affected what its bid of $160,000.00 represented—an appraisal of the building in an *undamaged* condition. It is that basis for the purchasing mortgagee's bid which categorizes the situation as a foreclosure-before-loss case. When no upset bid was filed and plaintiff's right of redemption was not exercised, Northwestern was entitled to the property and to *all* the insurance proceeds. Contrary to plaintiff's assertions, such a result will not unjustly enrich Northwestern. The proceeds merely represent the difference between the property Northwestern received and the property upon which it based its only bid.

The dismissal of plaintiff's action is affirmed.

Affirmed.

Judges MARTIN (Robert M.) and ARNOLD concur.

STATE OF NORTH CAROLINA v. DONNA FAYE WINDHAM

No. 8120SC900

(Filed 1 June 1982)

Searches and Seizures § 24— affidavit for search warrant—information from informant

An SBI agent's affidavit was sufficient to support the issuance of a warrant to search defendant's residence for controlled substances where it alleged that a reliable informant had told him that defendant and a white male lived at the address given in the warrant, that on numerous occasions he had purchased marijuana and other drugs at the residence from defendant, that he had contact with defendant in the past twenty-four hours and that defendant "does in fact have at this time marijuana and other drugs at her house," and where it also alleged that the informant had provided information that led to arrest and conviction on at least ten previous occasions.

APPEAL by defendant from *DeRamus, Judge.* Judgment entered 24 April 1981 in Superior Court, RICHMOND County. Heard in the Court of Appeals 3 February 1982.

Defendant was arrested and indicted for possession with intent to sell LSD and possession with intent to sell marijuana, in violation of G.S. 90-95(a)(1). Officers of the Rockingham Police Department and SBI, pursuant to a warrant, had searched defendant's premises in Rockingham and seized the controlled substances. Defendant moved on 23 April 1981 to suppress evidence obtained as a result of the search. The motion was denied. Defendant entered a plea of guilty and subsequently gave notice of appeal from an order of imprisonment.

Attorney General Edmisten, by Associate Attorney James W. Lea, III, for the State.

Leath, Bynum, Kitchin and Neal, by Henry L. Kitchin, for defendant appellant.

MORRIS, Chief Judge.

Defendant's sole contention is that the search warrant pursuant to which the contraband was seized was invalid. She argues, therefore, that the court erred in denying her motion to suppress and in entering the judgment against her. Both defendant and the state agree that the legality of the warrant depends

upon whether the affidavit supporting the search warrant was sufficient for the magistrate to find probable cause to search.

Special Agent Kenneth Ray Snead of the State Bureau of Investigation, applying for the warrant, swore to the following facts:

> A reliable confidential informant stated on 1-14-81 that Donna Windham and a white male live in the house described in this Warrant. The reliable informant further stated that Donna Windham and the white male does in fact possess and sell marihuana and other drugs and have been doing so for several months. Informant stated that on numerous occasions he has purchased, bought, marihuana and other drugs at the house on Roberdel Road from Donna Windham. The reliable informant further stated to this applicant that he had contact with Donna Windham in the past twenty-four hours and she does in fact have at this time marihuana and other drugs at her house. The informant said that Windham normally keeps the drugs in her kitchen or bedroom The informant has been proven reliable in the past and has provided information to applicant that has resulted in arrest and conviction of persons selling drugs. The informant has supplied this information on at least ten occasions that led to arrests and convictions.

An affidavit is generally deemed sufficient "if it supplies reasonable cause to believe that the proposed search for evidence of the commission of the designated criminal offense will reveal the presence upon the described premises of the objects sought and that they will aid in the apprehension or conviction of the offender." *State v. Vestal*, 278 N.C. 561, 576, 180 S.E. 2d 755, 765 (1971), *cert. denied* 414 U.S. 874, 38 L.Ed. 2d 114, 94 S.Ct. 157 (1973). Magistrate O. Brown Smith found probable cause and authorized a search on 15 January 1981.

A voir dire hearing was conducted at which Agent Snead testified that he had prepared the affidavit and warrant before submitting them to the magistrate. He said that the magistrate acted purely upon the information set forth in the application. Agent Snead also revealed that his informant had provided information resulting in numerous arrests in the past but that his information had proved to be incorrect on at least one occasion. The

court found that the application for the warrant did, on its face, provide a sufficient basis for the magistrate to find probable cause.

Because the information supplied in the supporting affidavit was obtained from a confidential informant, it was necessary that the magistrate be apprised of some of the underlying circumstances from which the informant concluded that the drugs were where he claimed they were, and from which Agent Snead concluded that the informant was credible or his information reliable. *State v. Hayes*, 291 N.C. 293, 230 S.E. 2d 146 (1976). We hold that the supporting affidavit contains enough facts to meet the requirements of *Spinelli v. United States*, 393 U.S. 410, 21 L.Ed. 2d 637, 89 S.Ct. 584 (1969), and *Aguilar v. Texas*, 378 U.S. 108, 12 L.Ed. 2d 723, 84 S.Ct. 1509 (1964), as propounded in *Hayes*.

The following non-conclusory information was included in the affidavit:

(1) Defendant and a white male lived at the address given in the warrant.

(2) The informant made several purchases at the address from defendant.

(3) The informant had been in contact with defendant within the twenty-four hours prior to the application, learning that she had drugs in the residence.

We hold these facts sufficient to reveal the informant's basis of knowledge that contraband was being possessed on the premises to be searched. Agent Snead's assertion that his informant had provided information that led to arrest and conviction on at least ten previous occasions is also satisfactory to show veracity. See *State v. Hayes*, supra. The magistrate is required to determine the presence or absence of probable cause upon the information before him. We attach no significance to the agent's statement that his informant had been less than reliable at least once before, as the affidavit on its face supports our finding of reliability.

The gravamen of defendant's appeal is that the information contained in the affidavit was not specific enough. Yet information pertaining to the identity of defendant, her residence, and

the contraband in her possession all appear in the affidavit. The manner in which the informant learned the information communicated to Agent Snead is directly or inferentially apparent, as well. This case parallels *State v. Gibson*, 32 N.C. App. 584, 233 S.E. 2d 84 (1977), in which an affidavit adducing the same sort of information was found to be constitutionally sound. Defendant asserts that the application is conclusory. We disagree and find the facts contained in the application sufficient to persuade a reasonable man that probable cause existed. Perhaps the averment that "[t]he reliable informant . . . stated . . . that he had contact with Donna Windham in the past twenty-four hours and she does in fact have at this time marihuana and other drugs at her house" could have been more skillfully worded to better show that the informant learned of the presence of the drugs from defendant. However, because applications are normally submitted by police officers who do not have legal training, the language is to be construed in a common-sensical, non-technical and realistic way. *United States v. Ventresca*, 380 U.S. 102, 13 L.Ed. 2d 684, 85 S.Ct. 741 (1965).

Nor did the twenty-four hour span between the informant's contact with defendant and the issuance of the warrant render the information so stale as to fail to establish probable cause. Probable cause must be based on facts gathered in close enough proximity to the time of the issuance of the warrant as to justify a finding of probable cause at that time; but whether this test is met is to be determined on the facts of each case. *Sgro v. United States*, 287 U.S. 206, 77 L.Ed. 260, 53 S.Ct. 138 (1932). "Where the affidavit recites a mere isolated violation . . ., probable cause dwindles rather quickly. . . . However, when the affidavit properly recites facts indicating activity of a protracted and continuous nature, . . . the passage of time becomes less significant." *United States v. Johnson*, 461 F. 2d 285, 287 (10th Cir. 1972). It is apparent in the case at bar that defendant had been selling drugs from her residence on a regular basis for a term of months. There was a great likelihood that the evidence sought would still be in place when the warrant issued. See *State v. Louchheim*, 296 N.C. 314, 250 S.E. 2d 630, *cert. denied* 444 U.S. 836, 62 L.Ed. 2d 47, 100 S.Ct. 71 (1979).

For the reasons enumerated above, we find that the court did not err in denying defendant's motion to suppress, or in entering its judgment.

Affirmed.

Judges VAUGHN and MARTIN (Harry C.) concur.

SYLVESTER DAVIS AND WIFE, RUTH DAVIS v. ALMA M. FLYNN, ADMINISTRATRIX OF THE ESTATE OF OSCAR PEARSON HEGE

No. 8122SC579

(Filed 1 June 1982)

1. **Evidence §§ 11, 11.8— Dead Man's Statute—services rendered decedent by other plaintiff—expectation of compensation**

In an action to recover for personal services rendered to decedent in the years prior to his death, the "Dead Man's Statute," G.S. 8-51, did not prohibit each plaintiff from testifying as to the services rendered by the other. Furthermore, by cross-examining the female plaintiff as to services rendered and the value thereof, defendant administratrix opened the door to testimony by the female plaintiff as to her expectation of compensation for the services she rendered to decedent.

2. **Executors and Administrators § 27; Quasi Contracts and Restitution § 2.2— services rendered to decedent—value of estate—relevancy**

Testimony by defendant administratrix as to the value of decedent's estate was relevant to the value of services rendered by plaintiffs to decedent in view of testimony by plaintiffs' witness that decedent "said he was going to leave whatever he had" to plaintiffs.

APPEAL by defendant from *Battle, Judge.* Judgment entered 4 January 1981 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 3 February 1982.

Plaintiffs sought to recover for services rendered to the deceased, Oscar Pearson Hege, in the years prior to his death. Plaintiffs' evidence tended to show that deceased suffered from heart disease. Sylvester Davis testified that his wife, Ruth Davis, cared for deceased for approximately 25 to 30 hours per week. He stated that she prepared special diets and meals, took deceased to the doctor, grocery store and hospital and got medicine for him. Ruth Davis testified that her husband spent about 15 to 20 hours per week performing services for the deceased, such as reading the mail and taking deceased to the doctor and on errands.

Earlene Harris, a housekeeper and one of Mr. Hege's neighbors, testified that deceased told her that he did not have anyone to care for him except the Davises and that he planned to

leave whatever he had to them. She also testified that in her opinion, the services Ruth Davis rendered to deceased were worth $3.50 per hour. Jessie Stoner, another neighbor of deceased, testified that the deceased had planned to have some rooms added to his house for the Davises to occupy, and that the Davises would have the house when he died.

Administratrix Alma Flynn, the deceased's niece, testified that deceased's estate was worth $78,826.49.

Defendant appeals from an $18,000 jury verdict in plaintiff's favor.

Grubb and Penry, by J. Rodwell Penry, Jr., for plaintiff appellees.

R. Lewis Ray and Associates, by R. Lewis Ray, for defendant appellant.

MORRIS, Chief Judge.

We note at the outset that defendant has failed to include in the record on appeal the issues submitted to the jury and the verdict, in violation of Rule 9(b)(1)(vii) of the Rules of Appellate Procedure. Nor have references to pertinent assignments of error been identified by number in defendant's brief, as required by Rule 28(b)(5). More significantly, over 150 days elapsed between 18 December 1980, when notice of appeal was given, and the filing with this Court of the record on appeal, a breach of Rule 12(a). Even though the appeal is subject to summary dismissal, we choose to treat the purported appeal as a petition for a writ of certiorari which we have allowed, in order to discuss the case on its merits.

[1] Defendant first argues that the trial court erred in allowing plaintiffs, who are interested parties pitted against a party who has died, to give testimony in support of their claim. He cites G.S. 8-51, commonly referred to as the "Dead Man's Statute" as authority for the proposition that each of them should have been disqualified as a "party" and a "person interested in the event" because they both had a direct legal and pecuniary interest in the outcome of the litigation. G.S. 8-51 "prohibits a party, or interested person, from testifying in his own interest against the personal representative of a deceased person about a personal

transaction or communication between the witness and the deceased." *Etheridge v. Etheridge*, 41 N.C. App. 39, 41, 255 S.E. 2d 735, 737 (1979). The performance of services for the deceased by a witness has been held to be a personal transaction. *Godwin v. Tew*, 38 N.C. App. 686, 248 S.E. 2d 771 (1978). For testimony to be competent under the statute, the following four questions must all be answered in the affirmative:

> 1. Is the witness (a) a party to the action, or (b) a person interested in the event of the action, or (c) a person from, through or under whom such a party or interested person derives his interest or title?
>
> 2. Is the witness testifying (a) in his own behalf or interest, or (b) in behalf of the party succeeding to his title or interest?
>
> 3. Is the witness testifying against (a) the personal representative of a deceased person, or (b) the committee of a lunatic or (c) a person deriving his title or interest from, through or under a deceased person or lunatic?
>
> 4. Does the testimony of the witness concern a personal transaction or communication between the witness and the deceased person or lunatic?

Peek v. Shook, 233 N.C. 259, 261, 63 S.E. 2d 542, 543 (1951). Ruth and Sylvester Davis each testified regarding services rendered the decedent by the other. Neither plaintiff testified in his own behalf or interest. Therefore, the second and fourth inquiries outlined in *Peek* must be answered in the negative. This renders the statute inapplicable. *Bank v. Atkinson* and *Atkinson v. Bennett*, 245 N.C. 563, 96 S.E. 2d 837 (1975), *Burton v. Styers*, 210 N.C. 230, 186 S.E. 248 (1936). *Woodard v. McGee* and *Little v. McGee*, 21 N.C. App. 487, 204 S.E. 2d 871 (1974), is instructive. There, two plaintiffs claimed the existence of service contracts with the deceased. The deceased allegedly promised each plaintiff $6,000 worth of stock at his death in exchange for the performance of certain services. We upheld in *McGee* the trial court's exclusion of each plaintiff's testimony regarding his dealings with the deceased, and sanctioned its allowance of testimony as to conversations between the deceased and one of the plaintiffs, brought out by the other plaintiff while testifying. Therefore, we

find, as we did in *McGee*, that the trial court acted properly in permitting each plaintiff to testify as to services rendered by the other. The fact that the actions were tried together does not alter the result. *Burton v. Styers*, supra.

Defendant also asserts that the trial court erred in allowing Ruth Davis to testify as to whether she expected to be compensated for the services she performed for deceased. This contention is without merit. The general rule is that a claimant is incompetent under G.S. 8-51 to testify as to the value of personal services rendered by him to a decedent. *Peek v. Shook*, supra. Defendant's counsel, however, on cross examination inquired as to services rendered, and elicited from Mrs. Davis her sentiment regarding the remuneration to which she was entitled. Mrs. Davis on redirect then stated that she expected compensation for those services. "The law is that the incompetence of the adverse party to testify may be removed by his being cross-examined as to the transaction in question by the personal representative of the deceased, . . . (Citations omitted.)" *Smith v. Dean*, 2 N.C. App. 553, 561, 163 S.E. 2d 551, 556 (1968). We hold that defendant, by cross examining Ruth Davis as to services rendered and the value thereof, "opened the door" for Mrs. Davis to testify regarding her expectation of being compensated, as her testimony on both cross and redirect examination involved the same transaction; i.e., personal services performed for decedent. See *Gray v. Cooper*, 65 N.C. 183 (1871), and *Godwin v. Tew*, supra.

[2] Finally, defendant submits that the court erred in compelling the administratrix to testify as to the value of the deceased's estate, on the grounds of irrelevancy and because the probative value of the evidence, if any, was outweighed by its prejudicial nature. We hold that the information was relevant to the value of the services in view of Earlene Harris's testimony that deceased "said he was going to leave whatever he had" to the Davises. Even were we to deem the value of the estate irrelevant, evidence of the value per hour of the plaintiffs' services multiplied by the number of hours the services were rendered overwhelmingly supports the verdict. The admission of the value of the estate, therefore, could not have been prejudicial.

No error.

Judges VAUGHN and MARTIN (Harry C.) concur.

JUDITH A. GLADSON, EMPLOYEE, PLAINTIFF v. PIEDMONT STORES/SCOTTIES DISCOUNT DRUG STORE, EMPLOYER AND CASUALTY RECIPROCAL EXCHANGE, CARRIER, DEFENDANTS

No. 8110IC546

(Filed 1 June 1982)

Master and Servant § 55.3— workers' compensation—conclusion injury resulted from "accident" proper

The Industrial Commission properly concluded that plaintiff's injury resulted from an "accident" under G.S. 97-2(6) where plaintiff was lifting crates and lifted one which was "heavier than usual" and caused an injury to her back.

APPEAL by defendants from the Industrial Commission. Opinion and award filed 30 March 1981. Heard in the Court of Appeals 28 January 1982.

Kennedy W. Ward, P.A., for plaintiff appellee.

Stith and Stith, by F. Blackwell Stith, for defendant appellants.

WHICHARD, Judge.

The Industrial Commission awarded workers' compensation to plaintiff for a back injury sustained when she lifted a crate in the course of her employment as defendant employer's store manager. The principal issue is whether the Commission properly concluded that the injury resulted from an "accident." G.S. 97-2(6) (1979). We hold that it did.

> Our Supreme Court has defined the term 'accident' as used in the Workers' Compensation Act as 'an unlooked for and untoward event which is not expected or designed by the person who suffers the injury.' [Citations omitted.] The elements of an 'accident' are the interruption of the routine of work and the introduction thereby of unusual conditions likely to result in unexpected consequences. [Citations omitted.]

Porter v. Shelby Knit, Inc., 46 N.C. App. 22, 26, 264 S.E. 2d 360, 363 (1980).

> 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.' [Citation omitted.]

'[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' Compensation Act. [Citation omitted.]

Locklear v. Robeson County, 55 N.C.App. 96, 97-98, 284 S.E. 2d 540, 541-42 (1981).

The crucial findings of facts relating to the accident issue here are the findings that the crate plaintiff lifted was "heavier than she realized" and "heavier than usual." The findings are supported by the following competent evidence in the record:

Plaintiff testified that the crates she was lifting were "stacked 5 high." She had lifted four of the crates in one stack. She opened the lid of the fifth and found that it contained Maalox, a remedy for ills of the stomach. She lifted it and "realized it was heavier than what [she] thought." When she "picked this crate up, [she] realized it was heavier than usual." It was "heavier than the other ones [she] had been picking up before this." She swung it onto a pushcart to her right and "[her] back started hurting and [she] fell to [her] knees on the floor." The other crates were not heavy. Compared to the others, the crate plaintiff lifted "was real heavy."

Plaintiff's fellow employee testified that Maalox was usually separated in several different crates, with "6 in one, maybe 12 in one, but very seldo[m] any other; never a full crate." She estimated that, by contrast, there were approximately 24 bottles of Maalox in the crate plaintiff lifted. She testified: "I would say that there was three or four times more in that crate. That would have made it three or four times heavier."

Because the findings that the crate plaintiff lifted was "heavier than she realized" and "heavier than usual" are supported by the foregoing competent evidence, they are conclusive on this appeal. *Porter*, 46 N.C. App. at 25, 264 S.E. 2d at 362. The findings support the conclusion of law that "[t]here was an interruption of plaintiff's regular work routine" and that she thus "sustained an injury by accident arising out of and in the course of her employment . . . ." The heavier than expected and heavier than usual nature of the crate constituted the requisite "unlooked for and untoward event . . . not expected or designed by [plain-

tiff]." *Porter, supra.* The work routine, the lifting of lighter crates, was interrupted by introduction of a crate heavier than expected and heavier than usual. This created an unusual condition, an unforeseen event, likely to result in unexpected consequences. The Commission was thus warranted in concluding as a matter of law that plaintiff suffered an injury "by accident." *Locklear, supra; Porter, supra. See also Coffey v. Automatic Lathe,* --- N.C. App. ---, 291 S.E. 2d 357 (1982).

We have carefully examined defendants' other contentions, and we find therein no basis for reversal. The opinion and award of the Industrial Commission is therefore

Affirmed.

Judges CLARK and ARNOLD concur.

DICK TOWNSEND AND WIFE, BINA TOWNSEND v. JAMES EVERETTE BENTLEY AND WIFE, MARY W. BENTLEY

No. 8125DC711

(Filed 1 June 1982)

1. **Rules of Civil Procedure § 13— no entitlement to set off for counterclaim— summary judgment for plaintiffs**

In an action on a promissory note executed by defendants to plaintiffs, defendants were not entitled to set off their claim against plaintiffs for work unperformed on a home sold by plaintiffs to defendants, and summary judgment was properly entered for plaintiffs in their action on the note.

2. **Rules of Civil Procedure § 15.1— denial of motion to amend to assert counterclaim**

The trial court did not abuse its discretion in the denial of defendants' motion to amend their answer to assert a non-compulsory counterclaim. G.S. 1A-1, Rule 15.

APPEAL by defendants from *Vernon, Judge.* Judgment entered 28 January 1981 in District Court, CALDWELL County. Heard in the Court of Appeals 9 March 1982.

The defendants appeal from the entry of summary judgment for the plaintiffs. The plaintiffs alleged in this action that the

defendants were indebted to them on a note. In their answer the defendants denied they owed anything on the note. In support of their motion for summary judgment, the plaintiffs filed an affidavit in which they said the defendants had executed a note in the amount of $3,800.00 to the plaintiffs; that the defendants had paid $1,500.00 on the note leaving a balance due of $2,300.00; that the note provided for the payment by the defendants of reasonable attorney fees incurred in the collection of the note, not to exceed 15% of the amount collected. The note was incorporated in the complaint and was one of the matters considered by the court at the hearing on the motion for summary judgment.

The defendants filed an affidavit in opposition to the motion for summary judgment in which they did not deny they had executed the note or that $2,300.00 was unpaid on it. They stated that they had purchased a home from the plaintiffs which contained several defects which the plaintiffs had agreed to correct and that any amounts owed to the plaintiffs should be deferred until the defects were corrected. They said they did not owe any amount to the plaintiffs. Simultaneously with the filing of the affidavit in opposition to the motion for summary judgment, the defendants filed a motion to assert a counterclaim for breach of contract based on the defendants' claim that the plaintiffs had sold them a home and had refused to correct the defects in the home as they had contracted to do.

The court denied the defendants' motion to amend and granted the plaintiffs' motion for summary judgment.

Tuttle and Thomas, by Carroll D. Tuttle, for plaintiff appellees.

Wilson, Palmer and Cannon, by Bruce Lee Cannon, for defendant appellants.

WEBB, Judge.

[1] The plaintiffs have by affidavit shown that the defendants executed a note to plaintiffs and $2,300.00 is due on the note. The note was incorporated into the complaint and was considered by the court in determining the motion for summary judgment. The only part of the plaintiffs' evidence that depends on the credibility of the plaintiffs as witnesses is the plaintiffs' statement that

the note was executed and the payments that were made by the defendants. The plaintiffs' testimony by affidavit is not inherently incredible and is neither self-contradictory nor susceptible to conflicting inferences. The defendants have filed nothing which contradicts the evidence of the plaintiffs but have filed an affidavit which alleges they have a claim against the plaintiffs for work unperformed on a home sold by the plaintiffs to defendants. If the defendants are not able to set off this claim against the plaintiffs in this action, the plaintiffs are entitled to judgment as a matter of law. *See Kidd v. Early*, 289 N.C. 343, 222 S.E. 2d 392 (1976). We do not believe the defendants are entitled to set off their claim against the plaintiffs in this action. The claims of the parties against each other grew out of separate transactions. The defendants did not plead this claim against the plaintiffs and there being no dispute as to the claim of the plaintiffs against the defendants, summary judgment was proper. *See Barber v. Edwards*, 218 N.C. 731, 12 S.E. 2d 234 (1940).

[2] The defendants also assign error to the court's denial of their motion to amend their answer to assert a counterclaim. G.S. 1A-1, Rule 15, provides that 30 days after a pleading has been filed which does not require a responsive pleading, the pleading may be amended only by leave of the court. We hold the court did not abuse its discretion in this case. We note that the counterclaim which the defendants attempted to assert was not a compulsory counterclaim within the meaning of G.S. 1A-1, Rule 13(a). *See Apartments, Inc. v. Landrum*, 45 N.C. App. 490, 263 S.E. 2d 323 (1980).

Affirmed.

Judges CLARK and ARNOLD concur.

STATE OF NORTH CAROLINA v. LONNIE RENARD NORWOOD

No. 8121SC770

(Filed 1 June 1982)

Constitutional Law § 50— speedy trial—embezzlement charge—later larceny charge—transactional connection—time period runs from first indictment

Where defendant was indicted for embezzlement on 6 October 1980 and on 3 November 1980 a new bill of indictment was returned charging the same embezzlement and felonious larceny and where defendant was tried on the felonious larceny charge on 17 February 1981 after the court dismissed the embezzlement charge, under G.S. 15A-703 the trial judge should have dismissed the larceny charge as well as the embezzlement charge as not being tried within 120 days since the two crimes with which the defendant was charged were "transactions connected together or constituting parts of a single scheme or plan." G.S. 15A-701(a1)(3).

APPEAL by defendant from *DeRamus, Judge.* Judgment entered 18 February 1981 in Superior Court, FORSYTH County. Heard in the Court of Appeals 7 January 1982.

The defendant appeals from a sentence imposed after he was convicted of felonious larceny. The defendant was formerly employed by Herring Decorating, Incorporated in Winston-Salem. On 25 August 1980 he was arrested by a police officer with a roll of carpet belonging to Herring Decorating, Incorporated, which carpet the State contends he stole on that date. The officer then accompanied the defendant to the defendant's home where carpet was found which the State contends the defendant took from his employer on 15 August 1980. The defendant was charged in a warrant with larceny of the carpet which was allegedly taken on 25 August 1980. Probable cause was found on this charge and the defendant was bound over to superior court. The district attorney then took a voluntary dismissal and based on the same occurrence, the defendant was indicted for embezzlement on 6 October 1980. On 3 November 1980 a new bill of indictment was returned charging the same embezzlement in different words to correct an error in the bill returned on 6 October 1980. In addition, the defendant was indicted on 3 November 1980 for felonious larceny as to the alleged taking of the carpet on 15 August 1980.

On 17 February 1981 both cases were called for trial. The defendant made a motion to dismiss both charges for the State's

failure to comply with the Speedy Trial Act. The superior court allowed the motion as to the embezzlement charge and denied it as to the felonious larceny charge. The defendant was convicted of felonious larceny.

Attorney General Edmisten, by Assistant Attorney General James E. Magner, Jr., for the State.

L. Donald Long, Jr. for defendant appellant.

WEBB, Judge.

The defendant assigns error to the denial of his motion to dismiss for his failure to be brought to trial within the limits prescribed by the Speedy Trial Act. We believe this assignment of error has merit. G.S. 15A-701(al) provides in part:

> "Notwithstanding the provisions of subsection (a) the trial of a defendant charged with a criminal offense who is arrested, served with criminal process, waives an indictment or is indicted, on or after October 1, 1978, and before October 1, 1983, shall begin within the time limits specified below:
>
> * * *
>
> (3) When a charge is dismissed, other than under G.S. 15A-703, or a finding of no probable cause pursuant to G.S. 15A-612, and the defendant is afterwards charged with the same offense or an offense based on the same act or transaction or on the same series of acts or transactions connected together or constituting parts of a single scheme or plan, then within 120 days from the date that the defendant was arrested, served with criminal process, waived an indictment, or was indicted, whichever occurs last, for the original charge . . . ."

The defendant was tried for larceny on 17 February 1981 on an indictment which was returned on 3 November 1980. This was within 120 days. The resolution of this case depends on whether the period should have been measured from 6 October 1980, the date the defendant was indicted for embezzlement. Our reading of G.S. 15A-701 convinces us the time should have been calculated from the date the defendant was indicted for embezzlement. The

larceny charge, which was later changed to embezzlement, was dismissed other than under G.S. 15A-703 or a finding of no probable cause. This satisfies the first clause of G.S. 15A-701(a1)(3). The defendant was then charged with embezzlement based on the same act or transaction. If the larceny charge for which the defendant was tried and the embezzlement charge were "transactions connected together or constituting parts of a single scheme or plan" the time period for trial on the larceny charge must be calculated from the date the embezzlement indictment was returned, that is from 6 October 1980. Our Supreme Court interpreted these words of the statute in *State v. Bracey*, 303 N.C. 112, 277 S.E. 2d 390 (1981). In that case the Supreme Court held that three separate common law robberies committed by the defendant over a ten day period and within a two block area were "transactions connected together or constituting parts of a single scheme or plan." Each of the robberies was committed in a way similar to the other robberies and the Supreme Court said this gave them a transactional connection. We believe that the alleged crimes in this case were committed so close in time and in such a similar way that we are bound by *Bracey* to hold that the two crimes with which the defendant was charged were "transactions connected together or constituting parts of a single scheme or plan." The 120 day period ran from 6 October 1980 and it was error not to grant the defendant's motion to dismiss under G.S. 15A-703. *See also State v. Street*, 45 N.C. App. 1, 262 S.E. 2d 365 (1980).

We note that neither party in its brief makes a point of the fact that after the defendant was indicted for embezzlement on 6 October 1980, a second indictment charging the same crime was returned on 3 November 1980. We do not believe the date for the running of the time period may be advanced by obtaining a new indictment charging the same crime.

We reverse and remand to the superior court for a hearing as to whether the charge should be dismissed with or without prejudice.

Reversed and remanded.

Judges VAUGHN and HILL concur.

FAYE T. MANN v. ROBERT E. MANN

No. 8115DC955

(Filed 1 June 1982)

1. **Divorce and Alimony § 24.4; Husband and Wife § 13— separation agreement—enforcement by specific performance**

Plaintiff was entitled to specific performance of the child support provisions of a separation agreement.

2. **Divorce and Alimony § 24.2— child support in separation agreement—modification—necessity for notice and proper hearing**

In an action in which plaintiff mother sought specific performance of the child support provisions of a separation agreement, the trial court's reduction of the amount of child support required by the agreement without a proper proceeding and notice and opportunity to be heard deprived plaintiff of her rights under the due process provisions of the North Carolina and United States Constitutions.

APPEAL by plaintiff from *Washburn, Judge.* Order signed 10 June 1981 in District Court, ALAMANCE County. Heard in the Court of Appeals 28 April 1982.

This appeal arises out of plaintiff's efforts to enforce the provisions of a separation agreement entered into by the parties on 19 June 1980. The agreement provided, *inter alia,* that defendant would pay to the plaintiff child support in the amount of $300 per month. In her complaint plaintiff alleged that defendant had willfully breached the terms of the contract by failing to make these payments. Plaintiff demanded "[t]hat judgment be rendered against the defendant requiring him to specifically perform all of the terms and conditions of the contract herein referred to . . . as to any and all arrearages and future payments of child support . . ."

After hearing the evidence, the trial judge concluded that the plaintiff did not have an adequate remedy at law and was entitled to an order for specific performance of the provisions of the separation agreement "subject to equitable modification of one of the child support terms" based on "substantial and material changes in the circumstances of the parties . . . which would justify modification of the Defendant's child support obligation." The judge ordered that the separation agreement of 19 June 1980 was to be made an order of the court and its terms were specifically ordered to be performed, "provided, however, that as

of the date hereof and in the future, the Defendant shall pay the sum of $200.00 per month as child support . . .."

Plaintiff appealed.

Latham, Wood and Balog, by B. F. Wood, for plaintiff appellant.

Bateman, Wishart, Norris, Henninger & Pittman, by Robert J. Wishart and June K. Allison, for defendant appellee.

MARTIN (Harry C.), Judge.

[1] The trial court found that the separation agreement between plaintiff and defendant was entitled to specific performance. We agree and affirm this portion of the judgment entered by the trial court. *Moore v. Moore*, 297 N.C. 14, 252 S.E. 2d 735 (1979); *Britt v. Britt*, 49 N.C. App. 463, 271 S.E. 2d 921 (1980). The reasons set out in *Moore* supporting an order for specific performance are equally applicable here. Plaintiff's remedy at law to enforce the separation contract is inadequate; equitable relief was appropriate.

We also affirm the order of the court finding plaintiff is entitled to arrearage in child support from defendant in the amount of $700. Although the court ordered that this was to be paid by defendant in monthly installments of $25, plaintiff did not except to this part of the judgment.

[2] Finally, we hold that the trial court erred in reducing the contract provision for child support from $300 to $200 per month. Where a separation agreement is adopted by incorporation into a consent judgment, the terms thereof are subject to modification by the court upon a showing of changed circumstances. *Britt, supra.* Such is not the case here. We are not concerned with the enforcement or modification of a judgment of the court. Here, the separation agreement of the parties has only been accorded enforcement by specific performance. "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." *Haynes v. Haynes*, 45 N.C. App. 376, 383, 263 S.E. 2d 783, 787 (1980).

Of course, the parties cannot by their agreement deprive the court of its inherent authority to protect the interests and provide for the welfare of minor children. *Fuchs v. Fuchs*, 260 N.C. 635, 133 S.E. 2d 487 (1963). Nevertheless, such authority must be exercised through a proper proceeding for this purpose, and interested parties must be given notice and opportunity to be heard. Otherwise, constitutional imperfections may result. On the record before us, plaintiff did not have notice that reduction of child support would be involved in the hearing. Although it is not controlling in this case, we note that defendant did not request a reduction of child support payments in his answer. He admitted the validity of the contract. Separation agreements are generally subject to the same rules with respect to enforcement as other contracts. *Moore, supra.* The reduction of the child support payments without a proper proceeding and notice and opportunity to be heard deprived plaintiff of her constitutional rights under the due process provisions of the North Carolina and United States constitutions. *Lee v. Lee*, 37 N.C. App. 371, 246 S.E. 2d 49 (1978); *Conrad v. Conrad*, 35 N.C. App. 114, 239 S.E. 2d 862 (1978).

The portions of the court's judgment ordering specific performance of the separation agreement and ordering payment of the $700 arrearage are affirmed. The portion of the judgment reducing the child support payments from $300 to $200 per month is reversed.

Affirmed in part; reversed in part.

Chief Judge MORRIS and Judge CLARK concur.

STATE OF NORTH CAROLINA v. BENJAMIN FRANKLIN GRANT III

No. 818SC1279

(Filed 1 June 1982)

1. Criminal Law § 88— cross-examination of prosecuting witness concerning civil lawsuit—improperly limited

The trial court improperly limited the scope of defendant's cross-examination of the prosecuting witness as to whether she had filed a civil lawsuit for damages against him based on the facts involved in the prosecution

for assault on a female; however, defendant failed to show prejudicial error since evidence of the prosecuting witness's pending civil action was later admitted without objection.

2. Criminal Law § 112.6— failure to charge on justification proper

In a prosecution for assault on a female, the trial judge properly failed to instruct the jury on the defense of justification since defendant's testimony indicated that he had reacted "on impulse" in assaulting the prosecuting witness and there was no evidence from which the jury could find that defendant reasonably believed himself in need of protection.

3. Criminal Law § 118.2— improper refusal to instruct on corroborative evidence

Where the court properly admitted as corroboration a statement previously made by defendant which was consistent with his testimony at trial, the trial judge erred in denying defendant's requested jury instruction on corroborative evidence; however, it did not constitute prejudicial error.

APPEAL by defendant from *Barefoot, Judge.* Judgment entered 2 July 1981 in Superior Court, WAYNE County. Heard in the Court of Appeals 6 May 1982.

Defendant was convicted of assault on a female in violation of G.S. 14-33(b)(2). Judgment imposing a suspended prison sentence was entered.

The State's evidence tends to show that on 28 February 1981, Estelle Allen visited defendant's grandfather in his hospital room. Defendant was present when she arrived. A verbal altercation ensued between defendant and Mrs. Allen. When Mrs. Allen left, defendant followed her to the hospital parking lot. He again exchanged words with her, grabbed her arm, shook her, slapped her in the face, and knocked her to the ground, causing her to break her arm.

Defendant presented evidence that he followed Mrs. Allen to the parking lot because his grandfather had asked him to appease her. When he confronted her, she slapped him in the face. He reactively slapped her back. Mrs. Allen then accidentally slipped and fell, injuring herself.

Attorney General Edmisten, by Assistant Attorney General J. Chris Prather, for the State.

David M. Rouse, for defendant appellant.

VAUGHN, Judge.

Defendant raises several assignments of error on appeal. None of them disclose prejudicial error.

[1] In Assignment of Error No. 1, defendant argues that the court erred in failing to allow him to cross-examine the prosecuting witness as to whether she had filed a civil lawsuit for damages against him based on the facts involved in the prosecution. We agree that the court improperly limited the scope of cross-examination.

Cross-examination of an opposing witness for the purpose of showing his bias or interest is a substantial legal right. Jurors are to consider evidence of any prejudice in determining the witness' credibility. *State v. Hart*, 239 N.C. 709, 80 S.E. 2d 901 (1954). In the present case, the prosecuting witness' pecuniary interest in the outcome of defendant's prosecution was clearly evidence which might have caused a jury to discount her testimony. The court, therefore, erred in its exclusion.

Ordinarily, such an exclusion of impeaching evidence would constitute reversible error since Mrs. Allen was the only witness, other than defendant, to the alleged assault. *See State v. Treadaway*, 249 N.C. 657, 107 S.E. 2d 310 (1959); *State v. Hart, supra.* The present record indicates, however, that evidence of Mrs. Allen's pending civil action was later admitted without objection. Defendant has, therefore, failed to show prejudicial error entitling him to a new trial. *See* G.S. 15A-1443(a). The assignment of error is overruled.

[2] In Assignment of Error No. 5, defendant argues that the court erred in failing to instruct the jury on justification. We disagree.

One without fault in provoking or continuing an assault is privileged to use such force as is reasonably necessary to protect himself from bodily harm or offensive physical contact. *State v. Anderson*, 230 N.C. 54, 51 S.E. 2d 895 (1949). If defendant's evidence, even though contradicted by the State, raises the issue of self-defense, it is error for the court not to charge on the defense. *State v. Blackmon*, 38 N.C. App. 620, 248 S.E. 2d 456 (1978), *cert. denied*, 296 N.C. 412, 251 S.E. 2d 471 (1979).

The present defendant testified that Estelle Allen was the aggressor in the physical confrontation. It was only after she slapped him without cause that he struck her. Defendant presented no evidence, however, that Mrs. Allen's action caused him to fear for his personal safety. Defendant testified, "She slapped me with her right hand. I reacted in a split second." Defendant's sister stated that defendant had told her he slapped Mrs. Allen "on impulse" and "didn't mean to." Where there is no evidence from which a jury could find that defendant reasonably believed himself in need of protection, it would be improper for the court to instruct on justification. *See State v. Moses*, 17 N.C. App. 115, 193 S.E. 2d 288 (1972).

[3] Defendant also excepts to the court's failure to instruct on the law of corroborative evidence. We overrule the assignment of error.

A prior consistent statement is one made by a witness at an earlier time which is consistent with his testimony at trial. It is not admitted as substantive evidence. Rather it is admitted solely for the purpose of affirming the witness' credibility. 1 Stansbury, N.C. Evidence § 52 (Brandis rev. 1973); *State v. Covington*, 290 N.C. 313, 337, 226 S.E. 2d 629, 646 (1976). If defendant so requests, he is entitled to an instruction in the jury charge concerning the restricted purpose for which the statement is received, in addition to a direction at the time of its admission. 1 Stansbury, N.C. Evidence § 52 (Brandis rev. 1973). *See State v. Lee*, 248 N.C. 327, 103 S.E. 2d 295 (1958); *State v. Spain*, 3 N.C. App. 266, 164 S.E. 2d 486 (1968).

In the present case, the court properly admitted as corroboration a statement previously made by defendant which was consistent with his testimony at trial. Defendant requested a jury instruction on corroborative evidence. The request was denied. Although defendant has grounds for exception, we conclude that in this case, the court's refusal to instruct did not constitute prejudicial error. In fact, by not restricting consideration of his prior consistent statement, the court benefited defendant.

No error.

Judges MARTIN (Robert M.) and ARNOLD concur.

In re Wallace

IN THE MATTER OF: THADDEUS WALLACE, DOB 3-22-69, 1237 MAPLE STREET, WASHINGTON, N.C. 27889

No. 812DC1183

(Filed 1 June 1982)

Infants § 18— insufficient evidence to support judgment of delinquency

Evidence that a child of twelve entered an unlocked door into a lighted store during daylight hours, that he did so in front of at least one known witness, and that he took nothing was insufficient to support a charge that the juvenile had broken and entered the store with intent to commit larceny.

APPEAL from adjudication of delinquency by *Hardison, Judge.* Judgment entered 12 August 1981 in District Court, BEAUFORT County. Heard in the Court of Appeals 8 April 1982.

Appellant was brought before Judge Hardison upon a petition filed by Leon Schaffer of the Washington, N.C., Police Department. The petition alleged that appellant, a juvenile, had broken and entered a Revco Drug Store with intent to commit larceny and was therefore a delinquent child as defined by G.S. 7A-517(12).

State's evidence tended to show that at approximately 2:30 a.m. on 10 August 1981, it was discovered that a glass door of a Revco Drug Store located on Main Street in Washington, N.C., had been broken sometime during the night. Store employees cleaned up the glass and Washington police set up surveillance for the remainder of the night. Lights were left on inside the store and the broken door, from which one pane of glass was missing entirely, was left unlocked.

At approximately 7:00 a.m., Thad Wallace, a twelve-year-old child, was seen walking west on Main Street. He stopped in front of the drug store, looked in, and walked on. A few minutes later, Wallace returned, walking east on Main Street. The boy stopped to ask James Baker, who was sitting on a bench near the drug store, if he had seen his tennis shoes. Baker said he had not. Wallace then approached Revco, opened the unlocked door, and went inside. Shortly afterward, Wallace came back out, ducking through the broken door. He was stopped by Officer Sheppard and asked if he had anything in his pockets the officer should see. The boy emptied his pockets to show that he had taken nothing from the store.

On cross-examination, Sheppard said the boy had explained that he had gone into the store to look for his tennis shoes. The shoes were later discovered nearby. There had been no sign on the door of the drug store to indicate that the store was closed or that the door was broken.

Judgment was entered finding Thad Wallace delinquent and an order was entered committing him to the Beaufort County Detention Facility for a term not to extend beyond his 18th birthday. The juvenile appeals.

Attorney General Edmisten, by Assistant Attorney General Robert R. Reilly, for the State.

Carter, Archie & Hassell, by Sid Hassell, Jr., for juvenile appellant.

ARNOLD, Judge.

Appellant first assigns error to the trial court's denial of his motion to dismiss. We agree that State's evidence failed to establish the elements of the crime charged and hold that dismissal of the action was improperly denied. The State has established only that a child of twelve entered an unlocked door into a lighted store during daylight hours, that he did so in front of at least one known witness, and that he took nothing.

This Court recognizes that the trial court apparently had before it indications of prior delinquent behavior by the appellant, including evidence that he had violated probation. We do not doubt the court's good faith in concluding that commitment of the juvenile to a detention facility was justified by all of the circumstances. Nevertheless, the court's conclusion that the juvenile was guilty of the crime set forth in the petition in this record is unsupported by the evidence and the judgment entered in reliance thereon must accordingly be reversed.

Having found the appellant's first assignment of error dispositive of the appeal, we do not reach his remaining assignments of error.

Reversed.

Judges VAUGHN and MARTIN (Robert M.) concur.

STATE OF NORTH CAROLINA v. ROBERT HANSON

No. 812SC1259

(Filed 1 June 1982)

Narcotics § 2— accessory before the fact to attempt to provide drugs to inmate— indictment insufficient to charge crime

An indictment alleging that defendant was an accessory before the fact to an attempt to deliver a controlled substance to a prison inmate as proscribed by G.S. 14-258.1 failed to charge defendant with a crime, since an attempt to provide controlled substances to an inmate is not an activity proscribed by G.S. 14-258.1. G.S. 14-5.

APPEAL by defendant from *Reid, Judge.* Judgment entered 7 January 1981 in Superior Court, WASHINGTON County. Heard in the Court of Appeals 5 May 1982.

Defendant was indicted under G.S. 14-5,[1] for being an accessory before the fact to the felony of attempting to provide drugs to an inmate, as proscribed by G.S. 14-258.1. The State's evidence tended to show that on 7 September 1980, defendant was an inmate at the Creswell Prison Unit. On 7 September, SBI agents informed prison officials that they suspected Mrs. Michelle Montague, an occasional visitor to defendant, of bringing controlled substances to defendant. Before allowing Mrs. Montague to visit with defendant, prison officials detained Mrs. Montague for questioning and a search. Mrs. Montague then voluntarily gave the prison Superintendent ten tablets of LSD which she said defendant had asked her to obtain for him with defendant's money. As Mrs. Montague was leaving the prison, she told defendant, who was in the yard, "they got me."

Defendant presented no evidence.

The jury found defendant guilty as charged, and a sentence of 3 years imprisonment was entered on the verdict. From this judgment, defendant appeals.

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

Robert H. Cowen, for defendant-appellant.

1. Repealed by Session Laws 1981, c. 686, s. 2, effective July 1, 1981.

WELLS, Judge.

In his appeal, defendant assigns error to the trial court's denial of his motion to dismiss at the close of the State's evidence. We do not reach defendant's assignment of error because we find the indictment on which defendant was tried to be fatally defective. The indictment is as follows, in pertinent part:

> THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the 7th day of September, 1980, in Washington County Robert Hanson unlawfully and wilfully did feloniously be and become *an accessory before the fact to the felony of Attempting to Provide Drugs to an Inmate*, G.S. 14-258.1, that was committed by Michelle Montague against the State of North Carolina on September 7, 1980, in that the defendant did counsel, procure, command and aid Michelle Montague to commit that felony, in violation of the following law: G.S. 14-5, contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the State. (Emphasis added.)

The statute which Michelle Montague is alleged to have violated, G.S. 14-258.1, is as follows:

> § 14-258.1. Furnishing poison, controlled substances, deadly weapons, cartridges, ammunition or alcoholic beverages to inmates of charitable, mental or penal institutions or local confinement facilities.
>
> (a) If any person shall give or sell to any inmate of any charitable, mental or penal institution, or local confinement facility, or if any person shall combine, confederate, conspire, aid, abet, solicit, urge, investigate, counsel, advise, encourage, attempt to procure, or procure another or others to give or sell to any inmate of any charitable, mental or penal institution, or local confinement facility, . . . any controlled substances included in Schedules I through VI contained in Article 5 of Chapter 90 of the General Statutes except under the general supervision of a practitioner, . . . he shall be guilty of a felony . . . .

The indictment does not allege a violation of G.S. 14-258.1 by Michelle Montague. Under the wording of the statute, attempting

to provide controlled substances to an inmate is not a proscribed activity. The allegation that defendant was an accessory before the fact to an attempt to deliver a controlled substance does not allege facts sufficient to constitute a violation of G.S. 14-5.[2] In order to state a violation of G.S. 14-5, the indictment must allege an underlying felony.

The judgment entered against defendant in this case must be and is

Vacated.

Judges WEBB and WHICHARD concur.

STATE OF NORTH CAROLINA v. JAMES D. MONROE

No. 8112SC1201

(Filed 1 June 1982)

1. **Criminal Law § 18.3— trial de novo in superior court—no right to object to trial on citation**

Once jurisdiction had been established and defendant had been tried in district court, he was no longer in a position to assert his right under G.S. 15A-922(c) to object to the trial on a citation when he appealed to superior court for a trial de novo.

2. **Criminal Law § 18.2— appeal to superior court—trial on original charge—absence in record of information about plea bargain**

Where the record shows that defendant was tried in district court on a citation charging "driving while license was permanently revoked" and that he entered a plea of guilty after the prosecutor deleted the word "permanently" from the charge, but the record contained no information as to the existence or nonexistence of a plea agreement, the appellate court cannot consider de-

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2. § 14-5. Accessories before the fact; trial and punishment.—If any person shall counsel, procure or command any other person to commit any felony, whether the same be a felony at common law or by virtue of any statute, the person so counseling, procuring or commanding shall be guilty of a felony, and may be indicted and convicted, either as an accessory before the fact to the principal felony, . . . or he may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may be punished in the same manner as any accessory before the fact to the same felony, if convicted as an accessory, may be punished. . . .

fendant's contention that the superior court had no jurisdiction to try him on the original charge of driving while his license was "permanently" revoked. G.S. 7A-271(b).

APPEAL by defendant from *Lee, Judge.* Judgment entered 18 June 1981 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 27 April 1982.

This is a criminal action tried in superior court, de novo, on appeal from the district court. Defendant was tried in district court on a traffic citation for "Driving Under the Influence" and "Driving While License Was Permanently Revoked." Defendant entered guilty pleas to both charges after the prosecutor apparently deleted the word "permanently" from the second charge. He was convicted and given an active prison sentence. Defendant then appealed to superior court for trial de novo pursuant to G.S. 15A-1431.

In superior court, defendant moved to dismiss the traffic citation as well as a misdemeanor statement of charges prepared by the prosecutor with regard to the charge of driving while license was permanently revoked. These motions apparently were denied.

Defendant was found guilty of reckless driving and driving while license was permanently revoked and was sentenced to one year in prison. Defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Sarah C. Young, for the State.

Downing, David, Vallery and Maxwell, by Edward J. David, for defendant appellant.

ARNOLD, Judge.

Defendant's only assignment of error on appeal is that the superior court should not have assumed jurisdiction. Defendant contends the traffic citation and misdemeanor statement of charges were insufficient to confer jurisdiction when timely objection had been lodged.

[1] With regard to the charge of driving under the influence, defendant claims his motion prior to trial obligated the prosecutor under G.S. 15A-922(c) to prepare a statement of charges. Had

defendant filed his motion prior to his trial at district court, the statute would indeed have precluded his trial on the citation alone. This statutory right applies only to the court of original jurisdiction, however. The appellate jurisdiction of the superior court is derivative in nature. *State v. Felmet*, 302 N.C. 173, 273 S.E. 2d 708 (1981). Once jurisdiction had been established and defendant had been tried in district court, therefore, he was no longer in a position to assert his statutory right to object to trial on citation when he appealed to superior court.

[2] Defendant next argues that even a statement of charges was insufficient to confer jurisdiction with regard to the charge of driving while license was permanently revoked. Defendant contends that this charge is greater than that on which he was originally tried and argues that the prosecutor was without authority to increase the offense from that charged in district court.

While defendant has correctly stated the general rule, G.S. 7A-271(b) sets forth an express exception where the conviction appealed from is the product of a plea agreement. Therefore, it is essential to this Court's consideration of defendant's argument that all available information bearing on the existence or nonexistence of a plea agreement be included in the record. Rule 9(b)(3), N.C. Rules of Appellate Procedure. Defendant having failed to include such information—or even to advance an informed opinion on the issue—we are unable to consider this portion of his appeal. *State v. Crews*, 296 N.C. 607, 252 S.E. 2d 745 (1979).

In the trial of defendant, we find

No error.

Judges VAUGHN and MARTIN (Robert M.) concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 1 JUNE 1982

ALLEN v. PLANT No. 8111SC1235	Johnston (79CVS0701)	Affirmed
COX v. COX No. 8126SC1082	Mecklenburg (80CVS7437)	Affirmed
HODGES v. WEST No. 818SC1021	Lenoir (81SP80)	Reversed & Remanded
HOPE v. JONES No. 8129SC919	Rutherford (78CVS556)	No Error
IN RE BEARD No. 8114DC656	Durham (80CVD1609) (80CVD1610)	Reversed & Remanded
JMD v. PARKER No. 8118SC1010	Guilford (80CVS5735)	Affirmed & Remanded
LUCAS v. TUTTLE No. 8121SC1222	Forsyth (81CVS410)	Reversed
NC STATE BAR v. TAYLOR No. 8210NCSB229	NC State Bar (81DHC5)	Reversed
NORTHWESTERN BANK v. HAMRICK No. 8129DC945	Rutherford (79CVD364) (79CVD365) (79CVD366)	Affirmed
SCHOOL BOARD OF ROANOKE, VA. v. GAJAR No. 811SC1043	Dare (79CVS223)	Affirmed
STATE v. BRYANT No. 814SC953	Duplin (80CRS7916) (80CRS7917) (80CRS7918) (80CRS7919) (80CRS7920)	Affirmed
STATE v. HINNANT No. 817SC1017	Wilson (80CRS7653)	No Error
STATE v. JACOBS No. 818SC1215	Wayne (81CR4733)	No Error
STATE v. PICKETT No. 815SC1347	New Hanover (81CRS10723) (81CRS10726)	No Error

STATE v. SHERILL No. 815SC1041	New Hanover (81CRS8467) (81CRS8468) (81CRS8469) (81CRS8470) (81CRS8471) (81CRS8472)	No Error
STATE v. SMITH No. 8121SC990	Forsyth (81CRS8039)	No Error
STATE v. THOMASON No. 8112SC1129	Cumberland (80CRS46542)	No Error
STATE v. WILLIAMS No. 818SC1252	Wayne (81CRS4165)	Dismissed
THOMPSON v. FAULKNER No. 814DC1089	Onslow (81CVD689)	Reversed

STATE OF NORTH CAROLINA v. DONNIE RAY ANDERSON, RONNIE ANDERSON, BARRY DEAN BARKER, ATHA LOUISE BATES, LARRY BOYD CROUSE, WILLIAM A. CODY DURHAM, JAMES C. RHODES, EDWARD SMOOT, WARREN GRADY WOOD, RANDY KEITH BYRD, RANDALL S. SMOOT

No. 8112SC1141

(Filed 15 June 1982)

1. **Narcotics § 1.3— possession and manufacture of excess of 50 pounds of marijuana—two separate felonies of trafficking**

Under G.S. 90-95(h) if a person engages in conduct which constitutes possession of in excess of 50 pounds of marijuana as well as conduct which constitutes manufacture of in excess of 50 pounds of marijuana, that person may be charged with and convicted of two separate felonies of trafficking in marijuana. Therefore, the trial court erred in finding that indictments charging defendants with possession *and* manufacture of 2,000 pounds or more but less than 10,000 pounds of marijuana in violation of G.S. 90-95(h)(1)c. and conspiracy to possess *and* manufacture 2,000 pounds or more but less than 10,000 pounds of marijuana in violation of G.S. 90-95(i) created only two felonies known as "Trafficking In Marijuana" and "Conspiracy To Traffic In Marijuana."

2. **Constitutional Law § 30— State's destruction of evidence—no violation of rights of discovery, confrontation or due process**

In a prosecution concerning the possession and manufacture of over 2,000 pounds of marijuana, the State's destruction of the marijuana except for three to four pounds of random samples did not violate defendants' discovery rights under G.S. 15A-903(e) or their rights of confrontation under Art. I, § 23 of the Constitution of North Carolina. Nor did the State's destruction of the marijuana deny defendants a fair and reasonable opportunity to investigate, prepare and present their defense in violation of their constitutional right to due process where the marijuana was destroyed in good faith because of the lack of storage facilities; the random samples were available for testing by defendants; photographs showing the field of marijuana, the stacks of cut marijuana, and the marijuana loaded on a truck were delivered to defendants; and defendants failed to show that the weight of the marijuana, though a necessary element of the crimes, was a critical issue.

APPEAL by the State from *Brannon, Judge.* Orders entered 26 May 1982 in Superior Court, HOKE County. Heard in the Court of Appeals 26 April 1982.

Each of the defendants was charged in separate indictments containing similar counts as follows: First, possession of 2,000 pounds or more but less than 10,000 pounds of marijuana, in violation of G.S. 90-95(h)(1)c.; second, manufacture of 2,000 pounds or more but less than 10,000 pounds of marijuana in violation of G.S.

90-95(h)(1)c.; third, conspiracy with the others to possess 2,000 pounds or more but less than 10,000 pounds of marijuana in violation of G.S. 90-95(i); fourth, conspiracy with the others to manufacture 2,000 pounds or more but less than 10,000 pounds of marijuana in violation of G.S. 90-95(i).

Defendants made a motion to compel election, a motion to quash the indictments and a motion to dismiss. The State and defendants agreed that evidentiary matters would be resolved by a Bill of Particulars provided by the State. The defendants filed a motion for a Bill of Particulars and the State responded.

By Order No. 1 dated 26 May 1982, the trial court quashed and dismissed the first and third counts in each indictment. The order recited that G.S. 90-95(h)(1) creates only a single felony, known as "Trafficking In Marijuana," which may be accomplished by selling, delivering, transporting, manufacturing or possessing more than fifty pounds; that G.S. 90-95(i) created a single felony known as "Conspiracy To Traffic In Marijuana," which is accomplished by engaging in a conspiracy to accomplish one or more of the acts of selling, manufacturing, delivering, transporting or possessing in excess of fifty pounds of marijuana; that the first and second counts constituted a duplication of a single offense; that the third and fourth counts constituted a duplication of a single offense; that thereupon the State elected to proceed on the second count "Trafficking In Marijuana by manufacture" and the fourth count "Conspiracy To Traffic In Marijuana by manufacture."

By Order No. 2 dated 26 May 1982 the trial court dismissed the second and fourth counts. The court found that law officers on 13 September 1980 discovered marijuana plants in a field, cut and stacked the plants on a flat bed truck, found the marijuana to weigh 2,200 pounds; that on 14 September 1980 law officers pulled up other plants from the field, which they estimated to weigh about 500 pounds; that three or four pounds of random samples were taken from the plants cut from the field for S.B.I. analysis; that photographs were made; and that thereafter by order of the Sheriff of Hoke County the plants were destroyed by fire because of lack of storage facilities.

The court concluded that defendants were denied the right to examine and test the plants as provided by G.S. 15A-903(e), and

that defendants were denied their constitutional rights of confrontation and due process.

The State appealed. The defendants made cross assignments of error.

In this opinion the green vegetable matter discovered in the field will be referred to as marijuana, as determined by Laboratory Report of the State Bureau of Investigation upon testing the random samples, for the purpose of brevity only.

Attorney General Edmisten by Assistant Attorney General Christopher P. Brewer for the State.

Paul W. Freeman, Jr., for defendant appellees Barry Dean Barker, Edward Smoot, and Warren Grady Wood; William C. Gray, Jr., for defendant appellees Donnie Ray Anderson, Ronnie Anderson, Larry Boyd Crouse, James C. Rhodes, Randy Keith Byrd and Randell S. Smoot.

CLARK, Judge.

This appeal raises two questions: First, did the trial court err in Order No. 1 by its interpretation of G.S. 90-95(h)(1), holding that both *possession* and *manufacture* were a single crime; and second, did the trial court err in Order No. 2 by dismissing the charges against the defendants on the grounds that the destruction of most of the seized marijuana plants by law officers violated statutory and constitutional rights of the defendants?

I. The Interpretation of G.S. 90-95(h)(1).

[1] Each of the defendants was charged with four crimes: (1) possession and (2) manufacture of marijuana in violation of G.S. 90-95(h)(1), and (3) conspiracy to possess marijuana and (4) conspiracy to manufacture marijuana in violation of G.S. 90-95(i).

These statutes read as follows:

> "(h) Notwithstanding any other provisions of law, the following provisions apply except as otherwise provided in this Article.
>
> (1) Any person who sells, manufactures, delivers, transports, or possesses in excess of 50 pounds (avoir-

> dupois) of marijuana shall be guilty of a felony which felony shall be known as 'trafficking in marijuana' and if the quantity of such substance . . . . "
>
> "(i) The penalties provided in subsection (h) of this section shall also apply to any person who is convicted of conspiracy to commit any of the offenses described in subsection (h) of this section."

There are many rules of statutory construction. *See* 12 Strong's N.C. Index 3d *Statutes* §§ 5-7 (1978). The most conspicuous rule is that the intent of the legislature controls the interpretation of a statute. *In re Banks,* 295 N.C. 236, 244 S.E. 2d 386 (1978); *State v. Hart,* 287 N.C. 76, 213 S.E. 2d 291 (1975). Other sections of G.S. 90-95 have been interpreted by the Supreme Court and the Court of Appeals of North Carolina. All of G.S. 90-95 deals with the same subject matter, violations of the Controlled Substances Act and penalties for these violations. Some of the other sections of the statute contain some of the same words in describing unlawful acts as does G.S. 90-95(h)(1). All parts of the same statute dealing with the same subject are to be construed together as a whole. *Duke Power Co. v. Clayton, Comr. of Revenue,* 274 N.C. 505, 164 S.E. 2d 289 (1968); *In re Hickerson,* 235 N.C. 716, 71 S.E. 2d 129 (1952). Among other *indicia* considered by the courts in determining legislative intent are previous interpretations of the same or similar statutes. *Wainwright v. Stone,* 414 U.S. 21, 38 L.Ed. 2d 179, 94 S.Ct. 190 (1973); *In re Banks, supra.*

G.S. 90-95(h) and (i), on which the subject indictments are based, are a part of Chapter 1251 of the 1979 Session Laws, entitled "An Act To Control Trafficking In Certain Controlled Substances."

Prior to the enactment of Chapter 1251 of the 1979 Session Laws, the majority of the substantive offenses involving illegal drug activities were set forth in G.S. 90-88 before passage of a 1973 amendment, and thereafter in G.S. 90-95(a)(1), (2) and (3), which made it unlawful for any person to manufacture, sell, or deliver, possess or possess with intent to manufacture, sell or deliver, a controlled substance. These same statutory sections are now a part of the new G.S. 90-95 with the 1979 amendments [subsections (h) and (i)] which provide for comprehensive gradua-

tions in the scale of mandatory sentences and fines for the sale, manufacture, delivery, transportation or possession of substantial amounts of certain illicit drugs.

It is clear that the 1979 amendments to G.S. 90-95 by the addition of subsections (h) and (i) are responsive to a growing concern regarding the gravity of illegal drug activity in North Carolina and the need for effective laws to deter the corrupting influence of drug dealers and traffickers. Prior to the enactment of the 1979 amendment, the provisions of G.S. 90-88 before 1973 and thereafter G.S. 90-95(a)(1), (2), and (3), have been interpreted by the courts of North Carolina. The distinct acts denounced by the statute (manufacture, sell, deliver, possess) have been held to constitute separate and distinct offenses. *State v. Aiken*, 286 N.C. 202, 209 S.E. 2d 763 (1974); *State v. Thornton*, 283 N.C. 513, 196 S.E. 2d 701 (1973); *State v. Cameron*, 283 N.C. 191, 195 S.E. 2d 481 (1973); *State v. Salem*, 50 N.C. App. 419, 274 S.E. 2d 501, *disc. rev. denied*, 302 N.C. 401, 279 S.E. 2d 355 (1981); *State v. Brown*, 20 N.C. App. 71, 200 S.E. 2d 666, *cert. denied*, 284 N.C. 617, 202 S.E. 2d 274 (1973). The same statutory interpretation has been made in other jurisdictions. 28 C.J.S. *Drugs and Narcotics Supplement* § 171 (1974).

The cases cited and others not cited, which have established the rule of law that it was the intent of the legislature in enacting previous and current statutes similar to the statute in question to create separate and distinct crimes for the various acts denounced, must be given substantial weight in interpreting the similar statute [G.S. 90-95(h) and (i)] on which the indictments are based.

We find the words "guilty of a felony . . . known as 'trafficking in marijuana' " relates primarily to the preceding words "50 pounds (avoirdupois) of marijuana," and the use of the word felony in singular form refers to the singular crime known as "trafficking in marijuana," a crime consisting of any one or more of the denounced acts, any one of which is a separate crime. We hold that under G.S. 90-95(h) if a person engages in conduct which constitutes possession of in excess of 50 pounds of marijuana as well as conduct which constitutes manufacture of in excess of 50 pounds of marijuana, then the person may be charged with and convicted of two separate felonies of trafficking in marijuana.

Order No. 1 quashing and vacating the first and third counts of the indictments is reversed.

II. Destruction of Marijuana Plants

[2] The circumstances relating to the destruction of the marijuana appear in the State's answer to the defendants' motion for Bill of Particulars, as follows: On 13 September 1980 Hoke County law officers discovered a field of approximately three to five acres containing growing marijuana and three stacks of marijuana recently cut above ground level. Photographs of the marijuana were taken. Random samples weighing about three to four pounds were taken from the cut stacks and the growing marijuana. The marijuana was immediately hauled away and weighed. The weight was about 2,200 pounds. On the following day the growing marijuana remaining in the field was harvested and estimated by the law officers to weigh 500 pounds. All the marijuana was taken by truck to the sally port of the Hoke County jail, where it was photographed. On 15 September 1980 law officers burned the marijuana, except the samples which were available to defendants for inspection. It was burned on the order of the Sheriff due to lack of storage facilities.

Five photographs showing the three stacks of cut marijuana, the field of marijuana, and the marijuana loaded on the truck, were delivered to defendants. The defendants offered no evidence or other material in support of their motions.

In Order No. 2 the court found as a fact that the Sheriff ordered the green vegetable matter destroyed because of lack of storage facilities, and that it was not destroyed with the intention to deprive the defendants of an opportunity to inspect or test the plants. It is obvious that 2,700 pounds of marijuana plants are quite bulky. Storage pending final disposition of the cases would require a substantial storage area. It appears that the Sheriff had no adequate storage facility under his control. There would be many problems involved in the preservation and security of the plants if a commercial storage facility were used. This finding of fact is supported by the Bill of Particulars. The defendants' cross assignments of error excepting to the finding are without merit.

In determining whether the trial court erred in dismissing the second and fourth counts, we must consider whether the circumstances of the destruction in light of the crimes charged deprived the defendants of constitutional rights to due process or statutory rights to discovery.

Weight is one of the essential elements of the crimes charged. The indictment alleges that the weight of the marijuana exceeded 2,000 pounds in violation of G.S. 90-95(h)(1)c. The weight element upon a charge of trafficking in marijuana becomes more critical if the State's evidence of the weight approaches the minimum weight charged. In the case *sub judice* it appears that the State's evidence tends to show that the weight of the marijuana plants was 700 pounds more than the 2,000 pounds charged under G.S. 90-95(h)(1)c. The only part of the marijuana plant which does not qualify as "marijuana" is "the mature stalks of such plant, . . . " G.S. 90-87(16). The defendants having offered no evidence in support of their motions, the record on appeal does not disclose whether defendants contend that the stalks were mature and, if so, whether the weight of the mature stalks could possibly reduce the total weight of the "marijuana" below 2,000 pounds. The burden would be upon the defendants to show that the stalks were mature or that any other part of the matter or material seized did not qualify as "marijuana," as defined by G.S. 90-87(16). *See State v. Childers*, 41 N.C. App. 729, 255 S.E. 2d 654, *disc. rev. denied*, 298 N.C. 302, 259 S.E. 2d 916 (1979).

The defendants contend that they cannot meet the burden of showing that some of the material seized and weighed was not "marijuana" and the weight of such disqualified material because of the destruction of the marijuana. The validity of this contention must be considered in light of the information submitted by the State in its Bill of Particulars, such as the retention of random samples of the marijuana stalks weighing three to four pounds, photographs taken 13 September 1980, showing the stacks of cut marijuana in the field and the open field of marijuana behind the stacks, and photographs taken 15 September 1980 showing the truckload of marijuana at the county jail. The random samples of marijuana are available to the defendants for inspection and testing. Also furnished or available to defendants is a copy of the Laboratory Report of the State Bureau of Investigation.

Defendants' claim of deprivation of rights is based entirely on the destruction of the marijuana, except for the random samples, as reported in the Bill of Particulars. Defendants have offered arguments but no evidentiary matter in support of their motions. It does not appear from the record on appeal that they have inspected or tested the random samples available to them for the purpose of determining if the samples are marijuana, or for the purpose of determining if the stalks are or were mature and their size and weight, or if there were other extraneous matter which did not qualify as "marijuana." The questions asked in defendants' motions for Bill of Particulars were fully answered by the State. There is nothing to indicate that defendants could not by discovery or independent investigation obtain other information which is relevant on the issue of weight.

There has been no violation of defendants' discovery rights under G.S. 15A-903(e), which provides in pertinent part as follows:

> "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.*" (Emphasis added.)

The State has made available to the defendants samples of the physical evidence in question. The only physical evidence available to the prosecutor is random samples. The statute does not require the preservation of all physical evidence. Most of the physical evidence originally seized was destroyed by law officers in good faith because of lack of storage facilities.

Nor has the destruction deprived the defendants of the opportunity to test independently the random samples of physical evidence to determine if it is marijuana, or to determine if a part of the gross weight of the matter is mature stalks or other extraneous matter which would not qualify as marijuana.

There has been no violation of defendants' rights of confrontation under Article I, Section 23 of the Constitution of the State of North Carolina, which provides:

"In all criminal prosecutions, every person charged with crime has the right to be informed of the accusation and to confront the accusers and witnesses with other testimony, . . . "

This provision of the State Constitution has been interpreted by numerous cases to guarantee to defendants in criminal trials the right to confront the witnesses against them and to confront the accusers with other testimony. *State v. Thomas*, 294 N.C. 105, 240 S.E. 2d 426 (1978); *State v. Smathers*, 287 N.C. 226, 214 S.E. 2d 112 (1975); *State v. Watson*, 281 N.C. 221, 188 S.E. 2d 289, *cert. denied*, 409 U.S. 1043 (1972).

The defendants next argue the infringement of their due process rights under either the State or Federal Constitutions. First, the finding by the trial court that the law officers acted in good faith in destroying the bulk of the marijuana is fully supported by the evidence. The finding of good faith, however, does not end the inquiry. There still remains the question of whether such destruction denied to the defendants a fair and reasonable opportunity to investigate, prepare and present their defense in violation of their constitutional right to due process. *United States v. Agurs*, 427 U.S. 97, 49 L.Ed. 2d 342, 96 S. Ct. 2392 (1976); *United States v. Bryant*, 448 F. 2d 1182 (D.C. Cir. 1971).

We have found no North Carolina cases directly on point. Cases in which all physical evidence was destroyed by the prosecution are not applicable because in the case before us random samples have been preserved. Federal cases which support the principle that the destruction of the bulk of the marijuana seized, but with the preservation of a random sample, does not violate due process are: *United States v. Benedict*, 647 F. 2d 928 (9th Cir.), *cert. denied*, --- U.S. ---, 102 S. Ct. 648 (1981); *United States v. Young*, 535 F. 2d 484 (9th Cir.), *cert. denied*, 429 U.S. 999 (1976); and *United States v. Heiden*, 508 F. 2d 898 (9th Cir. 1974).

We do not impose a hard and fast rule governing the destruction of physical evidence by the State. Whether the destruction infringes upon the rights of an accused depends upon the circumstances in each case. In this case we consider particularly significant the destruction of the bulk of the marijuana in good faith and for a practical reason, the preservation of random samples, the photographs of the physical evidence, and the failure

on the part of the defendants to show that the weight of the marijuana, though a necessary element, was a critical issue.

Order No. 1 and Order No. 2 are not supported by the evidence and the law. Defendants' cross-assignments of error are overruled. The orders appealed from are

Reversed.

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

TEXACO, INC. v. GEORGE E. CREEL, GRAHAM R. CREEL AND LORENE G. BRAME

No. 8115SC806

(Filed 15 June 1982)

1. **Vendor and Purchaser § 1.3— construction of lease agreement—right of first refusal and fixed price option**

The trial judge erred in denying plaintiff's motion for summary judgment for specific performance of a $50,000 fixed price option contained in a lease agreement. A right of first refusal in plaintiff in the lease agreement was meaningful only if the offer by a third party was at a price lower than that established under the fixed price option, and plaintiff conformed to the requirements necessary to exercise this option.

2. **Contracts § 22; Vendor and Purchaser § 2.4— tender of purchase price proper**

The tender by plaintiff of a $50,000 check drawn on the bank account of plaintiff's law firm was proper tender in exercise of a fixed price option where (1) there was evidence that no objection to a tender by check was made at the time of the purported tender, (2) tender of the check was the most practical tender possible under the circumstances, and (3) tender to one defendant's attorney, instead of the defendant personally, was tender to one apparently authorized to receive it and was sufficient.

APPEAL by plaintiff and cross-appeal by defendants from *Martin, Judge.* Order from which plaintiff appeals entered 26 February 1981, and judgment from which defendants appeal entered 3 March 1981, in Superior Court, ORANGE County. Heard in the Court of Appeals 31 March 1982.

Newsom, Graham, Hedrick, Murray, Bryson & Kennon, by Josiah S. Murray, III and Joel M. Craig, for plaintiff-appellant and cross-appellees.

Newitt, Bruny & Koch, by John A. Newitt, Jr. and Roger H. Bruny, for defendant-appellees and cross-appellants.

BECTON, Judge.

Plaintiff instituted this action against defendants to obtain specific performance of a fixed price option provision contained in an agreement under which plaintiff leased a certain parcel of land from defendants' predecessors in title. Defendants counterclaimed, alleging breach of the first refusal provision of the contract and seeking monetary damages. The trial court granted partial summary judgment to defendants on the issue of specific performance and, after evidence on the question of damages to defendants, granted plaintiff's motion for a directed verdict. The major issue considered on appeal involves the propriety of the trial court's grant of partial summary judgment for defendants and its denial of summary judgment for plaintiff. For the reasons set forth below, we reverse.

The Lease

On 9 September 1949, plaintiff, while doing business under the corporate name of The Texas Company, entered into a lease agreement whereby Thomas R. Pendergraft and wife Inez P. Pendergraft, as lessors, demised to plaintiff certain real property located on Franklin Street in Chapel Hill, North Carolina. The ten-year lease was to commence 1 February 1950, and contained four options to renew, each for a period of five years. The lease also contained the following option to purchase:

> (11)—Option to Purchase. Lessor hereby grants to lessee the exclusive right, at lessee's option, to purchase the demised premises, free and clear of all liens and encumbrances, including leases, (which were not on the premises at the date of this lease) at any time during the term of this lease or any extension or renewal thereof,
>
> (a) for the sum of *Fifty Thousand* dollars; it being understood that if any part of said premises be condemned, the amount of damages awarded to or accepted

by lessor as a result thereof shall be deducted from such price,

(b) On the same terms and at the same price as any bona fide offer for said premises received by lessor and which offer lessor desires to accept. Upon receipt of a bona fide offer, and each time any such offer is received, lessor (or his assigns) shall immediately notify lessee, in writing, of the full details of such offer, including the name and address of any offeror, whereupon lessee shall have thirty (30) days after receipt of such notice in which to elect to exercise lessee's prior right to purchase. No sale of or transfer of title to said premises shall be binding on lessee unless and until these requirements are fully complied with.

Any option herein granted shall be continuing and preemptive, binding on the lessor's heirs, devisees, administrators, executors, or assigns, and the failure of lessee to exercise same in any one case shall not affect lessee's right to exercise such option in other cases thereafter arising during the term of this lease or any extension or renewal thereof.

Upon receipt of lessee's notice of election to exercise any option granted herein, which notice shall be given in accordance with the Notice Clause of this lease, lessee shall have a reasonable time in which to examine title and, upon completion of such examination if title is found satisfactory, shall tender the purchase price to lessor, and lessor shall thereupon deliver to lessee a good and sufficient Warranty Deed conveying the premises to the lessee free and clear of all encumbrances (including without limiting the foregoing the rights of dower and/or curtesy). All rentals and taxes shall be prorated between grantor and grantee to the date of delivery of the aforesaid deed.

Lessee's notice of election to purchase pursuant to either of the options granted in this clause shall be sufficient if deposited in the mail addressed to lessor at or before midnight of the day on which option period expires.

The Purchase Option of $50,000.00 set out above in Clause 11 of this lease can only be exercised at the end of the

ten-year lease period or at the end of either of the four five-year renewal privileges contained in Clause 12. . . .

The Arguments and Contentions

On 4 February 1980, plaintiff filed notice of *lis pendens* and on 25 February, 1980, it filed this action against defendants, successors in interest to Thomas and Inez Pendergraft, seeking specific performance of the provision granting it the option to purchase the property for $50,000. The complaint alleged that, on 17 January 1980, plaintiff, through an authorized agent, gave notice of its election to purchase the property under the fixed price option and that further, on 31 January 1980, prior to the 12 o'clock midnight expiration of the lease term, plaintiff gave notice of its election to purchase to the attorney of defendant George Creel. On 1 February 1980, plaintiff, through its attorney, tendered the fixed price option amount of $50,000 to each defendant or his agent or representative. Defendants, however, failed to deliver to plaintiff a warranty deed conveying the premises. Alleging that it had no adequate remedy at law, plaintiff sought an order of specific performance.

Defendants answered, alleging that, under the terms of the lease agreement, the $50,000 option was valid unless there existed a "bona fide offer for said premises, received by lessor [defendants] and which offer lessor desires to accept." Defendants asserted that there was a bona fide offer of $217,000 from William Graham Creel and Catherine Jane Creel; that the offer was hand delivered to plaintiff on 25 January 1980; and that, on 23 January 1980, defendants also received a bona fide offer of $155,000 from T. Sherwin Cook, Inc. which offer was also communicated to plaintiff on 28 January 1980. Defendants contended that plaintiff's exercise of its option committed it to the $217,000 figure, and they counterclaimed for that amount. Further, defendants alleged that plaintiff's filing of the notice of *lis pendens* created a cloud upon the property; that, as a result of this, defendants were unable to convey title to William G. Creel and Catherine J. Creel; that defendants were damaged in the amount of $217,000; and that plaintiff's action constituted an unfair trade practice for which defendants were entitled to treble damages.

In its reply, plaintiff denied that it had elected to purchase the property under the first refusal provision, denied any damage

to defendants by virtue of the filing of a notice of *lis pendens*, and denied any unfair trade practice on its part. Plaintiff sought a dismissal of the counterclaims.

On 9 February 1981, after extensive discovery, plaintiff filed a motion for summary judgment. Defendants responded to plaintiff's motion with a cross-motion for summary judgment.

The Trial Court's Rulings

On 26 February 1981, the trial court entered an order finding no genuine issue of material fact and further finding, among other things, that, on or about 3 January 1980, the defendants received an offer from T. Sherwin Cook, Inc. to purchase the defendants' property for $155,000. The trial court concluded that on that date the plaintiff's right to purchase the property of defendants under the fixed price option of $50,000 was terminated. The trial court, therefore, granted in part the defendants' motion for summary judgment, concluding that plaintiff was not entitled to the equitable remedy of specific performance and ordering dissolution of the *lis pendens*. The trial court ordered that the issues contained in defendants' counterclaims be set for determination by a jury. Plaintiff excepted to this judgment and later gave notice of appeal. On 26 February 1981, a jury heard the evidence on defendants' counterclaim. At the end of the evidence, the trial court entered a judgment granting plaintiff's motion for a directed verdict. From this judgment the defendants gave notice of appeal.

I

[1] The first question presented is whether the trial court erred in denying plaintiff's motion for summary judgment in which plaintiff sought specific performance of the $50,000 fixed price option contained in the lease agreement.

The purpose of summary judgment under G.S. 1A-1, Rule 56 is to "bring litigation to an early decision on the merits without the delay and expense of trial [in cases in which] it can be readily demonstrated that no material facts are in issue." *Kessing v. Mortgage Corp.*, 278 N.C. 523, 533, 180 S.E. 2d 823, 829 (1971). Upon a motion for summary judgment, the trial court does not attempt to resolve issues of fact; rather, it determines whether there is a genuine issue of material fact necessitating a trial.

Lambert v. Power Co., 32 N.C. App. 169, 231 S.E. 2d 31, *disc. review denied*, 292 N.C. 265, 233 S.E. 2d 392 (1977). Summary judgment, being a drastic remedy, must be used with due regard to its purpose and to its requirements so that no person is deprived of trial on a genuine, disputed factual issue. *Kessing v. Mortgage Corp.*

In the case before us, we find no genuine issue of material fact. We reach a result contrary to that of the trial court, however, because our interpretation differs from that court's interpretation of the fixed price option and the first refusal clause of the lease agreement. In construing this contract, we are bound by the general rule that a contract must be read as a whole and that individual clauses and particular words in an agreement must be considered in connection with the rest of the agreement. *Robbins v. Trading Post*, 253 N.C. 474, 117 S.E. 2d 438 (1960).

In reaching our decision, we have paid particularly close attention to two cases interpreting substantially identical option clauses. In *Texaco, Inc. v. Rogow*, 150 Conn. 401, 190 A. 2d 48 (1963), Texaco was the lessee under a 1940 lease agreement that ran for ten years. Under the agreement, the lessee had an option to purchase the premises for $16,000. That option, however, was exercisable only after the end of the ninth year of the lease. Also contained in the contract was a provision giving lessee the right of first refusal should lessors receive a bona fide offer for the premises. Shortly before the expiration of the ninth year, lessor received an offer for $44,000 and, pursuant to the terms of the lease, communicated that offer to the lessee. Refusing this offer, lessee attempted, after the end of the ninth year, to exercise the fixed price option. When the lessor refused to accept formal tender of the fixed price, lessee instituted an action for specific performance. The Supreme Court of Connecticut found:

> There is no language whatever in the lease indicative of any intention other than that the first refusal provision was the only one under which the plaintiff could purchase the property during the first nine years and that, after that period, the first refusal provision was one of two option provisions, each of which was on a parity with the other.

Id. at 408, 190 A. 2d at 52. The court held that the lessee had to accept the first refusal offer as provided in the lease or risk los-

ing the right to purchase the property thereafter. In the opinion of the court, the fixed price option was rendered ineffective by the offer of the third party, and it could not be exercised even after the close of the ninth year.

We believe that the *Rogow* opinion renders completely meaningless the fixed price option and ignores language establishing, for practical purposes, the relationship of the two option provisions. We prefer the rationale supporting the opinion of *Crowley v. Texaco, Inc.*, 306 N.W. 2d 871 (S.D. 1981), which dealt with the same option provisions as found in the present case. Relying on the case of *Butler v. Richardson*, 74 R.I. 344, 60 A. 2d 718 (1948), the South Dakota court held that the first refusal option has no effect upon the fixed price option. The first refusal option provides only a means whereby the lessors, if they desire, can induce an acceleration of lessee's decision to purchase by affording them an opportunity to purchase at a price more advantageous to them than the price fixed in the option. Under this interpretation, therefore, the first refusal option is meaningful only if the offer by a third party is at a price lower than that established under the fixed price option. The lessee's rights under the fixed price option continue and are not extinguished by the failure of the lessee to exercise a first right to purchase after notice of an offer from a third person.

After reviewing these decisions and applying the rules of construction, we are of the opinion, and so hold, that the right of first refusal, designated an option to purchase, had no effect on the fixed price option. Since the options contained in the contract were "continuing and pre-emptive, binding on lessor's heirs, devisees, administrators, executors, or assigns. . .," a third party purchaser of the property would purchase only at a price less than the one established by the fixed price option. This interpretation of the option provision of the contract is the only interpretation which gives effect to the fixed price option. Thus, Texaco's right to purchase the property at the price of $50,000 was not affected by the offers made by third party purchasers. If, therefore, Texaco conformed to the requirements necessary to exercise the option, summary judgment in its favor would have been proper.

II

The only remaining question we consider is whether Texaco properly tendered the sum of $50,000 on 1 February 1980, thereby conforming to the option requirements. Before an action will lie for specific performance, plaintiff must show that he offered to perform his part of the agreement or that such offer was rendered unnecessary by the refusal of the defendant to comply. *Winders v. Kenan*, 161 N.C. 628, 77 S.E. 687 (1913).

[2] Defendants, in their cross-appeal, allege two defects in plaintiff's tender. First, they contend that plaintiff's tender of the $50,000 by check drawn on the bank account of plaintiff's law firm was not a proper tender. Citing the case of *Lumber Co. v. Privette*, 178 N.C. 37, 100 S.E. 79 (1919), defendants argue that a check is never legal tender unless there is evidence that the party to whom the check was tendered was willing to accept the check in lieu of legal tender money. The burden would be upon Texaco in the instant case to prove that defendants waived tender in cash.

It has generally been held that an objection to a tender by check is waived unless it is expressly made at the time of the purported tender. Annot., 23 A.L.R. 1284 (1923), supplemented at 51 A.L.R. 393 (1927). The reason for the requirement that there be an express objection to the form of tender is that this allows the party making the tender to secure the specific money for an acceptable tender. Based on this, plaintiff submits that the burden of proving the defendants' waiver of tender of the option amount in cash was satisfied by uncontroverted affidavits of Helga Nichols and Paulette Shaw who stated that none of the three persons to whom tender was made objected to the form of the tender. We agree with the plaintiff. Furthermore, we must note the extremely difficult time plaintiff would have had tendering $50,000 among the three defendants. One of those defendants owned a life estate in the property, thus forcing the plaintiff to determine the relative, but unequal interests of the parties. For all practical purposes, tender of the check appears to have been the most practical tender possible under the circumstances.

Defendants' second contention is that tender of payment was not properly made to defendant George E. Creel, because it was not delivered to him personally. The record shows that, as to

George Creel, the tender was made to his attorney, to whom Creel had referred plaintiff on questions " . . . about the lease or options. . . ."

Generally, a tender must be made to the person entitled to receive it or it is invalid. 86 C.J.S. Tender § 39 (1954). "As a general rule it must be made to the creditor, or to one either actually or apparently authorized to receive tender." *Id.* Because George Creel had indicated that his attorney would handle the property for him, we believe that the tender to that attorney was tender to one apparently authorized to receive it and was, therefore, sufficient.

Furthermore, in studying the question of tender, we note that defendants took no exception to the trial court's finding that there was no genuine issue as to the fact that the plaintiff tendered to defendants the sum of $50,000 for purchase of the property. We affirm that finding.

For the reasons set forth above, we conclude that the trial court erred in granting partial summary judgment to the defendants. We remand the case for entry of summary judgment for the plaintiff and for an order directing specific performance on the fixed option agreement.

Reversed and remanded.

Judge WELLS and Judge HILL concur.

WILLIE ROBINSON, EMPLOYEE, PLAINTIFF v. J. P. STEVENS AND COMPANY, INC., EMPLOYER, AND LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8110IC760

(Filed 15 June 1982)

1. Master and Servant § 68— sufficient causal connection between byssinosis and cotton dust exposure

The causal connection between plaintiff's disease of byssinosis and his employment was sufficiently established to permit the Commission's conclusion of compensability.

2. Master and Servant § 68— hypotheticals posed to experts adequate

In a workers' compensation proceeding, hypotheticals posed to medical experts adequately reflected plaintiff's testimony concerning former breathing problems and the material with which he worked.

3. Master and Servant § 68— byssinosis—findings and conclusions supporting finding of

The Commission's findings that plaintiff "experiences chest pain and breathlessness with moderate exercise and exertion," has been "unable to work at gainful employment and has not been employed since May 30, 1979," and is "totally and permanently disabled as a result of Byssinosis," were supported by competent evidence and were sufficient to support a conclusion of total and permanent disability under G.S. 97-2(9)(Supp. 1981).

4. Evidence § 50.2; Master and Servant § 68— medical expert witness in general practice—admissibility of testimony

The Industrial Commission did not err in allowing a medical expert witness "in general practice with experience in treating people with respiratory complaints" to give an opinion on whether plaintiff was "unable to engage in labor requiring exertion."

5. Master and Servant § 75— workers' compensation—permanent disability—failure to award medical expenses

Under G.S. 97-29, where the Industrial Commission found plaintiff to be permanently and totally disabled, it was required to award medical expenses during his lifetime.

6. Master and Servant § 99— failure to award attorney's fees proper—reasonable grounds for not defending

There was no evidence to support the Commission's conclusion that "the case was not defended without reasonable ground" under G.S. 97-88.1 and the Commission's denial of attorney's fees under G.S. 97-88.1 where there was sufficient evidence to support a finding that defendant had no knowledge of OSHA dust measurements being sought by plaintiff.

7. Master and Servant § 99— failure to enter award of attorney's fees—no abuse of discretion

The Industrial Commission did not abuse its discretion in failing to enter an award of attorney's fees for plaintiff pursuant to G.S. 97-88.

APPEAL by defendants from the North Carolina Industrial Commission. Opinion and award entered 29 January 1981. Heard in the Court of Appeals 30 March 1982.

Plaintiff alleged he suffered from byssinosis as a result of exposure to cotton dust while employed by defendant-employer. The full Commission affirmed in part the hearing commissioner's award of compensation for total and permanent disability as a

result of an occupational disease. From the opinion and award of the full Commission, defendants appeal and plaintiff cross appeals.

Hassell & Hudson, by Charles R. Hassell, Jr., Robin E. Hudson, and R. James Lore, for plaintiff.

Maupin, Taylor & Ellis, P.A., by Richard M. Lewis and David V. Brooks, for defendants.

WHICHARD, Judge.

DEFENDANTS' APPEAL

[1] Defendants assign error to the findings, conclusions, and award of the full Commission, contending that plaintiff failed to prove a sufficient causal connection between his byssinosis and cotton dust exposure, and that the record contains insufficient evidence of plaintiff's total and permanent disability. We disagree.

The findings of fact made by the Commission are conclusive on appeal if supported by competent evidence in the record. *Walston v. Burlington Industries*, 304 N.C. 670, 677, 285 S.E. 2d 822, 827 (1982); *Morrison v. Burlington Industries*, 304 N.C. 1, 6, 282 S.E. 2d 458, 463 (1981); *Moore v. Piedmont Processing Company*, 56 N.C. App. 594, 596, 289 S.E. 2d 573, 574 (1982). The conclusions of the Commission will not be disturbed if justified by the findings of fact. *Inscoe v. Industries, Inc.*, 292 N.C. 210, 216, 232 S.E. 2d 449, 452 (1977); *Rutledge v. Tultex Corp.*, 56 N.C. App. 345, 349, 289 S.E. 2d 72, 74 (1982); *Moore, supra*, 56 N.C. App. at 596, 289 S.E. 2d at 574.

The Commission found the following: "Plaintiff was exposed to respirable cotton dust" for a total of about twelve years while working at defendant-employer's cotton mill. Plaintiff contracted byssinosis, a disease in which the airways are obstructed "due to exposure to respirable cotton dust." No extrinsic factors contributed to plaintiff's airway obstruction. The Commission concluded that "plaintiff ha[d] contracted . . . Byssinosis . . . caused by exposure to cotton dust in his employment with defendant-employer." We hold these findings fully supported by the record, and that they fully support the conclusion that plaintiff's byssinosis was caused by exposure to cotton dust.

Defendants contend the medical testimony established at most that exposure to cotton dust was one factor in causing plaintiff's disease. They argue that the requirement that the disease be *caused by* exposure to cotton dust "is not met by establishing that the disease condition may have been contributed to by the exposure or that such exposure, in addition to other, non-compensable causes, may have been a *factor* in the disease condition."

Assuming, *arguendo*, that cotton dust was only one of multiple causal factors, "[d]isability . . . resulting from a disease is compensable when . . . the disease . . . is aggravated or accelerated by causes and conditions characteristic of and peculiar to claimant's employment." *Walston, supra*, 304 N.C. at 679-80, 285 S.E. 2d at 828. If the disease is not disabling apart from the aggravation by occupational conditions, "the employer must compensate the employee for the entire resulting disability." *Morrison, supra*, 304 N.C. at 18, 282 S.E. 2d at 470. The Commission specifically found that, although plaintiff had previously had nasal polyps, "no extrinsic factors . . . contribute[d] to plaintiff's airway obstruction" and that, in any event, the polyps were not in themselves disabling. We find the causal connection between plaintiff's disease and his employment to have been sufficiently established, pursuant to the foregoing standards, to permit the Commission's conclusion of compensability.

[2] Defendants further contend that certain medical testimony supporting causation was incompetent, in that hypotheticals posed to the medical experts did not include significant facts which would diminish the role of cotton dust as a cause of plaintiff's disease. Specifically, defendants argue that the hypotheticals failed to present plaintiff's testimony that (1) he wore a respirator for a year while working for defendant-employer, (2) synthetics were processed in some rooms he worked in, and (3) he had breathing problems before he was hired by defendant-employer.

We have examined the hypotheticals, and we find that they adequately reflect plaintiff's testimony on these points. Further, any failure to include in the hypotheticals all elements of plaintiff's testimony is not fatal. A hypothetical question need only present "sufficient facts to allow [the witness] to express an

intelligent and safe opinion." *Dean v. Coach Co.*, 287 N.C. 515, 521, 215 S.E. 2d 89, 93 (1975). *See also State v. Dilliard*, 223 N.C. 446, 448, 27 S.E. 2d 85, 87 (1943); *Pigford v. R.R.*, 160 N.C. 93, 103, 75 S.E. 860, 863 (1912). "It was not incumbent on the plaintiff to include in his [hypothetical] questions all the evidence bearing upon the fact to be proved; the defendants had the right to present other phases of the evidence in counter-hypothetical questions." *Godfrey v. Power Co.*, 190 N.C. 24, 31, 128 S.E. 485, 490 (1925); *see also State v. Stewart*, 156 N.C. 636, 640, 72 S.E. 193, 194 (1911). The hypotheticals here contained "sufficient facts to allow [the witness] to express an intelligent and safe opinion." *Dean, supra.* Further, the record shows that defendants cross-examined the medical experts but did not pose any counter-hypotheticals which included those facts they believed significant regarding causation. We thus find no merit to this contention.

[3] Defendants next contend there is insufficient evidence to support the Commission's findings that plaintiff "experiences chest pain and breathlessness with moderate exercise and exertion," has been "unable to work at gainful employment and has not been employed since May 30, 1979," and is "totally and permanently disabled as a result of Byssinosis." They argue that the finding that plaintiff cannot "perform ordinary activity consistent with ordinary employment" indicates the Commission applied the wrong criteria to determine disability.

G.S. 97-2(9)(Supp. 1981) defines "disability" as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." The test for disability is whether and to what extent earning capacity is impaired, not the fact or extent of physical impairment. *Priddy v. Cab Co.*, 9 N.C. App. 291, 297, 176 S.E. 2d 26, 30 (1970). "If [plaintiff] is unable to work and earn *any* wages, [he] is totally disabled. . . . If [he] is able to work and earn *some* wages, but less than [he] was receiving at the time of [his] injury, [he] is partially disabled." *Little v. Food Service*, 295 N.C. 527, 533, 246 S.E. 2d 743, 747 (1978). We hold that the Commission's findings are supported by competent evidence and are sufficient to support a conclusion of total and permanent disability under the applicable standard.

[4] Finally, defendants assign error to a number of evidentiary rulings during the testimony of plaintiff's family physician. They

argue that the hearing commissioner abused her discretion in allowing this witness, who was not a specialist, to give an expert opinion regarding the cause of plaintiff's disability.

"[W]hether none but a specialist can testify as an expert, is not a matter of judicial discretion the exercise of which by the trial court is final; it is a question of law which is subject to review by the appellate tribunal." *Pridgen v. Gibson*, 194 N.C. 289, 291, 139 S.E. 443, 445 (1927). A medical witness need not, as a matter of law, be a specialist in a particular subject to give an opinion on it. *Seawell v. Brame*, 258 N.C. 666, 129 S.E. 2d 283 (1963); *Pridgen, supra*, 194 N.C. at 291-92, 139 S.E. at 445. The witness here was properly accepted "as an expert witness in general practice with experience in treating people with respiratory complaints." It thus was not error to allow him to give his opinions regarding causation and disability in response to properly framed hypothetical questions.

Defendants' further argument that this witness improperly invaded the province of the fact finder in giving an opinion on the ultimate issue of whether plaintiff was disabled is without merit. Direct examination of this witness solicited an opinion on whether plaintiff was "unable to engage in labor requiring exertion," that is, whether he was *physically* disabled. It did not solicit an opinion on the ultimate issue of whether and to what extent plaintiff's earning capacity was impaired. *Priddy, supra.*

Defendants' final evidentiary argument is that they were denied their right to cross-examine plaintiff's family physician, because the hearing commissioner first excluded a hypothetical regarding causation and later reversed her ruling and admitted the testimony subsequent to the hearing. Assuming, *arguendo*, that the previously excluded evidence was improperly admitted due to lack of opportunity for cross-examination, the admission was not reversible error, because the findings of the Commission on disability and causation are supported by competent evidence introduced through two other medical experts. Findings supported by competent evidence are binding on appeal, even though incompetent evidence was also admitted. *See, e.g., Blalock v. Durham*, 244 N.C. 208, 92 S.E. 2d 758 (1956).

PLAINTIFF'S APPEAL

[5] Plaintiff assigns error to the Commission's failure to award medical expenses pursuant to G.S. 97-29. The Commission's award reads, in pertinent part, as follows: "Defendants shall pay all costs of reasonable medical and/or other treatment necessitated by plaintiff's occupational disease *so long as such treatment will tend to lessen the period of disability or provide needed relief* . . . . " (Emphasis supplied.)

The Commission did not state the statutory basis for its award of medical expenses. Both G.S. 97-25 and G.S. 97-59, as in effect at the time of the injury, appear to support the award, because they allow payments only so long as treatment will "tend to lessen the period of disability." G.S. 97-25 (1979); G.S. 97-59 (1979) (rewritten 1981). G.S. 97-29, however, contains a mandatory provision that applies when the Commission finds a permanent and total disability. *See Peeler v. Highway Comm.*, 302 N.C. 183, 185, 273 S.E. 2d 705, 707 (1981). "In cases of total and permanent disability, compensation, including reasonable and necessary nursing services, medicines, sick travel, medical, hospital, and other treatment or care or rehabilitative services *shall* be paid for by the employer *during the lifetime of the injured employee.*" G.S. 97-29 (1979 & Supp. 1981) (emphasis supplied). The Commission here found plaintiff to be permanently and totally disabled. It thus was required to award medical expenses during his lifetime. *Id.*

[6] Plaintiff assigns error to the full Commission's reversal of the hearing commissioner's award of attorney's fees pursuant to G.S. 97-88.1, which provides: "If the Industrial Commission shall determine that any hearing has been brought, prosecuted, or defended without reasonable ground, it may assess the whole cost of the proceedings including reasonable fees for defendant's attorney or plaintiff's attorney upon the party who has brought or defended them." The full Commission concluded that this provision was not applicable because "the case was not defended without reasonable ground."

The following stipulated facts are pertinent to the inquiry:

On 10 August 1979 plaintiff served defendants with interrogatories seeking, *inter alia*, dust level measurements made by

anyone, including state or federal OSHA representatives, in the parts of the mill in which plaintiff worked. Plaintiff specifically requested copies of any OSHA citations.

On 2 November 1979, plaintiff served defendant-employer's plant manager with a subpoena *duces tecum* requiring that he bring to a 16 November 1979 hearing copies of all dust level measurements made from 1960 to date in a room where plaintiff worked. On 8 November 1979 plaintiff served on defendants a motion to compel answers. On 9 November 1979 defendants served their answers to the interrogatories, objecting to the request for dust level measurements as irrelevant to plaintiff's claim. Also on 9 November 1979 defendants moved to quash the subpoena *duces tecum* as irrelevant and overbroad.

At the 16 November 1979 hearing certain dust level measurements were produced by defendant-employer's personnel manager and introduced by plaintiff over defendants' objections. Defendant-employer's personnel manager, as well as counsel for defendants, denied specific knowledge of the existence of OSHA dust level measurements.

On 5 December 1979 the hearing commissioner ordered that the matter be reset for hearing on 17 December 1979 "for the limited purpose of presentation by the plaintiff of dust level tests and measurements performed by OSHA . . . in the area which and during the time when, plaintiff worked for the defendant-employer." Before the 17 December 1979 hearing defendants delivered to plaintiff documents containing dust level measurements, including a 4 November 1976 OSHA citation with attachments showing that plaintiff in particular was exposed to a "serious" level of dust. Defendants stipulated to the authenticity of these documents, but objected to them as irrelevant and therefore inadmissible. The 17 December 1979 hearing was thus rendered unnecessary and was never held. The hearing commissioner awarded plaintiff attorney's fees

> as a result of plaintiff's counsels' preparation for the [17 December 1979] hearing . . . which was requested because of defendants' failure to produce documents which with reasonable diligence and in response to subpoena and order limiting the same, could have been provided at the [16 November 1979] hearing . . . or prior to another hearing be-

> ing set and plaintiff's having to acquire said documents in support of their motion for the [17 December 1979] hearing for the purpose of introducing the same into evidence. There is no reasonable argument or defense that these documents were not relevant, competent and material on the issue of plaintiff's exposure to cotton dust, an element of the claim herein, that these documents did not exist or that defendants did not have knowledge of them.

The full Commission, upon reviewing an award by the hearing commissioner, is not bound by findings of fact supported by the evidence, but may reconsider evidence and adopt or reject findings and conclusions of the hearing commissioner. *Watkins v. City of Wilmington*, 290 N.C. 276, 280, 225 S.E. 2d 577, 580 (1976); *Lee v. Henderson & Associates*, 284 N.C. 126, 130, 200 S.E. 2d 32, 35-36 (1973). The findings and conclusions of the full Commission, however, are binding on this Court if adequately supported by the record. *Walston, supra; Morrison, supra; Moore, supra.* Whether the evidence shows a "reasonable ground" to defend is, however, a matter reviewable by this court. *See Sparks v. Mountain Breeze Restaurant*, 55 N.C. App. 663, 286 S.E. 2d 575 (1982).

While we cannot agree with defendants' contention that the dust level measurements for the locations and times of plaintiff's work for defendant-employer were irrelevant, there was sufficient evidence to support a finding that defendants had no knowledge of the OSHA measurements. Therefore, although there was evidence to support a contrary result, there was sufficient evidence to support the Commission's conclusion that "the case was not defended without reasonable ground." The conclusion is therefore binding on this Court.

[7] Plaintiff assigns error to the failure of the Commission to award attorney's fees pursuant to G.S. 97-88, which provides:

> If the [I]ndustrial Commission at a hearing on review . . . shall find that such hearing . . . [was] brought by the insurer and the Commission . . . by its decision orders the insurer to make . . . payments of benefits . . . to the injured employee, the Commission . . . may further order that the cost to the injured employee of such hearing . . . including therein reasonable attorney's fee . . . shall be paid by the insurer as a part of the . . . costs.

Defendants here appealed to the full Commission and were ordered to compensate plaintiff. The prerequisites for an award pursuant to G.S. 97-88 thus were fulfilled. *See Bowman v. Chair Co.*, 271 N.C. 702, 157 S.E. 2d 378 (1967). The statute, however, leaves the award to the Commission's discretion; and we find no abuse of discretion in the failure to enter an award here.

In light of our disposition of defendants' appeal, we need not address plaintiff's assignment of error to the exclusion of certain evidence.

RESULT

In defendants' appeal, affirmed.

In plaintiff's appeal, remanded for entry of an award of medical expenses pursuant to G.S. 97-29; otherwise, affirmed.

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

NORTH CAROLINA NATIONAL BANK v. VIRGINIA CAROLINA BUILDERS, INC.

No. 8117SC825

(Filed 15 June 1982)

1. **Attorneys at Law § 2— out-of-state attorney—conditions to practice pro hac vice**

Until an out-of-state attorney meets the conditions of G.S. 84-4.1, a court has no discretion to admit out-of-state counsel to practice before it.

2. **Attorneys at Law § 2; Judgments § 25.2— default judgment—attributable to defendant's neglect in hiring out-of-state attorney**

By hiring a Virginia attorney to defend it in a North Carolina action, defendant did not exercise the degree of care expected of a man of ordinary prudence in dealing with his important business, and defendant's default in the action must therefore be attributed to its own inexcusable negligence.

Chief Judge MORRIS dissenting.

N.C.N.B. v. Virginia Carolina Builders

APPEAL by plaintiff from *Long, Judge.* Order entered 21 April 1981 in Superior Court, ROCKINGHAM County. Heard in the Court of Appeals on 31 March 1982.

The order appealed from allowed defendant's motion to set aside a default judgment entered against it by the clerk of superior court on 3 February 1981. The action was commenced on 3 July 1979 when plaintiff filed a complaint seeking to recover over $32,000 allegedly due it on a promissory note executed by defendant, a Virginia corporation. Attorney John Epperly filed answer on defendant's behalf on 25 July 1979 alleging that a much smaller amount was due on the note. Plaintiff filed a reply denying this allegation on 27 July 1979.

Approximately three months later, on 19 October 1979, plaintiff filed a motion for entry of default against defendant on the ground that no proper answer had been filed, defendant's purported answer having been filed by an out-of-state attorney who had failed to comply with the provisions of G.S. § 84-4.1 for limited practice by an out-of-state attorney. The attached certificate of service indicates that a copy of the motion was served on counsel for defendant.

On 8 November 1979 North Carolina attorney Victor Bryant filed a notice of appearance stating that he would be representing defendant in the matter along with attorney Epperly of the Virginia bar.

On 2 February 1981 entry of default was filed by the clerk, and on 3 February 1981 a default judgment was entered by the clerk in the amount of $32,650.81.

On 16 and 17 February 1981 attorneys Bryant and Epperly each filed a motion to set aside the default judgment, alleging that they had received no notice of the hearing on plaintiff's motion for entry of default and that their first knowledge of the default judgment came when a copy of it was delivered to them by defendant on 11 February 1981. In a supplement to his motion attorney Bryant reasserted that defendant has a meritorious defense and attached a statement of account showing defendant's indebtedness to plaintiff to be only $3,340.76.

On 16 March 1981 attorney Epperly filed a motion, with supporting affidavits, pursuant to G.S. § 84-4.1 to be admitted to practice in North Carolina for the limited purpose of representing defendant in this action.

On 21 April 1981 Judge Long entered two orders. One, dated 20 March 1981, allowed Epperly's limited practice motion. It was stated to be prospective only, without prejudice to any rights of plaintiff which might have arisen prior thereto. The other order, dated 6 April 1981, set aside the default judgment previously entered in plaintiff's favor and ordered that the answer theretofore filed on defendant's behalf by attorney Epperly be declared a proper portion of the record. In the order setting aside the default judgment, Judge Long took judicial notice of a long-standing practice and custom among attorneys of Virginia practicing close to the North Carolina state line to appear in the courts of North Carolina without fully complying with the provisions of G.S. § 84-4.1. He then found and concluded that although counsel for defendant may have been negligent in not meeting the requirements of G.S. § 84-4.1 prior to entry of the default judgment, such neglect should not be imputed to defendant who exercised proper care throughout by delivering the suit papers to its attorney for defense of the action. He also found that defendant had asserted a meritorious defense. Plaintiff appeals from this order.

Harrington, Stultz & Maddrey, by Thomas S. Harrington, for plaintiff appellant.

Broaddus, Epperly, Broaddus & Warren, by John D. Epperly; and Bryant, Drew, Crill & Patterson, by Victor S. Bryant, Jr., for defendant appellee.

HEDRICK, Judge.

Judge Long's order setting aside the default judgment must be reversed. We are advertent to the fact that orders setting aside default judgments are interlocutory and ordinarily not appealable. *Bailey v. Gooding*, 301 N.C. 205, 270 S.E. 2d 431 (1980). Nevertheless, because the present order contains serious error regarding a matter of great importance we, in our discretion, choose to review it.

[1] We first note our disapproval of the taking of judicial notice by Judge Long of a custom and practice which violates the law of

this State. The legislature has fixed the conditions under which an out-of-state attorney may be admitted to practice *pro hac vice* in this State in G.S. § 84-4.1. The purpose of this statute is to afford the courts a means to control out-of-state counsel and to assure compliance with the duties and responsibilities of attorneys practicing in this State. *E.g., State v. Nickerson*, 13 N.C. App. 125, 185 S.E. 2d 326 (1971), *cert. denied*, 280 N.C. 304, 186 S.E. 2d 179, *cert. denied*, 408 U.S. 925, 33 L.Ed. 2d 336, 92 S.Ct. 2503 (1972). The conditions in the statute are mandatory. Until they have been met, a court has no discretion to admit out-of-state counsel to practice before it. *In re Smith*, 301 N.C. 621, 272 S.E. 2d 834 (1981). We have consistently refused to allow noncomplying out-of-state attorneys to appear in this Court. *E.g., Resort Development Co. v. Phillips*, 9 N.C. App. 158, 175 S.E. 2d 782 (1970), *aff'd in part, rev'd in part on other grounds*, 278 N.C. 69, 178 S.E. 2d 813 (1971); *State v. Daughtry*, 8 N.C. App. 318, 174 S.E. 2d 76 (1970). Likewise, a party cannot nullify the statute merely by responding to actions of a noncomplying out-of-state attorney in the courts of this State, such as, in this case, replying to a purported answer filed by that attorney. The fact that a custom may have grown up among Virginia attorneys practicing near the North Carolina state line to ignore the requirements of G.S. § 84-4.1 is irrelevant to this case. Such custom in no way abrogates or excuses out-of-state counsel from complying with the statute. *Compare Brown v. Hale*, 93 N.C. 188 (1885).

[2] Although Judge Long committed error in judicially noting said irrelevant and unlawful practice, he correctly concluded that counsel for defendant had been negligent in failing to comply with G.S. § 84-4.1. Not only did attorney Epperly fail to comply with G.S. § 84-4.1 initially, he took no action to rectify the matter for seventeen months after plaintiff filed its motion for entry of default. Such neglect was inexcusable. Judge Long further concluded, however, that this neglect should not be imputed to defendant because defendant had exercised proper care. With this conclusion we do not agree.

"[O]rdinarily a client is not charged with the inexcusable neglect of his attorney, provided the client himself has exercised proper care. . . . The standard of care required of the litigant is that which a man of ordinary prudence usually bestows on his important business." *Moore v. Deal*, 239 N.C. 224, 227, 79 S.E. 2d

507, 510 (1954). To exercise proper care a party must not only pay proper attention to the case himself, he must employ counsel who is licensed or entitled to practice in the court where the case is pending. *Moore v. Deal, supra; Kerr v. North Carolina Joint Stock Land Bank,* 205 N.C. 410, 171 S.E. 367 (1933); *Manning v. Roanoke & Tar River Railroad Co.,* 122 N.C. 824, 28 S.E. 963 (1898); *Norton v. Sawyer,* 30 N.C. App. 420, 227 S.E. 2d 148, *cert. denied,* 291 N.C. 176, 229 S.E. 2d 689 (1976). The attorney hired by defendant to defend it in this North Carolina action was not licensed to practice in the courts of North Carolina and, as we have previously discussed, was not entitled to practice there by reason of a custom and practice which violates the laws of this State. By hiring a Virginia attorney to defend it in a North Carolina action, defendant did not exercise the degree of care expected of a man of ordinary prudence in dealing with his important business. Defendant's default in this action must therefore be attributed to its own inexcusable negligence. *See Harrell v. Welstead,* 206 N.C. 817, 175 S.E. 283 (1934).

"It is only when there is excusable negligence (and not when there is inexcusable negligence) that the judge can in his discretion set the judgment aside . . . . " *Manning v. Roanoke & Tar River Railroad Co., supra* at 831, 28 S.E. at 965. The order setting aside the default judgment is

Reversed and remanded for reinstatement of the judgment.

Judge ARNOLD concurs.

Chief Judge MORRIS dissents.

Chief Judge MORRIS dissenting.

Plaintiff's appeal should be dismissed. An order setting aside a default judgment is interlocutory and not immediately appealable unless it affects a substantial right of the appellant and will work 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). The purpose of this rule is "to prevent fragmentary and premature appeals that unnecessarily delay the administration of justice and to ensure that the trial divisions fully and finally dispose of the case before an appeal can be heard." *Id.* at 209, 270

S.E. 2d at 434. In this case dismissal will merely delay plaintiff's appeal until after final judgment. Although plaintiff would have to undergo a trial on the merits, avoidance of trial is not a "substantial right" requiring immediate appeal. *Id.* Plaintiff has preserved its exception to the order setting aside the default judgment and can appeal and assign error thereto should a trial on the merits result in a judgment for defendant. Should a trial on the merits result in a judgment for plaintiff and should defendant appeal therefrom, plaintiff may set out its exception to and cross assign as error the action of the trial court in setting aside the default judgment. Rule 10(d), North Carolina Rules of Appellate Procedure.

I perceive no reason to exercise our discretionary authority to review the matter by treating this purported appeal as a petition for writ of certiorari and allowing the writ. Another panel has already denied a petition for a writ of certiorari previously filed here by plaintiff. In my view, plaintiff's premature appeal clearly should be dismissed.

I also disagree with the majority's decision on the merits. The law is well established in this State that default may not be entered by the clerk after answer has been filed. G.S. 1A-1, Rule 55; *Bailey v. Davis*, 231 N.C. 86, 55 S.E. 2d 919 (1949). An answer "is deemed to be filed when it is delivered for that purpose to the proper officer and received by him." *Peebles v. Moore*, 302 N.C. 351, 355, 275 S.E. 2d 833, 835 (1981). This rule holds true even when the answer is delivered late or is deficient in some respect. *See Peebles v. Moore, supra; Rich v. Norfolk Southern Railway*, 244 N.C. 175, 92 S.E. 2d 768 (1956); *White v. Southard*, 236 N.C. 367, 72 S.E. 2d 756 (1952); *Steed v. Cranford*, 7 N.C. App. 378, 172 S.E. 2d 209 (1970). In such instances, plaintiff's remedy is by motion to strike the answer and then move for entry of default and default judgment. *Bailey v. Davis, supra.* Until an answer is so challenged, however, it remains filed of record once it has been delivered to and accepted by the proper court officer. Clearly, defendant did not fail to plead in the present case, though its answer may have been defective because prepared and signed by an out-of-state attorney who had failed to qualify to appear in the action. However, plaintiff never challenged the answer by motion to strike. Indeed, it even filed a reply. Upon plaintiff's subsequent motion for judgment by default, the clerk was not at liberty to ig-

nore defendant's answer which remained filed of record. Because the clerk was without authority to enter a default judgment while the answer was on file, that judgment was properly set aside by Judge Long.

Because defendant did not fail to plead in this action, the issue of excusable neglect need not be reached, and Judge Long's findings thereon are superfluous. Nevertheless, I must express my disagreement with the majority's decision on this issue under the facts of this case. I perceive no excusable neglect on the part of defendant, a Virginia Corporation, in hiring a Virginia attorney to represent it in an action filed in the courts of North Carolina where, by virtue of a long standing practice and custom, that attorney had apparent authority to practice in the North Carolina courts. Judge Long did not commit error in taking judicial note of such custom because, although it did not excuse defendant's attorney from complying with G.S. 84-4.1, it was relevant to the question of the degree of care exercised by defendant in defending the action. Furthermore, in hiring Virginia counsel, defendant was merely exercising its fundamental right to select counsel of its own choosing to represent it in this action. *Holley v. Burroughs Wellcome Co.*, 56 N.C. App. 337, 289 S.E. 2d 393 (1982). In *Holley* an order barring an out-of-state attorney from appearing on the plaintiff's behalf because of his failure to comply with all of the requirements of G.S. 84-4.1 was vacated and remanded because the trial judge had erroneously exercised his discretion in the matter, effectively preventing the plaintiff from seeking leave to amend the deficiencies in her attorney's application. Likewise, this defendant should not be penalized for hiring out-of-state counsel where that counsel had the apparent ability to appear in the action, where the laws of this State provide a means by which such counsel may appear in our courts and where defendant's counsel did comply with those legal requirements, although somewhat belatedly.

I vote to dismiss this appeal.

STATE OF NORTH CAROLINA v. JOHNNY ALLISON

No. 8127SC1238

(Filed 15 June 1982)

1. **Criminal Law § 77.1— desire for attorney—admission of evidence concerning**

It was not prejudicial error to allow testimony by a detective that defendant was not willing to answer questions and wanted to talk to an attorney.

2. **Criminal Law §§ 50.1, 63— expert testimony concerning mental capacity—basis for opinion admissible**

The trial court should have allowed an expert witness in the field of psychiatry to testify as to the content of his conversations with the defendant; however, exclusion of this testimony was not prejudicial error since there was sufficient testimony to demonstrate to the jury that the witness spent considerable time working with the defendant and had a deep and broad basis for his opinion as to the defendant's legal sanity.

3. **Criminal Law § 63— failure to permit one psychiatrist to testify concerning diagnoses of other psychiatrists—no error**

In a prosecution for murder in the second degree and other crimes, the trial court did not err in failing to permit a psychiatrist to testify what the diagnoses of other psychiatrists who had tested defendant had been since no foundation was laid for admission of the other diagnoses and since it was not shown that such diagnoses were contained in the defendant's official hospital record.

Judge BECTON dissenting.

APPEAL by defendant from *Friday, Judge.* Judgments entered 5 March 1981 in Superior Court, GASTON County. Heard in the Court of Appeals on 4 May 1982.

Defendant was charged with two counts of assault with a deadly weapon with intent to kill inflicting serious injuries, with murder in the second degree, and with willfully and wantonly setting fire to a dwelling house. He pleaded not guilty.

Evidence for the State tended to show that the defendant was about 37 years old and had a long history of mental illness. Defendant lived with his parents and spent most of his time in his room listening to gospel music. Defendant saw a psychiatrist once a week and received weekly injections at the mental health clinic. Defendant's father was awakened by screams during the early morning hours of 8 December 1980. The defendant was stabbing his mother with a butcher knife. Both the father and defendant's

younger brother tried to stop defendant, and they were both stabbed during the scuffle. They all got out of the house, and the house burned. Officers arriving at the scene found the defendant standing outside the burning house. He appeared calm and stated that he had started the fire. The defendant's mother died as a result of her stab wounds.

Defendant was found guilty on all four charges and was sentenced to prison terms of not less than 25 nor more than 30 years for the second degree murder charge; of 7 to 10 years for both counts of assault with a deadly weapon with intent to kill, each sentence to run at the expiration of the sentence in the second degree murder count and not concurrently; and of 5 to 10 years for setting fire to a dwelling house. He appealed.

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

Public Defender Curtis Harris for defendant appellant.

HEDRICK, Judge.

[1] Detective Gary Queen testified that he advised defendant of his constitutional rights at about 5:00 a.m. on 8 December 1980 and that defendant replied that he understood his rights. Detective Queen asked defendant whether he was willing to answer questions, and the defendant replied that he was not, that he wanted to talk to an attorney. By his first assignment of error, the defendant argues that this testimony should not have been allowed since it "can easily be considered by the jury as an implied admission to the general issue of guilt." Defendant cites *State v. Castor*, 285 N.C. 286, 204 S.E. 2d 848 (1974); however, we find that case inapplicable to the present situation.

The defendant in *Castor* remained silent while a prospective witness for the prosecution was brought into his presence and was asked questions which elicited answers incriminating as to defendant. Our Supreme Court held that evidence of this confrontation should not have been admitted at trial since the defendant's exercise of his constitutional right to remain silent could not be considered an admission of the statements made by the prospective witness. Such is not the situation here. In this case there was no evidence of a specific incriminating accusation

being made against the defendant at the time he asserted his rights.

> Where, as here, there is evidence that defendant simply asserted his rights, but no evidence that he remained silent (because he had asserted his rights) in the face of a specific incriminating accusation, the Miranda rule does not apply, for there has been no accusation made which the defendant, by his silence, might be taken to have admitted. (Citation omitted.)

State v. Love, 296 N.C. 194, 202, 250 S.E. 2d 220, 226 (1978). We therefore reject the argument made by defendant in support of this assignment of error. Furthermore, we find no reasonable possibility that admission of this evidence, if erroneous, contributed to the conviction. *See State v. Love, supra; State v. Hamilton*, 53 N.C. App. 740, 281 S.E. 2d 680 (1981); G.S. § 15A-1443(b). We overrule the assignment of error.

[2] Defendant presented two psychiatric witnesses, Dr. James Groce and Dr. Harris L. Evans. Each testified that in his opinion the defendant was unable to distinguish between right and wrong with respect to his behavior at the time of the alleged crimes. Dr. Groce testified that his diagnosis was based in part on interviews with the defendant. The doctor was asked what the defendant had said, but objection was lodged and sustained. Dr. Groce's answer has been included in the record. Defendant, relying upon *State v. Wade*, 296 N.C. 454, 251 S.E. 2d 407 (1979), argues that the doctor should have been allowed to give this testimony before the jury. We agree.

The defendant in *Wade* was convicted of three murders. A psychiatric witness for the defense was allowed to testify that in his opinion the defendant was incapable of distinguishing between right and wrong at the time of the killings; however, this witness was not allowed to testify as to the basis of his opinion. On appeal, our Supreme Court drew the following propositions from the case law:

> (1) A physician, as an expert witness, may give his opinion, including a diagnosis, based either on personal knowledge or observation or on information supplied him by others, including the patient, if such information is inherently reliable

> even though it is not independently admissible into evidence. The opinion, of course, may be based on information gained in both ways.
>
> (2) If his opinion is admissible the expert may testify to the information he relied on in forming it for the purpose of showing the basis of the opinion. (Citation omitted.)

Id. at 462, 251 S.E. 2d at 412. The Court concluded that the witness should have been allowed to testify as to the content of his conversations with the defendant. Similarly, Dr. Groce should have been allowed to give such testimony in the present case. The trial court erred, but we must consider whether this error prejudiced the defendant. We conclude that it did not.

Evidence of a psychiatric witness' conversations with a defendant is not admissible as substantive evidence. It is admitted only to show the basis for the witness' opinion as to the defendant's legal sanity. As explained in *Wade*,

> "[T]o allow a psychiatrist as an expert witness to answer without any explanation . . . would impart a meaningless conclusion to the jury. The jury must be given an opportunity to evaluate the expert's conclusion by his testimony as to what matters he took into consideration to reach it."

Id. at 463, 251 S.E. 2d at 412, *quoting State v. Griffin*, 99 Ariz. 43, 49, 406 P. 2d 397, 401 (1965). The psychiatric witness in *Wade* was permitted to tell the jury little more than his opinion as to sanity. He was not allowed to testify as to his conversations with the defendant, his medical findings, or his medical diagnoses. By contrast, Dr. Groce testified at length as to this defendant's history and his own observations, findings and diagnoses. In part, he testified as follows:

> When I first saw the defendant he was sitting calmly. He was fairly neat. His motor movements were somewhat sluggish when he walked around. The defendant was given four psychological tests. The first was a Schlossen Intelligence Test. The second was a wide range test of his reading ability. The third was some projective drawings. The fourth was a Bender Gestalt Visual/Motor Test. On the I.Q. Test the defendant scored 61. This score suggest[s] some mild retardation. Mr. Allison read at an 8.6 grade level. The Bender Test

suggest [sic] that the defendant might have a degree of brain damage. The defendant's projective drawings did appear consistent with mental illness. I conducted interviews with the defendant to evaluate his mental condition. I felt he was suffering from a mental illness. I observed the defendant's ward behavior. The defendant was at first rather isolated. He stayed by himself and didn't interact very much with other patients. He did respond when he was given instructions. He did not initiate any conversation except to ask very routine questions. During his hospital stay, defendant gradually improved his interaction with other patients and staff. The defendant was given Melloril when he first came to Dix. Melloril was discontinued after five days, and he was placed on Haldol. The defendant was also given Cogenton. The defendant was administered Melloril to control hallucinations that he described. The defendant was put on Haldol because of conversation I had with him. Haldol is a tranquilizer. It is a fairly powerful medication. Haldol is an anti-psychotic medication that is used to control manifestations of mental illness.

I initially diagnosed the defendant as paranoid schizophrenia. I later changed that diagnosis to chronic undifferentiated schizophrenia. My diagnosis was based upon interviews, ward behavior and conversation with the defendant. Paranoid schizophrenia is a disturbance of an individual's thinking, mood and behavior. The main features are some paranoid thoughts, mistrust and suspiciousness. Chronic undifferentiated schizophrenia is a sub-type of schizophrenia. It still includes disturbances of thinking, mood and behavior but is less clearly focused on paranoid thoughts. Paranoid thoughts are thoughts of some intent to be harmed. They could be generalized with suspiciousness and mistrust. I obtained the defendant's past medical reports and psychiatric history. My diagnosis has been consistent with other diagnosis. The defendant's psychiatric history dates back to 1972.

This testimony was sufficient to demonstrate to the jury that Dr. Groce spent considerable time working with the defendant and had a deep and broad basis for his opinion as to the defendant's legal sanity. He should have been allowed to testify additionally

as to his conversations with the defendant, but we do not believe that the exclusion of this evidence so impaired his testimony that a jury would have otherwise reached a different result. We hold this error harmless. Additionally, we note that Dr. Evans was allowed to testify as to his conversations with the defendant and that his conversations revealed some of the same points as those conducted by Dr. Groce.

[3] Defendant's third assignment of error deals with two evidentiary rulings during the testimony of Dr. Evans. Dr. Evans testified that he was familiar with diagnoses of the defendant made by other psychiatrists and that he had used the other diagnoses in forming his own. He was asked, "What have those diagnoses been?" Objection was sustained, and defendant excepts. We find no error in this ruling. As noted above, a psychiatric witness may testify to the information he relied upon in forming his opinion for the purpose of showing the basis of the opinion. However, such information must be "inherently reliable." *State v. Wade, supra* at 462, 251 S.E. 2d at 412. *State v. DeGregory,* 285 N.C. 122, 203 S.E. 2d 794 (1974), stands for the proposition that an expert witness may base his opinion as to a defendant's sanity "upon both his own personal examination and other information contained in the patient's official hospital record." *Id.* at 134, 203 S.E. 2d at 802. In the present case no foundation was laid for admission of the other diagnoses relied upon by Dr. Evans since it was not shown that such diagnoses were contained in the defendant's official hospital record and no other evidence was presented to show that the diagnoses were inherently reliable. In the absence of such a foundation, objection was properly sustained. Furthermore, we note that Dr. Evans' answer to this question has not been included in the record. Finally, defendant excepts to the trial court's sustaining an objection to the question "Would a person with the defendant's condition be mistrustful?" Dr. Evans would have answered the question, "I would say yes." We find no possible prejudicial error in this ruling since Dr. Evans' very next testimony, admitted without any objection, was to the effect that he found defendant mistrustful and frightened.

In defendant's trial, we find

No error.

Judge HILL concurs.

Judge BECTON dissents.

Judge BECTON, dissenting.

As does the majority, I believe it was error to exclude Dr. Groce's explanation of the bases for his opinion that defendant was unable to distinguish between right and wrong. The majority and I differ on the prejudicial effect of the exclusion of the proffered evidence, and I, therefore, dissent.

State v. Wade, 296 N.C. 454, 251 S.E. 2d 407 (1979) is, in my view, controlling. To allow Dr. Groce to give an expert opinion on sanity without fully explaining the bases for his opinion "impart[s] a meaningless conclusion to the jury. The jury must be given an opportunity to evaluate the expert's conclusion by his testimony as to what matters he took into consideration to reach it." *Id.* at 463, 251 S.E. 2d at 412, *quoting State v. Griffin*, 99 Ariz. 43, 49, 406 P. 2d 397, 401 (1965).

After setting out in detail the number and type tests Dr. Groce gave defendant, the type and the effect of medication defendant was given, and the diagnoses made, the majority then states, as if this were dispositive of the issue, that: "[t]his testimony was sufficient to demonstrate to the jury that Dr. Groce spent considerable time working with the defendant and had a deep and broad basis for his opinion as to the defendant's legal sanity." Ante, p. 6. The teaching of *Wade* is that the facts and factors that form and support the "deep and broad basis for [a psychiatrist's] opinion" are as important as the opinion.

Significantly, the jury was not allowed to hear the following testimony that assisted Dr. Groce in forming his opinion that defendant was suffering from chronic undifferentiated schizophrenia:

> He reported to me that he had been hearing voices, arbitrary hallucination kind of voices, talking to him every day; that he had *heard his family plotting to kill him; that he had heard his mother offer money to have him killed;* that his family made comments like, "He eats too much, he's greedy," he told me that he had heard shooting outside of the house,

> and that *he knew from the conversation in the house that that was the hired killers who had been practicing to kill him and they were waiting for him to come out of the house.* He told me that he did not remember the actual assault on his family members. [Emphasis added.]

It was critically important for the jury in evaluating Dr. Groce's credibility to hear this testimony. Moreover, it is not sufficient simply to "note that Dr. Evans was allowed to testify as to his conversations with the defendant and that his conversations revealed some of the same points as those conducted by Dr. Groce." Ante, p. 7. Dr. Evans' testimony is not nearly as descriptive as Dr. Groce's, and, more important, does not specifically suggest that defendant thought his family was plotting to kill him or have him killed. The jury may have viewed Dr. Evans' testimony as merely suggesting that defendant thought that neighbors wanted his mother to commit him to a mental institution. To highlight the difference between Dr. Groce's testimony that was excluded, and Dr. Evans' testimony, that was heard by the jury, I include it herein:

> The defendant had the idea about neighbors meeting his mother and paying her a thousand dollars to get rid of him. He related that people were saying things about him in the neighborhood. That they were running a liquor store across the street from him, and he thought that was a bad thing. He didn't like that. He told me he thought his mother was connected in some way with getting rid of him. I knew the defendant's mother. She accompanied the defendant to the mental health center.

Believing that the exclusion of Dr. Groce's testimony was harmful, not harmless, I vote for a new trial.

LUCY WOOD TAYLOR, EMPLOYEE-PLAINTIFF v. J. P. STEVENS & COMPANY, INC., EMPLOYER AND LIBERTY MUTUAL INSURANCE COMPANY, CARRIER-DEFENDANT

No. 8110IC445

(Filed 15 June 1982)

1. **Master and Servant § 68— disability prior to 1973—no increase in weekly payments in all cases**

G.S. 97-29.1 does not apply to all cases of total and permanent benefits prior to 1975 but instead applies only to those cases in which the plaintiff received lifetime weekly benefits under G.S. 97-29 prior to the 1975 amendment to that statute.

2. **Master and Servant § 99— denial of attorney's fees—no abuse of discretion**

Under G.S. 97-88 and 97-88.1, the Commission did not err in denying plaintiff's motion for attorney's fees for services rendered (1) for appeal to the Supreme Court and (2) in preparation for the hearing before the Commission. The Commission was not authorized to award fees for appeals to the Supreme Court, and there was no abuse of discretion in denying an award of these in connection with the hearing before the Commission.

Judge BECTON dissenting.

APPEAL by plaintiff from the North Carolina Industrial Commission. Opinion and award filed 20 November 1980. Heard in the Court of Appeals 10 December 1981.

This appeal is a part of long and complicated litigation between these parties relating to plaintiff's occupational disease. The defendants' liability was established by the Supreme Court in *Taylor v. Stevens & Co.*, 300 N.C. 94, 265 S.E. 2d 144 (1980), but plaintiff's claim was remanded to the North Carolina Industrial Commission (Commission) for a determination of the date of disability. On remand, the parties stipulated that the date of disability was 2 August 1963, and the Deputy Commissioner issued an order which contained the following awards: (1) that plaintiff receive $12,000.00 under G.S. 97-29 and an increase provided by G.S. 97-29.1 subject to the attorney fees awarded and (2) that the defendant pay for medical expenses incurred by the plaintiff as a result of the occupational disease and be "responsible for the expense of continuing medication and treatment as recommended by plaintiff's physicians as will give plaintiff needed relief and aid the reversibility, if any, of this occupational

disease." The defendants appealed the judgment. After the initial letter of appeal, the defendant insurance carrier paid the $12,000.00 judgment, thereby mooting appeal of the award under G.S. 97-29.

The Deputy Commissioner's award was modified in part and affirmed in part by the Commission. The Commission struck that part of the Deputy Commissioner's award which allowed an increase of payment under G.S. 97-29.1 and affirmed the rest of the judgment. The Commission also denied a motion by plaintiff to require defendants to pay plaintiff's attorney's fees as a part of costs under G.S. 97-88 and G.S. 97-88.1.

Hassell & Hudson, by Charles R. Hassell, Jr., for plaintiff appellant.

Teague, Campbell, Conely & Dennis, by C. Woodrow Teague and George W. Dennis III, for defendant appellees.

CLARK, Judge.

The plaintiff presents two arguments on this appeal: (1) that the plaintiff is entitled to increased benefits under G.S. 97-29.1; and (2) that the "Commission erred and abused its discretion in denying plaintiff-appellant's motion for attorney's fees under G.S. 97-88 and G.S. 97-88.1."

I

[1] We first address the increase of the award under G.S. 97-29.1, which reads in part:

> In all cases of total and permanent disability occurring prior to July 1, 1973, weekly compensation payments shall be increased effective July 1, 1977, to an amount computed by multiplying the number of calendar years prior to July 1, 1973, that the case arose by five percent (5%).

And how are we to interpret this statute? Our courts have offered guidance:

> The primary rule of statutory construction is that the intent of the legislature controls the interpretation of a statute. In seeking to discover this intent, the courts should consider the language of the statute, the spirit of the act, and what

> the act seeks to accomplish. [Citations omitted.] . . . "In seeking to discover and give effect to the legislative intent, an act must be considered as a whole, and none of its provisions shall be deemed useless or redundant if they can reasonably be considered as adding something to the act which is in harmony with its purpose. [Citations omitted.]" *State v. Harvey*, [281 N.C.] 1, 187 S.E. 2d 706 [1972].

Stevenson v. City of Durham, 281 N.C. 300, 303, 188 S.E. 2d 281, 283 (1972).

Our Supreme Court has said that "benefits under the [Worker's Compensation] Act 'should not be denied by a technical, narrow and strict construction.'" *Petty v. Transport, Inc.*, 276 N.C. 417, 426, 173 S.E. 2d 321, 328 (1970), *quoting Hollman v. City of Raleigh*, 273 N.C. 240, 252, 159 S.E. 2d 874, 882 (1968). And while it has been said that the Act is to be liberally construed to give full effect to its purpose, our Supreme Court has put this construction in perspective. In *Barnhardt v. Cab Co.*, 266 N.C. 419, 427, 146 S.E. 2d 479, 484 (1966) the Court said:

> It is frequently said that the Workmen's Compensation Act must be liberally construed to accomplish the humane purpose for which it was passed, i.e., compensation for injured employees. The purpose of the Act, however, is not only to provide a swift and certain remedy to an injured workman, but also to insure a limited and determinate liability for employers. [Citation omitted.] In any event, this Court may not legislate under the guise of construing a statute liberally.

We turn now to the interpretation of G.S. 97-29.1. The legislative history of this statute reveals an intent to provide additional benefits for persons who were disabled prior to 1973. "The purpose of this bill is to increase the compensation rate for permanently and totally disabled individuals at the rate of five percent per year. This involves some 200 citizens of the State who were injured in previous years; this bill affects only the people who are now disabled." Minutes. House Committee on Manufacturers and Labor, April 21, 1977. The statute makes no reference to a maximum amount of recovery or to a maximum number of weeks during which benefits are to be paid.

We do not believe that the Legislature intended to do anything other than increase the *weekly* benefits of claimants who were totally and permanently disabled. We do not believe that the statute is applicable to the case at bar for the following reasons.

At the time the plaintiff became disabled in 1963, her disability was covered by G.S. 97-53(13). Compensation for total and permanent disability was governed by G.S. 97-29, which at that time specified a maximum amount of weeks and a maximum amount of total recovery. In 1963, G.S. 97-29 read:

> Except as hereinafter otherwise provided, where the incapacity for work resulting from the injury is total, the employer shall pay or cause to be paid, as hereinafter provided, to the injured employee during such total disability a weekly compensation equal to sixty percent of his average weekly wages, but not more than thirty-seven dollars and fifty cents ($37.50), nor less than ten dollars per week during not more than four hundred weeks from the date of the injury, provided that the total amount of compensation paid shall not exceed twelve thousand dollars.

It was not until 1975, when the General Assembly enacted the amendments to G.S. 97-29, that employees suffering from byssinosis were able to receive unlimited weekly benefits for their total and permanent disability. Prior to that time, G.S. 97-29 only provided lifetime weekly benefits for persons disabled due to paralysis resulting from injury to the brain or spinal cord or from loss of mental capacity due to injury to the brain. In all other cases of total disability, compensation was restricted in the amount of money paid per week, in the amount of weeks paid and in the maximum amount which the claimant could receive.

By enacting G.S. 97-29.1, we believe that the Legislature intended only to affect those cases in which the claimant received lifetime weekly benefits under G.S. 97-29 prior to the 1975 amendment to that statute which provided lifetime weekly benefits for total and permanent disability regardless of the cause of disability. The import of G.S. 97-29.1 was to effectuate some economic parity in benefits afforded persons who prior to G.S. 97-29.1 received lifetime weekly benefits with those who received lifetime weekly benefits by virtue of the 1975 amendment to G.S.

97-29. We find support for this position in the minutes of the House Committee on Manufacturers and Labor. The Minutes reflect a belief that the scope of the statute would be limited. In fact, the statute was believed to affect only some 200 people. In view of the Minutes and the historical analysis we attach to the statutes, we do not believe that the Legislature intended the broad application the plaintiff advances. To adopt the plaintiff's argument that G.S. 97-29.1 is to be applied to all cases of total and permanent benefits prior to 1975 would encourage every person who has ever received benefits for total and permanent disability to seek supplements to their awards even though the statute governing their award limited their recovery by the amount of weeks and total amount of the award to be received.

II

[2] The plaintiff contends next that the Commission erred and abused its discretion in denying plaintiff appellant's motion for attorney's fees under G.S. 97-88 and G.S. 97-88.1.

G.S. 97-88 provides:

> *Expenses of appeals brought by insurers.*—If the Industrial Commission at a hearing on review or any court before which any proceedings are brought on appeal under this Article, shall find that such hearing or proceedings were brought by the insurer and the Commission or court by its decision orders the insurer to make, or to continue payments of benefits, including compensation for medical expenses, to the injured employee, the Commission or court may further order that the cost to the injured employee of such hearing or proceedings [sic] including therein reasonable attorney's fee to be determined by the Commission [sic] shall be paid by the insurer as a part of the bill of costs.

G.S. 97-88.1 provides:

> *Attorney's fees at original hearing.*—If the Industrial Commission shall determine that any hearing has been brought, prosecuted, or defended without reasonable ground, it may assess the whole cost of the proceedings including reasonable fees, for defendant's attorney or plaintiff's attorney upon the party who has brought or defended them.

G.S. 97-88 requires that there be a hearing or proceeding brought by the insurer from which the insurer is ordered to pay

an award. In the case before us, the plaintiff has requested fees for work done in order to defend an appeal to the Supreme Court. Plaintiff also seeks compensation for services rendered between the time of the Supreme Court's decision and the hearing before the Commission and for services rendered in preparation for the hearing before the Commission. Whether an award of fees is made is within the discretion of the Commission. Further, G.S. 97-88 only authorizes the Commission to make awards of attorney's fees for hearings before it. On review, the Commission's decision must be upheld unless there is an abuse of discretion. *See Perdue v. Board of Equalization*, 205 N.C. 730, 172 S.E. 396 (1934).

We hold that the Commission was not authorized to award fees for the services rendered in connection with the appeal before the Supreme Court. It was authorized to make an award of attorney's fees for services rendered in connection with the hearing before the Commission. We find this authority based on the fact that the hearing was the result of an appeal by the insurer from a deputy commissioner's order requiring the insurer to pay a claim. The Full Commission modified and affirmed the award. The import of that decision is that the insurer was relieved of an obligation to pay benefits under G.S. 97-29.1 but it was still required to pay medical expenses incurred by the plaintiff. The Commission denied the motion for attorney's fees. Because we find no abuse of its discretion, we must uphold the Commission's decision to deny attorney's fees under G.S. 97-88.

Finally, because of our decision to affirm the Commission's decision with regard to the defendant's liability, we hold that the Commission did not abuse its discretion in not awarding attorney's fees under G.S. 97-88.1.

For the foregoing reasons, the judgment below is

Affirmed.

Judge WHICHARD concurs.

Judge BECTON dissents.

Judge BECTON, dissenting.

I dissent from the majority opinion because the clear, unambiguous language of the statute includes *all* cases of total disability. It is well settled that the words of a statute are to be given their common and ordinary meaning unless a technical interpretation is apparent by the context. *In re Duckett*, 271 N.C. 430, 436, 156 S.E. 2d 838, 844 (1967). Further, "[i]t is always presumed that the legislature acted with care and deliberation and with full knowledge of prior and existing law." *State v. Benton*, 276 N.C. 641, 658, 174 S.E. 2d 793, 804 (1970). The legislature made no distinctions between the claimants who could benefit under G.S. 97-29.1. The only requirements which the statute contains is that the claimant be totally and permanently disabled prior to July 1, 1973. Mrs. Taylor was totally and permanently disabled prior to 1973 and, therefore, should receive the benefits afforded under this statute.

The defendants argue that there are vested rights and responsibilities which accrue to each party based upon the law in existence at the time of the claimant's injury or illness. Apparently, the legislature has determined that the best interests and welfare of this State would be served by allowing these claims to be filed. I do not believe that this is a case of a retroactive application of the statute. It is instead a declaration of new rights and responsibilities based upon past events.

The defendants argue that, depending upon when a claimant filed a claim and had that claim settled, the statute could lead to unequal results in cases among persons suffering with the same injuries or illnesses. That may be so. It has no effect on the validity of the statute, however. All statutes become effective upon some given date. Cases which arise after the effective date and before any amendments or repealing legislation are passed are governed by the statutes. It happens all the time that some individuals, because of when incidents occur, will either benefit or be penalized by a change in a statute.

For the foregoing reasons, I vote to reverse the Commission's Opinion and Award and reinstate the Deputy Commissioner's Opinion and Award which allowed an increase of payment under G.S. 97-29.1.

ANDERSON CHEVROLET/OLDS, INC. v. PHYLLIS HIGGINS, D/B/A HIGGINS INDUSTRIES

No. 8130DC984

(Filed 15 June 1982)

1. Appeal and Error §§ 24, 28— no exception in record—findings binding on appeal

Under App. R. 10(a), where there are no exceptions in the record, an appeal from a final judgment may present for review whether the judgment is supported by the findings and conclusions. However, where no exceptions are made to the findings, they are presumed to be supported by competent evidence and are binding on appeal.

2. Contracts § 27— contract to repair—findings supporting conclusion

In an action to recover the cost of repairs performed by plaintiff on a vehicle leased by defendant, findings which established defendant (1) requested plaintiff to tow the vehicle to its garage, (2) authorized plaintiff to disassemble the vehicle, (3) allowed the disassembled vehicle to remain in plaintiff's garage for twenty-two days, and (4) sent two of her employees to plaintiff's garage to take possession of the repaired vehicle after being informed that the repairs were complete and the cost thereof, permitted the conclusion that defendant impliedly accepted plaintiff's offer to repair the vehicle.

APPEAL by defendant from *Snow, Judge.* Judgment entered 9 April 1981 in District Court, HAYWOOD County. Heard in the Court of Appeals 30 April 1982.

Plaintiff, a business engaged in the selling, leasing and repairing of cars and trucks, instituted this action to recover losses caused by defendant's alleged breach of a "Non-Maintenance Lease Agreement" [hereinafter the Agreement], and to recover the cost of repairs performed by plaintiff on the leased vehicle. The court, sitting without a jury, entered the following findings of fact:

On 29 October 1977 the parties entered into the Agreement wherein defendant was to lease a 1978 Chevrolet pickup truck from plaintiff and pay monthly rental payments of $179.68. The Agreement provided: "Lessee shall pay for all maintenance and repairs to keep vehicle in good working order and condition and will maintain the vehicle as required to keep the manufacturer's warranty in force. The vehicle will be returned at the end of the lease period in good condition, reasonable wear and tear ex-

cepted." Defendant accepted delivery on or about the date the Agreement was executed and thereafter made seventeen monthly payments.

On 11 December 1978 an employee of defendant called plaintiff and indicated that the truck had stopped running. He requested that plaintiff tow the vehicle to plaintiff's garage and determine the problem. Plaintiff promptly towed the vehicle and thereafter discovered that it contained no motor oil. Further examination revealed that it displayed no maintenance stickers with the exception of the pre-delivery inspection sticker applied by plaintiff.

Plaintiff keeps maintenance records on all vehicles leased or sold by it. An examination of these records indicated that the truck leased to defendant had not been lubricated in fourteen months, and that oil had neither been changed nor added.

At the time the truck was towed to plaintiff's garage, the odometer showed 25,494 miles. When the oil pan was removed, plaintiff discovered that the engine was "seized" and that it would be necessary to disassemble the engine in order to ascertain the extent of the damage and the type of repairs needed. Plaintiff called defendant to request permission to disassemble the engine for this purpose.

On 15 December 1978 an employee of defendant authorized the disassembly. The engine was disassembled, and plaintiff advised defendant or one of her employees that the engine needed a new block and other parts at an estimated cost of $1,399. After personally conferring with plaintiff's president about the repairs, defendant sent some of her employees to plaintiff's garage to examine the block and damaged parts. After conversing with an employee of General Motor's Chevrolet Division, defendant verified that the vehicle was no longer under warranty.

The disassembled vehicle continued to occupy one of plaintiff's work bays for approximately twenty-two days. On 2 January 1979 plaintiff's president instructed his employees to repair the vehicle. A new block and other necessary parts were installed for the purpose of returning the vehicle to good working order.

On or about 5 January 1979 plaintiff's service manager telephoned defendant to inform her that the vehicle had been repaired, and that the bill for said repairs was $1,379.87 in addition to a $10 bill for towing. A few days later defendant sent two of her employees to the garage for the purpose of accepting and taking possession of the repaired vehicle. When they arrived plaintiff advised them that both bills would have to be paid before possession could be taken. Defendant refused to pay any part of the bills.

The statements and conduct of the defendant and her employees evinced defendant's intention to contract with plaintiff for the necessary repairs to the vehicle and further constituted, by reasonable inference and implication, a contract between the parties.

Defendant made seventeen lease payments under the Agreement and breached the Agreement by failing and refusing to make the remaining payments. Plaintiff had complied with the Agreement provision entitled "Premature Lease Termination" by specifically advertising and selling the vehicle to the highest bidder for $4,800. As a result of defendant's breach, plaintiff suffered damages, computed in accordance with the terms and conditions of the Agreement, in the amount of $954.64. This amount has not been paid.

The Agreement further specified that defendant would pay to plaintiff "reasonable collection cost, including attorney fees and legal expenses incurred."

Based upon the foregoing findings of fact the trial court entered the following conclusions of law:

1. That Defendant contracted with Plaintiff to tow her leased vehicle into Plaintiff's garage for which services Plaintiff is entitled to recover of Defendant the amount of $10.00.

2. That Defendant contracted with Plaintiff to repair her leased motor vehicle and pursuant thereto Plaintiff repaired said vehicle and is entitled to recover from Defendant the amount of $1379.87 for labor and parts.

3. That Defendant breached the Non-Maintenance Lease Agreement previously entered into between the parties and because of said breach Plaintiff is entitled to recover judgment against Defendant in [the] amount of $954.64.

. . . .

5. That Defendant is not entitled to recover from Plaintiff by virtue of the counterclaim set forth in her Answer.

Defendant appeals.

Hallett S. Ward, Jr., for plaintiff appellee.

Burton C. Smith, Jr., for defendant appellant.

WHICHARD, Judge.

[1] No exceptions appear in the record. "[T]he scope of review on appeal is confined to a consideration of those exceptions set out and made the basis of assignments of error in the record . . . ." Rule 10(a), Rules of Appellate Procedure. The rule provides, however, that notwithstanding the absence of exceptions, an appeal duly taken from a final judgment may present for review, if properly raised in the brief, the question of whether the judgment is supported by the findings of fact and conclusions of law. *Id. See Swygert v. Swygert*, 46 N.C. App. 173, 180-81, 264 S.E. 2d 902, 907 (1980).

No exceptions to the findings of fact appear. When no exceptions are made to the findings of fact, they are presumed to be supported by competent evidence and are binding on appeal. *Grimes v. Sea & Sky Corp.*, 50 N.C. App. 654, 656, 274 S.E. 2d 877, 878 (1981); *In re Hodges*, 49 N.C. App. 189, 190, 270 S.E. 2d 599, 599-600 (1980); *Schloss v. Jamison*, 258 N.C. 271, 275, 128 S.E. 2d 590, 593 (1962).

[2] We consider the errors argued in defendant's brief, then, to determine whether the findings support the conclusions entered.

The court made the following "finding of fact":

That the acts, statements, and conduct of the Defendant and her authorized employees, and the reasonable inferences arising therefrom, evinced the intention of Defendant to contract with the Plaintiff for the necessary repairs to her

leased vehicle, constituted a manifestation and expression of assent necessary to form a contract and by reasonable inference and implication constituted a contract between Plaintiff and Defendant.

Defendant first contends no such contract existed, because the evidence fails to show a meeting of the minds or mutuality of consent. Because defendant failed to except to the foregoing finding, the question of sufficiency of the evidence to support it does not arise. It is deemed supported by competent evidence. *Grimes, supra.* The "finding of fact" is, however, at least in part, in actuality a conclusion of law. Whether the findings of fact support the conclusion is the principal issue presented.

A contract to repair the leased vehicle would be one implied in fact, since there was clearly no express or written contract. Our Supreme Court has stated:

> "A 'contract implied in fact,' . . . arises where the intention of the parties is not expressed, but an agreement in fact, creating an obligation is implied or presumed from their acts, or, as it has been otherwise stated, where there are circumstances which, according to the ordinary course of dealing and the common understanding of men, show a mutual intent to contract." 17 C.J.S., *Contracts* § 4(b) (1963). An implied contract is valid and enforceable as if it were express or written. "[A]part from the mode of proving the fact of mutual assent, there is no difference at all in legal effect between express and contracts implied in fact." Simpson, Contracts, § 5 (2d ed. 1965) . . . . The essence of any contract is the mutual assent of both parties to the terms of the agreement so as to establish a meeting of the minds. *Pike v. Wachovia Bank & Trust Co.*, 274 N.C. 1, 161 S.E. 2d 453 (1968). This mutual assent and the effectuation of the parties' intent is normally accomplished through the mechanism of offer and acceptance . . . . With regard to a contract implied in fact, one looks not to some express agreement, but to the actions of the parties showing an implied offer and acceptance.

Snyder v. Freeman, 300 N.C. 204, 217-18, 266 S.E. 2d 593, 602 (1980). The relationship between the parties, or other circumstances, may justify the offeror in assuming that silence indicates assent to his offer. Examples are:

> (1) Where the offeree with reasonable opportunity to reject offered goods or services takes the benefit of them under circumstances which would indicate to a reasonable man that they were offered with the expectation of compensation.
>
> . . . .
>
> (3) Where because of previous dealings or otherwise, the offeree has given the offeror reason to understand that the silence or inaction was intended by the offeree as a manifestation of assent, and the offeror does so understand.
>
> (4) Where the offeree takes or retains possession of property which has been offered to him, such taking or retention in the absence of other circumstances is an acceptance.

1 S. Williston, *A Treatise on the Law of Contracts* § 91 (3d ed. 1957).

The findings here establish the following: Defendant signed a lease agreement with plaintiff in which she agreed to pay for all "maintenance and repairs to keep [the] vehicle in good working order." When the vehicle ceased to function, defendant called plaintiff to request that it tow the vehicle to its garage. Defendant thereafter gave plaintiff permission to disassemble the engine to ascertain the problem. Plaintiff informed defendant of the needed repairs and estimated cost. Defendant then instructed several of her employees to examine the damaged parts, but she never attempted to have the vehicle removed from plaintiff's garage. Approximately twenty-two days after informing defendant of needed repairs, plaintiff's president ordered his employees to repair the disassembled vehicle. When the vehicle was ready, plaintiff's service manager notified defendant that the repairs had been completed and the bill was $1,379.87. A few days later, defendant sent two of her employees to plaintiff's garage "for the purpose of accepting and taking possession of the repaired leased vehicle."

These findings support the conclusion that defendant contracted with plaintiff to have the vehicle repaired. Defendant's conduct in (1) requesting plaintiff to tow the vehicle to its garage, (2) authorizing plaintiff to disassemble the vehicle, and (3) allowing the disassembled vehicle to remain in plaintiff's garage for twenty-two days clearly permit the conclusion that defendant

gave plaintiff reason to believe she had consented to the repairs. The finding most detrimental to defendant's contention that no contract existed is the finding that after she was informed that the repairs were complete, and the cost thereof, defendant sent two of her employees to plaintiff's garage "for the purpose of accepting and taking possession of the repaired leased vehicle." This finding fully supports a conclusion that by her conduct defendant impliedly accepted plaintiff's offer to repair the vehicle, and thereby impliedly incurred an obligation to pay for the repairs.

Defendant next contends the court erred in awarding damages to plaintiff in the amount of the repair bill "without evidence of the reasonable nature of such damages within the community at the time." None of the errors assigned relate to the issue of damages. The issue thus is not properly before us for review. Rule 10(a), Rules of Appellate Procedure.

Defendant's contention that the court erred in failing to make findings regarding her counterclaim likewise is not properly before us. Defendant took no exception to the conclusion of law regarding the counterclaim. Further, she has failed to identify the omitted findings of fact as required by App. R. 10(b)(2) and to cite any supporting authority as required by App. R. 28(b)(3). We thus do not consider the argument.

Our examination of the record and the contentions of the parties discloses no basis for reversal or re-trial. Accordingly, the judgment is

Affirmed.

Judges WEBB and WELLS concur.

BETTY COLEMAN DISHMON v. OTIS LEON DISHMON

No. 8117DC1078

(Filed 15 June 1982)

1. **Divorce and Alimony § 24.8— assumption of responsibility of supporting emancipated son—not changed circumstance**

The fact that defendant voluntarily assumed the responsibility of supporting his emancipated son was not a factor to be considered in determining a changed circumstance sufficient to support a reduction in child support of the other children.

2. **Divorce and Alimony § 24.8— increase in support improper—insufficient evidence of changed circumstances**

In an action concerning child support, where there were no findings that the needs of the children had increased or that there had been a change of circumstances affecting the welfare of the children, the findings of fact did not support the court's conclusion that the payment should be increased.

APPEAL by defendant from *McHugh, Judge.* Judgment entered 11 May 1981 in District Court, ROCKINGHAM County. Heard in the Court of Appeals 25 May 1982.

Defendant appeals from a decision of the trial court granting plaintiff's motion to increase the amount of child support payments, denying his motion to reduce child support payments, and holding him in contempt for willful failure to make timely and regular child support and mortgage payments. The court also found that defendant was $720 in arrears in child support payments and one payment delinquent in mortgage payments.

On 5 March 1979 the parties entered into a consent judgment under the terms of which defendant agreed to pay the sum of $450 per month for the support of the three minor children. The agreement further provided that as each child reached the age of eighteen the support payment was to be reduced "on a pro rata basis" and that the judgment would be "binding upon the parties hereto and any violation by either party shall be punishable as for contempt of court."

On 27 February 1981, plaintiff filed a motion in the cause in which she admitted that one of the children had reached his majority thereby reducing defendant's support obligation to $300 per month. She alleged that as of 1 December 1980 defendant had

failed to pay child support and mortgage payments as required under the judgment. She further alleged that the needs of the remaining two children justified an increase in child support of twenty-five percent and that defendant was capable of paying the increase because his income was twenty-five percent greater than at the time the original judgment was rendered.

Defendant, by motion, alleged that he had suffered a decrease in his income and that he was contributing to the support of his emancipated son, justifying a reduction in support payments to $300 per month.

At a hearing held on the motions, both plaintiff and defendant presented evidence. Plaintiff testified that monthly expenses for the two children totalled $515 and that her salary from Fieldcrest Mills had not increased from the approximately $10,000 per year she was receiving in 1979. Defendant testified that his gross income in 1980 was $34,136.96 (an increase of approximately $8,000 since 1979); that he had experienced health problems due to a fall in December of 1980 and due to dental surgery; that he is contributing approximately $200 per month for the support of his emancipated son who lives with him; that he received a tax refund of $2,200 in 1980; and that during the first two and one-half months of 1981 his gross income has been $6,000.

J. Hoyte Stultz, Jr. for plaintiff appellee.

Thurman B. Hampton for defendant appellant.

MARTIN (Harry C.), Judge.

Defendant is of the opinion that the trial court denied his motion to reduce the amount of support payments he was obligated to pay under the 5 March 1979 agreement. The record does not support his contention. Defendant did not ask for a greater reduction than that to which he was entitled under the agreement. The sum of $300, the "reduction" which defendant sought, represents the amount defendant properly owes after subtracting a pro rata amount of $150 for the emancipated son.

[1] Further, we are of the opinion that defendant's evidence was, in any event, insufficient to support any reduction other than that to which he was entitled. The fact that defendant has voluntarily assumed the responsibility of supporting his emancipated son is

not a factor to be considered in determining a change of circumstances sufficient to support a reduction. *Crosby v. Crosby*, 272 N.C. 235, 158 S.E. 2d 77 (1967); *Gilmore v. Gilmore*, 42 N.C. App. 560, 257 S.E. 2d 116 (1979). Defendant offered no evidence with respect to changed circumstances affecting the remaining minor children or that expenses relating to their maintenance and support had decreased. *Gilmore, supra; Ebron v. Ebron*, 40 N.C. App. 270, 252 S.E. 2d 235 (1979). Nor has defendant offered sufficient evidence to support a finding of his inability to pay the required amount.

[2] Defendant contends that the trial court erred in ordering an increase in child support payments absent evidence or findings of a change in circumstances affecting the children's welfare. In response, plaintiff first asks that we draw a distinction between judgments of the court ordering child support and consent judgments wherein the amount of child support is agreed to by the parties. The thrust of plaintiff's argument is that a showing of changed circumstances would not be a necessary prerequisite to the court's setting an amount for child support if the prior agreement was not an "order" of the court. Plaintiff urges that the 5 March 1979 consent judgment was not court ordered. Assuming, arguendo, that the original agreement entered into by the parties is a contract rather than a court-ordered consent judgment, the trial court's findings of fact do not support an award of child support in the amount of $350.

Our Supreme Court has most recently stated the law with respect to setting amounts for child support in *Coble v. Coble*, 300 N.C. 708, 268 S.E. 2d 185 (1980).

> Where, as here, the trial court sits without a jury, the judge is required to "find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment." . . . The purpose of the requirement that the court make findings of those specific facts which support its ultimate disposition of the case is to allow a reviewing court to determine from the record whether the judgment—and the legal conclusions which underlie it—represent a correct application of the law. The requirement for appropriately detailed findings is thus not a mere formality or a rule of empty ritual; it is designed instead "to

dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system." . . .

Under G.S. 50-13.4(c) . . . an order for child support must be based upon the interplay of the trial court's conclusions of law as to (1) the amount of support necessary to "meet the reasonable needs of the child" and (2) the relative ability of the parties to provide that amount. These conclusions must themselves be based upon factual *findings* specific enough to indicate to the appellate court that the judge below took "due regard" of the particular "estates, earnings, conditions, [and] accustomed standard of living" of both the child and the parents. It is a question of fairness and justice to all concerned . . . . In the absence of such findings, this Court has no means of determining whether the order is adequately supported by competent evidence . . . .

. . . .

. . . Effective appellate review of an order entered by a trial court sitting without a jury is largely dependent upon the specificity by which the order's rationale is articulated. Evidence must support findings; findings must support conclusions; conclusions must support the judgment. Each step of the progression must be taken by the trial judge, in logical sequence; each link in the chain of reasoning must appear in the order itself. Where there is a gap, it cannot be determined on appeal whether the trial court correctly exercised its function to find the facts and apply the law thereto.

300 N.C. at 712, 714, 268 S.E. 2d at 188-90 (citations omitted).

We hasten to add, however, that the existence of a prior agreement between the parties adds a new dimension to the trial court's role in setting an amount for child support. "[W]here parties to a separation agreement agree upon the amount for the support and maintenance of their minor children, there is a presumption in the absence of evidence to the contrary, that the amount mutually agreed upon is just and reasonable." *Fuchs v. Fuchs*, 260 N.C. 635, 639, 133 S.E. 2d 487, 491 (1963). In *Fuchs* the Court went on to hold that upon motion a trial court may not order an increase "in the absence of any evidence of a change in

conditions or of the need for such increase, particularly when the increase is awarded solely on the ground that the father's income has increased, therefore, he is able to pay a larger amount." *Id.* The facts of this case fit squarely within the rule enunciated in *Fuchs.* Plaintiff's evidence and the court's findings of fact fall seriously short of supporting the court-ordered increase. *See also Hines v. Hines,* 21 N.C. App. 218, 203 S.E. 2d 647 (1974).

Under the authority of *Henderson v. Henderson,* 55 N.C. App. 506, 286 S.E. 2d 657 (1982), we hold that the agreement of 5 March 1979 is a court-adopted consent judgment. The agreement is thus superseded by its adoption as an order of the court.[1] As such, the party moving for a modification of the child support terms has the burden of showing a substantial change in circumstances affecting the welfare of the children. N.C. Gen. Stat. § 50-13.7(a) (Supp. 1981); *Ebron, supra.*

Plaintiff's only evidence consisted of a skeleton list of current expenses for the maintenance of the children. Based on this evidence, the trial judge found that these expenses totalled $440 per month and further concluded that plaintiff was in need of additional support. Plaintiff presented no evidence, nor did the court make findings, with respect to the original expenses for support of the children. *See Daniels v. Hatcher,* 46 N.C. App. 481, 265 S.E. 2d 429, *disc. rev. denied,* 301 N.C. 87 (1980); *Willis v. Bowers,* 56 N.C. App. 244, 287 S.E. 2d 424 (1982). There were no findings that the needs of the children had increased or that there had been a change of circumstances affecting the welfare of the children. *Id.* Nor would the evidence support such findings. In short, the trial court failed to tell the defendant, or this Court, why an increase was necessary. *See Daniels, supra.* We hold that on the record before us the trial court's findings of fact do not support the conclusion increasing the child support payments. The record does support the findings and conclusions as to the arrearages and that portion of the judgment is affirmed.

Plaintiff concedes that the order of contempt is not supported by sufficient findings of fact and requests that it be

1. We note that the trial court apparently considered the consent judgment of 5 March 1979 an order of the court in holding defendant in contempt for failure to comply with the mortgage and support provisions of the judgment.

vacated and the cause remanded for further proceedings on that question. We agree.

The judgment is vacated with respect to the order of contempt and increased child support, and the cause is remanded to the District Court of Rockingham County.

Judges VAUGHN and HILL concur.

BARCLAYSAMERICAN/CREDIT COMPANY v. PATRICIA ANN RIDDLE

No. 8124DC1104

(Filed 15 June 1982)

Chattel Mortgages and Conditional Sales § 1— N.C. Consumer Finance Act—small loan secured by automobile

Under the pertinent statutes, and particularly N.C.G.S. 53-180(f), a general lender operating under N.C.G.S. 53-173 is entitled to secure any loan by taking a security interest in a motor vehicle. N.C.G.S. 53-173 does not limit the type of security that may be taken by a lender. N.C.G.S. 53-176.1, 53-191 (1965) and N.C.G.S. 53-168(c).

APPEAL by plaintiff from *Lacey, Judge.* Judgment filed 2 July 1981 in District Court, YANCEY County. Heard in the Court of Appeals 27 May 1982.

Plaintiff is licensed under N.C.G.S. 53-168 and engaged in the business of making small loans pursuant to N.C.G.S. 53-173. On 6 July 1979 plaintiff loaned the defendant the sum of $1,677.42, in return for which defendant signed a promissory note and granted plaintiff a security interest in her car. Plaintiff instituted an action on the account on 28 January 1981, alleging that the defendant was $740.29 in arrears on the loan. Judgment was entered in favor of the plaintiff. Defendant appealed the magistrate's decision to district court. By answer and counterclaim she denied liability and alleged that the loan was void as in violation of the North Carolina Consumer Finance Act. Plaintiff moved for summary judgment.

Pursuant to Rule 56(c) of the North Carolina Rules of Civil Procedure, the trial court granted summary judgment in favor of

the defendant, concluding that the plaintiff, "while purporting to operate under N.C. Gen. Stat. § 53-173, by taking a security interest in a motor vehicle, was a motor vehicle lender in this instance, and was prohibited from charging an interest rate greater than 16% per annum." The trial court further concluded that by charging the defendant an interest rate of 23.27 percent per annum, plaintiff violated N.C.G.S. 53-176.1 of the North Carolina Consumer Finance Act pertaining to motor vehicle lenders. Pursuant to N.C.G.S. 53-166(d), the court held that the loan contract was void and ordered plaintiff to pay the defendant the sum of $1,514.53, plus eight percent interest from the date of judgment.

Carnes and Little, by Stephen R. Little, and Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by Henry A. Mitchell, Jr. and Julian D. Bobbitt, Jr., for plaintiff appellant.

Legal Aid Society of Northwest North Carolina, Inc., by Ellen W. Gerber, for defendant appellee.

MARTIN (Harry C.), Judge.

The question before us is whether the summary judgment is supported by a correct interpretation of the applicable provisions of the North Carolina Consumer Finance Act. The case is one of first impression in our courts, necessitating the construction of N.C.G.S. 53-173 and -176.1 as each provision relates to the other and to the overall policies of the Consumer Finance Act.

Plaintiff is licensed as a general lender under N.C.G.S. 53-168 and operating pursuant to N.C.G.S. 53-173. Small loan operations under N.C.G.S. 53-173 enjoy substantially higher interest rates than allowed to other lenders. The ceiling amount of a loan permitted under this section is $3,000. The only section of the Consumer Finance Act which expressly limits the type of collateral available to a general lender operating under N.C.G.S. 53-173 is N.C.G.S. 53-180(f) which states that "[n]o loan made pursuant to the provisions of G.S. 53-173 shall be secured in any way by an interest in real property." Nothing else appearing, it would seem that a general lender may secure loans by taking a security interest in any type of personal property—including a motor vehicle.

It is defendant's contention that N.C.G.S. 53-176.1 must be construed as an implied limitation imposed on N.C.G.S. 53-173.

"[A]ny person, firm or corporation licensed under [article 15, the North Carolina Consumer Finance Act] to make loans to borrowers . . . secured by a security interest in a motor vehicle, and whose license shall indicate on the face thereof that such licensee is a motor vehicle lender" falls into the category of a motor vehicle lender as provided in N.C.G.S. 53-176.1. This section goes on to provide that:

> No office holding a license under the provisions of this section and making loans secured by motor vehicles may make loans under the provisions of G.S. 53-166, G.S. 53-173, G.S. 53-180, or G.S. 53-141, nor shall such office allow or permit loans under the other provisions of this Article to be made on its premises or any connecting premises. All other provisions of this Article not inconsistent with this section shall apply to a "motor vehicle lender."

Loans under this section may be made up to an amount not exceeding $5,000 at an interest rate not in excess of 16 percent.

We first turn to the legislative history of these provisions of the Consumer Finance Act in order to resolve the parties' conflicting interpretations. Prior to 1969, section 173 lenders were subject to N.C.G.S. 53-191 as follows: "Businesses exempted.—Nothing in this article shall be construed to apply to any person, firm or corporation engaged solely in the business of making loans of fifty dollars ($50.00) or more secured by motor vehicles . . .." N.C. Gen. Stat. § 53-191 (1965). Although plaintiff contends that this exemption did not apply to the general lender operating under section 173, a review of the Annual Reports of the Commission of Banks indicates otherwise. Under an "Analysis of Loans by Type of Security" for the years 1961 (when the C.F.A. was enacted) through 1969, the type of security for section 173 loans did not include motor vehicles. The schedules represent a compilation of reports submitted by the licensees.

In 1969 the Act was amended. The above-quoted portion of N.C.G.S. 53-191 was deleted and -176.1 was added, thus bringing the motor vehicle lender within the scope of the Act. By amendment in 1973, N.C.G.S. 53-168(c) was added to the Act, allowing a one-time election for those holding either a section 173 or a section 176.1 license to switch categories without meeting the section 168 licensing requirements. It is plaintiff's contention that the ad-

dition of section 176.1 and the subsequent opportunity for motor vehicle lenders to elect to become general lenders bespeaks of a clear legislative intent to merely add a new category of lenders to the Act, while at the same time recognizing that an election to become a section 173 general lender would not impair, but in fact would broaden, their loan options.

Our second consideration in resolving this dispute involves an analysis of the purpose and policy behind these provisions. Motor vehicles, whether new or used, provide lower risk security for loans which would justify the lower interest rate and necessitate the higher loan ceiling over a longer term evidenced in N.C.G.S. 53-176.1. Every motor vehicle owner is required by N.C.G.S. 20-50(a) to secure registration plates and a certificate of title to operate the vehicle on public highways. Furthermore, N.C.G.S. 20-58 allows a motor vehicle lender to perfect its security interest by indicating the lien on the certificate of title. A creditor taking a security interest in a motor vehicle is also protected by the availability of insurance. Motor vehicles are more likely to be subject to the right of a secured lender on default to take possession of collateral without judicial process. N.C. Gen. Stat. § 25-9-503 (Supp. 1981). Based on these facts, it is defendant's position that the general lender is precluded from having the advantage of a higher interest rate and the low risk security of a motor vehicle; that the statutory provisions contemplate an election; and that plaintiff's election to become a N.C.G.S. 53-173 general lender is determinative of its rights to secure loans on personal property other than motor vehicles.

Based upon the express language of the relevant statutes, we must reject defendant's contentions. We hold that under the pertinent statutes, and particularly N.C.G.S. 53-180(f), a general lender operating under N.C.G.S. 53-173 is entitled to secure any loan by taking a security interest in a motor vehicle. N.C.G.S. 53-173 does not limit the type of security that may be taken by a lender. The limitation imposed by N.C.G.S. 53-180(f) only proscribes the use of interests in real property as security. This subsection refers specifically to section 173, and it may be reasonably inferred that had the legislature intended to prohibit the use of motor vehicles as security for loans made under section 173, it would have so stated.

Plaintiff was entitled to summary judgment in its favor, and the trial court erred in granting summary judgment for defendant.

Reversed.

Judges VAUGHN and HILL concur.

STATE OF NORTH CAROLINA v. THEODORE C. WASHINGTON

No. 8112SC1269

(Filed 15 June 1982)

1. **Criminal Law § 66.15— independent origin of in-court identification**

Any suggestiveness of a post lineup conversation between the prosecuting witness and an officer in a prosecution for rape and kidnapping did not taint her in-court identification, and the trial court properly found it to be of independent origin where the witness had ample opportunity to observe the defendant and where the witness gave a general, but accurate, description of the defendant to the police along with his correct nickname. Nor did the fact that the prosecuting witness gave a tentative pretrial identification render the in-court identification inadmissible.

2. **Criminal Law § 34.3— evidence of another crime properly excluded**

The trial court did not err in failing to declare a mistrial after evidence regarding the commission of another crime was elicited since the trial court immediately sustained an objection and ordered the jury not to consider the evidence.

APPEAL by defendant from *Lee, Judge.* Judgment entered 23 March 1981 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 6 May 1982.

Defendant was charged with second degree rape, kidnapping and common law robbery. From his conviction of and imprisonment for second degree rape and kidnapping, the defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Stephen F. Bryant, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Ann B. Petersen, for defendant appellant.

BECTON, Judge.

The defendant brings forth three arguments on this appeal: (1) that the trial court erred in refusing to suppress the in-court identification of the defendant; (2) that the defendant was deprived of his right to a fair trial as a result of improper questions and arguments by the prosecutor; and (3) that the trial court erred in failing to instruct the jury that a verdict of guilty of the offense of kidnapping required unanimity as to at least one of the alternative means for committing that offense. We find no prejudicial error in this case.

I

The State's evidence tended to show the following. The prosecuting witness, upon running out of gas on Interstate 95 (I-95), proceeded to walk to a nearby motel hoping to find a gas station open. Being unsuccessful in that endeavor, she decided to walk along I-95 in a southerly direction. She noticed that a 1974 Cadillac was slowing down in the opposite lane of travel and that afterwards two men got out to push the car. She went over and spoke to the men pushing the vehicle, whereupon she found out that they, too, had run out of gas and were going to push the vehicle to Fayetteville. She offered to help push if the men would give her a ride back to her van with some gas. After a short while the prosecutrix changed places with the man who had been steering the car. She steered and he assumed the position she had maintained at the center of the trunk of the car. After approximately an hour of pushing, they arrived at a gas station in Fayetteville where the prosecutrix bought gas for the car and for her van. All four individuals then got into the car. Instead of returning to I-95, the driver of the car proceeded to drive through the City of Fayetteville until he reached a run-down, dead end street. There, the three men proceeded to rape the prosecutrix and rob her of her rings and the contents of her wallet.

The incident was reported to the Fayetteville Police Department which undertook an investigation of the crime and later arrested the defendant. The prosecutrix was asked to view a pre-trial line-up which included the defendant. After viewing the line-up for approximately five to ten minutes, she indicated that one of the men who raped her was the defendant. She indicated that she was not positive, however. After the line-up she inquired

of Officer Sessoms, who was present during the line-up, how she had done and if she had picked the one who had been arrested. The officer indicated that she had.

Prior to trial, the trial court entertained a motion to suppress the in-court identification of the defendant. Testimony by the prosecutrix and Officer Sessoms was admitted. After making findings of fact, including one regarding the post line-up conversation between the prosecutrix and Officer Sessoms, the trial court denied the motion.

II

[1] It is well settled that a defendant is entitled to a line-up free of impermissible suggestions regarding his identity. *Manson v. Brathwaite*, 432 U.S. 98, 53 L.Ed. 2d 140, 97 S.Ct. 2243 (1977). The defendant admits that the line-up itself was not unduly suggestive or prejudicial. He maintains, however, that the post line-up conversation between Officer Sessoms and the prosecutrix was unduly suggestive and "a sufficient influence on her that she made an unequivocal in-court identification of the defendant at the motion [to suppress] hearing" whereas her identification at the line-up was tentative. He further argues that on the authority of *State v. Harren*, 302 N.C. 142, 273 S.E. 2d 694 (1981), that the in-court identification should have been suppressed. We do not agree, and we find no prejudicial error.

Even if a pretrial identification process is unduly suggestive, suppression of in-court identification is not required if the in-court identification is independent of the suggestive procedure and thus untainted by it. *Manson v. Brathwaite; Neil v. Biggers*, 409 U.S. 188, 34 L.Ed. 2d 401, 93 S.Ct. 375 (1972); *State v. Clark*, 301 N.C. 176, 270 S.E. 2d 425 (1980). After a determination that a pretrial line-up is impermissively suggestive, courts balance the following five factors to determine if the taint has been purged:

[1] the opportunity of the witness to view the criminal at the time of the crime;

[2] the witness' degree of attention;

[3] the accuracy of the witness' prior description of the criminal;

[4] the level of certainty demonstrated by the witness at the confrontation; and

[5] the length of time between the crime and the confrontation.

409 U.S. at 199-200, 34 L.Ed. 2d at 411, 93 S.Ct. at 382.

It is not difficult to imagine instances in which police intimations of or confirmations of a witness' selection of a suspect would be unduly suggestive. *See Commonwealth v. Lee*, 215 Pa. Super. 240, 257 A. 2d 326 (1969). The prosecutrix, when questioned about the post line-up conduct stated that Officer Sessoms' conduct only reinforced what she had in her own mind. Indulging the inference that Officer Sessoms' conduct was suggestive, we now examine the trial court's order to see if it considered the above factors in determining whether to suppress the in-court identification.

After making ample findings of fact the trial court made the following conclusions of law:

1. That there was ample opportunity for [the prosecuting witness] to observe the defendant at the time of the commission of the crimes with which he is charged;

2. That from evidence offered there is nothing to indicate that any suggestions were made by the investigating officers or anyone else to [the prosecuting witness] which would color her identification on January 24, 1980 of the defendant made at the in-person line-up;

3. That the Court has viewed State's Exhibit Number One, a photograph of the six (6) individuals who were in the in-person line-up, which was conducted on January 24, 1980, and the line-up was in all respects fair and reasonable, and presented six (6) black males similar to the defendant in age, height and weight, all wearing the same or identical items of clothing and did not in any manner distinguish the defendant from the other individuals standing in the line-up;

4. That the in-court identification of the defendant is of independent origin based solely on what [the prosecuting witness] saw at the time of the crime and does not result from any out of Court confrontation or from any other pretrial identification procedures which were conducive to

lead to irreparable mistaken identification to the extent that the defendant would be denied due process of law;

5. That the in-court identification of the defendant by [the prosecuting witness] is based upon her own independent observations of the defendant, and is not based upon any improper out of Court identification procedure, and is not in violation of any rights of privileges guaranteed to the defendant by the laws or constitutions of the United States or the State of North Carolina.

Our *Neil v. Biggers* analysis convinces us that any suggestiveness of the post line-up conduct was purged. The prosecutrix had ample opportunity to observe the defendant. At numerous points during her direct and cross examination she described times when she observed the defendant under lighted conditions. One of the times that she observed him was at the gas station at a point in time when she had no other real diversions. The evidence does not show that at this time her attention was diverted or distracted. On another occasion during the rape, the prosecutrix also had the opportunity to observe the defendant free from any distractions. Although the description given to the policemen by the prosecutrix was general, the prosecutrix gave the police nicknames to which the defendant responded. She described him as a nineteen to twenty-three year-old black male weighing approximately 160 pounds with no facial hair, who answered to a nickname "Triny, Tino or Teenie—something like that." In fact, the defendant was a 21-year-old, 5 feet seven inch black male who answered to the nickname Tino. It is apparent to us that the trial court considered the *Neil v. Biggers* factors in reaching its decision. Its decision is supported by the facts, and we find no error.

We also reject the defendant's argument that because the prosecutrix's pre-trial identification was tentative, only evidence regarding the pre-trial identification should have been submitted. In *State v. Harren*, our Supreme Court upheld the trial court's suppression of the in-court identification by the eleven-year-old prosecuting witness who (1) could not positively identify the defendant at a pretrial line-up; (2) only saw defendant in a poorly lit bedroom for a short time; and (3) had very little opportunity to observe the defendant. This case is distinguished from *Harren* in

that the prosecutrix here had ample opportunity to observe the defendant having been in his presence for three to four hours and at times under well-lighted conditions.

Further, we see no error in the admission of the in-court identification in view of the fact that the jury was presented with evidence of the tentative pretrial identification through the direct and cross examination of the prosecutrix and through the direct and cross examination testimony of Officer Sessoms. The jury was also presented with evidence that the prosecuting witness was unable to pick out the defendant's voice from a voice identification test. As the Court stated in *Harren*, "[t]he identification . . . was relevant and its tentative nature went to the *weight* that the jury might place upon it and not to its admissibility." 302 N.C. at 149, 273 S.E. 2d at 698 (emphasis in original).

III

[2] The defendant next argues that the trial court erred when it failed to declare a mistrial after evidence regarding the commission of another crime by the defendant was elicited. We find no error since the court immediately sustained the objection and ordered the jury not to consider the evidence. *See State v. Robbins*, 287 N.C. 483, 487-89, 214 S.E. 2d 756, 760-61 (1975), *death sentence vacated*, 428 U.S. 903, 49 L.Ed. 2d 1208, 96 S.Ct. 3208 (1976).

IV

We also find no merit in defendant's argument that closing arguments by the prosecutor denied him a fair trial.

We have reviewed the defendant's remaining argument carefully, and we find it to be without merit.

For the foregoing reasons, in the trial below we find

No error.

Judge HEDRICK and Judge HILL concur.

STATE OF NORTH CAROLINA v. ROGER RIVARD AND STATE OF NORTH CAROLINA v. KEVIN POWER

No. 815SC1344

(Filed 15 June 1982)

1. **Criminal Law § 146.5— plea of guilty—no right to appeal denial of motions to quash bills of indictment**

Under G.S. § 15A-1444(e), defendants were not entitled to appellate review as a matter of right of the denial of their motions to quash where they pleaded guilty to the bills of indictment.

2. **Searches and Seizures § 3— border search of airplane**

The trial court did not err in denying defendants' motion to suppress evidence of cocaine obtained by the government where the evidence tended to show that defendants' airplane, and the contents thereof, were under the constant surveillance of customs officials from the time before it entered the United States airspace until the time it landed in Wilmington, North Carolina which brought the search within the "border search" exception.

APPEAL by defendants from *Tillery, Judge.* Judgments entered 15 September 1981 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals on 27 May 1982.

Defendants were charged in separate bills of indictment with felonious trafficking in controlled substances by transporting and possessing more than 400 grams of cocaine, in violation of G.S. § 90-95. Defendants moved to quash the indictments, and such motion was denied on 14 September 1981. Defendants also moved "to suppress all evidence seized on or about the 7th day of June, 1981, as the result of a search of defendants and defendants' effects at the New Hanover County Airport." On *voir dire*, uncontroverted evidence was offered tending to show the following: At about 9:00 p.m. on 6 June 1981, a Customs Air Officer for the United States Customs Service spotted an aircraft on the radar he was operating; the radar indicated that the aircraft was in flight in an area beyond United States territorial waters, but that the aircraft, while in flight, eventually entered the United States on either late 6 June or early 7 June 1981; the flight of the aircraft was continuously tracked by radar, and the airplane itself was intercepted and followed, except for a five minute interval during which it was not visible, by a United States Customs Service airplane; the airplane being tracked landed at New Hanover County Airport in Wilmington, North Carolina, and from it

emerged the defendants; upon the landing of the aircraft, U.S. Customs Officers who had tracked defendants' plane and were aware of its having initially been spotted en route from outside the United States, searched the defendants' airplane and removed therefrom numerous nylon duffel bags; the officers then unzipped one of the nylon duffel bags, which weighed forty or fifty pounds, and found therein another padlocked nylon bag, which they slit open with a knife and found therein plastic packages containing cocaine. The trial court, at the conclusion of *voir dire*, denied defendants' motions to suppress "the evidence seized from the airplane."

Defendants thereupon changed their pleas to guilty as charged, and reserved their rights to appeal the denials of their motions to quash and to suppress. From judgments imposing on each defendant a prison term of no more than nor less than sixteen years, defendants appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Daniel F. McLawhorn, for the State.

Crossley & Johnson, by Robert W. Johnson; and Richard S. Emerson, Jr., for defendant appellants.

HEDRICK, Judge.

[1] Defendants first assign error to the denial of their motions to quash the bills of indictment. G.S. § 15A-1444(e) in pertinent part provides:

> Except as provided in subsection (a1) of this section [such subsection dealing with a guilty-pleading defendant's right to appeal the prison term to which he is sentenced] and G.S. 15A-979 [dealing with a guilty-pleading defendant's right to appeal from a denial of a motion to suppress evidence], and except when a motion to withdraw a plea of guilty or no contest has been denied, the defendant is not entitled to appellate review as a matter of right when he had entered a plea of guilty or no contest to a criminal charge in the superior court, but he may petition the appellate division for review by writ of certiorari.

Since defendants pleaded guilty to the bills of indictment, they are not entitled to appellate review as a matter of right of the

denial of their motions to quash, and defendants have not petitioned this Court for a writ of certiorari to review the denial of their motions to quash. This assignment of error therefore presents no question for review.

[2] In their next assignment of error, defendants argue, "The Trial Court Erred in Denying Appellants' Motions to Suppress Evidence Obtained Illegally by the Government." This assignment of error is reviewable pursuant to G.S. § 15A-979(b). Defendants contend that the warrantless searches of their plane and of the duffel bags found therein violated the Fourth Amendment in that such warrantless searches were conducted without the requisite existence of exigent circumstances, and of probable cause to believe the searches would uncover evidence of a crime.

"[S]earches made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border." *United States v. Ramsey,* 431 U.S. 606, 616, 52 L.Ed. 2d 617, 626, 97 S.Ct. 1972, 1978 (1977). The single fact that the person or item in question has entered the United States from outside suffices to endow border searches with the reasonableness required by the Fourth Amendment; there is no additional requirement that there be a showing of probable cause or the prior procurement of a search warrant. *Id.* Further, this " 'border search' exception is not based on the doctrine of 'exigent circumstances.' " *Id.* at 621, 52 L.Ed. 2d at 629-30, 97 S.Ct. at 1981. Rather, "[t]he authority of the United States to search the baggage of arriving international travelers is based on its inherent sovereign authority to protect its territorial integrity. By reason of that authority, it is entitled to require that whoever seeks entry must establish the right to enter and to bring into the country whatever he may carry." *Torres v. Puerto Rico,* 442 U.S. 465, 472-73, 61 L.Ed. 2d 1, 9, 99 S.Ct. 2425, 2430 (1979).

Border searches "may in certain circumstances take place not only at the border itself, but at its functional equivalents as well." *Almeida-Sanchez v. United States,* 413 U.S. 266, 272, 37 L.Ed. 2d 596, 602, 93 S.Ct. 2535, 2539 (1973). "For . . . example, a search of the passengers *and cargo* of an airplane arriving at a St. Louis airport after a nonstop flight from Mexico City would clearly be

the functional equivalent of a border search." *Id.* at 273, 37 L.Ed. 2d at 602-03, 93 S.Ct. at 2539. (Emphasis added.)

Although "border searches may be conducted regardless of whether customs officials have a reasonable or articulable suspicion that criminal activity is afoot," *United States v. Sheikh*, 654 F. 2d 1057, 1068 (5th Cir. 1981), "there cannot be [a] . . . border search without some degree of probability that the vessel has crossed a border, i.e. the officials must possess some articulable facts tending to show that the vessel has recently crossed an international border." *United States v. Laughman*, 618 F. 2d 1067, 1072, n. 2 (4th Cir.), *cert. denied*, 447 U.S. 925, 65 L.Ed. 2d 1117, 100 S.Ct. 3018 (1980). Were the law otherwise, customs officials could search persons and property without any grounds for believing the border had been crossed, and such otherwise arbitrary intrusions would be retroactively legitimated by the subsequent discovery that the persons and property searched had recently come from outside the United States.

In the present case, the uncontroverted evidence presented at *voir dire* tended to show that defendants' airplane, and the contents thereof, were under the constant surveillance of customs officials from the time before it entered United States airspace until the time it landed in Wilmington; the evidence tended to show that the defendants' airplane was continuously tracked on radar even though the airplane manned by customs officials lost sight of defendants for a few minutes. Although the trial court did not make findings of fact to show the bases of its ruling, the necessary findings may be implied from the admission of the challenged evidence, since there was no material conflict of evidence on *voir dire*. *State v. Phillips*, 300 N.C. 678, 268 S.E. 2d 452 (1980). Hence, the court's ruling implicitly contains findings that the airplane and contents searched were the same airplane and contents known to have come from outside the United States, and that the transnational character of the airplane and its contents was known to the customs officials who conducted the challenged search. These findings support the conclusion that the evidence was obtained pursuant to a valid border search, and, hence, the denial of the motion to suppress was proper. *See United States v. Moore*, 638 F. 2d 1171 (9th Cir. 1980), *cert. denied*, 449 U.S. 1113, 66 L.Ed. 2d 842, 101 S.Ct. 924 (1981). This assignment of error has no merit.

The order appealed from is

Affirmed.

Judges ARNOLD and WELLS concur.

STATE OF NORTH CAROLINA v. LINWOOD E. MOORE v. RALPH BENTON, JR.

No. 813SC1337

(Filed 15 June 1982)

Arrest and Bail § 11— forfeiture of bond—setting aside judgment of forfeiture—misapprehension as to applicable statute

The trial judge set aside a judgment of forfeiture on a bail bond under the wrong statute where the order of remittance was entered more than 90 days after entry of the judgment on the appearance bond and under G.S. 15A-544(e) the court was without power to remit the judgment "if it appear[ed] that justice require[d]." However, the record contained ample evidence to support a conclusion that "extraordinary cause" had been shown for remittance of the judgment and the trial court upon remand could make such a finding and conclusion under G.S. 15A-544(h).

APPEAL by the New Bern-Craven County Board of Education, judgment creditor and private prosecutor, from *Winberry, Judge.* Order entered 25 September 1981 in Superior Court, CRAVEN County. Heard in the Court of Appeals 26 May 1982.

The New Bern-Craven County Board of Education appeals from an order setting aside "any and all judgments or executions" against the surety on the appearance bond of a criminal defendant.

Attorney General Edmisten, by Assistant Attorney General Kaye R. Webb, for the State, appellant.

Stubbs & Chesnutt, by Marc W. Chesnutt, for the surety, appellee.

WHICHARD, Judge.

On 12 December 1979 a warrant issued for defendant's arrest for assault with a deadly weapon with intent to kill. On 21

December 1979 defendant and the surety executed a bond to secure defendant's appearance for trial on that charge.

On 27 December 1979 a warrant issued for defendant's arrest for ravishing and carnally knowing a female of the age of twelve years or more. The court released defendant on the same bond as in the prior assault case.

Upon defendant's failure to appear for arraignment, the court entered duplicate orders for his arrest which were returned unexecuted because defendant could not be found. The court then ordered the appearance bond forfeited; and, after notice to the obligors, on 12 January 1981 it entered judgment against them for the amount of the bond and costs.

On 18 August 1981, more than 90 days after entry of judgment on the bond, and apparently subsequent to issuance of execution on the judgment (*see* G.S. 15A-544(f) (1978)), the surety moved for an order striking the forfeiture and recalling all outstanding executions. The motion alleged that the surety was defendant's employer; that he had not been advised of defendant's release on the second charge under the same bond as on the first; that he had "assumed no obligations under the second charge and had no knowledge of the same at the time of the consolidation of the bond requirement for release"; and that the release on the second charge under the bond he had signed on the first "was an alteration and modification of any liabilities existing on his behalf and substantially changed and modified the conditions existing at the time of the signing of the initial surety agreement."

The surety thereafter filed in support of the motion an affidavit which stated the following:

The surety owned and operated a small farm with one part-time employee and provided the sole support for himself, his wife, and three minor children. In 1980 he did not report any taxable income after expenses, and his prospects for 1981 were not bright.

Defendant, whose family had a history of mental retardation, had worked for the surety for approximately six years. The surety allowed defendant to work for him so defendant could provide partial support for his family. When the initial assault charge was lodged against defendant, the surety signed defendant's bond to

enable defendant to remain employed and thus able to continue partial support for his family.

The surety at no time realized pecuniary gain from signing the bond. He spent considerable time and money searching for defendant. He had been informed that defendant had committed suicide, but he had been unable to confirm it. Payment of the bond would work a tremendous hardship on him and his family and might force him into bankruptcy. He "did not obligate [him]self to assume any bonds" on the second charge, and in his opinion it was the second charge which accounted for defendant's disappearance.

The court found that a hearing was held on the motion; that it examined the motion and affidavit; that a complete review of the files on both charges, and of the motion and affidavit, indicated "*that equity would best be served* by the setting aside of [the] Judgment upon payment of the costs by the Surety . . . ." (Emphasis supplied.) It then ordered that "any and all judgments or executions against the Surety . . . are set aside *in the interest of justice* upon payment of the court costs by the Surety . . . ." (Emphasis supplied.)

In *State v. Rakina and State v. Zofira*, 49 N.C. App. 537, 539, 272 S.E. 2d 3, 4-5 (1980), *disc. rev. denied*, 302 N.C. 221, 277 S.E. 2d 70 (1981), we find the following:

> The purpose of N.C. Gen. Stat. § 15A-544, which regulates the forfeiture of bonds in criminal proceedings, is to establish "an orderly procedure for forfeiture." *Id.*, (Official Commentary). After entry of judgment of forfeiture, subsections (e) and (h) provide two situations in which the court is authorized to order remission. Subsection (e) provides:
>
> > At any time within 90 days after entry of the judgment against a principal or his surety, or on the first day of the next session of court commencing more than 90 days after the entry of the judgment, the court may direct that the judgment be remitted in whole or in part, upon such conditions as the court may impose, if it appears that justice requires the remission of part or all of the judgment.

Under subsection (e) the court is guided in its discretion as "justice requires." Execution is mandatory under subsection (f) "[i]f a judgment has not been remitted within the period provided in subsection (e) above. . . ." Subsection (h) becomes applicable after execution of the judgment. Subsection (h) provides in pertinent part:

> For extraordinary cause shown, the court which has entered judgment upon a forfeiture of a bond may, after execution, remit the judgment in whole or in part and order the clerk to refund such amounts as the court considers appropriate.

Under subsection (h), the court in its discretion is authorized to remit the judgment "[f]or extraordinary cause shown."

The record establishes that the order of remittance here was entered more than 90 days after entry of judgment on the appearance bond. The courts will take judicial notice of the dates of the terms of the superior courts, *State v. Anderson*, 228 N.C. 720, 724-25, 47 S.E. 2d 1, 4 (1948); *Grady v. Parker*, 228 N.C. 54, 57, 44 S.E. 2d 449, 451 (1947), including the date of commencement of such a term, *Freeman v. Bennett*, 249 N.C. 180, 182, 105 S.E. 2d 809, 810 (1958). Accordingly, we take judicial notice of the fact that the next criminal term of Craven Superior Court after the 90 day period following entry of the judgment convened 20 April 1981. The order appealed from thus was entered neither within 90 days after entry of the judgment nor on the first day of the next session of court commencing after that 90 day period. The court was, then, without power to remit the judgment "if it appear[ed] that justice require[d]" pursuant to G.S. 15A-544(e).

The recitals in the order "that equity would best be served by the setting aside of [the] Judgment" and that the judgment was set aside "in the interest of justice" indicate that the order was entered under a misapprehension as to the applicable statute. The 90 day period during which the court could set aside the judgment "in the interest of justice" pursuant to G.S. 15A-544(e) had expired. The only extant recourse was to set aside the judgment "[f]or extraordinary cause shown" pursuant to G.S. 15A-544(h). While the record contains ample evidence to support a conclusion that "extraordinary cause" had been shown, the trial court should "make brief, definite, pertinent findings and conclu-

sions" to that effect. *Rakina and Zofira*, 49 N.C. App. at 541, 272 S.E. 2d at 5.

Because the recitals indicate that the order appealed from was entered under a misapprehension as to the applicable statute, and because the order does not contain appropriate findings and conclusions indicating that the requisite "extraordinary cause" to set aside the judgment has been shown, the order is vacated; and the cause is remanded to the trial court for entry of appropriate findings, conclusions, and order or judgment pursuant to G.S. 15A-544(h).

Vacated and remanded.

Judges CLARK and WEBB concur.

PATRICIA SMITH SHEPHERD v. HERBERT DAN SHEPHERD

No. 8112DC668

(Filed 15 June 1982)

Limitation of Actions § 4.1— misrepresentation of marital status—action for fraud barred by statute of limitations

Plaintiff's action, in which she alleged defendant had perpetrated a fraud upon her by knowingly inducing her to enter into a bigamous marriage, was barred by the three-year statute of limitations found in G.S. 1-52(9), and summary judgment was properly entered for defendant.

APPEAL by plaintiff from *Cherry, Judge.* Judgment entered 24 February 1981 in District Court, HOKE County. Heard in the Court of Appeals 3 March 1982.

Plaintiff filed an action on 8 January 1980, seeking an annulment of her marriage to defendant and alimony pendente lite. She also alleged that defendant had perpetrated a fraud upon her by knowingly inducing her to enter into a bigamous marriage, for which she sought actual and punitive damages.

The evidence adduced at trial tended to show that plaintiff and defendant began dating in 1969 when each was separated from a previous spouse. Plaintiff received a divorce in 1969, then

went with defendant to Lumberton, where defendant consulted with an attorney about obtaining a divorce. Sometime thereafter, defendant told plaintiff that he had obtained the divorce, and they were married on 20 February 1971.

About a month after the marriage, defendant's prior spouse, Linda Britt Shepherd, came to the couple's residence in Saint Pauls. Defendant refused to talk with her. She told plaintiff that she wanted to remarry, but could find no record in Robeson County of her divorce from defendant. Linda Britt Shepherd subsequently filed an action for divorce and plaintiff read the civil summons pertaining to that suit. She also discussed the matter with defendant's brother. The mother of defendant's prior spouse told plaintiff that she and defendant were not legally married, but none of these incidents prompted plaintiff to investigate the legality of the divorce. Defendant told plaintiff in May of 1978 that he and plaintiff were not legally married, and plaintiff left defendant on 15 July 1979.

Plaintiff sought recovery of $50,000 for "her contribution to the defendant of companionship, love, affection and earnings from the 20th day of February, 1971 until the 14th day of July 1979," and punitive damages for "the wanton, willful and malicious actions of the defendant in engaging in the bigamous marriage to the plaintiff."

A consent judgment was entered awarding plaintiff an annulment. The court dismissed, at the conclusion of plaintiff's evidence and upon motion of defendant, plaintiff's cause of action in tort in accordance with Rule 50 of the Rules of Civil Procedure. Plaintiff appeals from entry of the order dismissing the cause of action for money damages.

Moses, Diehl and Pate, by Philip A. Diehl, for plaintiff appellant.

Locklear, Brooks and Jacobs, by Dexter Brooks, for defendant appellee.

MORRIS, Chief Judge.

Plaintiff argues, by her sole assignment of error, that the trial court erred in granting defendant's motion for a directed verdict at the close of plaintiff's evidence. Defendant responds

that plaintiff's cause of action in tort is barred by the statute of limitations for relief on the ground of fraud, and by the doctrine of unclean hands; that the parties voluntarily settled their differences via a binding accord and satisfaction or compromise; and that plaintiff failed to demonstrate that she suffered actual damages as a consequence of any wrongful conduct of defendant. We hold plaintiff's cause of action was barred by G.S. 1-52(9), the three-year statute of limitations for actions based on fraud. Therefore, the court's action in granting defendant's motion for summary judgment did not constitute reversible error.

An action for fraud accrues when the aggrieved party discovers the facts constituting the fraud, or when, in the exercise of due diligence, such facts should have been discovered. *Wilson v. Development Co.*, 276 N.C. 198, 171 S.E. 2d 873 (1970). The uncontroverted evidence shows that as early as 1971, plaintiff had had warning that defendant remained party to a previous marriage, when Linda Britt Shepherd visited defendant's residence and later sued, with plaintiff's knowledge, for divorce from defendant. Plaintiff also discussed defendant's marital status with defendant's mother and brother. "A party having notice must exercise ordinary care to ascertain the facts, and if he fail to investigate when put upon inquiry, he is chargeable with all the knowledge he would have acquired, had he made the necessary effort to learn the truth of the matters affecting his interests. *Hargett v. Lee*, 206 N.C. 536, 539, 174 S.E. 498, 500 (1934). Failure to discover the facts constituting fraud may be excused, however, where a confidential relationship exists between the parties. *Small v. Dorsett*, 233 N.C. 754, 28 S.E. 2d 514 (1944). The relationship between husband and wife is the most confidential of all relationships. *Eubanks v. Eubanks*, 273 N.C. 189, 159 S.E. 2d 562 (1968). A confidential relationship also exists between a couple contemplating marriage, and a woman is generally entitled to rely on her fiance's representation that he is eligible to marry. *Humphreys v. Baird*, 197 Va. 667, 90 S.E. 2d 796 (1956). Yet failure of the defrauded party to use diligence in discovering the fraud is not wholly excused merely because a relation of trust and confidence exists between the parties. The law only goes so far as to say "that when it appears that by reason of the confidence reposed the confiding party is actually deterred from sooner suspecting or discovering the fraud, he 'is under no duty to make in-

quiry *until something occurs to excite his suspicions.*' " (Emphasis added.) *Vail v. Vail*, 233 N.C. 109, 116-117, 63 S.E. 2d 202, 208 (1951). "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." *Peacock v. Barnes*, 142 N.C. 215, 218, 55 S.E. 99, 100 (1906). " 'This can only mean that the defrauded party's ignorance must not be negligent; that he remains ignorant without any fault of his own; that he has not discovered the fraud, and could not by any reasonable diligence discover it. . . .' " *Id.* at 219, 55 S.E. at 100. A defendant, upon less notice than was present here, was negligent in not inquiring whether his divorce from a prior spouse was defective. *Redfern v. Redfern*, 49 N.C. App. 94, 270 S.E. 2d 606 (1980). We hold, therefore, that plaintiff had been put on sufficient notice reasonably to require inquiry which would have discovered the facts and that she failed to exercise due diligence, after receiving several clear warnings, to determine whether he was still married to Linda Britt Shepherd. The action was barred at the time of its institution in 1980, and a directed verdict was properly entered at the close of plaintiff's evidence. See *Blankenship v. English*, 222 N.C. 91, 21 S.E. 2d 891 (1942); *Hargett v. Lee*, supra.

Plaintiff's claim was couched firmly in tort. Paragraph 12 of the third cause of action set forth in the complaint alleged

> That the defendant knowingly and willfully induced the plaintiff into a marriage ceremony . . . when in fact the defendant full well knew and held secret from the plaintiff that he was then and there lawfully married to Linda Britt Shepherd and that neither he nor the said Linda Britt Shepherd had obtained a lawful divorce from the other. That the defendant held such knowledge secret from the plaintiff to wrongfully and maliciously obtain from the plaintiff her companionship and her love and affection.

The Supreme Court of North Carolina has recognized an action in *quantum meruit* in favor of one who is fraudulently induced to go through a marriage ceremony with someone having a living lawful spouse, where the still-married party thereafter is unjustly enriched by the innocent party's performance of valuable services. *Sanders v. Ragan*, 172 N.C. 612, 90 S.E. 777 (1916). An action on an implied contract may be brought upon such facts as are

before us, *id.*, but plaintiff chose to ground her action in tort. Plaintiff's tort claim, as we held above, is barred by the three-year statute of limitations. We need not further determine whether the complaint states a cause of action in contract, as G.S. 1-52(1) limiting actions "[u]pon a contract . . . express or implied . . ." is also a three-year statute. Since plaintiff should have had knowledge of the relevant facts as early as 1971, it cannot be said, nor was it alleged, that services rendered after that time were either given in expectation of pay, that a contract existed by tacit understanding, or that reason and justice impose an obligation on defendant. See *Sanders v. Ragan*, supra.

Plaintiff's brief raises an issue of breach of promise to marry. She did not, however, plead a cause of action for breach of promise to marry. On the contrary, her complaint alleges that "the plaintiff . . . asked defendant to enter into a valid marriage ceremony with her, however, the defendant continuously refused. . . ."

The order of directed verdict was appropriately entered. The court's judgment is, therefore,

Affirmed.

Judges HEDRICK and VAUGHN concur.

STATE OF NORTH CAROLINA v. ROY LEE GRIFFIN, JR.

No. 8118SC1195

(Filed 15 June 1982)

1. **Robbery § 5.4— no instructions on lesser offenses of assault and larceny from the person proper**

In a prosecution for common law robbery, the trial court properly refused to instruct the jury on assault and larceny from the person since there was no evidence to support the theory that the assault on the victim and the taking of his property were separate and unrelated crimes.

2. **Criminal Law § 89.6— evidence of prosecuting witness's reputation for homosexuality properly excluded**

The trial court did not err in excluding evidence of the prosecuting witness's reputation for homosexuality since the evidence sought to be in-

troduced was that of the general reputation and not a specific instance of the witness's behavior, and since the prejudicial effect of the victim's alleged bias was questionable at best since two other State's witnesses testified to the identity of the defendant and to his criminal acts.

3. Criminal Law § 89.10— defense witness's prior convictions—admissible

The trial court properly permitted cross-examination of a defense witness regarding his own conviction for the same crime for which defendant was being tried.

4. Criminal Law § 134.2— sentencing—right of allocution

Unlike Rule 32(a) of the Federal Rules of Criminal Procedure G.S. 15A-1334(b) does not mandate that a personal invitation to speak on his own behalf prior to sentencing be directed to defendant himself rather than to his attorney.

APPEAL by defendant from *Rousseau, Judge.* Judgment entered 23 April 1981 in Superior Court, GUILFORD County. Heard in the Court of Appeals 27 April 1982.

Defendant was charged in bills of indictment with common law robbery and kidnapping in connection with the alleged abduction of Robert Rhinehart.

State's evidence tended to show that defendant and a companion approached Rhinehart from behind as he was getting into his car during the early morning hours of 26 October 1980. Rhinehart was forced into the back of the car and made to lie on the floor after being robbed of his wallet and car keys and beaten over the head. The victim testified that the defendant drove the car while the other man, identified as Anthony Taylor, sat on the passenger side of the front seat. Rhinehart was released when the car was stopped by a highway patrolman.

Officer Apple of the State Highway Patrol testified that he stopped Rhinehart's car because it was being driven erratically. When he approached the car, Apple saw defendant, Rhinehart and Anthony Taylor. Rhinehart had blood on his face and was crying. After arresting defendant and Taylor, the officer found Rhinehart's wallet in Taylor's pocket. No weapons or money were found in the car and only Rhinehart appeared to have been drinking.

Defendant's evidence tended to show that Rhinehart agreed to give Taylor and defendant a ride to High Point on the night in

question. Taylor drove because Rhinehart was drunk and because his driver's license had been revoked. Clarissa Whitfield was also in the car, but got out before Officer Apple stopped them. Before leaving the car, Ms. Whitfield gave Rhinehart's empty wallet to Taylor. At some point, defendant took over driving the car. While defendant was driving, Rhinehart made homosexual advances to Taylor.

Clarissa Whitfield testified that she was in Rhinehart's car waiting to ask him for a ride when Taylor and defendant pushed Rhinehart into the car and hit him with their fists. She said she saw Rhinehart's wallet being taken but she did not say by whom. Until she left the car, Ms. Whitfield said Rhinehart, who had been drinking, sat beside her and leaned on her. Rhinehart did not remember seeing Ms. Whitfield on the night in question.

Defendant was found guilty of common law robbery and sentenced to ten years imprisonment. A mistrial was declared as to the kidnapping charge when the jury failed to agree on a verdict. Defendant appeals.

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

Appellate Defender Adam Stein, by Assistant Appellate Defenders Lorenzo L. Joyner and Marc D. Towler, for defendant appellant.

ARNOLD, Judge.

[1] Defendant's first assignment of error is that the trial court erred in refusing to instruct the jury on assault and larceny from the person. While these are lesser included offenses of the crime charged, we find no significant evidence to support an instruction thereon. Defendant would have the Court theorize that the assault on Rhinehart and the taking of his property may have been separate and unrelated crimes. Yet the only direct evidence presented at trial established that the victim was beaten and robbed by defendant and Taylor. Only evidence tending to show the absence of one of these elements would have justified an instruction on a lesser included offense. We find no such evidence in the record.

[2] Defendant next argues that the trial court erred in excluding evidence of Rhinehart's reputation for homosexuality. Defendant contends that such evidence was essential to his theory of the case in that Taylor's refusal of Rhinehart's sexual advances could have been the motive for Rhinehart's false charges against Taylor and defendant. Defendant argues that since the value of the evidence for impeachment purposes is obvious from the record, his failure to make an offer of proof was not fatal.

Defendant relies heavily on the case of *State v. Becraft*, 33 N.C. App. 709, 236 S.E. 2d 306, *cert. denied*, 293 N.C. 362, 237 S.E. 2d 850 (1977), in which this Court held that the trial court had erred in excluding evidence that the alleged robbery victim was a homosexual who had previously propositioned the defendant. The case at bar is distinguishable from *Becraft*, however, in two important respects. First, the only evidence identifying the defendant in *Becraft* came from the alleged victim, making any evidence of the victim's bias or prejudice against the defendant critical. Here, the prejudicial effect of the victim's alleged bias is questionable at best since two other State's witnesses testified to the identity of the defendant and to his criminal acts. Moreover, *Becraft* involved evidence of a specific instance of the witness's behavior. Where, as here, evidence of the general reputation of a witness is sought to be introduced, a foundation must be laid to establish the basis for the testifying witness's opinion of that reputation. 1 Stansbury's N.C. Evidence § 110 (Brandis Rev. 1973). This was not done.

Defendant next assigns error to the trial court's failure to strike an improper question by the prosecutor and to give a curative instruction. Objection to the question, asked of defense witness Taylor about crimes committed by defense witness Means, was sustained. Yet we agree with defendant that the question itself could have been prejudicial and that a denial of defendant's motion to strike and for curative instructions might well have been error. However, where, as here, no such motion was made at trial, the issue is deemed to have been waived on appeal. *State v. Willard*, 293 N.C. 394, 238 S.E. 2d 509 (1977); *State v. Locklear*, 41 N.C. App. 292, 254 S.E. 2d 653 (1979).

[3] As his next assignment of error, defendant contends that the trial court improperly permitted cross-examination of Anthony

Taylor regarding his own conviction for the same crime for which defendant was being tried. It is well established that impeachment by cross-examination of a witness concerning his prior criminal behavior is proper. *State v. Monk*, 286 N.C. 509, 212 S.E. 2d 125 (1975). Moreover, defendant's reliance upon the rationale set forth in *State v. Atkinson*, 25 N.C. 575, 214 S.E. 2d 270 (1975), is misplaced. *Atkinson* supports exclusion of evidence of a co-defendant's conviction for the same crime only where the co-defendant does not testify. Here, Taylor was called as a witness by defendant. The defendant thus exposed his witness to impeachment by the prosecutor. Finally, even if the cross-examination had been improper, the defendant's failure to object to it at trial constitutes a waiver of the issue on appeal. *State v. Campbell*, 296 N.C. 394, 250 S.E. 2d 228 (1979).

[4] Defendant's final argument on appeal concerns the court's alleged error in failing to issue an invitation to defendant to speak personally on his own behalf prior to sentencing. We find this Court's opinion in *State v. Martin*, 53 N.C. App. 297, 280 S.E. 2d 775 (1981), to be dispositive of this issue. *Martin* established that, unlike Rule 32(a) of the Federal Rules of Criminal Procedure, G.S. 15A-1334(b) does not mandate that such a personal invitation be directed to the defendant himself rather than to his attorney.

In the trial of defendant we find

No error.

Judges VAUGHN and MARTIN (Robert M.) concur.

Brothers v. Howard

LEOLIA B. BROTHERS, WIDOW, HILDA B. THOMPSON AND HUSBAND, HENRY THOMPSON, JEAN B. COLEMAN AND HUSBAND, MAURICE COLEMAN, JANICE BROTHERS, UNMARRIED, LEOLIA B. CHERRY AND HUSBAND, DENNIS CHERRY, FLOYD BROTHERS AND WIFE, GERALDINE BROTHERS, CLIFFORD L. BROTHERS AND WIFE, BETTY BROTHERS, DWIGHT BROTHERS AND WIFE, CAROLYN BROTHERS, DORA B. LEE AND HUSBAND, ULYSSES LEE, ERMA B. JONES AND HUSBAND, WILLIAM JONES, AND WAYMOND BROTHERS, UNMARRIED v. RUDOLF HOWARD AND WIFE, LOUVENIA HOWARD

No. 811DC1107

(Filed 15 June 1982)

Quieting Title § 2.2— directed verdict for defendants improper—plaintiffs established prima facie case

In an action to quiet title, the trial court erred in allowing defendants' motion for directed verdict at the close of plaintiffs' evidence where (1) plaintiffs established a marketable record title to the land in dispute by the introduction of the deed which was recorded more than 30 years prior to the institution of the action which, under the Real Property Marketable Title Act, G.S. 47B-2(d) (Supp. 1981), was prima facie evidence that plaintiffs owned title to the property, and (2) plaintiffs established a prima facie case of their title to the property in dispute under the common source of title rule.

APPEAL by plaintiffs from *Chaffin, Judge.* Judgment entered 10 June 1981 in District Court, PASQUOTANK County. Heard in the Court of Appeals 27 May 1982.

Plaintiffs instituted an action to quiet title to a seven and one-half acre tract of land known as Joe's Island and to recover damages for the wrongful cutting of two trees on the property. Prior to trial, the parties stipulated to the following:

1. Plaintiffs are the heirs at law of Floyd Brothers, who died intestate.

2. The common source of the parties' title is C. L. Albertson and copies of all deeds in both plaintiffs' and defendants' chains of title are true and accurate.

3. By deed dated 9 January 1915, C. L. Albertson and wife conveyed to Riley White a parcel of land containing two hundred and twenty-five acres "excepting therefrom . . . a small Island containing seven acres, more or less, known as Joe's Island situate near Dailey's Landing."

4. By deed recorded in book 108, page 599, Pasquotank County Registry, on 11 September 1943, C. L. Albertson and wife conveyed to Floyd Brothers a parcel of land "known as Joe's Island and being a part of the Ed Albertson Land. Said to contain seven and one-half acres (7-1/2) more or less . . .."

At the close of plaintiffs' evidence, the trial court granted defendants' motion for a directed verdict and dismissed the action, stating that "the plaintiffs had failed to offer sufficient evidence to establish, prima facie, plaintiffs' title to the lands in dispute . . .."

Twiford, Trimpi, Thompson & Derrick, by John G. Trimpi, for plaintiff appellants.

Cherry, Cherry and Flythe, by Joseph J. Flythe, for defendant appellees.

MARTIN (Harry C.), Judge.

The trial court erred in allowing defendants' motion for directed verdict at the close of plaintiffs' evidence on plaintiffs' cause of action to quiet title.

First, the Real Property Marketable Title Act provides that the establishment of a marketable record title in any person pursuant to the statute shall be prima facie evidence that such person owns title to the real property described in his record chain of title. N.C. Gen. Stat. § 47B-2(d) (Supp. 1981). Plaintiffs have established a marketable record title to the land in dispute by the introduction of the deed from C. L. Albertson and wife, Rose Albertson, to Floyd Brothers, recorded 11 September 1943, more than thirty years prior to the institution of this action. N.C. Gen. Stat. 47B-2(a). The evidence supports a conclusion that plaintiffs have a marketable record title. *See Kennedy v. Whaley,* 55 N.C. App. 321, 285 S.E. 2d 621 (1982).

Defendants argue that the Act does not apply because their rights to the property in dispute come within the exceptions contained in N.C.G.S. 47B-3(4). Defendants, however, have the burden of proof on the issue of whether their rights come within the statutory exceptions. Plaintiffs' evidence does not establish that

defendants are protected by the exceptions, and defendants have yet to introduce their evidence.[1]

We hold that plaintiffs have made out a prima facie case under the statute sufficient to overcome defendants' motion for directed verdict at the close of plaintiffs' evidence. *Lea v. Dudley*, 20 N.C. App. 702, 202 S.E. 2d 799 (1974).

We also hold that plaintiffs have established a prima facie case of their title to the property in dispute, under the common source of title rule. *Mobley v. Griffin*, 104 N.C. 112, 10 S.E. 142 (1889). Defendants argue that the common source of title rule does not apply because the property in question was reserved from the lands granted to plaintiffs and defendants by C. L. Albertson, their common source of title. *Vance v. Pritchard*, 213 N.C. 552, 197 S.E. 182 (1938). Defendants, however, have stipulated that the parties do have a common source of title to the property in question. Defendants' chain of title from that common source has not been introduced into evidence. Plaintiffs' deed conveying the property from the common source is in evidence.

Defendants stipulated that the property in dispute, a part of Joe's Island, was owned by C. L. Albertson, who is the common source of title for plaintiffs' and defendants' property. They also stipulated the authenticity of the deed from C. L. Albertson and wife, Rose Albertson, conveying the property in dispute to Floyd Brothers, plaintiffs' predecessor in title, on 11 September 1943. The common source of title rule applies and defendants cannot deny C. L. Albertson's title to Joe's Island. *Vance, supra.*

The question then becomes, which party has the better title from that common source. Plaintiffs have introduced their record title to the property. They are not bound to introduce defendants' chain of title in order to make out a case for the jury that they possess the better title. They do not have to show the invalidity of defendants' claim. *Wells v. Clayton*, 236 N.C. 102, 72 S.E. 2d 16 (1952); 5 A.L.R. 3d 375, § 7 (1966). Plaintiffs' evidence was sufficient to overcome defendants' motion for directed verdict on plaintiffs' action to quiet title.

1. For a discussion of the effect of the exceptions upon the marketable title rule, see Note, *North Carolina's Marketable Title Act—Will the Exceptions Swallow the Rule?*, 52 N.C. L. Rev. 211 (1973).

Plaintiffs failed to produce sufficient evidence on their claim for damages for wrongful cutting of timber. There is no evidence that defendants cut trees on plaintiffs' property, other than the one tree for which defendants paid plaintiffs. The court properly entered a directed verdict against plaintiffs' claim for damages.

Affirmed in part; reversed in part.

Judges VAUGHN and HILL concur.

JAY DENNIS HERSHEY v. ROSELLA CANTWELL HERSHEY

No. 8127DC552

(Filed 15 June 1982)

Divorce and Alimony § 24.8— child support—finding of changed circumstances by emancipation of oldest child improper

Where the parties entered into a separation agreement which provided that the plaintiff would support his children by the payment of $700 per month until the youngest reached 18, the trial court erred in reducing the amount of support payable to defendant when the oldest of four children reached 18.

APPEAL by defendant from *Phillips, Judge.* Judgment entered 31 December 1980, District Court, GASTON County. Heard in the Court of Appeals 1 February 1982.

The parties hereto were formerly husband and wife, having been lawfully married on 13 May 1961. They separated on 20 July 1979, at which time they entered into a separation agreement. Four children were born of the marriage, and the separation agreement provided that the defendant would "have the primary custody, care and control of said minor children during their respective minorities subject to the right of husband to visit with the children at reasonable times and places." Plaintiff agreed "to pay to the wife the sum of $700.00 per month for the support and maintenance of said minor children which amount shall be payable until the youngest child attains the age of eighteen (18) years of age." Plaintiff further agreed "within his means" to be responsible for the college education of the children, and to be responsible for their reasonable medical and dental expenses and to maintain

them as beneficiaries on a hospitalization insurance policy "until they attained their majority."

On 25 September 1980 plaintiff brought an action for absolute divorce. In his complaint, he asked that defendant be granted custody of the minor children, that he be granted reasonable visitation rights, and that he be ordered to pay a reasonable amount of support for them "under the conditions now prevailing."

Defendant answered, attached a copy of the separation agreement, and asked that its provisions with respect to alimony, child custody and support, and visitation rights be adopted by the court.

By reply to the counterclaim, plaintiff averred that there had been material changes in circumstances since the execution of the agreement, "both with regard to the status of the minor children and also the plaintiff's employment."

The court entered judgment granting plaintiff an absolute divorce, finding facts, and concluding that there had been no material change in circumstances with respect to the incomes of plaintiff and defendant since the separation agreement "but there has been a material change in circumstance with reference to the minor children in that Michael Hershey has become emancipated since the entry of the Separation Agreement." The court found that "$175.00 per month per minor child plus medical and dental expenses is a reasonable sum to be paid by Plaintiff unto the Defendant for the use and benefit of the three minor children born to the marriage," and ordered plaintiff to pay that amount. Defendant appealed.

Gaither and Gorham, by John W. Crone, III, for defendant appellant.

No counsel contra.

MORRIS, Chief Judge.

While it is true that the provisions of a valid separation agreement relating to marital and property rights of the parties cannot be set aside by the court without the consent of the parties, no agreement between husband and wife can serve to de-

prive the courts of their inherent authority to protect the interests of and provide for the welfare of minor children. *Childers v. Childers*, 19 N.C. App. 220, 198 S.E. 2d 485 (1973); and cases there cited; *Rabon v. Ledbetter*, 9 N.C. App. 376, 176 S.E. 2d 372 (1970), and cases there cited. However, "where parties to a separation agreement agree concerning the support and maintenance of their minor children, there is a presumption, in the absence of evidence to the contrary, that the provisions mutually agreed upon are just and reasonable, and the court is not warranted in ordering a change in the absence of any evidence of a change in conditions." *Rabon v. Ledbetter*, at p. 379.

In the case before us, the court found, and there was no exception to the finding, that at the time of the separation, plaintiff had a gross salary of $20,000 per year, an expense account, and a company car and at the time of the hearing had a gross salary of $24,000 without an expense account or a company car. The court also found, and there is no exception to the finding, that the oldest child of the parties is now 18 years of age and a student in college. The court further found that defendant is employed full time and has a net income after taxes and insurance of approximately $127 per week. Upon these findings the court concluded that there had been no material change in circumstances with regard to the income of the plaintiff or defendant from the time of the execution of the separation agreement. Neither plaintiff nor defendant complains of this conclusion. Defendant does complain of the court's conclusion that "there has been a material change in circumstance with reference to the minor children in that Michael Hershey has become emancipated since the entry of the Separation Agreement." Defendant's position has merit and requires reversal of the court's order.

It is obvious that this so-called change in circumstances formed the sole basis for the court's order reducing the support payments from $700 per month as agreed to $525 per month, with the sum to be allocated as "$175.00 per minor child". The separation agreement clearly provided for the payment of $700 per month "which amount shall be payable until the youngest child attains the age of eighteen (18) years." There was no allocation of the sum to be paid.

Clearly a parent can obligate himself to support a child after emancipation and past majority, and the contract is enforceable, it

being beyond the inherent power of the court to modify absent the consent of the parties. *Church v. Hancock*, 261 N.C. 764, 136 S.E. 2d 81 (1964); *Shaffner v. Shaffner*, 36 N.C. App. 586, 244 S.E. 2d 444 (1978); *Carpenter v. Carpenter*, 25 N.C. App. 235, 212 S.E. 2d 911, *cert. den.*, 287 N.C. 465, 215 S.E. 2d 623 (1975); *see also* Lee, North Carolina Family Law, 4th Ed. § 151, pp. 235-36. There can be no question but that plaintiff here agreed to support his children—all of them—by the payment of $700 per month until the youngest reached eighteen. Clearly he had to know that the three oldest children would be past their majority by the time the youngest reached majority. The fact that the oldest child had reached eighteen was no change in circumstances. It was an eventuality recognized by plaintiff at the time he entered into the separation agreement. He then agreed that there would be no change in the amount of the monthly payment. He is bound by his agreement. The court erred in ordering a reduction of payment by reason of the fact that the oldest child had reached eighteen.

The record is barren of any evidence of any change in conditions warranting a change in the support payments to which plaintiff agreed in the separation agreement. The order entered must be modified in accordance with this opinion, but in all other respects, it is affirmed.

Modified and affirmed.

Judges VAUGHN and MARTIN (Harry C.) concur.

HEINS TELEPHONE COMPANY v. GRAIN DEALERS MUTUAL INSURANCE COMPANY

No. 8111DC974

(Filed 15 June 1982)

1. Insurance § 105— sufficiency of complaint—placed defendant on notice of claim

Where plaintiff stated in its complaint that Gladys Dorsey was the wife of defendant's named insured and that defendant was obligated under the terms of the policy to pay the amount of plaintiff's judgment against Mrs. Dorsey, the allegations were sufficient to allow defendant to prepare its defense in which it alleged that Mrs. Dorsey was not a resident of her husband's household at the time of the accident.

2. Insurance § 105— refusal to pay claim unwarranted—award of counsel fees proper

While the trial court properly awarded attorney fees under G.S. 6-21.1 after the jury verdict clearly established that defendant's refusal to pay an insurance claim had been unwarranted, plaintiff's attorney should have been entitled to additional compensation for his time and effort in defending against this appeal.

APPEAL by defendant from *Lyon, Judge.* Judgment entered 8 June 1981 in District Court, LEE County. Heard in the Court of Appeals 29 April 1982.

This is an action to recover damages from defendant insurance company based on a prior judgment against the alleged insured of defendant. The issue before the trial court, and the only real issue before this Court on appeal, is whether Gladys Dorsey, whose negligence caused plaintiff's damages in an automobile accident, is the insured of defendant. It is undisputed that the applicable policy of insurance, by its express terms, covered James Paul Dorsey and residents of his household. At the time of the accident, Mrs. Dorsey was the wife of James Paul Dorsey. The only issue of material fact before the trial court was whether Mrs. Dorsey was a resident of Mr. Dorsey's household at the time of the accident.

Plaintiff's evidence tended to show that Mrs. Dorsey had told a representative of plaintiff's insurer that she resided with her husband at the time of the accident. Mrs. Dorsey testified at trial, however, that she and Mr. Dorsey were having marital problems at the time of the accident and did not share a bedroom. She admitted preparing Mr. Dorsey's meals, and said he spent most of his time in his shop located behind the house. Mr. and Mrs. Dorsey had resumed living together at the time of trial.

Defendant's evidence tended to show that at the time of the accident Mr. Dorsey had been living for about two or three weeks in a trailer located on the same one acre lot as his wife's residence. He did not give Mrs. Dorsey permission to drive his vehicle and did not know she had taken it until notified of the accident by police. On cross-examination, Mr. Dorsey said he and his wife had separated and reconciled several times over a three year period and were presently living together.

The jury found that Mrs. Dorsey was a resident of her husband's household at the time of the accident. Judgment was accordingly entered against defendant for damages and attorney's fees. Defendant appeals and plaintiff cross-appeals.

Staton, Perkinson and West, by Stanley W. West, for plaintiff appellee.

C. Christopher Smith for defendant appellant.

ARNOLD, Judge.

[1] Defendant's first argument challenges the sufficiency of the complaint to place the defendant on notice as to the basis for the plaintiff's claim. We find this contention to be wholly without merit. Plaintiff stated in its complaint that Gladys Dorsey was the wife of defendant's named insured and that defendant was obligated under the terms of the policy to pay the amount of plaintiff's judgment against Mrs. Dorsey. These allegations were clearly sufficient to allow defendant to prepare its defense. Indeed, in a factually similar case cited by defendant this Court upheld a complaint which alleged only that the driver of a car "was an insured under the provisions of the policy issued by the defendant insurance company." *Marlowe v. Reliance Insurance Co.*, 15 N.C. App. 456, 460, 190 S.E. 2d 417, 419, *cert. denied* 282 N.C. 153, 191 S.E. 2d 602 (1972). Plaintiff here included considerably more detail in its complaint than that required by Marlowe.

Defendant's second assignment of error is that the trial court improperly denied summary judgment. Plaintiff established through its complaint and requests for admission, however, that there were triable issues of fact as to whether Gladys Dorsey was insured by defendant by virtue of her relationship to defendant's named insured, or her lawful possession of her husband's automobile. Summary judgment was properly denied.

As its next assignment of error, defendant argues that it was entitled to a directed verdict because plaintiff was not the real party in interest in the original action, plaintiff's existence was not proven by the evidence, and plaintiff suffered no damage. These arguments amount to a collateral attack on the original judgment against Gladys Dorsey, the correctness of which has no relevance to this appeal.

Defendant has made numerous other assignments of error in its appeal. We have reviewed all of these and found them to be so feckless as to merit no comment by this Court. We have concluded that the court committed no prejudicial error, that the jury verdict was supported by the evidence presented at trial, and that the trial court properly entered judgment consistent with this verdict and the prior determination of damages.

[2] Finally, defendant's argument that the court abused its discretion in awarding counsel fees under G.S. 6-21.1 is without merit since the jury verdict clearly established that defendant's refusal to pay the claim had been unwarranted. Indeed, we consider the trial court's award of counsel fees at a rate of $20 per hour to have been extremely low. While we do not find that the award was so inadequate as to constitute an abuse of discretion, we feel strongly that plaintiff's attorney should be entitled to additional compensation for his time and effort in defending against this appeal. Authority to award additional attorney's fees for an appeal has been held to fall within the purview of G.S. 6-21.1. *Hill v. Jones*, 26 N.C. App. 168, 215 S.E. 2d 168 (1975). Accordingly, we remand this cause for the limited purpose of allowing the District Court, in its discretion, and upon plaintiff's motion, to make findings of fact relevant to a determination of reasonable attorney's fees for services rendered on appeal and to enter an award consistent with those findings.

The judgment is

Affirmed and remanded in part.

Judges VAUGHN and MARTIN (Robert M.) concur.

STATE OF NORTH CAROLINA v. FLEETWOOD BUTCHER

No. 812SC1305

(Filed 15 June 1982)

1. Criminal Law § 114.3— instructions—date of verdict—no expression of opinion

The trial judge did not express an opinion in violation of G.S. 15A-1222 and G.S. 15A-1232 when he noted a day to be inserted in the jury verdict and stated "I hope it will be decided this day" since, in light of the instructions as

a whole, the jury would not reasonably infer from the comment that the judge was expressing an opinion on defendant's guilt, and neither was the court coercing the jury to render a verdict by any certain time.

2. Criminal Law § 131.2— newly discovered evidence—motion for appropriate relief properly denied

The trial court properly denied defendant's motion for appropriate relief under G.S. 15A-1415(b)(6) upon the ground of newly discovered evidence where the defense attorney learned after defendant's conviction that one of the State's primary witnesses had been charged with driving under the influence, third offense, and that on the same day the verdict was rendered against defendant, the witness was allowed to plead guilty in district court to a reduced charge of reckless driving since the only tendency of the evidence was to impeach or discredit the testimony of the former witness, and since the court found that the witness was not advised by anyone that his testimony would have any effect on the disposition of his district court case.

APPEAL by defendant from *Reid, Judge.* Judgment entered 13 January 1981 in Superior Court, BEAUFORT County. Heard in the Court of Appeals 25 May 1982.

Defendant was convicted of second degree murder. Judgment imposing a prison sentence was entered.

Attorney General Edmisten, by Special Deputy Attorney General Myron C. Banks, for the State.

Rodman, Rodman, Holscher and Francisco, by Christopher B. McLendon, for defendant appellant.

VAUGHN, Judge.

Defendant brings forward two assignments of error. Neither of them disclose prejudicial error.

[1] Defendant argues that during the charge to the jury, the judge expressed an opinion in violation of G.S. 15A-1222 and G.S. 15A-1232. We disagree.

At the completion of the jury charge, the judge read the verdict form to the jurors. He noted the possible verdicts and continued as follows: "this __ day of January . . . 13th day of January, 1981, I hope it will be decided this day, and there's a line for the signature of the foreman or foreperson of your jury." Defendant argues that the comment, "I hope it will be decided this day," intimated to the jury that the judge felt there were no doubts as to defendant's guilt.

Defendant has highlighted an isolated portion of the jury charge. Instructions, however, must be construed contextually. *State v. Gaines*, 283 N.C. 33, 43, 194 S.E. 2d 839, 846 (1973); *State v. McLellan*, --- N.C. App. ---, 286 S.E. 2d 873 (1982). The trial judge emphasized throughout his jury charge that the jurors were to impartially consider the evidence presented. He told them not to draw any inference from any ruling he may have made or any inflection in his voice. He stated that although a verdict required a unanimous decision, the jurors should not surrender their honest convictions solely to return a verdict.

In light of the foregoing, we conclude that a juror would not reasonably infer from the comment highlighted by defendant that the judge was expressing an opinion on defendant's guilt. *See State v. Staley*, 292 N.C. 160, 165, 232 S.E. 2d 680, 684 (1977). Neither would he reasonably infer that the court was coercing the jury to render a verdict by any certain time. *See State v. Holcomb*, 295 N.C. 608, 247 S.E. 2d 888 (1978). The comment was an explanation of why a particular date was orally inserted in the form's blank. Defendant has shown no prejudice, and the assignment of error is overruled.

[2] In his second assignment of error, defendant argues that the court erred in denying his motion for appropriate relief. We disagree.

G.S. 15A-1415(b)(6) allows a defendant to seek appropriate relief upon the ground of newly discovered evidence "which has a direct and material bearing upon the guilt or innocence of the defendant." In the present case, the defense attorney learned after defendant's conviction that one of the State's primary witnesses had been charged earlier with driving under the influence, third offense. The attorney also learned that on the same day the verdict was returned against defendant, the witness was allowed to plead guilty in district court to a reduced charge of reckless driving. Defendant contends that evidence of the plea raises a substantial question as to the motive of the witness' testimony and, therefore, has a direct bearing on his innocence.

According to *State v. Beaver*, 291 N.C. 137, 229 S.E. 2d 179 (1976), defendant is required to meet seven factors in order for a new trial to be granted on the ground of newly discovered evidence. Those factors include that "the new evidence does not

merely tend to contradict, impeach or discredit the testimony of a former witness" and that "the evidence is of such a nature that a different result will probably be reached at a new trial." 291 N.C. at 143, 229 S.E. 2d at 183.

Defendant's own argument supports a denial of his motion. When the sole purpose for which evidence of a plea is offered is to show motive from which a jury can infer lack of credibility, then the only tendency of that evidence is to impeach or discredit the testimony of the former witness.

Furthermore, in ruling on defendant's motion, the court concluded that there was no reasonable likelihood that the evidence would have any effect on the jury if a new trial was had. The conclusion was based in part on the following findings of fact:

> "that he [Frank Borden] in no way was influenced in his testimony in the Superior Court by the disposition of his case in the District Court; that he was advised by no one that his testimony would have any effect on the disposition of his District Court case, and that he expected no favoritism on account of it and was never told by anyone that he would be given any special consideration on account of his testimony for the state in the Fleetwood Butcher case."

Since defendant has failed to except to any of these findings, they are presumed to be supported by competent evidence and are binding on appeal. *Jarman v. Jarman*, 14 N.C. App. 531, 188 S.E. 2d 647, *cert. denied*, 281 N.C. 622, 190 S.E. 2d 465 (1972). We affirm the order denying defendant's motion.

No error.

Judges MARTIN (Harry C.) and HILL concur.

STATE OF NORTH CAROLINA v. ROBERT LEWIS PATTON, JR.

No. 8126SC1074

(Filed 15 June 1982)

Taxation § 28.5— attempt to evade or defeat taxes—statute of limitations runs from date of offense

An attempt to evade or defeat taxes on 29 April 1979 by failing to file a return for an earlier year within the time required by G.S. 105-159 and by placing assets in the account of another would constitute a new offense, and the statute of limitations applicable to G.S. 105-236(7) would begin to run anew as of that date; therefore, the three-year limitations period for such a violation would not have expired when warrants were issued on 25 March 1981.

APPEAL by the State from *Johnson, Judge.* Order entered 3 September 1981 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 9 March 1982.

These actions were instituted by issuance of three warrants on 25 March 1981 charging the defendant with wilfully attempting to evade or defeat North Carolina income taxes for the years 1971, 1972 and 1973. Each warrant alleges that defendant attempted to evade or defeat the taxes "by causing not to be filed an income tax return . . . on correction of additional income from a federal tax audit as required by NC GS 105-159 and by placing his income in his wife's bank account thereby depriving the state from collecting tax due." Each warrant alleges that the offense charged occurred on 29 April 1979.

The defendant was convicted in district court and appealed to superior court. There he moved to dismiss on grounds that the statute of limitations as to the three charges had expired. The superior court allowed the motion to dismiss on this basis, and the State appeals pursuant to G.S. 15A-1445(a)(1).

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

No counsel for defendant appellee.

WEBB, Judge.

There are no exceptions or assignments of error in the record. Still, upon any appeal duly taken from a final judgment, a

party may present for review the question of "whether a criminal charge is sufficient in law, notwithstanding the absence of exceptions or assignments of error in the record on appeal." Rule 10(a), N.C. Rules App. Proc.

The warrants herein charge offenses under G.S. 105-236(7), which declares it a misdemeanor, punishable by a fine not to exceed $1,000.00 or by imprisonment not to exceed six months or by both, for any person wilfully to attempt or to aid or abet another to attempt in any manner to evade or defeat state income taxes or the payment thereof. The warrants allege that the offenses occurred on 29 April 1979 when the defendant (1) failed to file an income tax return upon correction of his income for the years 1971, 1972 and 1973 by a federal tax audit and (2) placed his income in his wife's bank account. Such acts committed in a wilful attempt to evade or defeat income taxes would constitute the offense defined by G.S. 105-236(7). *See generally Spies v. U.S.*, 317 U.S. 492, 63 S.Ct. 364, 87 L.Ed. 418 (1943). G.S. 105-236(7) provides for a three-year statute of limitations. Defendant would contend that the bar of the statute of limitations appears on the face of the warrants. In his brief filed in the trial court, defendant argued that he attempted to evade or defeat income taxes for 1971, 1972 and 1973, if at all, when those taxes fell due in 1972, 1973 and 1974 respectively and, therefore, that the three-year statute of limitations for any such offenses expired in 1975, 1976 and 1977, well before issuance of these warrants on 25 March 1981. We cannot agree with this interpretation of the limitations period.

G.S. 105-159 provides, in pertinent part, as follows:

> "If the amount of the net income for any year of any taxpayer under this Division, as reported or as reportable to the United States Treasury Department, is changed, corrected, or otherwise determined by the Commissioner of Internal Revenue or other officer of the United States of competent authority, such taxpayer, within two years after receipt of internal revenue agent's report or supplemental report reflecting the corrected or determined net income shall make return under oath or affirmation to the Secretary of Revenue of such corrected, changed or determined net income . . . . If the taxpayer fails to notify the Secretary of Revenue of assessment of additional tax by the Commissioner of Internal

> Revenue, the statute of limitations shall not apply. The Secretary of Revenue shall thereupon proceed to determine, from such evidence as he may have brought to his attention or shall otherwise acquire, the correct net income of such taxpayer for the fiscal or calendar year, and if there shall be any additional tax due from such taxpayer the same shall be assessed and collected . . . Provided, that any taxpayer who fails to comply with this section as to making report of such change as made by the federal government within the time specified shall be subject to all penalties as provided in G.S. 105-236, in case of additional tax due, and shall forfeit his rights to any refund due by reason of such change."

This statute imposes a positive duty upon taxpayers beyond the requirements as to their original return. *See Knitting Mills v. Gill*, 228 N.C. 764, 47 S.E. 2d 240 (1948). The taxpayer whose net income *for any year* is corrected by the Commissioner of Internal Revenue or other authorized federal officer must file a new return reflecting his corrected net income within two years after receipt of the federal agent's report. Additional state income taxes may be assessed on the basis of the corrected net income. The failure to make such a new return within the time specified subjects the taxpayer to all penalties provided by G.S. 105-236 including, when applicable, the criminal penalty provided by G.S. 105-236(7). Defendant argued below that the provision "[i]f the taxpayer fails to notify the Secretary of Revenue of assessment of additional tax by the Commissioner of Internal Revenue, the statute of limitations shall not apply" should be read as relieving the bar of the statute of limitations as to assessment and collection of additional taxes due but not as to criminal prosecutions. We see no basis for so limiting the provision.

Thus, an attempt to evade or defeat taxes on 29 April 1979 by failing to file a return for an earlier year within the time required by G.S. 105-159 and by placing assets in the account of another would constitute a new offense, and the statute of limitations applicable to G.S. 105-236(7) would begin to run anew as of that date. The three-year limitations period for such a violation of G.S. 105-236(7) would not have expired when these warrants were issued on 25 March 1981.

Reversed and remanded.

Judges CLARK and ARNOLD concur.

IN THE MATTER OF LENETTE TUCKER AND CASHAWN TUCKER

No. 8112DC1053

(Filed 15 June 1982)

Parent and Child § 1— termination of parental rights—insufficient competent evidence to support conclusion

In a proceeding to terminate parental rights, there was insufficient competent evidence to support the trial court's conclusion that the children were "neglected children pursuant to General Statute 7A-517(21)(c) [sic] in that said minor children have not been provided necessary medical care or other remedial care," where (1) there was no direct evidence regarding one of the children's seizure disorder, and (2) the testimony regarding one witness being "called" regarding missed medical appointments by the children placed into evidence statements by the caller, a person other than the witness under oath. G.S. 7A-635.

APPEAL by respondent from *Guy, Judge.* Order entered 4 June 1981 in District Court, CUMBERLAND County. Heard in the Court of Appeals 7 May 1982.

Respondent appeals from an order concluding that her two minor children were neglected juveniles.

Attorney General Edmisten, by Associate Attorney General Walter M. Smith, for the State.

Jennie Dorsett for the Cumberland County Department of Social Services, petitioner appellee.

Staples Hughes, Assistant Public Defender, 12th Judicial District, for respondent appellant.

WHICHARD, Judge.

Petitioner, the Cumberland County Department of Social Services, alleged that respondent's two minor children were neglected in that (1) they did not receive proper care, supervision, or discipline; (2) they had not received necessary medical

care; and (3) they lived in an environment injurious to their welfare. Respondent in open court denied the allegations.

Petitioner's evidence consisted of the testimony of two social workers. The first, respondent's case worker from March 1980 through March 1981, testified in pertinent part as follows:

Over objection that the evidence constituted inadmissible hearsay, he stated that he knew that respondent had missed certain appointments; that when Cashawn missed an appointment in Chapel Hill, he was called; that when Lenette or Cashawn missed an appointment at physical therapy, he was called; and that on occasions when respondent missed appointments with the WIC program, he was called. Respondent told him the Chapel Hill appointment was too early. As to the other appointments, she either denied that they existed or said "the ride didn't come by to pick them up."

He stated that Lenette was out of phenobarbital in March, but respondent did not have an appointment to get another prescription until July. Over objection, he stated that Lenette had seizure disorders.

The witness further testified that he had discussed with respondent "her being intoxicated" and that she "admitted to drinking but not to having been intoxicated." He had noticed the effects of respondent's drinking on the days he visited with her and had talked with her about getting involved in an alcohol treatment program. She responded that she did not have a drinking problem.

The second social worker testified as follows: She saw respondent at the hospital on a single occasion. Respondent had a strong odor of alcohol on that occasion, and she felt that respondent was intoxicated. Respondent was hostile when talking to her. Respondent at first refused to admit her child to the hospital. She finally allowed the child to be admitted when the witness told her if she did not the witness would obtain a court order to have the child admitted.

Respondent offered no evidence.

The court found as facts that: respondent had failed to keep medical appointments for Lenette; respondent had failed and

refused to keep clinical appointments for both minor children, even though transportation was provided; respondent is an excessive drinker and in the opinion of the first social worker she was intoxicated on one occasion when Lenette had to be admitted to the hospital; the minor child Lenette is in need of medical care, has seizures, is in need of phenobarbital for the reduction of seizures, and respondent fails to maintain a sufficient supply of phenobarbital for her; both children are in need of medical attention and respondent has refused medical care; and neither child has received proper care and supervision by respondent and there has been a definite lack of supervision in that the children have not received necessary medical care. It concluded that the children "are neglected children pursuant to General Statute 7A-517(21)(c) [sic] in that said minor children have not been provided necessary medical care or other remedial care."

Respondent contends the cumulative effect of the several errors assigned renders the conclusion that her children were neglected unsupported by competent evidence or by proof by clear and convincing evidence. We agree, and accordingly reverse.

The testimony regarding the witness being "called" regarding missed medical appointments placed into evidence statements by the caller, a person other than the witness under oath. It was offered to establish the truth of the matter stated. It thus was clearly inadmissible hearsay. *See Wilson v. Indemnity Corp.*, 272 N.C. 183, 158 S.E. 2d 1 (1967); *Powers v. Commercial Service Co.*, 202 N.C. 13, 161 S.E. 689 (1931).

There was likewise no direct evidence regarding Lenette's seizure disorders. The witness was not qualified as a medical expert. While a nonexpert witness may testify as to a person's health, he must do so based on observation or facts within his knowledge. *See Gasque v. Asheville*, 207 N.C. 821, 178 S.E. 848 (1935). No foundation was laid here establishing that the witness had observed the child or had facts within his knowledge on the basis of which to testify. Hence, the testimony was either hearsay or uninformed conjecture, either of which was inadmissible.

The allegations in a petition alleging neglect must be proved by clear and convincing evidence. G.S. 7A-635. Absent the foregoing incompetent evidence, the record is devoid of clear and convincing evidence to sustain the conclusion that respondent failed

to provide necessary medical care or other remedial care for her children. Because the conclusion is not supported by clear and convincing evidence, and because it was the sole ground for entry of the order, the order must be and is

Reversed.

Judges WEBB and WELLS concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 15 JUNE 1982

BURCH v. PORT O'CALL No. 811DC1311	Dare (81CVD46)	Affirmed
BURMANN v. BURMANN No. 8110DC855	Wake (80CVD565)	No Error
COUNTY OF WAYNE v. BATTS No. 818DC787	Wayne (80CVD2866)	Dismissed
GOODWIN v. BALDWIN'S INC. No. 8110IC1285	Industrial Commission (G-9699)	Affirmed
GOUGH v. GOUGH No. 8123DC1181	Yadkin (80CVD253)	Vacated in part; Affirmed in part
IN RE THOMAS No. 8111SC917	Harnett (80E254)	No Error
LINK v. JARVIS, et al. No. 8123SC1030	Wilkes (80CVS566)	Affirmed
NCNB v. RUTLEDGE No. 8121DC774	Forsyth (79CVD1607)	Affirmed
STATE v. BROWN No. 8127SC1306	Gaston (81CRS10524)	No Error
STATE v. BRUNNER No. 8112SC1352	Cumberland (81CRS20757)	No Error
STATE v. BURNETTE No. 8115SC1315	Orange (81CRS2384) (81CRS2385)	No Error
STATE v. GORE No. 8113SC1102	Columbus (81CRS74)	No Error
STATE v. GRIFFIN No. 8118SC1332	Guilford (81CRS15874)	No Error
STATE v. HARPER No. 815SC1316	New Hanover (80CRS24079)	No Error
STATE v. KING No. 818SC1204	Wayne (81CR5567)	No Error
STATE v. MARTIN No. 8127SC1261	Cleveland (81CRS4720)	No Error
STATE v. MORROW No. 8115SC1350	Alamance (80CRS14990)	No Error

STATE v. PERRY No. 819SC1385	Franklin (76CRS5582)	No Error
STATE v. PISCIOTTA No. 8122SC1212	Davidson (81CRS2699)	No Error
STATE v. SOUHRADA No. 814SC1056	Onslow (81CRS1808)	No Error
STROUD v. K-MART CORPORATION No. 8114SC840	Durham (80CVS3214)	Affirmed
UPCHURCH v. IRA No. 8114DC1208	Durham (80CVM11383)	Reversed

APPENDIXES

AMENDMENT TO
INTERNAL OPERATING PROCEDURES
MIMEOGRAPHING DEPARTMENT

ORDER CONCERNING ELECTRONIC MEDIA AND
STILL PHOTOGRAPHY COVERAGE OF PUBLIC
JUDICIAL PROCEEDINGS

AMENDMENT TO
INTERNAL OPERATING PROCEDURES
MIMEOGRAPHING DEPARTMENT

The Internal Operating Procedures, Mimeographing Department, 295 NC 743-744 are hereby amended as follows:

"8. Until such time as the Court may order further, records, briefs, petitions, and any other documents which may be required by the Rules of Appellate Procedure or by order of the appropriate appellate court to be reproduced, shall be printed at a cost of $4.00 per printed page where the document is retyped and printed and at a cost of $1.50 per printed page where the Clerk determines that the document is in proper format and can be reproduced directly from the original."

By order of the Court in conference this 7th day of December 1982 to become effective 1 January 1983.

MARTIN, J.
For the Court

ORDER CONCERNING ELECTRONIC MEDIA AND STILL PHOTOGRAPHY COVERAGE OF PUBLIC JUDICIAL PROCEEDINGS

Effective 18 October 1982, Canon 3A(7) of the Code of Judicial Conduct and Rule 15 of the General Rules of Practice for the Superior and District Courts Supplemental to the Rules of Civil Procedure, published in 276 N.C. at 740, are hereby suspended to and including 18 October 1984, and electronic media and still photography coverage of public judicial proceedings in the appellate and trial courts of this state shall be allowed on an experimental basis, in accordance with the terms of this order.

1. Definition.

The terms "electronic media coverage" and "electronic coverage" are used in the generic sense to include coverage by television, motion picture and still photography cameras, broadcast microphones and recorders.

2. Coverage allowed.

Electronic media and still photography coverage of public judicial proceedings shall be allowed in the appellate and trial courts of this state, subject to the conditions below.

(a) The presiding judge shall at all times have authority to prohibit or terminate electronic media and still photography coverage of public judicial proceedings.

(b) Coverage of the following types of judicial proceedings is expressly prohibited: adoption proceedings, juvenile proceedings, proceedings held before clerks of court, proceedings held before magistrates, probable cause proceedings, child custody proceedings, divorce proceedings, temporary and permanent alimony proceedings, proceedings for the hearing of motions to suppress evidence, proceedings involving trade secrets, and *in camera* proceedings.

(c) Coverage of the following categories of witnesses is expressly prohibited: police informants, minors, undercover agents, relocated witnesses, and victims and families of victims of sex crimes.

(d) Coverage of jurors is prohibited expressly at any stage of a judicial proceeding, including that portion of a proceeding during which a jury is selected. The trial judge shall inform all potential jurors at the beginning of the jury selection process of the restrictions of this particular provision which is designated 2(d).

3. Location of equipment and personnel.

(a) The location of equipment and personnel necessary for electronic media and still photographic coverage of trial proceedings shall be at a place either inside or outside the courtroom in such a manner that equipment and personnel are completely obscured from view from within the courtroom and not heard by anyone inside the courtroom.

(i) If located within the courtroom, this area must be set apart by a booth or other partitioning device constructed therein at the expense of the media. Such construction must be in harmony with the general architectural style and decor of the courtroom and must meet the approval of the Senior Resident Superior Court Judge and the governing body of the county or municipality that owns the facility.

(ii) If located outside the courtroom, any booth or other partitioning device must be built so that passage to and from the courtroom will not be obstructed. This arrangement must meet the approval of the Senior Resident Superior Court Judge and the governing body of the county or municipality that owns the facility.

(b) Appropriate openings to allow photographic coverage of the proceedings under these rules may be made in the booth or partitioning device, provided that no one in the courtroom will see or hear any photographic or audio equipment or the personnel operating such equipment. Those in the courtroom are not to know when or if any such equipment is in operation.

(c) Video tape recording equipment which is not a component part of a television camera shall be located in an area remote from the courtroom.

(d) Media personnel shall not exit or enter the booth area once the proceedings are in session except during a court recess or adjournment.

(e) Electronic media equipment and still photography equipment shall not be taken into the courtroom or removed from the designated media area except at the following times:

(i) prior to the convening of proceedings;

(ii) during the luncheon recess;

(iii) during any court recess with the permission of the trial judge; and

(iv) after adjournment for the day of the proceedings.

4. Official representatives of the media.

(a) This Court hereby designates the North Carolina Association of Broadcasters, the Radio and Television News Directors Association of the Carolinas, and the North Carolina Press Association, as the official representatives of the news media. The governing boards of these associations shall designate one person to represent the television media, one person to represent the radio broadcasters, and one person to represent still photographers in each county in which electronic media and still photographic coverage is desired. The names of the persons so designated shall be forwarded to the Senior Resident Superior Court Judge, the Director of the Administrative Office of the Courts, and the county manager or other official responsible for administrative matters in the county or municipality in which coverage is desired. Thereafter, these persons shall conduct all negotiations with the appropriate officials concerning the construction of the booths or partitioning devices referred to above. Such persons shall also be the only persons authorized to speak for the media to the presiding judge concerning the coverage of any judicial proceedings.

(b) It is the express intent and purpose of this rule to preclude judges and other officials from having to "negotiate" with various representatives of the news media. Since these rules require pooling of equipment and personnel, cooperation by the media is of the essence and the designation of three media representatives is expressly intended to prevent presiding judges from having to engage in discussion with others from the media.

5. Equipment and personnel.

(a) Not more than two television cameras shall be permitted in any trial or appellate court proceedings.

(b) Not more than one still photographer, utilizing not more than two still cameras with not more than two lenses for each camera and related equipment for print purposes, shall be permitted in any proceeding in a trial or appellate court.

(c) Not more than one audio system for radio broadcast purposes shall be permitted in any proceeding in a trial or appellate court. Audio pickup for all media purposes shall be accomplished with existing audio systems present in the court facility. If no technically suitable audio system exists in the court facility, microphones and related wiring essential for media purposes may be installed and maintained at media expense. The microphones

and wiring must be unobtrusive and shall be located in places designated in advance of any proceeding by the Senior Resident Superior Court Judge of the judicial district in which the court facility is located. Such modifications or additions must be approved by the governing body of the county or municipality which owns the facility.

(d) Any "pooling" arrangements among the media required by these limitations on equipment and personnel shall be the sole responsibility of the media without calling upon the presiding judge to mediate any dispute as to the appropriate media representative or equipment authorized to cover a particular proceeding. In the absence of advance media agreement on disputed equipment or personnel issues, the presiding judge shall exclude all contesting media personnel from a proceeding.

(e) In no event shall the number of personnel in the designated area exceed the number necessary to operate the designated equipment or which can comfortably be secluded in the restricted area.

6. Sound and light criteria.

(a) Only television photographic and audio equipment which does not produce distracting sound or light shall be employed to cover judicial proceedings. No artificial lighting device of any kind shall be employed in connection with the television camera.

(b) Only still camera equipment which does not produce distracting sound or light shall be employed to cover judicial proceedings. No artificial lighting device of any kind shall be employed in connection with a still camera.

7. Courtroom light sources.

With the concurrence of the Senior Resident Superior Court Judge of the judicial district in which a court facility is situated, modifications and additions may be made in light sources existing in the facility, provided such modifications or additions are installed and maintained without public expense and provided such modifications or additions are approved by the governing body of the county or municipality which owns the facility.

8. Conferences of counsel.

To protect the attorney-client privilege and the right to counsel, there shall be no audio pickup or broadcast of conferences which occur in a court facility between attorneys and

their clients, between co-counsel of a client, between adverse counsel, or between counsel and the presiding judge held at the bench.

9. Impermissible use of media material.

None of the film, video tape, still photographs or audio reproductions developed during or by virtue of coverage of a judicial proceeding shall be admissible as evidence in the proceeding out of which it arose, any proceeding subsequent and collateral thereto, or upon any retrial or appeal of such proceedings.

This order shall be published in the Advance Sheets of the Supreme Court and of the Court of Appeals.

ADOPTED BY THE COURT IN CONFERENCE this 21st day of September, 1982.

MARTIN, 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

ADVERSE POSSESSION

§ 7. By One Tenant in Common Against Other Tenants in Common

A tenant in common did not constructively oust her cotenants by paying past due taxes in 1939 or by using the property without paying rents or profits to the cotenants where she recognized the cotenancy in 1971 by buying a cotenant's share of the property. *Sheets v. Sheets*, 336.

§ 24. Competency and Relevancy of Evidence

Plaintiff's surveyor, in an action to quiet title among other things, should have been allowed to describe the distance errors in the complaint description and to explain that a deed referred to in plaintiff's deed and the complaint contained correct descriptions of the tract claimed and used by the surveyor in making his survey and plat. *E. I. du Pont de Nemours & Co. v. Moore*, 84.

AGRICULTURE

§ 2. Lien for Supplies and Advancements

In an action in which plaintiffs alleged that they had leased farm property to an individual defendant, the trial court erred in directing a verdict for defendants where the evidence showed plaintiff had a landlord's lien on the crop grown by the individual defendant on plaintiffs' farm by virtue of G.S. 42-15. *Rivenbark v. Moore*, 339.

APPEAL AND ERROR

§ 3. Review of Constitutional Questions

Where the trial court did not rule on the constitutionality of G.S. § 7A-289.32 (4) in a proceeding to terminate parental rights, the appellate court would not rule on its constitutionality. *In re Bradley*, 475.

§ 6.2. Premature Appeals

An order of a trial judge denying plaintiff's motion to reconsider an order in which the judge denied an attorney's motion for admission pro hac vice was an interlocutory order and was not immediately appealable. *Leonard v. Johns-Manville Sales Corp.*, 553.

§ 9. Moot and Academic Questions

A telephone company's challenge to the rate of return on common equity allowed by the Utilities Commission was rendered moot when the Commission in another case approved an additional rate increase and a higher rate of return on common equity for the telephone company. *State ex rel. Utilities Comm. v. Southern Bell*, 489.

§ 24. Necessity for Objections, Exceptions, and Assignments of Error

Under App. R. 10(a), where there are no exceptions in the record, an appeal from a final judgment may present for review whether the judgment is supported by the findings and conclusions. However, where no exceptions are made to the findings, they are presumed to be supported by competent evidence and are binding on appeal. *Anderson Chevrolet/Olds v. Higgins*, 650.

§ 42. Conclusiveness and Effect of Record

Trial court's order that a prior action was res judicata as to issues raised by a motion to restrain confirmation of a foreclosure resale is presumed correct where neither the prior action nor the motion is in the record on appeal. *In re Foreclosure of Burgess*, 268.

APPEAL AND ERROR — Continued

§ 42.2. Presumptions with Respect to Record

Appellant failed to show error in the court's failure to submit certain issues to the jury and in the instructions where none of the evidence was included in the record on appeal. *Burns v. McElroy*, 299.

§ 57. Findings or Judgments on Findings: Duty of Court to Make

The trial court did not err in failing to adopt defendant's proposed findings of fact. *Lea Co. v. Board of Transportation*, 392.

ARBITRATION AND AWARD

§ 1. Arbitration Agreements

A contract for construction work did not require arbitration unless one of the parties demanded it. *Triangle Air Cond. v. Board of Education*, 482.

ARREST AND BAIL

§ 11. Liabilities on Bail Bonds

The trial judge set aside a judgment of forfeiture on a bail bond under the wrong statute where the order of remittance was entered more than 90 days after entry of the judgment on the appearance bond. *State v. Moore*, 676.

ASSAULT AND BATTERY

§ 1. Elements and Essentials of Right of Action for Civil Assault

The bare allegation that defendant's agent stopped plaintiff and removed a shirt from her shopping bag does not allege an offensive and nonconsensual contact or an apprehension thereof sufficient to allege a claim for damages for emotional distress as a result of an assault or a battery. *Morrow v. Kings Department Stores*, 13.

§ 13. Competency of Evidence

Trial court did not err in limiting the scope of defense counsel's cross-examination of a police officer concerning the victim's reputation in the community for violence where no evidence of self-defense had been introduced at that time. *State v. Tann*, 527.

§ 14.4. Assault with a Deadly Weapon with Intent to Kill Inflicting Serious Bodily Injury; Where Weapon is a Firearm

The State's evidence was sufficient for the jury in a prosecution of defendant for assault with a deadly weapon with intent to kill inflicting serious injury although a shot fired by another person actually struck the victim while he was riding in a car. *State v. Jacobs*, 537.

§ 15.6. Instructions on Defense of Self, Property or Others

The trial court in a felonious assault case erred in failing to instruct the jury as to the bearing that evidence that the victim was a violent and dangerous man might have had on the reasonableness of defendant's apprehension of death or great bodily harm. *State v. Tann*, 527.

Trial court erred in instructing that self-defense was unavailable to defendant if he was the aggressor where there was no evidence that defendant was the aggressor. *Ibid.*

ATTORNEYS AT LAW

AUTOMOBILES AND OTHER VEHICLES

BANKS AND BANKING

BASTARDS

BURGLARY AND UNLAWFUL BREAKINGS

CHATTEL MORTGAGES AND CONDITIONAL SALES

CONSPIRACY

CONSTITUTIONAL LAW

four pounds of random samples did not violate defendants' discovery rights under G.S. 15A-903(e) or their rights of confrontation under Art. I, § 23 of the Constitution of North Carolina. Nor did the State's destruction of the marijuana deny defendants a fair and reasonable opportunity to investigate, prepare and present their defense in violation of their constitutional right to due process. *State v. Anderson*, 602.

§ 31. Affording the Accused the Basic Essentials for Defense

In prosecutions for larceny of an automobile and armed robbery, it was not prejudicial error for the trial court to refuse to appoint a private investigator. *State v. Jones*, 460.

The trial court did not err in refusing to require the State to identify an informant who defendants contended alerted the State to search one defendant's apartment. *Ibid.*

§ 40. Right to Counsel; Generally

Plaintiff's statutory and constitutional rights were not violated by refusal of the trial court to appoint counsel or to recognize a fellow prisoner of the plaintiff to aid plaintiff in the prosecution of his action to recover damages for the alleged deprivation of plaintiff's constitutional rights under color of state law during his pretrial detention. *Loren v. Jackson*, 216.

§ 50. Speedy Trial; Generally

Where defendant was indicted for embezzlement on 6 October 1980 and on 3 November 1980 a new bill of indictment was returned charging the same embezzlement and felonious larceny, and where defendant was tried on the felonious larceny charge on 17 February 1981 after the court dismissed the embezzlement charge, under G.S. 15A-703 the trial judge should have dismissed the larceny charge as well as the embezzlement charge as not being tried within 120 days. *State v. Norwood*, 584.

CONTRACTS

§ 2. Offer and Acceptance Generally

Where the court found a guaranty agreement was a guaranty of payment; that there were no oral conditions precedent to the agreement; and that the written guaranty set forth the agreement in clear and unambiguous language, defendant could not avoid the agreement on the ground that there was no meeting of the minds. *Farmers Bank v. Brown Distributors*, 313.

§ 6.2. Contracts Relating to Domestic or Family Relationships

The trial court erred in dismissing the wife's action against her husband seeking enforcement of an agreement between the parties to transfer real property to the parties' joint ownership. *Earp v. Earp*, 194.

§ 12. Construction and Operation of Contracts

Plaintiff was not entitled to compensation for rock excavated from a quarry area but wasted because it was not suitable for use in a dam construction project at the unit price for common excavation. *Clement Brothers Co. v. Dept. of Administration*, 497.

§ 14.2. Circumstances Under Which Third Party Beneficiary is Denied Recovery

Plaintiff real estate broker could not maintain an action as third party beneficiary for breach of an agreement between the sellers and purchasers of a

CONTRACTS — Continued

house requiring the purchasers to pay plaintiff's commission on the sale. *Reidy v. Macauley*, 184.

§ 16. Conditions

Summary judgment was improperly entered for plaintiff sellers in an action to recover for breach of a contract to purchase a house where the offer to purchase was conditioned upon the buyer securing a conventional loan and defendant was unable to close the loan because his wife refused to sign the deed of trust. *Smith v. Dickinson*, 155.

§ 18.1. Enforceability of Modification, Waiver or Abandonment

The forecast of evidence was sufficient to permit the jury to find that defendant waived a contract requirement of a change order for plaintiff to receive additional compensation for construction work. *Triangle Air Cond. v. Board of Education*, 482.

Plaintiff did not waive its claim for additional compensation under a contract by accepting payment of the original contract price. *Ibid.*

§ 22. Tender of Performance or Payment

The tender by plaintiff of a $50,000 check drawn on the bank account of plaintiff's law firm was proper tender in exercise of a fixed price option. *Texaco, Inc. v. Creel*, 611.

§ 27. Sufficiency of Evidence Generally

In an action to recover the cost of repairs performed by plaintiff on a vehicle licensed by defendant, the findings permitted the conclusion that defendant impliedly accepted plaintiff's offer to repair the vehicle. *Anderson Chevrolet/Olds v. Higgins*, 650.

Plaintiff's forecast of evidence was sufficient to show that it complied with a contract requirement that it present a claim for increased costs to the architect within 20 days of the occurrence of the event giving rise to the claim. *Triangle Air Cond. v. Board of Education*, 482.

§ 30. Forfeitures and Penalties Under Terms of Instrument

Defendants acted arbitrarily and capriciously in notifying plaintiff that it would permit no further construction shutdowns because of severe winter weather conditions, and the trial court properly required defendants to remit a portion of the liquidated damages which had been assessed against plaintiff for tardy completion of the project. *Clement Brothers Co. v. Dept. of Administration*, 497.

CORPORATIONS

§ 1. Incorporation and Corporate Existence

A corporation's nonexistence was established by defendant's failure to respond to plaintiff's request for an admission that defendant was doing business as a company which has never been incorporated. *Overnite Transportation v. Styer*, 146.

COSTS

§ 3.1. Allowance of Attorney's Fees

In an action upon a small claim, the trial court properly awarded attorney's fees pursuant to G.S. 6-21.1. *Plow v. Bug Man Exterminators*, 159.

COURTS

CRIMINAL LAW

CRIMINAL LAW — Continued

§ 34.3. Admission of Inadmissible Evidence Cured by Court's Admonition

The trial court did not err in failing to declare a mistrial after evidence regarding the commission of another crime was elicited since the trial court immediately sustained an objection and ordered the jury not to consider the evidence. *State v. Washington*, 666.

§ 34.6. Admissibility of Evidence of Other Offenses

In prosecutions for larceny of an automobile and armed robbery, the trial court properly admitted evidence of ten other pending charges against each defendant for possession or receiving stolen goods. *State v. Jones*, 460.

§ 34.8. Admissibility of Evidence of Other Offenses to Show Common Plan or Scheme

In a prosecution for attempting to obtain property by false pretenses by falsely promising to sell a grocery store owner goods from a certain warehouse at below cost, testimony by two other store owners concerning similar schemes by defendant was competent to establish a common plan or scheme and to establish an intent to deceive. *S. v. Wilburn*, 40.

§ 46. Flight of Defendant as Implied Admission

In a prosecution for murder and armed robbery, the trial court did not err in instructing the jury on the evidence of flight. *S. v. Downes*, 102.

§ 46.1. Competency and Sufficiency of Evidence of Flight

The trial court did not err in admitting into evidence testimony regarding the defendant's flight from his first trial since the testimony could be admitted as some evidence of guilt. *State v. Jeffries*, 416.

The trial court properly instructed the jury on flight where defendant left home at about the time of the crime, although there was also evidence that defendant returned home voluntarily several hours later. *S. v. Jenkins*, 191.

§ 50.1. Admissibility of Opinion of Expert

The trial court should have allowed an expert witness in the field of psychiatry to testify as to the content of his conversations with the defendant. *State v. Allison*, 635.

§ 60.5. Competency and Sufficiency of Evidence in Regard to Fingerprints

In an action in which defendant was charged with the larceny of a truck, fingerprint evidence and other evidence was sufficient to withstand defendant's motion to dismiss. *S. v. Strange*, 263.

§ 63. Evidence as to Sanity of Defendant; Nonexpert and Expert Witnesses

The trial court should have allowed an expert witness in the field of psychiatry to testify as to the content of his conversations with the defendant. *State v. Allison*, 635.

In a prosecution for murder in the second degree and other crimes, the trial court did not err in failing to permit a psychiatrist to testify what the diagnoses of other psychiatrists who had tested defendant had been. *Ibid.*

§ 66.15. Sufficiency of Evidence of Independent Origin of In-Court Identification in Cases Involving Lineups

Any suggestiveness of a post lineup conversation between the prosecuting witness and an officer in a prosecution for rape and kidnapping did not taint her in-

CRIMINAL LAW — Continued

court identification, and the trial court properly found it to be of independent origin. *State v. Washington*, 666.

§ 68. Evidence of Identity

In a prosecution for murder and armed robbery, the trial court properly admitted expert testimony concerning the comparison of hair samples from rubber gloves found close to the crime scene and hair samples from defendant's arm. *S. v. Downes*, 102.

§ 73.2. Statements not Within Hearsay Rule

Defendant's proffered testimony about a conversation with the owner of a garage where she allegedly delivered methaqualone was not hearsay, and its exclusion constituted prejudicial error. *S. v. Tate*, 350.

§ 75. Admissibility of Confession in General

The standard of proof for determination of the voluntariness of a confession is proof by a preponderance of the evidence. *S. v. Washington*, 309.

§ 77.1. Admissions and Declarations of Defendant

It was not prejudicial error to allow testimony by a detective that defendant was not willing to answer questions and wanted to talk to an attorney. *State v. Allison*, 635.

§ 79. Acts and Declarations of Companions, Codefendants and Co-conspirators

Declarations made by defendant's co-conspirators that they needed a gun, that they should rob a store and that they should kill a man in the store were not inadmissible as hearsay. *S. v. Allen*, 256.

§ 88. Cross-examination Generally; Right to Cross-examination

The trial court improperly limited the scope of defendant's cross-examination of the prosecuting witness as to whether she had filed a civil lawsuit for damages against him based on the facts involved in the prosecution for assault on a female. *State v. Grant*, 589.

§ 89.5. Slight Variances in Corroborating Testimony

Defendant was not prejudiced by the admission of a witness's non-corroborative statement to a police officer that defendant stabbed deceased with something wrapped in a towel. *S. v. Jenkins*, 191.

§ 89.6. Impeachment

Trial court's ruling which prevented a State's witness from testifying about any fear he might have in testifying "for defendant's attorney" did not prohibit defendant from impeaching the witness. *S. v. Allen*, 256.

The trial court did not err in excluding evidence of the prosecuting witness's reputation for homosexuality. *State v. Griffin*, 684.

§ 89.10. Witness's Prior Degrading and Criminal Conduct and Convictions

The trial court properly permitted cross-examination of a defense witness regarding his own conviction for the same crime for which defendant was being tried. *State v. Griffin*, 684.

§ 90. Rule that Party is Bound by and May Not Discredit His Own Witness

Even if the State improperly impeached its own witness by asking if the witness was afraid to testify to the full truth, defendant waived his objection thereto by failing to make a timely objection. *S. v. Allen*, 256.

CRIMINAL LAW — Continued

§ 91. Nature and Time of Trial; Speedy Trial

Where defendant was indicted for murder while he was incarcerated in New York but was released from his prison in New York before the expiration of 180 days after his written notice of request for disposition of the murder charge, the Interstate Agreement on Detainers no longer governed defendant's right to a speedy trial. *S. v. Dunlap*, 175.

§ 91.4. Continuance to Obtain New Counsel

The denial of defendant's motion for continuance to permit his newly retained attorney to prepare for trial did not violate defendant's constitutional right to the effective assistance of counsel. *S. v. Wilburn*, 40.

§ 91.7. Continuance on Ground of Absence of Witness

The trial court did not err in the denial of defendant's motion for a continuance in order to secure the presence of his alleged alibi witnesses. *State v. Perkins*, 516.

§ 92.1. Consolidation of Counts or of Charges Against Multiple Defendants

A motion for joinder of charges against two defendants made at the beginning of the trial was made in apt time. *State v. Jacobs*, 537.

In a prosecution for larceny of an automobile and armed robbery, consolidation of the trials of both defendants was proper and each defendant's election to testify did not deny the other his right to remain silent. *State v. Jones*, 460.

Under G.S. 15A-926(b)(2), in a prosecution for common law robbery, the trial judge did not err in joining all defendants for trial. *State v. Melvin*, 503.

§ 92.3. Consolidation of Multiple Charges Against Same Defendant

Where defendant was charged in separate bills of indictment with two separate instances of obtaining money under false pretenses, the two cases against him were improperly joined for trial. *State v. Wilson*, 444.

§ 92.4. Consolidation of Multiple Charges Held Proper

Defendant's contention that the State's motion for joinder was not timely made because it was not made prior to arraignment could be rejected on two bases. *State v. Wilson*, 444.

§ 97.2. No Abuse of Discretion in Permitting Additional Evidence

The trial court did not abuse its discretion in refusing to permit defendant to reopen his case to testify after the court had concluded its charge to the jury. *State v. Perkins*, 516.

§ 99.2. Questions, Remarks and Other Conduct of Court During Trial

The trial judge's statement to the jury, after the State's case in chief, concerning the pleas of the other defendants did not violate G.S. 15A-1025 concerning plea discussions of defendant and did not constitute an expression of opinion in violation of G.S. 15A-1232. *State v. Melvin*, 503.

§ 99.4. Questions, Remarks, and Other Conduct of Court in Connection With Objections and Rulings Thereon

The trial judge did not express an opinion on the evidence in stating, "You're going to object to every question, aren't you?" *Saintsing v. Taylor*, 467.

§ 101.2. Exposure of Jurors to Publicity or to Evidence not Formally Introduced

While it would have been the "better practice" for the trial court to have asked the jurors if they had read an article concerning defendant which was

CRIMINAL LAW — Continued

published the morning of the second day of their deliberation, reversible error was not presumed and no abuse of discretion was found. *S. v. Henry*, 168.

§ 102. Who is Entitled to Conclude Argument

The trial court erred in not allowing the defendant to make the closing arguments to the jury where the only "evidence" the defendant put on was in using a sweatshirt to cross-examine the State's witness as to the characteristics of the sweatshirt. *State v. Hall*, 561.

§ 112.1. Instructions on Reasonable Doubt

The trial court did not err in failing to instruct the jury that a reasonable doubt could arise from the lack of evidence presented by the State since the State's evidence was amply sufficient to support the verdict. *S. v. Robertson*, 294.

§ 112.2. Particular Charges on Reasonable Doubt

Trial court's instruction that a reasonable doubt is a fair doubt based on reason and common sense "generated by the insufficiency of the evidence" was a sufficient statement of the law. *State v. Jacobs*, 537.

§ 112.6. Charges on Affirmative Defenses

In a prosecution for assault on a female, the trial judge properly failed to instruct the jury on the defense of justification. *State v. Grant*, 589.

§ 113.7. Charge as to "Aiding and Abetting"

Trial court's instructions sufficiently conveyed to the jury that it must find that defendant shared the criminal intent of the perpetrator in order to convict defendant as an aider and abettor. *S. v. Jackson*, 71.

The trial court was not required to instruct the jury that the mere presence of a person at the scene of a crime was not enough to constitute aiding and abetting or acting in concert. *State v. Jacobs*, 537.

§ 114.2. No Expression of Opinion in Statement of Evidence or Contentions

The trial court expressed an opinion on the evidence in instructing the jury that the State had offered evidence tending to show that defendant "made a statement freely and voluntarily," but such error was not prejudicial in this case. *S. v. Washington*, 309.

The trial judge did not express an opinion on defendant's guilt when he referred to a State's witness as an "accomplice." *State v. Perkins*, 516.

§ 114.3. No Expression of Opinion in Instructions

The trial judge did not express an opinion when he noted a day to be inserted in the jury verdict and stated "I hope it will be decided this day." *State v. Butcher*, 698.

§ 114.4. Prejudicial Expression of Opinion in Statement of Evidence or Contentions

In a prosecution for armed robbery, the trial judge violated G.S. 15A-1232 which prohibits him from expressing an opinion as to whether a fact has been proved. *S. v. Thompson*, 142.

§ 118. Charge on Contention of Parties

The trial court did not err in instructing that defendant fled after the commission of the crime charged. *S. v. Robertson*, 294.

CRIMINAL LAW — Continued

§ 118.3. Particular Charges on Contentions of Parties as Erroneous

Where the trial court properly admitted as corroboration a statement previously made by defendant which was consistent with his testimony at trial, the trial judge erred in denying defendant's requested jury instruction on corroborative evidence. *State v. Grant*, 589.

§ 122.2. Additional Instructions Upon Failure to Reach Verdict

Instructions given to the jury after it had been deliberating for several hours and after the jury foreman informed the court that the jury was deadlocked in an eleven to one vote were not erroneous. *State v. Jeffries*, 416.

§ 131.2. New Trial for Newly Discovered Evidence; Sufficiency of Showing

The trial court properly denied defendant's motion for appropriate relief under G.S. 15A-1415(b)(6) upon the ground of newly discovered evidence. *State v. Butcher*, 698.

§ 134.2. Procedure for Imposition of Sentence

G.S. 15A-1334(b) does not mandate that a personal invitation to speak on his own behalf prior to sentencing be directed to defendant himself rather than to his attorney. *State v. Griffin*, 684.

§ 142.4. Probation and Suspended Sentences; Conditions Proper

Trial court erred in requiring defendant, as a condition of probation, to pay restitution to a victim not involved in the charges against defendant. *S. v. Wilburn*, 40.

§ 143.13. Appeal from Order of Revocation of Suspended Sentence

Where defendant received a suspended sentence upon certain conditions, defendant failed to adhere to the conditions and his sentence was activated, the defendant could not question the validity of the original judgment when his sentence was suspended. *S. v. Neeley*, 211.

§ 146.4. Appeal of Constitutional Questions

For an appellant to assert a constitutional or statutory right in the appellate court, the right must have been asserted and the issue raised before the trial court. *S. v. Robertson*, 294.

§ 146.5. Appeal from Sentence Imposed on Plea of Guilty

Under G.S. § 15A-1444(e), defendants were not entitled to appellate review as a matter of right of the denial of their motions to quash where they pleaded to the bills of indictment. *State v. Rivard and State v. Power*, 672.

§ 148. Judgments Appealable

Under G.S. 7A-666, an adjudication of delinquency is not a final order, and no appeal may be taken from such order unless no disposition is made within 60 days of the adjudication of delinquency. *In re Taylor*, 213.

§ 148.1. Judgments and Orders Before or During Trial

The right to perfect an appeal from an order denying a motion to suppress seized evidence for which the time allowed had expired was not "appropriate relief" which the trial court could grant. *S. v. Mack*, 163.

DAMAGES

DEATH

DESCENT AND DISTRIBUTION

§ 8. Bastards

The statute permitting an illegitimate child to inherit by, through and from his putative father only if certain acknowledgment or filing requirements have been followed is not unconstitutional. *Herndon v. Robinson*, 318.

Plaintiff did not show a "constructive" compliance with statutory provisions permitting an acknowledgment of paternity by the father's written admission of paternity executed before a certifying officer and filed in the office of the clerk of court. *Ibid.*

DIVORCE AND ALIMONY

§ 24.1. Determining Amount of Support

There was competent evidence to support the court's findings of fact as to the reasonable needs of the parties' minor child and to assume the court relied on this evidence in determining the child's needs. *Hamilton v. Hamilton*, 182.

§ 24.2. Effect of Separation Agreements on Support

The trial court's reduction of the amount of child support required by a separation agreement without a proper proceeding and notice and opportunity to be heard deprived plaintiff of her due process rights. *Mann v. Mann*, 587.

§ 24.4. Enforcement of Support Orders

There was sufficient evidence to support the trial court's conclusion "that defendant has deliberately attempted to avoid his financial responsibilities to his daughter and that he had not acted in good faith." *Goodhouse v. DeFravio*, 124.

Plaintiff was entitled to specific performance of the child support provisions of a separation agreement. *Mann v. Mann*, 587.

§ 24.8. Support; Where Changed Circumstances Are Not Shown

The fact that defendant voluntarily assumed the responsibility of supporting his emancipated son was not a factor to be considered in determining a changed circumstance sufficient to support a reduction in child support of the other children. *Dishmon v. Dishmon*, 657.

Where there were no findings that the needs of the children had increased or that there had been a change of circumstances affecting the welfare of the children, the findings of fact did not support the court's conclusion that the payment should be increased. *Ibid.*

Where the parties entered into a separation agreement which provided that the plaintiff would support his children by the payment of $700 per month until the youngest reached 18, the trial court erred in reducing the amount of support payable to defendant when the oldest of four children reached 18. *Hershey v. Hershey*, 692.

§ 25. Custody; Generally

Trial court did not err in awarding temporary custody to the mother; however, the court erred in entering the award of custody under the provisions of G.S. 50B-3(a)(2) and (4) since Chapter 50B did not become effective until after the acts of violence in plaintiff's complaint. *Story v. Story*, 509.

The trial court erred in relying exclusively on plaintiff's verified complaint and answer and in failing to hear any testimony in determining that custody of plaintiff's minor child should be permanently awarded to her. *Ibid.*

ELECTRICITY

§ 4. Care Required of Electric Companies in General

In a wrongful death action following the electrocution of a man by a utility wire, the trial judge was slightly incorrect in stating that "another rule" of negligence applies to power companies. *Beck v. Carolina Power & Light Co.*, 373.

In a wrongful death action against a power company, the trial judge did not commit prejudicial error by failing to couple the term "highest degree of care" with "consistent with the practical operation of its business" on every occasion on which the judge used the phrase "highest degree of care." *Ibid.*

§ 8. Contributory Negligence

The evidence was sufficient to be submitted to the jury on the issue of contributory negligence in an action to recover for the death of plaintiff's intestate who was electrocuted by defendant's power lines while removing an antenna from the roof of a house. *Zach v. Electric Membership Corp.*, 326.

§ 10. Damages

In a wrongful death action in which decedent was electrocuted by a guy wire attached to defendant's power pole, plaintiff's evidence which tended to show numerous violations of the National Electric Safety Code and of defendant's own standards was sufficient to merit the submission of the issue of punitive damages to the jury. *Beck v. Carolina Power & Light Co.*, 373.

EMBEZZLEMENT

§ 6. Sufficiency of Evidence

The State's evidence was sufficient for the jury to find that defendant had constructive possession of meats belonging to a hospital and that he was guilty of embezzling the meats although the meats never left the delivery truck which brought them to the hospital. *S. v. Jackson*, 71.

EMINENT DOMAIN

§ 2.4. Reasonable Access Afforded

The building of a limited access highway abutting church property did not constitute a taking of all reasonable and adequate access to and from the property so as to entitle the church to compensation. *Dept. of Transportation v. Harkey*, 172.

§ 13. Actions by Owner for Compensation or Damages

The trial court properly concluded that defendant Board of Transportation took an easement for flooding by the placement of its highway structures. *Lea Co. v. Board of Transportation*, 392.

Mere priority of occupation would not ipso facto bar recovery in an inverse condemnation action. *Ibid.*

Plaintiff's inverse condemnation action seeking compensation for a flood easement allegedly taken by defendant Board of Transportation was not barred by a prior consent judgment in a condemnation action instituted by defendant. *Ibid.*

EVIDENCE

§ 11. Transactions or Communications with Decedent or Lunatic

In an action to recover for personal services rendered to decedent, the "Dead Man's Statute" did not prohibit each plaintiff from testifying as to the services rendered by the other. *Davis v. Flynn*, 575.

EVIDENCE — Continued

§ 11.7. Particular Evidence or Testimony Barred by Statute

In an action to recover for services rendered to deceased during her lifetime, the Dead Man's Statute prohibited testimony by plaintiff concerning circumstances surrounding deceased's endorsement and delivery to plaintiff of a check payable to deceased on the day prior to deceased's death, and an admission in a responsive allegation by defendant administrator did not constitute the administrator's being "examined in his own behalf" so as to open the door for plaintiff's testimony. *Burns v. McElroy*, 299.

§ 29. Private Writings, Documents, and Records

In a proceeding to terminate parental rights, the trial court did not err in admitting an authenticated copy of a Department of Correction document reclassifying respondent's status as a prisoner and disclosing that respondent had been removed from the work-release program for having returned therefrom in a highly intoxicated condition. *In re Bradley*, 475.

§ 40. Nonexpert Opinion Evidence

A witness's use of the word "guess" did not render his opinion testimony inadmissible. *Aarhus v. Wake Forest University*, 405.

§ 47. Expert Testimony as Invasion of Province of Jury

Computer calculations by defendant's expert witness were properly excluded where the witness was unable to state with certainty the basis of his calculations. *Lea Co. v. Board of Transportation*, 392.

§ 50.2. Testimony by Medical Experts; Cause of Injury or Disease

The Industrial Commission did not err in allowing a medical expert witness "in general practice with experience in treating people with respiratory complaints" to give an opinion on whether plaintiff was "unable to engage in labor requiring exertion." *Robinson v. J. P. Stevens*, 619.

EXECUTORS AND ADMINISTRATORS

§ 27. Services Rendered Decedent; Amount of Recovery

Testimony by defendant administratrix as to the value of decedent's estate was relevant to the value of services rendered by plaintiffs to decedent. *Davis v. Flynn*, 575.

FALSE PRETENSE

§ 1. Nature and Elements of Crime

In a prosecution for attempting to obtain property by false pretenses, it was not necessary for the State to prove that the victim was actually deceived. *S. v. Wilburn*, 40.

§ 3.1. Evidence; Nonsuit

State's evidence was sufficient for the jury to find that defendant and another conspired to obtain property by false pretenses by misrepresenting to a grocery store owner that they would sell him goods from a certain warehouse at below cost. *S. v. Wilburn*, 40.

FRAUD

§ 9. Pleadings

The trial judge properly granted summary judgment on a fraud claim for defendants where a motion in the cause alleging fraud was filed after a final determination of the case between the parties and the facts adduced in support of the fraud charge were inapposite to any issue previously determined. *Poore v. Swan Quarter Farms*, 97.

§ 12. Sufficiency of Evidence

The evidence amply supported the trial court's failure to find that an usurious loan to a corporation was induced by the lender's agent's misrepresentations concerning undisclosed principals in the main transaction. *Complex, Inc. v. Furst*, 282.

FRAUDS, STATUTE OF

§ 2.1. Memorandum Held Sufficient to take Contract Out of Statute of Frauds

A letter from defendant's real estate manager to plaintiffs stating that defendant "will lease a 40 x 40 building adjacent to the 7-Eleven store at Tega Cay, South Carolina" and that the "monthly rental will be $400.00 and the term of lease will be 20 years" constituted a sufficient memorandum of the terms of the lease to satisfy the statute of frauds when considered with certain parol evidence. *Fuller v. Southland Corp.*, 1.

GUARANTY

§ 2. Actions to Enforce

In an action in which plaintiff bank sought to enforce a loan guaranty agreement, the evidence was sufficient to support the trial court's findings and conclusion that attaining valid signatures under the agreement was not a condition precedent to defendant's liability under the guaranty agreement. *Farmers Bank v. Brown Distributors*, 313.

Where the court found a guaranty agreement was a guaranty of payment; that there were no oral conditions precedent to the agreement; and that the written guaranty set forth the agreement in clear and unambiguous language, defendant could not avoid the agreement on the ground that there was no meeting of the minds. *Ibid.*

HOMICIDE

§ 27.1. Voluntary Manslaughter; Heat of Passion

Trial court did not err in failing to instruct the jury in the final mandate that failure to prove malice meant failure to prove that defendant did not act in the heat of passion upon adequate provocation. *S. v. Hoyle*, 288.

§ 28. Self-Defense

The trial court did not use "without justification or excuse" as the equivalent of self-defense in the charge so as to deprive defendant of the benefit of the defense of imperfect self-defense. *S. v. Hoyle*, 288.

§ 28.3. Aggression or Provocation by Defendant

The court's instruction that the plea of self-defense was not available to defendant if she was the aggressor was warranted by the evidence. *S. v. Hoyle*, 288.

HOMICIDE — Continued

§ 28.8. Defense of Accidental Death

Defendant was not entitled to an instruction on the defense of accident where all the evidence indicated that defendant intended to pull the trigger of the gun which fired the fatal shots. *S. v. Hoyle*, 288.

§ 30.3. Submission of Lesser Degrees of Crime; Involuntary Manslaughter

The trial court's failure to present the offense of involuntary manslaughter to the jury was correct where all the evidence showed the intentional discharge of a weapon in the direction of the deceased. *S. v. Hoyle*, 288.

HUSBAND AND WIFE

§ 3.1. Evidence of Agency of One Spouse for the Other

Plaintiff wife's evidence was insufficient to entitle her to half of the shares of the stock acquired during her marriage to defendant but was sufficient for the jury to find that she was entitled to an interest in farm equipment and household goods purchased by the parties during their marriage. *Ward v. Ward*, 343.

§ 4. Contracts and Conveyances Between Husband and Wife

The trial court erred in dismissing the wife's action against her husband seeking enforcement of an agreement between the parties to transfer real property to the parties' joint ownership. *Earp v. Earp*, 194.

§ 13. Bonds and Enforcement of Separation Agreement

Plaintiff was entitled to specific performance of the child support provisions of a separation agreement. *Mann v. Mann*, 587.

§ 15.1. Possession and Control of Property by Husband

Testimony by plaintiff wife was insufficient to show an express or implied agreement that plaintiff was entitled to share in the rents and profits received by the husband for jointly owned property during the marriage. *Ward v. Ward*, 343.

INFANTS

§ 4. Protection and Supervision of Infants by Courts

The definition of a "neglected juvenile" in G.S. 7A-517(21) is not unconstitutionally vague, and the statute does not violate equal protection provisions. *In re Huber*, 453.

The evidence was sufficient to support a finding that a child was a "neglected child" because the child's mother refused to permit the child to receive necessary medical and remedial care for a severe speech defect. *Ibid.*

§ 18. Juvenile Hearing; Admissibility and Sufficiency of Evidence

Evidence that a child of twelve entered an unlocked door into a lighted store during daylight hours, that he did so in front of at least one known witness, and that he took nothing was insufficient to support a charge that the juvenile had broken and entered the store with intent to commit larceny. *In re Wallace*, 593.

§ 21. Appellate Review of Juvenile Hearing

Under G.S. 7A-666 an adjudication of delinquency is not a final order, and no appeal may be taken from such order unless no disposition is made within 60 days of the adjudication of delinquency. *In re Taylor*, 213.

INSURANCE

§ 29.1. Right to Proceeds; Change of Beneficiary

In a case in which plaintiff's estranged wife executed a form changing the beneficiary of an insurance policy to herself without plaintiff's knowledge, the trial court properly granted summary judgment in favor of defendant life insurance company. *Allen v. Investors Heritage Life Ins. Co.*, 133.

§ 74. Actions on Collision Policies

Defendant insurer was under no legal duty to notify plaintiff insured of the expiration of his motor vehicle collision insurance. *Scott v. Allstate Insurance Co.*, 357.

§ 105. Actions Against Insurer

The allegations in plaintiff's complaint were sufficient to allow defendant to prepare its defense in which it alleged that a Mrs. Dorsey was not a resident of her husband's household at the time of an automobile accident. *Heins Telephone Co. v. Grain Dealers Mutual Ins. Co.*, 695.

Where the trial court properly awarded attorney fees under G.S. 6-21.1 after the jury verdict clearly established that defendant's refusal to pay an insurance claim had been unwarranted, plaintiff's attorney should have been entitled to additional compensation for his time and effort in defending against this appeal. *Ibid.*

§ 113. Fire Insurance

The trial court erred in dismissing plaintiff's claim for special damages in an action concerning fire insurance on his dwelling home and its contents. *Dailey v. Integon Ins. Corp.*, 346.

§ 119. Loss Payable Clauses in Fire Insurance

Where mortgaged property was damaged by fire after a foreclosure sale, the purchasing mortgagee was entitled to recover the entire amount of the insurance proceeds on the property, not just the amount of the deficiency remaining after the foreclosure. *Tech Land Development v. Insurance Co.*, 566.

JUDGMENTS

§ 5.1. Final Judgments

The trial judge properly granted summary judgment on a fraud claim for defendants where a motion in the cause alleging fraud was filed after a final determination of the case between the parties and the facts adduced in support of the fraud charge were inapposite to any issue previously determined. *Poore v. Swan Quarter Farms*, 97.

§ 25. What Justifies Relief

In a negligence action in which plaintiff sought damages from defendant and defendant answered and counterclaimed for damages from plaintiff, the trial judge erred in failing to set aside the verdict for defendant under Rule 60(b)(1) after being advised that plaintiff's counsel was in superior court in an adjoining county and that counsel was leaving to come a distance of 85 miles for trial of the case sub judice in district court. *Lee v. Jenkins*, 522.

§ 25.1. Want of Notice as Justifying Relief

Defendant failed to show excusable neglect where he showed only that a court calendar listed his name as "A.R. Styler" rather than "A.R. Styer." *Overnite Transportation v. Styer*, 146.

JUDGMENTS — Continued

§ 25.2. Imputation to Litigant of Another's Misconduct

By hiring a Virginia attorney to defend it in a North Carolina action, defendant did not exercise the degree of care expected of a man of ordinary prudence in dealing with his important business, and defendant's default in the action must therefore be attributed to its own inexcusable negligence. *N.C.N.B. v. Virginia Carolina Builders*, 628.

§ 29.1. Sufficiency of Statement of Defense

The trial court properly found that defendant had no meritorious defense to plaintiff's action on the ground that a corporation rather than defendant was responsible for the obligation to plaintiff. *Overnite Transportation v. Styer*, 146.

§ 37.5. Proceedings Involving Real Property Rights

Plaintiff's inverse condemnation action seeking compensation for a flood easement allegedly taken by defendant Board of Transportation was not barred by a prior consent judgment in a condemnation action instituted by defendant. *Lea Co. v. Board of Transportation*, 392.

LANDLORD AND TENANT

§ 8.3. Sufficiency of Evidence to Show Negligence of Landlord

Defendant landlord was negligent in permitting defective steps to remain on the leased premises, but plaintiff tenant was contributorily negligent in using the steps when she knew of such defective condition. *Brooks v. Francis*, 556.

LARCENY

§ 4.2. Ownership or Possession of Property

An indictment alleging the larceny of personal property of "Metropolitan YMCA t/d/b/a Hayes-Taylor YMCA Branch" was fatally defective in failing to allege ownership in a legal entity capable of owning property. *State v. Perkins*, 516.

§ 6. Competency and Relevancy of Evidence

In a prosecution for larceny in which defendant was charged with taking property from a burned building, the trial court did not err in refusing to permit defendant to question a witness by voir dire with respect to the insurance that he had on the building and its contents. *State v. Hall*, 544.

§ 7.2. Sufficiency of Evidence of Identity of Property

There was a fatal variance between indictment and proof in a prosecution for larceny of eight heavy duty freezers. *State v. Simmons*, 548.

§ 7.3. Ownership of Property Stolen

In a prosecution for larceny the trial court did not err in denying defendant's motion to dismiss on the ground that the evidence of ownership was at variance from the allegation of ownership in the charging warrant. *State v. Hall*, 544.

§ 7.13. Felonious Breaking and Entering and Larceny; Cases Where Evidence Insufficient

In a prosecution for first degree burglary and felonious larceny pursuant to the burglary, the trial court should have treated the jury's verdict of guilty of felonious larceny as a finding of guilty of misdemeanor larceny. *State v. Hall*, 561.

LARCENY — Continued

§ 8. Instructions

In a prosecution for misdemeanor larceny in which defendant was charged with taking stainless steel pots and pans from a building which had burned eight days previously, evidence that defendant observed other people in the building after the fire, along with contradictory evidence as to the physical condition of the personal property, was not sufficient to create a basis for the legitimate belief that the property had been abandoned. *State v. Hall*, 544.

LIBEL AND SLANDER

§ 1. Generally

Where plaintiff alleged that defendant's agent stopped plaintiff and, in the presence of onlookers, removed a shirt from her shopping bag, she failed to allege a claim for damages for emotional distress as a result of slander. *Morrow v. Kings Department Stores*, 13.

§ 16. Sufficiency of Evidence

In an action in which plaintiff, a candidate for State Senate, had been inaccurately reported as having served a prison term by defendant newspaper, summary judgment for defendant was properly entered. *Taylor v. Greensboro News Co.*, 426.

In an action instituted to recover actual and punitive damages resulting from "slanderous and defamatory statements" made by plaintiff's employer, the trial court erred in failing to grant defendant's motions for directed verdict and judgment notwithstanding the verdict. *Tallent v. Blake*, 249.

LIMITATION OF ACTIONS

§ 4.1. Accrual of Tort Cause of Action

Plaintiff's action, in which she alleged defendant had perpetrated a fraud upon her by knowingly inducing her to enter into a bigamous marriage, was barred by the three-year statute of limitations found in G.S. 1-52(9). *Shepherd v. Shepherd*, 680.

MASTER AND SERVANT

§ 3.1. Distinction Between Employee and Independent Contractor

Plaintiff's employer who managed food service facilities on defendant University's campus was an independent contractor and not a lessee of defendant, and plaintiff employee was therefore an invitee of defendant. *Aarhus v. Wake Forest University*, 405.

§ 19. Liability of Contractee to Employees and Independent Contractors

Plaintiff's evidence of negligence by defendant University was sufficient for the jury in an action to recover for an injury to plaintiff caused by the collapse of a cash register table while plaintiff was working on defendant University's premises as a cashier for an independent food service contractor. *Aarhus v. Wake Forest University*, 405.

§ 21. Liability of Contractee for Injuries to Third Persons

A general contractor may be subject to liability for an injury done to a plaintiff as a proximate result of the general contractor's negligence in hiring an independent contractor to perform construction work. *Deitz v. Jackson*, 275.

MASTER AND SERVANT — Continued

The causal connection between plaintiff's disease of byssinosis and his employment was sufficiently established to permit the Commission's conclusion of compensability. *Robinson v. J. P. Stevens*, 619.

In a workers' compensation proceeding, hypotheticals posed to medical experts adequately reflected plaintiff's testimony concerning former breathing problems and the material with which he worked. *Ibid.*

The Commission's findings that plaintiff "experiences chest pain and breathlessness with moderate exercise and exertion," has been "unable to work at gainful employment and has not been employed since May 30, 1979," and is "totally and permanently disabled as a result of Byssinosis," were supported by competent evidence and were sufficient to support a conclusion of total and permanent disability. *Ibid.*

G.S. 97-29.1 does not apply to all cases of total and permanent benefits prior to 1975 but instead applies only to those cases in which the plaintiff received lifetime weekly benefits under G.S. 97-29 prior to the 1975 amendment to that statute. *Taylor v. J. P. Stevens*, 643.

§ 72. Partial Disability

No compensation could be paid for permanent partial disability where plaintiff had retained her job and was earning more at the time of the hearing than at the time of the injury. *Cloutier v. State*, 239.

§ 73. Loss of Specific Members

The Industrial Commission made insufficient findings as to whether plaintiff sustained permanent injury to important internal organs, including her ethmoid and maxillary sinuses, her sense of taste and smell, and her inner ear. *Cloutier v. State*, 239.

§ 75. Medical and Hospital Expenses

Under G.S. 97-29, where the Industrial Commission found plaintiff to be permanently and totally disabled, it was required to award medical expenses during his lifetime. *Robinson v. J. P. Stevens*, 619.

§ 79.1. Dependents as Entitled to Payment

Provision of G.S. 97-39 stating that a "child shall be conclusively presumed to be wholly dependent for support upon the deceased employee" is not unconstitutional. *Coleman v. City of Winston-Salem*, 137.

§ 97.2. Remand on Ground of Newly Discovered Evidence

The Full Industrial Commission erred in refusing to reopen a compensation hearing to take additional evidence. *Cloutier v. State*, 239.

§ 99. Costs and Attorneys' Fees

The Industrial Commission erred in failing to approve an agreement for the attorney's fee in a workers' compensation proceeding. *Cloutier v. State*, 239.

The travel expenses of plaintiff's attorney in taking the deposition of a witness in another state should have been taxed as a part of the cost of taking the deposition under G.S. 97-80. *Ibid.*

There was no evidence to support the Commission's conclusion that "the case was not defended without reasonable ground" under G.S. 97-88.1 and the Commission's denial of attorney's fees under G.S. 97-88.1. *Robinson v. J. P. Stevens*, 619.

The Industrial Commission did not abuse its discretion in failing to enter an award of attorney's fees for plaintiff pursuant to G.S. 97-88. *Ibid.*

MASTER AND SERVANT — Continued

Under G.S. 97-88 and 97-88.1, the Commission did not err in denying plaintiff's motion for attorney's fees for services rendered (1) for appeal to the Supreme Court and (2) in preparation for the hearing before the Commission. *Taylor v. J. P. Stevens*, 643.

§ 108.1. Right to Unemployment Compensation; Effect of Misconduct

An employee's discharge because he called his supervisor a "God-damned liar" constituted a discharge for misconduct in connection with his work which disqualified him for unemployment compensation. *In re Hagan v. Peden Steel Co.*, 363.

MORTGAGES AND DEEDS OF TRUST

§ 31. Report of Sale and Confirmation

The clerk of court did not err in confirming a foreclosure resale because of pending appeals in the Court of Appeals of related cases, and the issue as to whether the superior court should have stayed ratification of the order of confirmation because of the pending appeals became moot when each of the cases was decided by the Court of Appeals against respondents' interests. *In re Foreclosure of Burgess*, 268.

NARCOTICS

§ 1.3. Elements and Essentials of Statutory Offenses

Under G.S. 90-95(h) if a person engages in conduct which constitutes possession of in excess of 50 pounds of marijuana as well as conduct which constitutes manufacture of in excess of 50 pounds of marijuana, that person may be charged with and convicted of two separate felonies of trafficking in marijuana. *State v. Anderson*, 602.

§ 2. Indictment

An indictment alleging that defendant was an accessory before the fact to an attempt to deliver a controlled substance to a prison inmate failed to charge defendant with a crime. *State v. Hanson*, 595.

NEGLIGENCE

§ 2. Negligence Arising From Performance of Contract

A general contractor may be subject to liability for an injury done to a plaintiff as a proximate result of the general contractor's negligence in hiring an independent contractor to perform construction work. *Deitz v. Jackson*, 275.

In an action in which plaintiff was injured by a nail from a ramset gun, the trial court improperly dismissed a count of plaintiff's complaint alleging the general contractor was vicariously liable for the tort of the independent contractor. *Ibid.*

§ 29.1. Particular Cases Where Evidence of Negligence is Sufficient

In a negligence action in which a police officer for the City of Graham was killed while on duty when he was struck by a car being pursued by an officer of the City of Burlington Police Department, the trial court erred in granting summary judgment for the defendants City of Burlington and the Burlington officer. *Roberson v. Griffeth*, 227.

In a personal injury action in which plaintiff fell from a ramp into an excavated trench, the trial court erred in entering a directed verdict for defendant. *Cowan v. Laughridge Construction Co.*, 321.

NEGLIGENCE — Continued

§ 37.3. Instruction on Degree and Standard of Care

In a wrongful death action following the electrocution of a man by a utility wire, the trial judge was slightly incorrect in stating that "another rule" of negligence applies to power companies. *Beck v. Carolina Power & Light Co.*, 373.

In a wrongful death action against a power company, the trial judge did not commit prejudicial error by failing to couple the term "highest degree of care" with "consistent with the practical operation of its business" on every occasion on which the judge used the phrase "highest degree of care." *Ibid.*

§ 38. Instruction on Contributory Negligence

Trial court's instructions on contributory negligence were insufficient in failing to relate to the jury specific acts or omissions arising from the evidence which would constitute contributory negligence. *Zach v. Electric Membership Corp.*, 326.

§ 52.1. Particular Cases Where Person on Premises is Invitee

Plaintiff's employer who managed food service facilities on defendant University's campus was an independent contractor and not a lessee of defendant, and plaintiff employee was therefore an invitee of defendant. *Aarhus v. Wake Forest University*, 405.

§ 57.3. Falling Objects

Plaintiff's evidence of negligence by defendant University was sufficient for the jury in an action to recover for an injury to plaintiff caused by the collapse of a cash register table while plaintiff was working on defendant University's premises as a cashier for an independent food service contractor. *Aarhus v. Wake Forest University*, 405.

§ 57.4. Falls on Steps or Stairs

Plaintiff invitee's forecast of evidence was sufficient to present a genuine issue of material fact as to the negligence of defendant motel owner in permitting unlighted outside stairs to remain on the premises and did not establish her contributory negligence as a matter of law. *Hockaday v. Morse*, 109.

NUISANCE

§ 1. Generally

Mere priority of occupation would not ipso facto bar recovery in an inverse condemnation action. *Lea Co. v. Board of Transportation*, 392.

PARENT AND CHILD

§ 1. The Relationship Generally; Creation and Termination

In a proceeding to terminate parental rights, the trial court did not err in concluding that respondent failed to pay a reasonable portion of the cost of care of the minor children where respondent was incarcerated in the North Carolina Prison System. *In re Bradley*, 475.

By failing, for more than six years, to take steps to become responsible so as to be able to remove their child from foster care, respondents clearly fulfilled the willfulness requirement of G.S. 7A-289.32(3). *In re Wilkerson*, 63.

Petitioner provided clear and convincing evidence to support the finding and conclusion that respondents left their child in foster care for more than two consecutive years without showing that substantial progress had been made in correcting those conditions which led to the removal of their child for neglect. *Ibid.*

RAPE AND ALLIED OFFENSES

§ 6.1. Instructions on Lesser Degrees of Crime

In a prosecution for second degree rape, the trial court properly failed to submit to the jury the offense of assault on a female. *State v. Jeffries*, 416.

Defendant's evidence that the prosecutrix and he engaged in consensual sexual intercourse and that during the intercourse he hit her after she hit him did not support an instruction on assault on a female. *Ibid.*

ROBBERY

§ 2.2. Indictment; Ownership of Property

There was sufficient proof of lack of consent, an essential element of armed robbery, where an indictment charged that money was taken from the presence of a person who was an accomplice in the robbery. *S. v. Thompson*, 142.

§ 4.2. Common Law Robbery Cases Where Evidence Sufficient

In a prosecution for common law robbery, the evidence was sufficient to go to the jury. *State v. Melvin*, 503.

§ 4.3. Armed Robbery Cases Where Evidence Sufficient

Where the evidence showed that defendant took money from a restaurant by the use or threatened use of a gun, evidence by a defense witness that the gun was not loaded did not make the crime common law robbery rather than armed robbery. *S. v. Thompson*, 142.

§ 5.2. Instructions Relating to Armed Robbery

In a prosecution for armed robbery, by instructing the jury that they could find the defendant guilty if they found the property was taken from any of several employees of a restaurant, the court did not deprive the defendant of a unanimous verdict. *S. v. Thompson*, 142.

§ 5.3. Instructions Relating to Common Law Robbery

The trial court properly failed to submit the offenses of larceny from the person and misdemeanor larceny, lesser included offenses of common law robbery. *S. v. Henry*, 168.

§ 5.4. Instructions on Lesser Included Offenses and Degrees

In a prosecution for common law robbery, the trial court properly refused to instruct the jury on assault and larceny from the person. *State v. Griffin*, 684.

In a prosecution for armed robbery, the trial court properly failed to submit common law robbery and larceny to the jury. *S. v. Thompson*, 142.

RULES OF CIVIL PROCEDURE

§ 4. Process

In a personal injury action, the trial court did not err in denying defendant's motion to dismiss on the grounds of lack of personal jurisdiction, insufficient process and insufficient service of process. *Roshelli v. Sperry*, 305.

§ 8.1. Complaint

Under G.S. 1A-1, Rules 8(e)(2) and 12(b), dismissal of some claims in a complaint does not require dismissal of them all. *Morrow v. Kings Department Stores*, 13.

RULES OF CIVIL PROCEDURE — Continued

§ 13. Counterclaim and Crossclaim

The trial court erred in dismissing plaintiff's claim, concerning defendant landlord's duty to care for the maintenance of leased property and breach of that duty, on the ground that it should have been asserted as a counterclaim under G.S. 1A-1, Rule 13(a) in a prior summary ejectment action brought by defendant. *Curlings v. Macemore*, 200.

In an action on a promissory note, defendants were not entitled to set off their claim against plaintiffs for work unperformed on a home sold by plaintiffs to defendants, and summary judgment could properly be entered for plaintiffs in their action on the note. *Townsend v. Bentley*, 581.

§ 15.1. Discretion of Court to Grant Amendment

In an action to recover sums allegedly due under a separation agreement, the trial court abused its discretion in the denial of plaintiff's motion to supplement her pleadings to ask for payments which have accrued since the filing of this action. *Foy v. Foy*, 128.

The trial court did not abuse its discretion in permitting plaintiffs to amend their complaint and in refusing to allow defendant 30 days to respond to the amended complaint. *Saintsing v. Taylor*, 467.

The trial court did not abuse its discretion in denying defendants' motion to amend their answer to assert a non-compulsory counterclaim. *Townsend v. Bentley*, 581.

§ 15.2. Amendments to Conform to the Evidence or Proof

The trial court did not abuse its discretion in permitting plaintiff's G.S. 1A-1, Rule 15(b) post-trial motion to amend its complaint to conform to the evidence where defendant did not object to any evidence as being outside the pleadings. *Lea Co. v. Board of Transportation*, 392.

§ 26. Depositions in a Pending Action

In a medical malpractice action where plaintiff's expert witness failed to testify as expected and plaintiff decided to call an expert listed as one of the defendant's witnesses and informed defendant's attorney of that fact, the trial court erred in refusing to allow the witness to testify. *Shepherd v. Oliver*, 188.

§ 56.3. Summary Judgment; Necessity for Supporting Material

An affidavit is not required to state specifically that it is made on personal knowledge in order to be considered upon a motion for summary judgment. *Fuller v. Southland Corp.*, 1.

A statement in an affidavit that the affiant "believes" that a lease was signed by one plaintiff's secretary was not based on personal knowledge and could not be considered. *Ibid.*

§ 60. Relief From Judgment or Order

In an action by a contractor for materials and labor furnished defendants, the evidence supported the trial court's findings of fact and conclusion that the feme defendant was entitled to relief on summary judgment against her. *Gentry v. Hill*, 151.

§ 60.2. Grounds for Relief from Judgment

In a negligence action in which plaintiff sought damages from defendant and defendant answered and counterclaimed for damages from plaintiff, the trial judge

TAXATION — Continued

§ 28.5. Assessment of Additional Income Tax

An attempt to evade or defeat taxes on 29 April 1979 by failing to file a return for an earlier year within the time required by statute and by placing assets in the account of another would constitute a new offense and the statute of limitations would begin to run anew as of that date. *State v. Patton*, 702.

TELECOMMUNICATIONS

§ 1.2. Determination of Rate Charged by Public Utility

Revenues received by a telephone company from advertising in the yellow pages of its telephone directory were properly considered in establishing rates for the telephone company. *State ex rel. Utilities Comm. v. Southern Bell*, 489.

TRIAL

§ 3.1. Motions for Continuance; Discretion of Trial Judge

Plaintiffs failed to show abuse in discretion in the denial of their motion for continuance. *Complex, Inc. v. Furst*, 282.

§ 33.8. Instructions on Negligence; Contributory Negligence

Trial court's instructions on contributory negligence were insufficient in failing to relate to the jury specific acts or omissions arising from the evidence which would constitute contributory negligence. *Zach v. Electric Membership Corp.*, 326.

§ 34. Statement of Contentions

The court adequately fulfilled its obligations to instruct the jury as to defendant's contentions. *Beck v. Carolina Power & Light Co.*, 373.

§ 58. Findings and Judgment of the Court

In an action in which plaintiff bank sought to enforce a loan guaranty agreement, the evidence was sufficient to support the trial court's findings and conclusion that attaining valid signatures under the agreement was not a condition precedent to defendant's liability under the guaranty agreement. *Farmers Bank v. Brown Distributors*, 313.

The trial court did not err in failing to adopt defendant's proposed findings of fact. *Lea Co. v. Board of Transportation*, 392.

TROVER AND CONVERSION

§ 2. Nature and Essentials of Action for Possession of Personalty

Trial court erred in entering summary judgment for defendant administrator on his counterclaim for conversion of the proceeds of a check payable to deceased which deceased endorsed and delivered to plaintiff on the day before her death. *Burns v. McElroy*, 299.

§ 4. Measure of Damages

Plaintiff could not recover for mental anguish in connection with an action for conversion of personal property where her complaint neither contained nor implied allegations of malice, wantonness, or other aggravating circumstances. *Morrow v. Kings Department Stores*, 13.

TRUSTS

§ 20. Actions to Establish Resulting Trust; Issues and Instructions

The trial court in an action to establish a parol or resulting trust did not err in failing to instruct the jury that a presumption of gift existed because plaintiffs were the foster parents of the feme defendant. *Saintsing v. Taylor*, 467.

UNIFORM COMMERCIAL CODE

§ 23. Right to Revoke Acceptance of Goods

Where plaintiff instituted an action to revoke his acceptance of a new automobile which he purchased from defendant car dealer, the trial court erred in entering summary judgment for the dealer. *Wright v. O'Neal Motors*, 49.

Under G.S. 25-2-608, revocation of acceptance is a remedy available to the buyer only against the seller. *Ibid.*

§ 33. Liability of Parties; Signatures

The evidence on motion for summary judgment presented a genuine issue of material fact as to whether plaintiff ratified unauthorized endorsements on checks paid by defendant bank. *American Travel Corp. v. Central Carolina Bank*, 437.

VENDOR AND PURCHASER

§ 1.3. Construction of Options

The trial judge erred in denying plaintiff's motion for summary judgment for specific performance of a $50,000 fixed price option contained in a lease agreement. *Texaco, Inc. v. Creel*, 611.

§ 2.4. Tender of Purchase Price

The tender by plaintiff of a $50,000 check drawn on the bank account of plaintiff's law firm was proper tender in exercise of a fixed price option. *Texaco, Inc. v. Creel*, 611.

WATERS AND WATERCOURSES

§ 1.1. Application of General Rules

Mere priority of occupation would not ipso facto bar recovery in an inverse condemnation action. *Lea Co. v. Board of Transportation*, 392.

WEAPONS AND FIREARMS

§ 3. Pointing, Aiming or Discharging Weapon

The State's evidence was sufficient for the jury on the issue of defendant's guilt of discharging a firearm into an occupied vehicle. *State v. Jacobs*, 537.

WORD AND PHRASE INDEX

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