NORTH CAROLINA COURT OF APPEALS REPORTS

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State v. Smedley	60 N.C. App. 1	Denied, 307 N.C. 581 Appeal Dismissed
State v. Taylor	60 N.C. App. 673	Denied, 308 N.C. 547 Appeal Dismissed
State v. Treants	60 N.C. App. 203	Denied, 307 N.C. 702
State v. White	60 N.C. App. 595	Denied, 308 N.C. 194 Appeal Dismissed
State v. Woodrup	60 N.C. App. 205	Denied, 307 N.C. 702
Susan B. v. Planavsky	60 N.C. App. 77	Denied, 307 N.C. 702
Tucker v. Charter Medical Corp.	60 N.C. App. 665	Denied, 308 N.C. 548
United Leasing Corp. v. Miller	60 N.C. App. 40	Denied, 308 N.C. 194
Vanlandingham v. Peters	60 N.C. App. 439	Denied, 308 N.C. 195
Waters v. Biesecker	60 N.C. App. 253	Allowed, 308 N.C. 195
Wooten v. Nationwide Mutual Ins. Co.	60 N.C. App. 268	Denied, 308 N.C. 392

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

STATE OF NORTH CAROLINA v. PAUL OVERTON, JR., JAMES WARREN SMEDLEY, LUCHAI RUVIWAT, AND ATHA ATKINSON

No. 818SC1244

(Filed 21 December 1982)

1. **Criminal Law § 92.2— consolidation of charges against multiple defendants—conspiracy over extended period of time—common scheme or plan**

Offenses charged against sixteen defendants for conspiracy to manufacture, to possess with intent to sell and deliver, and to sell and deliver heroin and for the manufacture, possession with intent to sell and deliver and sale or delivery of heroin were all part of a common scheme or plan within the meaning of G.S. 15A-926(b)b.1. and could properly be joined for trial where all the defendants were allegedly participants in a large-scale conspiracy to smuggle heroin from Thailand for marketing in North Carolina which continued for some years, notwithstanding participants entered and exited the conspiracy at various times between the years 1969-78.

2. **Criminal Law § 92.5— numerous defendants—mass of evidence relating to other defendants—severance not required**

Severance of the trials of numerous defendants charged with conspiracy to commit narcotics offenses and with narcotics offenses was not necessary to provide each defendant with a fair trial because of the mass of evidence presented relating to the activities of the other defendants since such evidence was relevant to show the existence of the ongoing conspiracy charged in the indictments, evidence relevant only to particular defendants was clearly limited to those defendants by the trial court, and the court instructed that the jury was to consider the evidence against each defendant separately. G.S. 15A-927(b).

3. **Criminal Law §§ 9.1, 10— defendant not at crime scene—no conviction as principal on conspiracy theory**

In a prosecution of multiple defendants on various charges of possession, manufacturing, and sale and delivery of heroin, the trial court committed prej-

udicial error in giving the jury instructions which permitted the jurors to find a defendant guilty as a principal to a crime at which he was not actually or constructively present because he participated in a conspiracy to commit the crime.

4. Criminal Law § 113— application of evidence to law of circumstantial evidence and conspiracy

The trial court sufficiently applied the law of circumstantial evidence and the law of conspiracy to the evidence in the case. G.S. 15A-1232.

5. Witnesses § 1.1— mental competency of witness to testify

The trial court did not err in concluding that a witness who was under the care of a psychiatrist was competent to testify where the court found upon supporting evidence that the witness suffered from an emotional disorder, that she had difficulty recalling certain events, especially dates, that she understood the nature of the oath, and that she had the ability to recall past events and occurrences.

6. Narcotics § 2— conspiracy beginning prior to Controlled Substances Act—reference in indictment to the Act

An indictment alleging a conspiracy beginning in 1969 and continuing until 1978 to possess, sell and deliver and manufacture heroin "in violation of the Controlled Substances Act" did not fail to state a criminal offense because the Controlled Substances Act was not effective until 1 January 1972 since (1) the Uniform Drug Act, G.S. 9-86 *et seq.*, remained in full force and effect as to offenses committed prior to 1 January 1972, (2) the conspiracy alleged was a crime under both statutes, and (3) reference in the indictment to the specific statute allegedly violated was immaterial.

7. Narcotics § 2— allegations of conspiracy between certain dates—evidence of defendant's late entry into conspiracy—no fatal variance

There was no fatal variance between an indictment alleging a conspiracy to possess, sell, deliver, and manufacture heroin from sometime in 1969 until 28 March 1978 and evidence showing that defendant took an active part in the conspiracy in 1974 and at various times thereafter, since defendant's relatively late entry into the conspiracy did not preclude her conviction as a participant in the conspiracy, and the single conspiracy did not become several merely because of personnel changes.

8. Narcotics § 1.3— conspiracy to possess heroin—lesser included offense of conspiracy to possess with intent to sell and deliver

Conspiracy to possess heroin is a lesser included offense of conspiracy to possess heroin with intent to sell or deliver.

9. Narcotics § 4— conspiracy to possess, possess with intent to sell and sell heroin—sufficiency of evidence

In a prosecution for conspiracy between 1969 and 1978 to manufacture, possess with intent to sell and deliver and sell and deliver heroin shipped from Thailand to North Carolina, the State's evidence was sufficient for the jury on issues of guilt of each of three defendants where it tended to show: (1) one

defendant stored heroin in his home as early as 1975, was initially paid $1,000.00 per month for such storage, and in 1976-77 stashed large amounts of heroin in his home which would be retrieved by a co-conspirator for delivery; (2) a second defendant participated in shipping heroin in AWOL bags and in furniture from Thailand to North Carolina; (3) and the third defendant met with a co-conspirator in 1974 and accepted two AWOL bags of heroin for which she gave him $6,000.00, met periodically in 1975 with another co-conspirator who supplied her with bags of heroin for which she paid $1,000.00 apiece, and knew enough about the overall operation to suspect in 1976 that other co-conspirators were "ripping off" her husband, who headed the heroin operation but was then in prison.

10. Criminal Law § 91— statutory speedy trial—exclusion of time pending motion for change of venue

The time between the filing of a motion for a change of venue on 30 May 1979 and its disposition on 19 December 1979 was properly excluded pursuant to G.S. 15A-701(b)(1)(d) in computing the statutory speedy trial period, the motion having been heard within a reasonable time after it was filed in view of the complexity of the case, which involved multiple defendants, and the numerous pretrial motions made by defendant and his codefendants.

11. Searches and Seizures § 15— disclosure of bank, employment and telephone records—no standing to object

Defendants had no standing to challenge on Fourth Amendment grounds the disclosure to the State of defendant's bank accounts, credit union account, employment records and telephone records.

12. Arrest and Bail § 9— one million dollar bail not unreasonable

Bail of $1 million for a defendant charged with various offenses relating to the shipment of heroin from Thailand for distribution in North Carolina was not unreasonable because defendant was found to be indigent and entitled to appointed counsel, because defendant was subject to federal incarceration at the time and the State would have been able to find him at the time of trial, or because defendant's incarceration in a State prison rather than a federal prison deprived him of access to federal prison law libraries for the preparation of his defense and better communication and exercise facilities of a federal prison. N.C. Const., Art. 1, § 27; G.S. 15A-533; G.S. 15A-534(c).

13. Criminal Law § 128.2— denial of mistrial

In a prosecution of multiple defendants for offenses related to drug smuggling, one defendant was not prejudiced by refusal of the trial court to order a mistrial after an officer testified concerning numerous taped conversations among drug smuggling conspirators and the trial court then refused to admit the tapes into evidence where the officer's testimony did not directly relate to such defendant.

14. Conspiracy § 5; Narcotics § 3.1— testimony about "dope" and "heroin"—showing state of mind

In a prosecution for conspiracy to possess, manufacture and sell or deliver heroin smuggled into North Carolina from Thailand, the trial court did not err

in permitting witnesses for the State to testify about "dope" and "heroin" without the State first laying a foundation supporting the witnesses' identification of the substance since (1) defendant lost the benefit of his objection to such testimony when the same evidence was later admitted without objection, and (2) the testimony was competent to show the state of mind of the witnesses in believing that the substance being transported in certain AWOL bags and furniture was heroin and thus was relevant to show the conspiracy alleged.

15. Conspiracy § 8; Narcotics § 5— verdict not invalid because of disjunctive

Defendant was not prejudiced by a verdict finding him guilty of conspiracy to manufacture, possess with intent to sell and deliver *or* sell and deliver heroin because of the presence of the disjunctive since it is clear that the jury found defendant guilty of conspiracy, the parameters of the conspiracy could include either a conspiracy to manufacture or to possess with intent to sell and deliver or to sell and deliver heroin, the punishments for conspiracy to do any one of these three offenses are the same, and the trial court's judgment contained a sentence well within the statutory limits. G.S. 90-95.

16. Criminal Law § 26.5— conspiracy conviction in federal court—conspiracy trial in State court—same act not involved—no double jeopardy

The double jeopardy statute of the Controlled Substances Act, G.S. 90-97, was not violated by the State's prosecution of defendant for conspiracy to manufacture, to possess with intent to sell or deliver, or to sell or deliver heroin after defendant had pled guilty in a federal court to conspiracy to import heroin in violation of 21 U.S.C. § 963, since "the same act" was not involved in both prosecutions within the meaning of G.S. 90-97.

17. Witnesses § 10— denial of motion to depose prisoner in another state—statutory remedy to obtain testimony

The trial court did not err in the denial of defendant's motion to depose a co-conspirator who was confined in a New Jersey prison at the time of trial since defendant had an appropriate remedy under G.S. 15A-822 to secure the attendance of a prisoner outside the state as a witness in his trial.

18. Criminal Law § 14— conspiracy entered in foreign country—jurisdiction over conspiracy prosecution

The North Carolina courts had jurisdiction to try defendant for conspiracy to manufacture, possess with intent to sell and deliver, and sell and deliver heroin, notwithstanding defendant was acquitted of the substantive offenses involving heroin which occurred in North Carolina and the State's evidence tended to show that he entered the conspiracy while living in Thailand, since our courts have jurisdiction over those involved in a criminal conspiracy if any one of the conspirators commits an overt act in furtherance of the conspiracy within the state, even if the unlawful conspiracy was entered outside the state.

19. Constitutional Law § 31— denial of interpreter for foreign defendant

An order providing for the appointment of an interpreter at State expense for a defendant who was a Thai national was an interlocutory order

which could be altered upon a showing of changed circumstances, and the trial court did not err in revoking such order where the court found upon supporting evidence that defendant had eight years of education related to reading and writing English and that he had sufficient understanding of the language to enable him to confer with his attorney and assist in his own defense.

20. Criminal Law § 83— co-conspirator spouses—admissibility of spouse's statements against other spouse

Evidence of statements made by one spouse implicating the other spouse is admissible against the other where the spouses were co-conspirators. G.S. 8-57.

21. Conspiracy § 5— involuntary commitments of defendant—irrelevancy

In a prosecution for conspiracy to manufacture, possess with intent to sell and deliver, and sell and deliver heroin, evidence of one defendant's involuntary commitments during three time periods which did not include the times the evidence showed defendant's involvement in the conspiracy was irrelevant and properly excluded.

22. Conspiracy § 7— possession of proceeds of husband's crimes—refusal to instruct on insufficiency to establish agreement to commit crime

In a prosecution for conspiracy to manufacture, possess with intent to sell and deliver, and sell and deliver heroin, the trial court did not err in refusing to instruct the jury that defendant's mere subsequent possession of the proceeds of her husband's crimes was not sufficient to establish an agreement between them to commit the crimes where there was clear evidence showing that defendant was a participant in the conspiracy in that she picked up drugs, purchased heroin from a co-conspirator, and had knowledge of problems with money within the conspiracy.

APPEAL by defendants from *Smith, Judge.* Judgments entered 4 August 1980, in Superior Court, WAYNE County. Heard in the Court of Appeals 31 August 1982.

Attorney General Rufus L. Edmisten, by Assistant Attorneys General Joan H. Byers and Francis W. Crawley, for the State.

Dees, Dees, Smith, Powell & Jarrett, by Tommy W. Jarrett, for defendant-appellant Overton.

C. Branson Vickory for defendant-appellant Smedley.

Malone, Brown and Matthewson, P.A., by Glennie M. Matthewson, II, for defendant-appellant Ruviwat.

Hulse & Hulse, by Herbert B. Hulse, for defendant-appellant Atkinson.

WELLS, Judge.

The defendants were indicted on charges of conspiring with numerous individuals to manufacture, to possess with intent to sell and deliver, and to sell and deliver heroin and on various charges of manufacture, possession with intent to sell or deliver, and sale or delivery of heroin. Thirteen other individuals[1] were also indicted on related charges, and the State's motion to consolidate all seventeen cases was allowed. All four defendants who have appealed were found guilty of some degree of conspiracy and all of them, except defendant Smedley, were found guilty of one or more substantive violations of the North Carolina Controlled Substances Act, G.S. 90-86, *et seq.* The issues on appeal include questions concerning the trial court's consolidation of the cases, instructions to the jury, rulings on evidentiary matters as well as on numerous motions, and sufficiency of the evidence. Because of the trial court's erroneous instructions on vicarious liability related to the substantive offenses, we reverse defendant Atkinson's conviction of the substantive counts and we order a new trial for defendants Overton and Ruviwat on the substantive counts. There was no error in the trial affecting defendant Smedley.

EVIDENCE AT TRIAL

The State's evidence at trial tended to show the historical development of a complex and lucrative scheme of drug smuggling which began in the mid-1960's.[2] The following summary sketches representative activities of the conspiracy which the State's evidence tended to show and focuses on the particular in-

1. From the record, it is difficult to ascertain exactly how many defendants were originally charged with participating in related drug transactions. Although defendants' briefs indicate there were sixteen co-defendants, seventeen were named in the State's last motion to consolidate. Some of the defendants thereafter entered guilty pleas; the charges against others were dismissed. The cases of eight defendants were submitted to the jury, and four of those defendants were acquitted.

2. Testifying at trial were many of the participants in the smuggling; most of these individuals had entered guilty pleas with the State, had already been prosecuted for their drug activities, and/or had been granted immunity. Among these people were Herman Jackson, Robert Patterson, Freddie Clay Thornton, William K. Wright, Herbert Houston, Laura Holmes Smith, Vernon Lucas, Harry Terrell, William G. Hill, and Wilbur Fuller.

volvements of the four defendants who have appealed their convictions.

In the mid-1960's, in Bangkok, Thailand, three retired military personnel, Herman Jackson, Leslie "Ike" Atkinson (husband of defendant Atha Atkinson and hereinafter referred to as Ike Atkinson) and James Smedley, and a Thai national named Luchai Ruviwat became acquainted. In May 1967, Jackson, Smedley, Ruviwat, and another friend went into business together, owning and operating Jack's American Star Bar, a Bangkok hangout for American military personnel. In 1968, Ike Atkinson and Jackson began smuggling heroin from Thailand to the United States. Jackson was primarily responsible for shipments from Thailand. In this country, Ike Atkinson would receive and distribute the heroin and also collect and distribute the proceeds of sales. Jackson estimated that, from 1968 until January 1972, he was involved in ten or eleven heroin shipments which went to such places as a National Guard Armory in Philadelphia, Walter Reed Medical Facility in Washington, D.C., and Monmouth, New Jersey.

Various servicemen were involved in the venture. In 1969, Robert Patterson, using his position as postal clerk, mailed packages of heroin to New Jersey. Later James McArthur, an administrative postal clerk, replaced Patterson in the mailing of heroin. Both Ike Atkinson and Jackson actively recruited military personnel for the venture. On at least one occasion in mid-1970, Jackson received four or five kilos from Ruviwat, which he directed to Freddie Clay Thornton, a member of the United States Air Force. In early 1971, Thornton, while returning from Thailand, concealed in the nose of a military aircraft an AWOL bag containing five kilos of heroin, and in July 1971, he returned from Thailand to Travis Air Force Base in California with two boxes of heroin.

According to Thornton's testimony, there was no drug traffic "from after 1971 until sometimes in 1974." In 1972, however, Jackson was arrested when twenty pounds of heroin were seized in Colorado. He was convicted and imprisoned in Leavenworth, Kansas, and, at the time of this trial, remained a federal prisoner.

There was other evidence tending to show that sometime in 1973, Ike Atkinson initiated drug shipments to the U.S. by con-

cealing heroin inside furniture. Patterson conceived the idea of placing false bottoms on furniture and suggested it to Ike Atkinson by letter. Ike Atkinson hired a carpenter from this country to go to Thailand to put a "professional finishing touch" to the furniture. Meanwhile, the more conventional methods for smuggling continued. In June 1974, defendant Smedley approached Patterson and paid him $6,000 to carry AWOL bags containing heroin to the U.S. On 20 June 1974, Patterson delivered the bags to defendant Atha Atkinson who, with her daughter, met Patterson at the Holiday Inn in Goldsboro. Atha Atkinson paid Patterson $6,000. Also in the time period 1973-74, Vernon Lucas, who lived in New Jersey, began to work for Ike Atkinson. He mailed boxes containing as much as $70,000 to Bangkok; he personally delivered thousands of dollars to Thailand; through the mail he received heroin which he turned over to his brother Frank Lucas for distribution in New York; and he flew at least twice to the Cayman Islands to put money in a bank.

In February 1974, Thornton was sent back for another military tour in Thailand. In the summer of that year, defendant Smedley asked Thornton to get leave and return to the U.S. Thornton arranged a thirty day leave to attend school, picked up AWOL bags from Smedley, and checked them on his flight back to the U.S. Thornton delivered the bags to Goldsboro and, while there, arranged for a friend to accept and handle future shipments of heroin he was to make through military flight crew chiefs.

Meanwhile, in Bangkok, in October 1974, Smedley continued his activities by delivering to William Wright a package containing $10,000 which was eventually picked up from Wright by Herbert Houston. Houston, a sergeant in the Air Force, worked with James McArthur in the air post office in downtown Bangkok and had begun mailing packages of heroin for McArthur shortly after August 1974.

After returning to Thailand from his education leave, Thornton went to SOI 53 where he observed the packing of heroin into furniture being shipped to the U.S. by Ike Atkinson. Among those present was William Wright. The shipment being prepared was known as the "Brown Shipment," a soldier by the name of Brown having agreed to ship the heroin to Augusta, Ga. with his

household goods. For the Brown shipment, fifty kilos of heroin were purchased from defendant Ruviwat. Later a "Myrick" shipment of 52 kilos was arranged by Thornton, who, with Jackson in prison, had become Ike Atkinson's major representative in the transactions being initiated in Thailand.

The illicit drug activities proliferated in the period beginning in 1974. Apparently, at about the same time the Brown shipment was being prepared, Smedley himself was arranging a shipment concealed in furniture. Also during this period, Thornton had activated his plan to ship heroin by military flight crew chiefs; for this purpose, he purchased heroin from Smedley for shipments in November and December 1974.

Although there was ample evidence that, throughout the conspiracy period, shipments of heroin were successfully being delivered to places within the United States, the evidence concerning drug activities in North Carolina focused on the mid- to late- 1970's. Sometime in the early part of 1975, Laura Holmes Smith started working with Ike Atkinson, allowing him, Ronnie, Buster, and Dallas Atkinson to use her home in Goldsboro to package and store heroin. In June 1975, Ike Atkinson, having been convicted on federal drug charges, entered the Atlanta Federal Penitentiary. Before he left, he asked Smith to keep the heroin, but to allow Atha Atkinson to purchase relatively small bags of the drug. In fact Atha Atkinson did purchase about four or five bags, each containing about one ounce of heroin.

In prison, Ike Atkinson was reunited with Herman Jackson who had been transferred from Leavenworth. With help from associates, they were able to keep the drug smuggling business alive. In August 1975, Sharon Atkinson Arrington, daughter of Ike and Atha Atkinson, delivered several messages from her imprisoned father to Freddie Thornton. One message put Thornton in charge of the entire operation in Thailand. However, shortly afterwards, in September, Thornton was arrested by Drug Enforcement Administration agents and was returned to the U.S. where he feigned cooperation and was eventually released. In October, Thornton retrieved the Brown Shipment in Augusta, Georgia and delivered it to Michael and Sharon Arrington at Seymour Johnson Air Force Base in Goldsboro.

The chief messenger for Ike Atkinson and Jackson during their incarceration was Laura Smith. In 1976, Ike Atkinson was returned to North Carolina, placed in the Wake County jail and tried again. Herman Jackson also was moved to the jail. After seeing both Ike Atkinson and Jackson, and following their directions, Smith received some heroin from Dallas Atkinson, repackaged it, and delivered it to Harry Terrell at the Howard Johnson Motor Inn in Smithfield. Thereafter Smith had five or six meetings with Terrell in various places in North Carolina and Maryland. Smith estimated that she received from Terrell approximately one million dollars for heroin delivered to him.

During the summer of 1976, Atha Atkinson told George Wynn, a Goldsboro native also involved in the Ike Atkinson organization, that somewhere in Johnston County, Dallas and Buster Jack Atkinson and Pearl and Ed Atkinson had "something" belonging to her husband. She apparently believed that these four and others were involved in a "rip-off" of her husband; she linked Laura Smith to this suspicion because Smith refused to turn over money due Atkinson's husband.

Smith delivered messages for Herman Jackson to defendant Overton; the messages were written by Ike Atkinson. After delivering the second message, Smith picked up from Overton a trunk of heroin which she took to Charlotte Best's house, where, with the help of Ennis Allen, she weighed and sealed approximately seventy-three one-kilo bags of heroin. The bags were returned to Overton who agreed to store them. During 1976 and 1977, at Jackson's direction, Smith met with Overton approximately five times to transfer heroin. For his participation, Overton initially received $1,000 per month; later this was reduced to $500 per month. After receiving the bags of heroin from Overton, Smith would pass them on to Harry Terrell.

Overton was also involved in passing money to Smith. On two or three occasions in the 1976-1977 period, Smith met Overton in the gym of the Goldsboro Middle School South and received from him a bag of money. These transactions were also at the direction of Herman Jackson, who remained at Atlanta Federal Penitentiary. Smith's last transaction with Overton occurred sometime in early 1977, when she received heroin from Overton and delivered it to James Melvin Harper, Holmes' cousin

who was employed to work for Ike Atkinson. Harper then unwittingly turned the heroin over to an undercover S.B.I. agent, Martha Owens, on 23 May 1977. This was the last drug transaction for which the State presented evidence. The State did, however, introduce records of defendant Overton's bank accounts showing numerous substantial cash deposits during the period of his alleged involvement in the conspiracy.

Defendant Overton's evidence tended to show that he was a teacher and that his schedule in the Goldsboro Middle School gym coincided with those of two other teachers who had never seen Laura Smith in the gym. Overton did carpentry work and thereby earned money to supplement the salary he received for teaching.

Defendant Smedley offered into evidence a stipulation with the State showing his incarceration in Thailand from 20 October 1975 until January 1978.

Defendant Ruviwat offered into evidence indictments against witnesses Patterson and Jackson, a judgment against witness Thornton, and a stipulation that Ruviwat's brother, if called to testify, would say that his brother has a good reputation in the Thai community in which he lives.

Defendant Atkinson offered into evidence copies of bills of indictment against Jackson and Wilbur Fuller, both witnesses for the State.

The jury found Overton guilty of one count of conspiracy to possess heroin, one count of possession of heroin, two counts of manufacture of heroin, and one count of sale or delivery of heroin. The trial court consolidated judgment for the conspiracy to possess and the actual possession, and sentenced Overton to not less than nor more than five years imprisonment. The two counts of manufacture were consolidated with the sale and delivery of heroin. Overton received a maximum of ten and a minimum of ten years imprisonment, the two terms to run concurrently.

The jury found defendant Smedley guilty of conspiracy to manufacture, to possess with intent to sell or deliver, or to sell and deliver heroin, but acquitted him of the substantive charges. Smedley received a prison term of six years to run concurrently with an eight year prison term imposed on 15 May 1979, in U.S. District Court, Eastern District of North Carolina.

The jury found Ruviwat guilty of conspiracy to manufacture, to possess with intent to sell or deliver, or to sell and deliver heroin, of possession with intent to sell or deliver heroin, and of sale or delivery of heroin. On the conspiracy charge, Ruviwat was sentenced to five years, to run concurrently with a thirty year sentence imposed on 15 January 1976, in U.S. District Court, Northern District of California. For the substantive offenses, he was sentenced to ten years to run concurrently with the five year term and the thirty year federal sentence.

The jury found Atha Atkinson guilty of one count of conspiracy to possess heroin, one count of possession of heroin, two counts of manufacture of heroin, and one count of sale or delivery of heroin. The trial judge consolidated the conspiracy and possession counts and sentenced Atha Atkinson to a maximum and minimum term of five years in prison and a fine of $5,000. On the manufacture and sale or delivery counts, Atkinson was sentenced to a maximum term of ten years and a minimum term of one year plus a $10,000 fine.

Additional facts as necessary will be set out in the discussion of the issues to which those facts pertain.

COMMON ISSUES ON APPEAL

I

[1] In their briefs, all four defendants present two common questions concerning the trial of their cases. The first question is whether the trial court erred in consolidating the sixteen cases and in failing to allow the defendants' repeated motions for severance.

G.S. 15A-926(b)(2) sets forth the grounds for a motion by the State for joining the cases of multiple defendants:

a. When each of the defendants is charged with accountability for each offense; or

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.

Defendants argue, and the State concedes, that the basis for consolidation in the present case is G.S. 15A-926(b)(2)b.1., all of the offenses charged allegedly being part of a common scheme or plan. Defendants contend, however, that, since their indictments alleged different years of participation in the conspiracy, the four defendants could not have been involved in a common scheme or plan. We disagree. The indictments alleged, and the evidence at trial tended to show, that the four defendants were participants in an on-going, large-scale conspiracy to smuggle heroin from Thailand for marketing in North Carolina. The fact that participants entered and exited the conspiracy at various times between the years 1969-1978 did not convert one conspiracy into several. *United States v. Bates*, 600 F. 2d 505 (5th Cir. 1979). The conspiracy was originally based on a common scheme, and its continuation over several years did not sever that common scheme.

Several defendants argue that *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946), supports their argument that multiple conspiracies were involved and that a consolidated trial was prejudicial to them. *Kotteakos* involved a number of defendants charged with conspiring to induce various financial institutions to grant credit, with the intent that the loans be offered to the Federal Housing Administration for insurance upon applications containing false and fraudulent information. A central figure in the applications was one Brown. The Court found several separate conspiracies because each agreement with Brown was completely separate; those involved with one application had no connection with those dealing with another application. The Supreme Court accepted the government's analogy that the pattern was "that of separate spokes meeting at a common center," but it disagreed with the government when it concluded that trial upon indictments alleging one conspiracy, with instructions to the jury which underlined the single conspiracy, was prejudicial.

The factual situation in *Kotteakos* is distinguishable from the situation in the case at bar, where numerous individuals represented different links in a common scheme or plan of

distribution. The present case is more closely attuned to *Blumenthal v. United States*, 332 U.S. 539, 68 S.Ct. 248, 92 L.Ed. 154 (1947), where the Court found one conspiracy even though each individual defendant acted separately. Since all the defendants knew of and joined the overall scheme of selling whiskey at over-ceiling prices, there was one conspiracy:

> The scheme was in fact the same scheme; the salesmen knew or must have known that others unknown to them were sharing in so large a project; and it hardly can be sufficient to relieve them that they did not know, when they joined the scheme, who those people were or exactly the parts they were playing in carrying out the common design and object of all. By their separate agreements, if such they were, they became parties to the larger common plan, joined together by their knowledge of its essential features and broad scope, though not of its exact limits, and by their common single goal.

332 U.S. at 558, 68 S.Ct. at 257, 92 L.Ed. at 168-69. *See also United States v. Perez*, 489 F. 2d 51 (5th Cir.), *cert. denied*, 417 U.S. 945, 94 S.Ct. 3067-68, 41 L.Ed. 2d 664 (1974) (conspiracy among numerous individuals, including doctors and lawyers, to stage automobile accidents and to file and collect for fraudulent insurance claims); *and State v. Smith*, 237 N.C. 1, 74 S.E. 2d 291 (1953) (to be guilty of conspiracy, a defendant does not need to be acquainted with the others engaged in the conspiracy).

[2] Having concluded that the offenses charged against these defendants were parts of a common scheme or plan and, therefore, subject to being joined for trial, we now address the question of whether severance of the trials was necessary in order to provide defendants with fair trials. Under G.S. 15A-927(b), severance of offenses is necessary whenever:

> (1) If before trial, it is found necessary to promote a fair determination of the defendant's guilt or innocence of each offense; or
>
> (2) If during trial, upon motion of the defendant or motion of the prosecutor with the consent of the defendant, it is found necessary to achieve a fair determination of the defendant's guilt or innocence of

> each offense. The court must consider whether, in view of the number of offenses charged and the complexity of the evidence to be offered, the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense.

In addition to objecting to orders of consolidation, each defendant made numerous motions throughout the trial to sever his trial from the trial of the other defendants. Each now contends that failure to sever subjected him to many days of trial involving numerous witnesses who never mentioned him, indeed may not even have known him, and that the mass of evidence being largely irrelevant to the question of his guilt was highly prejudicial to him.

Our Supreme Court has held that the trial court's exercise of authority to consolidate cases for trial is discretionary and will not be disturbed on appeal absent a showing that a joint trial deprived a defendant of a fair trial. *State v. Slade*, 291 N.C. 275, 229 S.E. 2d 921 (1976). The allegedly irrelevant testimony in this trial tending to show the criminal activities of various participants in the conspiracy was relevant to show the existence of the on-going conspiracy charged in the indictments. *United States v. Bates, supra.* We are not unmindful of the necessary precautions which must be taken to assure that each defendant is not unfairly tainted by such evidence. In *Blumenthal, supra*, the United States Supreme Court set forth safeguards for the admission of evidence at trial involving multiple defendants: clear rulings on admissibility, limitations on the relevance of evidence vis-á-vis a particular defendant, and adequate instructions. *See also Kotteakos v. United States, supra.* In reviewing the record of this trial, we find that the trial court employed these safeguards to avoid the chance that the jury would be confused over the import of the evidence. Further, in the instructions to the jurors, the Court admonished them that, although the cases were consolidated for trial, they were to consider the evidence against each defendant separately. Of the eight defendants whose cases were submitted to it, the jury acquitted four, indicating its ability to distinguish and weigh the evidence independently as to each defendant. After reviewing this and other related assignments of error, we are unable to say that denial of the defendants' motions to sever deprived any of them of a fair trial. *See also United*

States v. Moten, 564 F. 2d 620 (2nd Cir.), *cert. denied*, 434 U.S. 959, 98 S.Ct. 489, 54 L.Ed. 2d 318 (1977). These assignments are overruled.

II

[3] The next issue common to each defendant's appeal involves the trial court's instructions on the theory of vicarious liability. The law of vicarious liability—under which a conspirator may be guilty as a principal to crimes actually committed by a co-conspirator—has been set out by our Supreme Court in *State v. Small*, 301 N.C. 407, 272 S.E. 2d 128 (1980).

In *Small*, the defendant hired two men to kill his estranged wife. The two men succeeded. Small was indicted on charges of conspiracy to commit murder and first degree murder. At trial, the court gave this final mandate to the jury:

> "So, I charge that if you should find from the evidence, beyond a reasonable doubt, that on the 14th day of November, 1978, either Paul Lowery or Vincent Johnson intentionally strangled or smothered Evelyn Small, thereby proximately causing Evelyn Small's death, to kill her, and that the act was done with malice, with premeditation and deliberation, *and that the person who strangled or smothered Evelyn Small had previously agreed with James Small to murder Evelyn Small, and at the time of the agreement, James Small and the person with whom he made the agreement intended that it be carried out, and that the agreement had not been terminated, and that the strangling or smothering was done in the furtherance of the agreement, then it would be your duty to return a verdict of first degree murder, as alleged in the Bill of Indictment, as to James L. Small.*" (Emphasis supplied in original.)

Id. at 411, 272 S.E. 2d at 131. The jury found Small guilty of conspiracy to commit murder and first degree murder. On appeal, the Court found error in these instructions and remanded for entry of a verdict of guilty of accessory before the fact to murder.

While the Court's discussion of the issue was lengthy and involved extensive analysis of previous North Carolina cases, we find it necessary only to set forth the Court's summary of its holding:

(1) Evidence sufficient to show defendant's involvement in a criminal conspiracy does not itself establish defendant's liability as a party to the substantive felony committed as a result of the conspiracy; it is reversible error for the court to so instruct the jury.

(2) Such evidence will nevertheless always be *relevant* to submit to the jury as proof of defendant's complicity in the substantive felony charged, in that it tends to show either (a) defendant, though absent at the felony's commission, nevertheless counseled, procured, or commanded its commission, or (b) that defendant, present at the scene of the felony, shared in the criminal intent of the actual perpetrators and thus aided and abetted in the felony's occurrence or acted in concert with those who committed it. What the evidence does in fact show, however, is for the jury to decide.

(3) Unless and until the legislature acts to abolish the distinction between principal and accessory, a party to a crime who was not actually or constructively present at its commission may at most be prosecuted, convicted and punished as an accessory before the fact.[3]

Id. at 428-29, 272 S.E. 2d at 141.

In the present case, defendants argue that in its instructions, the trial court erred under *Small.* The court charged the jury generally on the theory of vicarious liability as follows:

In order for you to find a particular defendant guilty of any count in the bill of indictment based on the theory of vicarious liability, the State would be required to prove three things beyond a reasonable doubt.

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3. In 1981, the General Assembly enacted G.S. 14-5.2 which reads in pertinent part:

All distinctions between accessories before the fact and principals to the commission of a felony are abolished. Every person who heretofore would have been guilty as an accessory before the fact to any felony shall be guilty and punishable as a principal to that felony.

This statute became effective 1 July 1981, and was made applicable to all offenses committed on and after that date. It does not, therefore, apply to the cases of defendants.

First, that the defendant whom the State seeks to convict by reason of the theory had entered into a conspiracy to commit the crime which was charged.

Second, that a co-conspirator or co-conspirators had in furtherance of the conspiracy actually committed the crime which was charged under the theory of vicarious liability.

And third, that the commission of that crime was committed, or the crime was committed, while the conspiracy was in existence and before it ended.

The State concedes, and we agree, that under the principles set forth in *Small*, the trial court in the present case erred because these instructions allowed the jurors to find a defendant guilty as a principal to the commission of a crime at which he was not actually or constructively present. Before we analyze the erroneous instructions as they pertain to each defendant on substantive offenses, it is pertinent to review the law concerning accessories before the fact. In *State v. Hunter*, 290 N.C. 556, 227 S.E. 2d 535 (1976), *cert. denied*, 429 U.S. 1093, 97 S.Ct. 1106, 51 L.Ed. 2d 539 (1977), our Supreme Court held that conviction of a defendant for being an accessory before the fact required the State to prove "(1) that the defendant counseled, procured, commanded, encouraged, or aided another to commit the offense; (2) the defendant was not present when the crime was committed; and (3) the principal committed the crime." 290 N.C. at 576, 227 S.E. 2d at 547. Under the reasoning of *Small*, it was not necessary that defendants in this case be indicted as accessories before the fact to the offenses charged. At the time the indictments against defendants were returned (21 May 1979, for defendants Overton, Smedley, and Ruviwat, and 30 July 1979, for defendant Atkinson), the law in this State allowed one indicted for the principal felony to be convicted upon that indictment as an accessory before the fact. *See* G.S. 14-5.[4]

4. G.S. 14-5.1, which became effective 1 October 1979, provides that any person "who shall be charged with the principal felony in an indictment . . . may not be convicted as accessory before the fact to the principal felony on the same indictment. . . ." In *State v. Small, supra*, the Supreme Court interpreted this statute to apply only to those cases in which an indictment is returned on or after 1 October 1979.

Application of these principles to defendant Overton persuades us that the trial court erroneously instructed the jury that Overton's guilt as a principal in the substantive offenses could be found if any one of his co-conspirators were guilty as a principal. Overton was charged with, and found guilty of possession of heroin (on or about 19 September 1976), two counts of manufacturing heroin (between 3 September 1976 and 19 September 1976, and in late September or early October 1976) and sale and delivery of heroin (to Agent Owens, on or about 23 May 1977). The State's evidence does not establish Overton's actual or constructive presence during the commission of these offenses. It is possible that the jury, convinced that Overton was a conspirator, found him guilty of the substantive offenses based solely on the erroneous instructions concerning vicarious liability. We are unable to say, as the Court did in *Small*, that the jury found defendant guilty because it found that he had procured the one-act conspiracy. Here we have a multi-act conspiracy; under the instructions given by the trial court, Overton may have been found guilty not because the evidence tended to show that he was involved as an accessory before the fact to the specifically dated offenses, but because he was simply a conspirator, and thus the conviction cannot stand. For defendant Overton, there must be a new trial on the substantive offenses.

In the case of Smedley, there was also error in the trial court's instructions on vicarious liability. Because he was acquitted of all substantive offenses, however, we do not find the error to be prejudicial to him.

Defendant Ruviwat was found guilty of possession with intent to sell and deliver heroin and sale and delivery of heroin, both offenses allegedly occurring on or about 16 October 1975. The record of the trial contains evidence tending to show that the October transaction was part of the Brown Shipment and that Ruviwat's role in this transaction took place in Thailand where he supplied the operation with the illicit drugs. We again are unable to determine whether jury instructions allowed his conviction as a principal in drug activities which, from the evidence, occurred in North Carolina or whether the jury would have found that Ruviwat's earlier involvement in the Brown Shipment would have made him an accessory before the fact. The jury instructions

were, therefore, prejudicial and Ruviwat is entitled to a new trial on the substantive charges.

Atha Atkinson's convictions on the substantive offenses clearly appear to have been based on the jury's reliance on the theory of vicarious liability. The State's evidence tended to involve Atkinson specifically with the conspiracy in June 1974, parts of 1975, and during the summer of 1976. By contrast, the verdicts against the defendant were for substantive offenses occurring in the fall of 1976 and the spring of 1977. From this evidence, we can only conclude that the jury, in finding her guilty of the substantive offenses, relied upon the erroneous instructions on the theory of vicarious liability. Her convictions of the substantive offenses, therefore, must be reversed.

III

[4] In varying combinations, defendants join to raise questions concerning whether the trial court's instructions adequately applied the law to the evidence. Under G.S. 15A-1232, the trial judge is required to state the evidence which is necessary to explain the application of the law to the particular case. In *State v. Graham*, 194 N.C. 459 at 467, 140 S.E. 26 at 30 (1927), the Supreme Court set forth the following standard which had evolved from G.S. 1-180 (now G.S. 15A-1232):

> Concerning the necessity of declaring and explaining the law it has been held in quite a number of cases that nothing more is required than a clear instruction which applies the law to the evidence and gives the position taken by the respective parties as to the prominent and controlling features which make for the ascertainment of the facts.

The Court is required " 'to explain the law of the case, to point out the essentials to be proved on the one side or the other, and to bring into view the relations of the particular evidence adduced to the particular issues involved.' " *Lewis v. Watson*, 229 N.C. 20 at 23, 47 S.E. 2d 484 at 486 (1948), *quoting* 53 Am. Jur., Trial, § 509.

Defendants Overton, Smedley, and Ruviwat contend that the trial court erred in failing to apply the facts of the case to the law of circumstantial evidence. The trial court's instructions on circumstantial evidence were entirely proper. We find that the court

adequately explained the application of the law to the evidence by its recapitulation of evidence following those instructions. There was no error in this part of the instructions.

Under this same assignment of error, defendant Ruviwat contends that the trial court failed to summarize circumstantial evidence elicited on cross-examination of Herman Jackson that Jackson never saw Ruviwat drive a truck containing heroin to Smedley's house and never saw Ruviwat place heroin in the truck. This evidence was intended only to impeach the earlier testimony of Jackson that Ruviwat obtained the heroin, placed it in a van, and delivered it to Smedley's house. This was not substantive evidence, was not necessary for the application of the law to the evidence; and there was, therefore, no necessity to summarize it in the recapitulation of the evidence. *See State v. Moore*, 301 N.C. 262, 271 S.E. 2d 242 (1980).

Defendants Overton, Smedley, and Atkinson contend that the trial court erred in failing to apply the law of conspiracy to evidence of their cases. After reviewing the instructions in the present case, we conclude that there was no violation of the standard of G.S. 15A-1232. For all the defendants, the trial court recapitulated the evidence (both the State's and the defendants') and explained generally the law of conspiracy as well as the law of the substantive crimes. As to each defendant, the court then instructed the jury as to what it had to find in order to reach a verdict on the conspiracy and on the substantive crimes. This set of instructions parallels that set forth by N.C.P.I. Crim. 202.80, except that the court, instead of explaining the general law of conspiracy for each defendant, explained it only once, at the outset. We find no fault with these instructions. These assignments are overruled.

IV

[5] Defendants Overton and Smedley assign error to the admission of certain evidence. First, they assert error in the trial court's determination that Laura Holmes Smith, who had mental problems and who was under the care of psychiatrist, was competent to testify. The rule on mental competence to testify, set forth in 97 C.J.S. *Witnesses* § 57(b) (1957), was adopted by our Supreme Court in *State v. Benton*, 276 N.C. 641 at 650, 174 S.E. 2d 793 at 799 (1970):

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

In view of these principles and of the pertinent portions of the record set out below, we find no abuse of the trial court's discretion in allowing Smith to testify.

The record discloses that the State initially questioned Smith's competence to testify by filing a motion for continuance and by subpoenaing Smith's psychiatrist, Dr. Louis A. Gagliano. On 15 May 1980, the trial court entered an order finding that, in Dr. Gagliano's opinion, Smith was not capable of testifying. The court ordered that the witness be examined by a psychiatrist selected by the State. Later, defendant Overton moved for a *voir dire* examination to determine Smith's competency. During the trial, prior to Smith's testimony, on *voir dire*, Dr. Gagliano testified that Smith suffered from psychotic depression, that she would have no trouble separating fact from fantasy, that she did have trouble remembering dates, but that, if she could not remember something, "she would probably just tell you that she does not know and be truthful. . . ." Smith, a high school graduate, testified that she understood what it meant to take an oath to tell the truth and that she knew the difference between "truth and untruth." She admitted being confused about the timing of events and having heard voices, but she stated that she had not had any hallucinations in the last few months.

The trial court found that Smith suffered from an emotional disorder, that she had difficulty recalling certain events, especially dates, that she understood the nature of the oath, and that she was able to recall past events and occurrences. The court concluded that Smith was competent to testify. In this conclusion, we find no abuse of discretion. Dr. Gagliano had obviously altered his opinion as to Smith's capability; his chief concern appeared to be the effects of long examinations on Smith's condition and not on her ability to distinguish fact from fantasy. Contrary to argu-

ments by counsel, the fact that Smith *had difficulty* remembering past events is not inconsistent with the court's finding that she could remember those events. These assignments are overruled.

Next, defendants Overton and Smedley argue that the trial court erred in admitting into evidence acts, statements, and declarations of Frank Lucas through the testimony of Wilbur Fuller.[5] Both defendants took numerous exceptions to the trial court's failure to sustain objections to allegedly hearsay evidence. We have reviewed that portion of the record containing this evidence and can find no prejudicial error. First, the evidence was introduced not to prove the truth of the matters asserted and was, therefore, not objectionable as hearsay. 1 Stansbury's North Carolina Evidence § 141 (Brandis' 2d revision, 1982). The trial court so instructed the jury. Secondly, neither defendant has shown this Court any prejudice resulting from this line of questioning. We overrule these assignments of error.

Overton and Smedley make a similar argument about the testimony of Herman Jackson, Herbert Houston, William K. Wright, and others. The defendants allege that the testimony to which they excepted contained hearsay statements made by their co-conspirators, chiefly Ike Atkinson. While they acknowledge the co-conspirator rule—that the acts and declarations of one conspirator, made or done in furtherance of or within the scope of the original conspiracy, may be imputed to other conspirators not present at the time, *State v. Small*, 301 N.C. 407, 272 S.E. 2d 128 (1980)—they argue that the statements admitted were narrative statements which are forbidden under *State v. Wells*, 219 N.C. 354, 13 S.E. 2d 613 (1941).

We have reviewed the numerous exceptions set forth by these two defendants. We have found that many do not constitute hearsay, that others were statements in furtherance of the common criminal design and within the *res gestae*, and that none was prejudicial to Overton or Smedley. These assignments are overruled.

5. Wilbur Fuller was an attorney representing Herman Jackson and Ike Atkinson during their incarceration in Georgia. He became involved in the sale and delivery of heroin in North Carolina and in New York where he transacted business with Lucas.

Defendants Overton and Atkinson make another common argument about the trial court's admission of evidence. Both assert numerous exceptions to denial of their motions to strike allegedly irrelevant and hearsay evidence. Their argument appears to be that most of the evidence adduced at the long trial was irrelevant as to each of them. This is similar to the argument concerning consolidation of the several defendants for trial, addressed above. While we agree that the evidence was lengthy and that a good portion of it did not relate directly with every defendants' involvement in the conspiracy, we do believe that the evidence was relevant and competent to show the parameters of the conspiracy. The activity of each individual defendant drew significance from an understanding of how this activity related to the actions of others within the conspiracy. That the jurors were not overwhelmed by the large amount of evidence is apparent from the verdicts they returned. We find no prejudice in the admission of such evidence.

V

[6] Defendants Smedley, Ruviwat, and Atkinson contend that the trial court erred when it refused to dismiss count 1 of the bill of their respective bills of indictment. Count 1 in the case of defendant Ruviwat was similar to those of Smedley and Atkinson:

> The jurors for the State upon their oath present that commencing sometime in 1969 . . . and continuing thereafter up through and including March 28, 1978 . . . Luchai Ruviwat, aka Chai unlawfully, wilfully and feloniously with common design and set purpose did . . . conspire with . . . [series of names] to unite for the common object and purpose to unlawfully, wilfully, and feloniously manufacture, possess with intent to sell and deliver, and sell and deliver a controlled substance in violation of the North Carolina Controlled Substances Act. The controlled substance in question consisted of heroin, which is included in Schedule I of the North Carolina Controlled Substances Act.

The defendants argue that, since the Controlled Substances Act was not effective until 1 January 1972, the indictment failed to state a criminal offense under North Carolina law. Additionally, Ruviwat contended that conviction under the Act was effectively a conviction under an *ex post facto* law. We do not agree.

The Controlled Substances Act did not repeal prior law controlling narcotic drugs. The predecessor to the Act was the Uniform Narcotic Drug Act, G.S. 90-86 *et seq.*, which remained in full force and effect as to offenses committed prior to 1 January 1972. *See State v. Harvey*, 281 N.C. 1, 187 S.E. 2d 706 (1972). The conspiracy to possess, sell, deliver, and manufacture heroin was equally a crime under both statutes. Reference in the indictments to the Controlled Substances Act did not invalidate the indictments and reference in the indictment to the specific statute allegedly violated is immaterial. *See State v. Anderson*, 259 N.C. 499, 130 S.E. 2d 857 (1963). Our courts have treated as surplusage to the indictment any incorrect reference to statutes. *E.g. State v. Link*, 13 N.C. App. 568, 186 S.E. 2d 634 (1972).

[7] Defendants Overton and Atkinson make additional arguments concerning the indictments, namely that there was a fatal variance in the evidence adduced at trial. These arguments are based primarily upon earlier contentions that the State's evidence showed numerous conspiracies, not just one spanning the period from 1969 to 1978. We have disposed of these contentions earlier in our opinion and find no need to repeat our discussion on the issue. Defendant Atkinson argues additionally that, since the indictment against her placed her in the conspiracy from sometime in 1969 until 28 March 1978, and since the evidence at trial showed only that she took an active part in the conspiracy in 1974 and at various times thereafter, the State failed to prove its allegations and the motion to dismiss should have been allowed. An argument similar to defendant Atkinson's was made and rejected in *United States v. Bates, supra.* The Fifth Circuit Court of Appeals noted that this argument is premised upon the erroneous assumption that a defendant's relatively late entry into a conspiracy precludes his conviction as a participant in the conspiracy. The court held that a single conspiracy does not become several merely because of personnel changes. We agree with the holding in *Bates*. It is obvious from the lengthy time span set forth in the indictment that the State would have to rely on scattered dates throughout the period to establish defendant Atkinson's involvement. We find no error in the trial court's refusal to dismiss the bills of indictment.

[8] Defendants Overton and Atkinson make a further argument concerning the conspiracy indictments against them, as related to

the trial court's instructions on conspiracy. They contend that, since the indictments alleged conspiracy to manufacture, to possess with intent to sell and deliver, *and* to sell and deliver heroin (the conjunctive), the trial court committed error when it instructed on conspiracy to manufacture, to possess with intent to sell and deliver, *or* to sell and deliver heroin. Since neither defendant was convicted of any of these offenses, such error, if any, was not prejudicial. Defendants' additional argument, that the trial court erred in instructing on the crime of conspiracy to possess heroin, is also rejected. Defendants contend that, since they were not indicted on this charge and since it is not a lesser included offense of the overall conspiracy charge, the trial court should not have instructed that they could be convicted of conspiracy to possess heroin. We disagree with defendants' argument that conspiracy to possess heroin is not a lesser included offense of conspiracy to possess with intent to sell or deliver heroin. In response to an analogous argument, in *State v. Aiken*, 286 N.C. 202, 209 S.E. 2d 763 (1974), our Supreme Court noted that one cannot possess a controlled substance with intent to deliver it without having possession thereof. Similarly, one cannot conspire to possess with intent to sell and deliver a controlled substance without conspiring to possess. We find no error in the trial court's submission of the lesser included offense to the jury.

VI

Defendants Overton, Smedley, and Atkinson each contend that the trial court erred in denying their motions to dismiss for insufficiency of the evidence. For the reasons noted below, we believe that as to the conspiracy charges, which are our only concern, there was ample evidence to allow the cases to go to the jury.

Upon a motion to dismiss made pursuant to G.S. 15A-1227, the trial court must consider evidence in the light most favorable to the State, giving the State the benefit of every reasonable intendment and every reasonable inference which may be drawn therefrom. *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980). Even so, the State is required to produce substantial evidence more than a scintilla to prove the allegations in the bill of indictment. *Id.* The requirement of substantial evidence is simply a requirement that it be "existing and real, not just seeming or imaginary." *Id.*

[9] In the case of Overton, there was evidence tending to show that, as early as 1975, he stored heroin in his home; that in 1976-77, he worked hand in hand with Laura Smith by stashing large amounts of heroin which Smith would later retrieve from Overton for delivery; and that initially he was paid $1,000 per month for his participation. This evidence, viewed in the light most favorable to the State, was more than a scintilla and was clearly ample to withstand defendant's motion to dismiss.

As to Smedley, the evidence tended to show his involvement at the Thailand end of the operation. According to Robert Patterson, Smedley participated in shipping heroin in AWOL bags and in furniture; Thornton testified that he worked with Smedley in securing heroin from Ruviwat (the Brown Shipment). Herbert Houston's testimony tended to show that in 1974 he was paid by Smedley to mail packages containing heroin. Given this evidence connecting Smedley to the drug conspiracy, the trial court acted properly in denying his motion to dismiss.

Finally, there was substantial evidence that Atha Atkinson was working within the conspiracy. In June 1974, according to the State's evidence, Atha Atkinson met with Robert Patterson and accepted two AWOL bags for which she gave him $6,000. Beginning in 1975, she met periodically with Laura Smith who supplied her with bags of heroin for which she paid $100 apiece. There was testimony from George Wynn tending to show that Atha Atkinson was cognizant enough of the overall operation to suspect co-conspirators of attempting to "rip off" her husband Ike. Defendant Atkinson's motion to dismiss was properly denied. Defendants' assignments of error are overruled.

ISSUES RAISED BY INDIVIDUAL DEFENDANTS

Each defendant brings forward assignments of error peculiar to his own case. We shall discuss those which contain merit and summarize as to each defendant the overall action which we take with regard to his appeal.

Defendant Overton

[10] Assigning as error the trial court's denial of his motion to dismiss for failure of the State to bring him to trial within 120 days, defendant Overton emphasizes the 292 day delay between the date he was served with a copy of his bill of indictment and

the date his trial began. G.S. 15A-701(a1)(1) required that Overton be tried within 120 days from the date he was arrested, was served with criminal process, waived an indictment, or was indicted, whichever occurred last. In computing the 120 days, certain periods are excluded:

. . . .

(1) Any period of delay resulting from other proceedings concerning the defendant including, but not limited to, delays resulting from:

. . . .

(d) *Hearings on any pretrial motions or the granting or denial of such motions.*

The period of delay under this subdivision must include all delay from the time a motion or other event occurs that begins the delay until the time a judge makes a final ruling on the motion or the event causing the delay is finally resolved;

. . . .

(6) A period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted;

(7) Any period of delay resulting from a continuance granted by any judge if the judge granting the continuance finds that the ends of justice served by granting the continuance outweigh the best interests of the public and the defendant in a speedy trial and sets forth in writing in the record of the case the reasons for so finding. A superior court judge must not grant a motion for continuance unless the motion is in writing and he has made written findings as provided in this subdivision.

The factors, among others, which a judge shall consider in determining whether to grant a continuance are as follows:

(a) Whether the failure to grant a continuance would be likely to result in a miscarriage of justice; and

(b) Whether the case taken as a whole is so unusual and so complex, due to the number of defendants or the nature of the prosecution or otherwise, that it is unreasonable to expect adequate preparation within the time limits established by this section;

. . . .

G.S. 15A-701(b). Using this formula for computation, we conclude that the State complied with the requirements of G.S. 15A-701 and that defendant Overton's motion to dismiss was properly denied.

From the record it can be determined that, on 25 April 1979, defendant Overton was served with a copy of the original bill of indictment. His trial commenced 11 February 1980. After his indictment, defendant filed numerous motions including four motions to dismiss, motions to require the State to elect and to identify and suppress evidence, a motion for severance, a motion for change of venue, and motions for a bill of particulars, for voluntary discovery, for discovery, and for an extension of time for discovery. These motions began in May of 1979 and continued through the beginning of 1980. With them were filed numerous motions, including motions for extensions of time, by the other defendants; the motions of those appealing their convictions are listed in the record, and we assume that that number is augmented by motions filed by the indicted individuals whose cases are not before this Court.

While we interpret G.S. 15A-701(b)(6) to allow the trial court to deduct from the total period of time any period of reasonable delay which is caused by co-defendants and which is an excluded period under G.S. 15A-701(b), *State v. Shelton*, 53 N.C. App. 632, 281 S.E. 2d 684 (1981), *disc. rev. denied and appeal dismissed*, 305 N.C. 306, 290 S.E. 2d 707 (1982), we find it unnecessary to enumerate the delay chargeable to each co-defendant in the present case. We find that the delay caused by defendant Overton's Motion for Change of Venue, could properly be deducted from the 272 day period and that, with that exclusion, defendant Overton was tried within the statutory period.

Defendant's motion for change of venue was made on 30 May 1979. On 19 December 1979, the trial court entered an order deny-

ing that motion. The G.S. 15A-701(b)(1)d. reference to pretrial motions has been interpreted to include motions for change of venue. *State v. Oliver*, 302 N.C. 28, 274 S.E. 2d 183 (1981). In *Oliver*, the Supreme Court stated:

> While motions should be promptly calendared for hearing, both sides are entitled to a reasonable time within which to prepare. We conclude that a motion for change of venue is included within the statutory reference to "pretrial motions." G.S. 15A-701(b)(1)(d). Provided the motion is heard within a reasonable time after it is filed and the state does not delay the hearing for the purpose of thwarting the speedy trial statute, the time between the filing of the motion and its disposition is properly excluded in computing the time within which a trial must begin. The time here between filing and disposition of the motion, 29 days, we find to be a reasonable time. There is nothing in the record to show any purposeful delay on the part of the state.

Id. at 41, 274 S.E. 2d at 192. While the period of delay in ruling on the motion for change of venue was considerably longer in the present case than in *Oliver* or *State v. Sellars*, 52 N.C. App. 380, 278 S.E. 2d 907 (*disc. rev. denied and appeal dismissed*), 304 N.C. 200, 285 S.E. 2d 108 (1981) (five months), we cannot, in view of the complexity of the case and the numerous motions made by this defendant as well as his co-defendants, find it unreasonable. When the 292 day period is reduced by the delay necessitated by the motion for change of venue, the total time from indictment to trial is shown to be well within the 120 day limitation.

We would also point out that, upon motion by the State, the trial court granted several continuances. In his order denying defendant Overton's motion to dismiss, Judge Rouse found that "the ends of justice served by granting the continuance [until 11 February 1980] outweighed the best interests of the public and the defendant in a speedy trial, that failure to grant the continuance would have been likely to result in a miscarriage of justice. . . ." Defendant Overton took no exception to this finding. This finding clearly supports the trial court's conclusion that

the defendant was not denied a speedy trial as guaranteed by G.S. 15A-701.[6]

[11] Defendant Overton also assigns error to the trial court's denial of his motion to suppress evidence concerning his bank account, credit union account, employment records, and telephone records. The record shows that defendant Overton objected to the introduction of such evidence on grounds that his Fourth Amendment right to be free of unreasonable searches and seizures had been violated.

United States v. Miller, 425 U.S. 435, 96 S.Ct. 1619, 48 L.Ed. 2d 71 (1976) held that a defendant's Fourth Amendment rights were not abridged when, in response to a subpoena *duces tecum*, the records of defendant's bank accounts were disclosed. The Court found that there was no intrusion into any area in which the defendant had a protected Fourth Amendment interest.

> [A depositor] takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government. . . . [T]he Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.

Id. at 443, 96 S.Ct. at 1624, 48 L.Ed. 2d at 79. The *Miller* court concluded that the defendant lacked the requisite Fourth Amendment interest to challenge the validity of the subpoenas and noted that the banks upon which they were served did not contest their validity.

We find that *Miller* controls the present case. Defendant's contentions that his Fourth Amendment rights were violated when the State obtained an Application for Examination of Records instead of a subpoena *duces tecum* and when it received some records without even this document are meritless. He had no standing to contest the disclosure of the information, and his motion to suppress was, therefore, properly denied.

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6. Defendant Overton does not contest the trial court's additional conclusion that his Sixth Amendment right to a speedy trial under the U.S. Constitution was not violated.

Defendant Overton brings forward two other assignments of error based upon his conviction of the substantive offenses. We have already determined that there was error in the jury instructions pertaining to those offenses, and we, therefore, find no reason to address the additional assignments of error.

Since the trial court erred in instructing on the theory of vicarious liability, we must remand defendant Overton's case for a new trial free of this prejudicial error. In addition, since the sentence for his conspiracy conviction was consolidated with the sentence for one of the substantive offenses, the case must be remanded for proper sentencing.

Defendant Smedley

[12] As his first assignment of error, defendant Smedley contends that, at his first appearance, the district court erred in setting his bail at one million dollars while simultaneously finding him indigent and in need of court-appointed counsel. Defendant cites N.C. Const., Art. 1, § 27 which prohibits excessive bail and G.S. 15A-533 and 15A-534, which require the imposition of a condition of pretrial release in a non-capital case. He argues an interpretation of these provisions analogous to the United States Supreme Court's interpretation of the Eighth Amendment of the U.S. Constitution. *See, e.g. Carlisle v. Landon*, 73 S.Ct. 1179, 97 L.Ed. 1642 (1953), where the Supreme Court allowed an application for bail when it determined that bail with unreasonable conditions attached to it was no bail at all. Smedley claims that the bail set for him was impossible to meet and that it was unreasonable since he was subject to federal incarceration at the time and the State, therefore, would have been able to find him at the time of trial. He further submits that his case was prejudiced by his incarceration in state prisons as opposed to federal prisons because he did not have access to federal prison law libraries for preparation of his defense and he would have had better communication and exercise facilities in federal prisons.

G.S. 15A-534(c) directs the judicial official determining pretrial release conditions to consider any available evidence relevant to the issue, including the nature and circumstances of the offense charged, the weight of the evidence against the defendant, the defendant's family ties, his financial resources, employment, character, and mental condition, defendant's intoxication at

hearing, the length of his residence in the community, his record of convictions and his history of flight to avoid prosecution. Given this list of factors, this Court cannot say that bail of one million dollars was unreasonable. This assignment of error is overruled.

[13] A second question raised by defendant Smedley is whether the trial court properly denied his motion for mistrial after the State, knowing that certain audio tapes could not be admitted into evidence, nevertheless introduced testimony about those tapes. The record shows that James Copeland, Chief Investigator for the Special Narcotic Prosecutors Office of New York City, testified concerning numerous taped conversations between and among drug smuggling conspirators. Upon objection, the trial court refused to admit the tapes into evidence and later refused to strike Copeland's testimony or to order a mistrial.

A trial court's ruling on a motion for mistrial in a criminal case less than capital lies within the discretion of the trial court. *State v. McCraw*, 300 N.C. 610, 268 S.E. 2d 173 (1980). In reviewing the testimony of Copeland and the action of the trial court, we find Copeland's testimony did not directly relate to defendant Smedley and was not prejudicial to him. This assignment is overruled.

[14] Next defendant Smedley argues that the trial court erred in allowing Robert Patterson, William Wright, and Lucian Dobbs, witnesses for the State, to testify about "dope" and "heroin." The basis of defendant's objection is that the State failed to lay a foundation supporting the witnesses' identification of the substance. As to Patterson's and Wright's testimony, defendant's argument must fail for at least two reasons. First, since the same evidence was later admitted without objection, defendant is deemed to have lost the benefit of his earlier objection. 1 Stansbury's § 30. Second, the references by Patterson and Wright were competent to show their state of mind, specifically their belief that the substance being transported in AWOL bags and furniture was heroin. The evidence of their beliefs was relevant to show the conspiracy alleged. *See State v. Smith*, 237 N.C. 1, 74 S.E. 2d 291 (1953). With regard to the testimony of Dobbs, we have reviewed the portions of the record to which Smedley objected; we find no reference to "heroin" or "dope," and conclude that defendant's argument does not pertain to the testimony of that witness.

[15] Defendant Smedley also took exception to the wording of the conspiracy charge as it was set forth on the verdict sheet. The verdict sheet charged, in pertinent part, a conspiracy to "manufacture, possess with intent to sell and deliver *or* sell and delivery of [sic] heroin." The jury's verdict mirrored this use of the disjunctive. Defendant argues that due to the presence of this disjunctive the verdict was ambiguous and cannot stand. In support of this argument, defendant cites numerous cases, all of which are clearly distinguishable from the case at bar.

State v. Albarty, 238 N.C. 130, 76 S.E. 2d 381 (1953), is not squarely on point. In that case, the criminal complaint charged that the defendant "did unlawfully and willfully sell, barter or cause to be sold or bartered, any ticket, token, certificate for any number of shares in any lottery commonly known as the numbers or butter or eggs lottery, or lotteries of similar character to be drawn or paid within or without the State against the statute. . . ." The petit jury found the defendant "guilty of lottery as charged in the warrant." In finding the verdict invalid for uncertainty, the Supreme Court noted that the jury verdict made this anomalous finding: "That the defendant is guilty of selling lottery tickets, *or* that the defendant is guilty of bartering lottery tickets, *or* that the defendant is guilty of causing another to sell lottery tickets, *or* that the defendant is guilty of causing another to barter lottery tickets." *Id.* at 133, 76 S.E. 2d at 383 (emphasis in the original).

By contrast, defendant Smedley was charged with conspiracy to deal with drugs. While we acknowledge that the verdict sheet was not artfully drawn, we find it clear that the jury found defendant guilty of conspiracy. The parameters of the conspiracy could include either a conspiracy to manufacture *or* to possess with intent to sell or deliver *or* to sell and deliver heroin. Defendant could not have been prejudiced by the inexact nature of this verdict form because the punishments for conspiracy to do any one of these three offenses are the same, and the trial court's judgment contained a sentence well within the statutory limits. G.S. 90-95. This assignment of error is, therefore, overruled.

[16] As his next assignment of error, defendant Smedley argues that his prosecution by State authorities violated our double jeopardy statute, G.S. 90-97, and that his motion to dismiss on

this basis should have been allowed. Smedley acknowledges that, as a general rule, prosecution and conviction founded on the same set of facts by both state and federal governments is not barred by the constitutional protection against double jeopardy. *State v. Harrison*, 184 N.C. 762, 114 S.E. 830 (1922). He relies solely on G.S. 90-97 which provides in pertinent part:

> If a violation of . . . [the North Carolina Controlled Substances Act] is a violation of a federal law or the law of another state, a conviction or acquittal under federal law or the law of another state for the same act is a bar to prosecution in this State.

The record shows that, on 15 May 1979, Smedley pleaded guilty to conspiracy to import heroin, a violation of 21 U.S.C. § 963. The question we must answer is whether the conspiracy to import heroin is "the same act" as conspiracy to manufacture, to possess with intent to sell or deliver, or to sell or deliver heroin. We hold that it is not the same act and that G.S. 90-97 was not violated.

The federal law under which defendant was convicted, 21 U.S.C. § 963, defines the punishment for conspiracy to violate Subchapter II, Import and Export, 21 U.S.C. § 951 *et seq.* Under 21 U.S.C. § 952, the substantive offense to which defendant's federal conspiracy charge was related, it is unlawful, with certain irrelevant exceptions, "to import into the customs territory of the United States . . . or to import into the United States . . . any controlled substance . . . " in various schedules, one of which includes heroin. It is obvious from a reading of the definition of this offense, that conspiracy to import heroin pertains to an act different from conspiracy to manufacture, to possess with intent to sell or deliver, or to sell or deliver heroin. It matters not that the two acts are closely related. They are different, and jeopardy under G.S. 90-97 did not attach in defendant's federal case.[7]

7. We note also that 21 U.S.C. § 846 sets punishment for conspiracy to commit offenses described in Subchapter I, Control and Enforcement, 21 U.S.C. §§ 801-904. The offenses defined in that subchapter are more closely akin to the offenses for which defendant Smedley was charged by the State. *See* 21 U.S.C. § 841 (manufacture, distribution, possession with intent to distribute). In *Albernaz v. United States*, 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed. 2d 275 (1981), the Supreme Court held that convictions and separate consecutive sentences received for conspiracy to import marijuana (21 U.S.C. § 963) and conspiracy to distribute marijuana reflected Congressional intent and did not violate the Double Jeopardy Clause. The Court

[17] Defendant Smedley argues further that it was error for the trial court to deny his motion to depose Frank Lucas, a co-conspirator who, at some point, had agreed to work with authorities in New York. Defendant, however, cites no constitutional, statutory, or case law basis for his contention. Frank Lucas did not testify for the State; at the time of trial, he was confined at the New Jersey Department of Corrections. If defendant Smedley had wanted Lucas' testimony at trial, he had an appropriate remedy under G.S. 15A-822. This assignment of error is overruled.

[18] One final assignment of error by defendant Smedley warrants discussion. In that assignment he contends that the trial court erred in denying his motion challenging the jurisdiction of the North Carolina trial court. The basis of his motion was that, since he was acquitted of the substantive offenses which occurred in North Carolina and since the State's evidence tended to show he entered the conspiracy while living in Thailand, there were no grounds for jurisdiction. We disagree. Our courts have jurisdiction over those involved in a criminal conspiracy if any one of the conspirators commits an overt act in furtherance of the conspiracy within the State, even if the unlawful conspiracy was entered into outside the State. *State v. Goldberg*, 261 N.C. 181, 134 S.E. 2d 334 (1964), *cert. denied*, 377 U.S. 978, 84 S.Ct. 1884, 12 L.Ed. 2d 747 (1965).

The remaining assignments of error brought forward by defendant Smedley either are contingent upon his success in earlier arguments or contain no merit. Consequently, in defendant Smedley's trial, we find no error.

Defendant Ruviwat

[19] Defendant Ruviwat brings forward only one argument which is not raised by one or more of the other defendants. He assigns error to the trial court's revocation of an order granting him, a Thai national, the assistance of an interpreter. We have reviewed the record and find no error in the trial court's decision.

noted that Sections 846 and 963 specify different ends as the proscribed object of the conspiracy and that each provision requires proof of a fact not required for the other.

The record reveals that the trial judge (Smith, J.) and the superior court judge hearing the motion for an interpreter (Rouse, J.) both agreed to the appointment of an interpreter, at State expense, to aid the indigent defendant. Later, after observing defendant in the courtroom and after a hearing, Judge Smith revoked that appointment. The order appointing the interpreter was interlocutory and could be altered upon a showing of changed circumstances. *See State v. Turner*, 34 N.C. App. 78, 237 S.E. 2d 318 (1977). In his order, denying defendant the right to an interpreter, Judge Smith found that defendant had eight years of education related to reading and writing English and that he had sufficient understanding of the language to enable him to confer with his attorney and assist in his own defense. To these findings, defendant took no exception. They support the trial court's order denying Ruviwat an interpreter. This assignment is overruled.

Defendant Atkinson

[20] Defendant Atkinson assigns as error the trial court's admitting into evidence statements made by her spouse, Ike Atkinson. The record shows that, prior to trial, defendant Atkinson made a motion for severance on the basis that statements made against the other defendants by Ike Atkinson would be inadmissible as to her under the provisions of G.S. 8-57 and that severance would, therefore, be necessary for a fair determination of her guilt or innocence. Defendant also filed a motion *in limine* to prevent the introduction of such evidence. Both motions were denied. Throughout the trial of her case, defendant Atkinson objected to the introduction of evidence pertaining to her husband's statements and criminal activities.

G.S. 8-57 provides in pertinent part that "[n]othing herein shall render any spouse competent or compellable to give evidence against the other spouse in any criminal action or proceeding," with certain stated exceptions.[8] This portion of the

8. The Supreme Court case of *State v. Freeman*, 302 N.C. 591, 276 S.E. 2d 450 (1981), modified the common law rule embodied in G.S. 8-57 and held that spouses are incompetent to testify against one another in a criminal proceeding *only if* the substance of the testimony concerns a confidential communication between the spouses during the duration of their marriage. Although an application of this ruling would clearly defeat defendant Atkinson's claim, we read it as being prospective only and not applicable to this case which was tried before *Freeman* was filed.

statute has been interpreted to prohibit the admission of evidence of statements made by one spouse implicating the other. *See State v. Dillahunt*, 244 N.C. 524, 94 S.E. 2d 479 (1956). As pointed out by the State, however, G.S. 8-57 is a codification of a common law rule of evidence, *State v. Freeman*, 302 N.C. 591, 276 S.E. 2d 450 (1981), and, as such, is subject to the same exceptions which pertain to the common law rule. One of the exceptions is that, when one spouse is made the agent of the other spouse, the statements of the agent are admissible against the principal despite the spousal relationship. *State v. Lemon*, 92 N.C. 790 (1885). We believe this is analogous to the situation involving co-conspirators who are spouses and that it controls the issue before us. In addition, we would note that none of the numerous exceptions taken by defendant Atkinson pertained to evidence related to her or to her involvement in the conspiracy. There has been no prejudicial error, and this assignment of error is overruled.

[21] Defendant Atkinson also assigns error to the refusal of the trial court to allow evidence of her involuntary commitment and hospitalization records. Evidence at trial tended to show defendant Atkinson's involvement in the conspiracy in June 1974, during parts of 1975, and the summer of 1976. The records of commitment showed that she was in the hospital from July 22, 1976, to October 16, 1976, from March 23, 1977, to March 31, 1977, and from April 2, 1977 to June 6, 1977. We agree with the State that such evidence had no logical tendency to prove or disprove any fact in issue and was, therefore, irrelevant. This assignment of error is overruled.

[22] Finally we review defendant Atkinson's argument that the trial court erred in denying her request for instructions that her mere subsequent possession of the proceeds of her husband's crimes is not sufficient to establish an agreement between them to commit the crime. In support of this argument, defendant cites the case of *State v. Phillips*, 240 N.C. 516, 82 S.E. 2d 762 (1954), where the Supreme Court noted that conspiracies cannot be established merely by evidence of association which is "normal for persons living in the marital state." This argument, however, overlooks the clear evidence showing that Atha Atkinson was a participant in the conspiracy: her pick-up of drugs, her purchase of heroin from Laura Smith, and her knowledge of problems with money within the conspiracy. Under this evidence, defendant's re-

quested instructions were not required and the trial court properly refused to give such instructions. This assignment is overruled.

We have reviewed the remaining assignments of error brought forward by defendant Atkinson, and in those assignments we find no error. Due to the court's instructions on vicarious liability, however, we reverse defendant Atkinson's conviction of the substantive counts. Her conviction for the conspiracy must stand, but, because her sentence for this crime was consolidated with the crime of possession, we must remand for re-sentencing on the conspiracy alone.

The results are:

For error in defendant Overton's trial for possession, manufacture, and sale or delivery of heroin, there must be a

New trial.

In defendant Overton's trial for conspiracy, we find

No error, but remand for resentencing.

In defendant Smedley's trial for conspiracy, we find

No error.

For error in defendant Ruviwat's trial for possession and sale or delivery of heroin, there must be a

New trial.

In defendant Ruviwat's trial for conspiracy we find

No error.

Defendant Atkinson's convictions for possession, manufacture, and sale or delivery of heroin are

Reversed.

In defendant Atkinson's trial for conspiracy, we find

No error, but remand for resentencing.

Judges HEDRICK and ARNOLD concur.

UNITED LEASING CORPORATION v. RANDALL C. MILLER AND POWE, PORTER, ALPHIN & WHICHARD, P.A.

No. 8114SC1349

(Filed 21 December 1982)

1. **Rules of Civil Procedure § 15.1— denial of motion to amend complaint—undue delay—no abuse of discretion**

In an action for attorney malpractice brought by a third party not in privity with defendant, the trial court did not abuse its discretion by denying plaintiff's motion to amend its complaint to include a second claim for relief in contract based upon a third party beneficiary theory. Plaintiff did not file its proposed amendment until some seven months after a previous opinion by the appeals court was filed, over five years after the complaint was filed and six years after the events in question. G.S. 1A-1, Rule 15(a).

2. **Attorneys at Law § 5.1— negligence of attorney in title search—contributory negligence of plaintiff—involuntary dismissal against plaintiff proper**

In an action in which plaintiff alleged negligence on the part of defendant attorney in failing to discover a lien on properties held by plaintiff as collateral for a loan with defendant's client, plaintiff's lessee, the trial court did not err in entering an involuntary dismissal pursuant to G.S. 1A-1, Rule 41(b) against the plaintiff on the grounds of contributory negligence. Plaintiff had notice of the first deed of trust in favor of a bank prior to closing the loan and failed to either pursue the discrepancies between the title search provided by defendants and a letter from its lessee's accountant or to inquire of defendants about the possibility of a deed of trust on the property having been overlooked in defendants' title search, despite the opportunity having presented itself by their continued communication about the transaction prior to closing. Plaintiff was not entitled to rely solely on defendants' title rundown letter for information regarding liens on the disputed property as it had constructive notice of the deed of trust.

APPEAL by plaintiff from *Herring, Judge.* Judgment entered 29 May 1981 in Superior Court, DURHAM County. Heard in the Court of Appeals 22 September 1982.

This is an action for attorney malpractice brought by a third party not in privity with defendant. Plaintiff, United Leasing Corporation ("ULC"), is a lessor of equipment. Defendant, Randall C. Miller, a lawyer, and the law firm by which he was employed, Powe, Porter, Alphin & Whichard, P.A., were hired by plaintiff's proposed lessee, Burlington Motor Hotel Owners ("Hotel Owners") to conduct, among other things, a title examination on the properties which were to serve as collateral for plaintiff's leasing agreement with Hotel Owners. Defendant furnished plaintiff a "title

rundown" letter which failed to disclose the existence of a deed of trust in favor of North Carolina National Bank ("NCNB") on one of the collateral properties. Subsequently, the lease went into default and plaintiff was unable to obtain full satisfaction against the collateral.

Plaintiff initiated this action against defendant Miller and his law firm by filing a complaint on 24 July 1975, alleging that defendant negligently failed to discover the existence of a lien. Plaintiff sought to recover actual damages in the amount of $65,000, representing approximately the value of the undisclosed lien, and special damages in the amount of $364,698.44, representing the value of the total original security obligation. Defendant filed an answer raising several defenses and a motion to dismiss pursuant to G.S. 1A-1, Rule 12(b)(6). After a hearing on 17 January 1979, Judge Herring granted the defendants' Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted. At that time plaintiff gave notice of appeal. The following day plaintiff unsuccessfully sought to have the dismissal set aside and to amend its pleadings on a third party beneficiary theory. The plaintiff then appealed the dismissal of its action to this Court.

In an opinion filed 4 March 1980, the trial court's dismissal of plaintiff's claim was reversed and remanded. This Court ruled that while the complaint did state a claim in tort for negligence arising from the breach of a common law duty of care flowing from the parties' non-contractual working relationship, it nevertheless failed to state a claim in contract on a third party beneficiary theory. In concluding, this Court stated: "Our holding does not preclude . . . the plaintiff from renewing its motion to amend." *United Leasing Corp. v. Miller*, 45 N.C. App. 400, 408, 263 S.E. 2d 313, 319 (1980). (*"United Leasing" I*)

Seven months later on 17 October 1980, plaintiff filed a motion for leave to amend its complaint and include an alternative claim for relief on the theory that plaintiff was an intended third party beneficiary of the contract between Hotel Owners and defendants. The gravamen of plaintiff's proposed amendment is defendants' negligent performance of their title search; the defendants' duty to plaintiff flowing from the contractual relationship of third party beneficiary. Plaintiff's motion to amend was denied by Judge Brewer in an order filed 4 December 1980.

Thereafter, the case was tried before Judge Herring, sitting without a jury, solely on a tort theory of negligence. The trial court concluded that plaintiff had failed to show that it is entitled to any relief and granted defendants' motion for involuntary dismissal pursuant to G.S. 1A-1, Rules 41(b) and 52(a). Specifically, the court concluded that notwithstanding the negligence of the defendants, the plaintiff's own negligence was a proximate cause of its injury and therefore, the doctrine of contributory negligence barred recovery by plaintiff. From a judgment dismissing the plaintiff's complaint with prejudice, the plaintiff appeals.

Frederick J. Sternberg, for the plaintiff appellant.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by Michael E. Weddington, for defendant appellee.

JOHNSON, Judge.

Plaintiff presents four questions for review: (1) whether plaintiff's motion for leave to amend its complaint should have been allowed, (2) whether the court erred in excluding certain testimony, (3) whether the court erred in entering an involuntary dismissal, and (4) whether the court erred in refusing to reopen the case to receive documentary evidence after plaintiff had rested.

In passing upon plaintiff's arguments in this opinion, we take judicial notice of our own record in *United Leasing I.* 1 Brandis, N.C. Evidence § 13 (2d Rev. Ed. 1982).

I

[1] Plaintiff contends that the court erred in denying its motion to amend the complaint to include a second claim for relief in contract based upon a third party beneficiary theory. It is well established that a motion under G.S. 1A-1, Rule 15(a) for leave of court to amend a pleading is addressed to the sound discretion of the trial judge and the denial of such motion is not reviewable absent a clear showing of an abuse of discretion. *Kinnard v. Mecklenburg Fair,* 46 N.C. App. 725, 266 S.E. 2d 14 (1980); *Hudspeth v. Bunzey,* 35 N.C. App. 231, 241 S.E. 2d 119 (1978). The trial court stated no reason for the denial of plaintiff's motion. In the absence of any declared reason for the denial of leave to

amend, this Court may examine any apparent reasons for such denial. *Kinnard v. Mecklenburg Fair, supra.*

Rule 15(a) of the North Carolina Rules of Civil Procedure is virtually identical to its federal counterpart. *Public Relations, Inc. v. Enterprises, Inc.*, 36 N.C. App. 673, 245 S.E. 2d 782 (1978). Rule 15(a) states that "leave shall be freely given when justice so requires." In interpreting the federal rule counterpart, the United States Supreme Court held that the trial judge abuses his discretion when he refuses to allow an amendment unless a justifying reason is shown. The court set forth certain areas of possible justification for denying amendments: (a) undue delay, (b) bad faith or dilatory tactics, (c) undue prejudice, (d) futility of amendment, and (e) repeated failure to cure defects by previous amendments. *Foman v. Davis*, 371 U.S. 178, 9 L.Ed. 2d 222, 83 S.Ct. 227 (1962).

The plaintiff's motion for leave to amend was not timely. In its brief plaintiff concedes that its amendment is not offered on the basis of newly discovered facts or upon any other facts not known to plaintiff in 1975, when the complaint was filed. Rather, plaintiff argues that there was no law in North Carolina as to whether claims for relief from attorney malpractice were actions sounding in tort or contract until the ruling in *Insurance Company v. Holt*, 36 N.C. App. 284, 244 S.E. 2d 177 (1978) established that such actions sound in contract; therefore, plaintiff was justified in electing to proceed with a tort theory. Furthermore, plaintiff contends that prior to this Court's 1980 ruling in *United Leasing I* recognizing the doctrine of third party beneficiary in attorney malpractice suits, it would have been a "vain thing" for plaintiff to include such a claim for relief in its complaint.

The record discloses that on the day following the 17 January 1979 dismissal of its action plaintiff filed a motion for relief from the dismissal pursuant to Rule 60(b)(6) of the North Carolina Rules of Civil Procedure. The motion states, *inter alia*, the following reason for plaintiff's entitlement to relief:

> (10)(c) That the complaint of the plaintiff shows an affirmative duty on the part of the defendants whose certified title directly to the plaintiff *under doctrines of either privity or third party beneficiary sufficiently to sustain the complaint.* (Emphasis added.)

Apparently plaintiff did not consider pleading a third party beneficiary claim to be a vain endeavor when filing its 1979 motion for relief. While plaintiff was precluded from filing its amendment to the complaint after giving notice of appeal from the order of dismissal, no justification is given for plaintiff's failure to plead its contract claim either (1) in its original complaint; (2) after *Insurance Co. v. Holt, supra* was filed 16 May 1978 and prior to the 1979 hearing on defendants' Rule 12(b)(6) motion; or (3) immediately following the filing of this Court's opinion in *United Leasing I.* That opinion states:

> To establish a claim based on the third party beneficiary contract doctrine, a complainant's allegations must show: (1) the existence of a contract between two other persons; (2) that the contract was valid and enforceable; and (3) that the contract was entered into for his direct, and not incidental benefit.

45 N.C. App. at 406, 263 S.E. 2d at 317. However, plaintiff did not file its proposed amendment until 17 October 1980, some seven months after the opinion was filed, over five years after the complaint was filed and six years after the events in question. As the material facts were clearly known to plaintiff from the outset, plaintiff's delay was entirely undue. Plaintiff has not carried its burden of proving that the trial court abused its discretion in denying plaintiff's motion to amend.

II

[2] The major issue in this appeal is whether the plaintiff's own contributory negligence precludes any recovery for losses sustained as a result of plaintiff's leasing agreement with Hotel Owners. For reasons set forth herein, we find no error in the entry of an involuntary dismissal against the plaintiff on the grounds of contributory negligence.

A

At the close of plaintiff's evidence, defendants moved for dismissal pursuant to G.S. 1A-1, Rule 41(b). The pertinent portion of Rule 41(b) provides:

> "After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the de-

fendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a)."

Under Rule 41(b) the judge, as trier of the facts, may weigh the evidence, find the facts against plaintiff and sustain defendant's motion at the conclusion of his evidence even though plaintiff has made out a prima facie case which would have precluded a directed verdict for defendant in a jury trial. *Helms v. Rea*, 282 N.C. 610, 194 S.E. 2d 1 (1973).

The Supreme Court recently clarified the standard which the trial judge must apply in testing the sufficiency of the evidence under Rule 41(b) in *Dealers Specialties, Inc. v. Neighborhood Housing Services, Inc.*, 305 N.C. 633, 291 S.E. 2d 137 (1982). The Court noted that previously two different standards had been applied to Rule 41(b) motions; (1) that the judge is to evaluate the evidence without any limitations as to the inferences which the court must indulge in favor of the plaintiff's evidence on a similar motion for a directed verdict in a jury case, *Bryant v. Kelly*, 10 N.C. App. 208, 213, 178 S.E. 2d 113, 116 (1970), *rev'd on other grounds*, 279 N.C. 123, 181 S.E. 2d 438 (1971), and (2) that the evidence must be viewed in the light most favorable to the plaintiff, *Sanders v. Walker*, 39 N.C. App. 355, 250 S.E. 2d 84 (1979). The Court stated that the correct rule was set forth in *Bryant v. Kelly;* the judge is not obliged to consider plaintiff's evidence in a light most favorable to plaintiff. 305 N.C. at 639, 291 S.E. 2d at 140.

When the motion to dismiss is allowed, the trial judge must determine the facts and render judgment against the plaintiff. The trial judge's findings are conclusive on appeal if supported by any competent evidence even though there may be evidence to support findings to the contrary. *Bryant v. Kelly, supra; Gibbs v. Heavlin*, 22 N.C. App. 482, 206 S.E. 2d 814 (1974).

In the case under discussion the trial judge made the following findings of fact relative to plaintiff's acts of negligence:

> 9. On or prior to May 21, 1974 plaintiff's officer, Mr. Tennent, received from Charles McMillan, in response to the requirement of the commitment letter, a letter dated May 10, 1974 concerning first mortgage balances on Alamance County real estate owned by him and Houston P. Sharpe. This letter indicated an outstanding first mortgage existed on Mr. Sharpe's approximately 7.8 acre tract in favor of North Carolina National Bank.
>
> 10. The receipt by Mr. Tennent of Mr. McMillan's May 10, 1974 letter incited inquiry on the part of Mr. Tennent with respect to the existence of a first mortgage in favor of North Carolina National Bank on the approximately 7.8 acre Sharpe property. Mr. Tennent made, or attempted to make, inquiry of both Mr. McMillan and Mr. Sharpe concerning this mortgage, but did not get any response that resolved the questions raised concerning this mortgage. Mr. Tennent did not make any inquiry of defendants concerning this matter.

A third finding of fact may have buttressed the court's conclusion of negligence.

> 6. It was plaintiff's requirement that in collateralizing the lease transaction with Burlington Motor Hotel Owners via the deeds of trust on real estate of the partners, the plaintiff obtained an equity position of at least $400,000; however, defendants were never made aware of any particular equity position that plaintiff desired to attain.

The plaintiff's failure to resolve the questions raised concerning the existence of an encumbrance in favor of NCNB prior to closing, was found to be a proximate cause of harm to the plaintiff. These findings are deemed conclusive on appeal if supported by competent evidence even though there may be evidence to support findings to the contrary. *Bryant v. Kelly, supra; Gibbs v. Heavlin, supra.* The record in this case amply supports the conclusion that plaintiff was contributorily negligent.

B

The key factual issue in this appeal is whether the documents before Mr. Tennent gave notice of the existence of the second lien

on the Sharpe property, which was not disclosed by defendants' title search. The evidence presented at trial shows that following some preliminary negotiations between William W. Tennent, III, Vice President/Regional Manager of plaintiff corporation and certain partners of Hotel Owners, Tennent drew up a handwritten checklist of plaintiff's requirements for the transaction. The list was incorporated, in a somewhat altered form, in a commitment letter dated 1 May 1974, which plaintiff delivered to Hotel Owners. By its commitment letter, plaintiff agreed to provide lease financing for the Hotel Owners' new project, subject to the furnishing of certain documents and compliance with certain conditions set forth therein. Conditions (7) and (8) were:

> 7. Deeds of Trust, appraisals, and title rundown letters on the following property reflecting approximately the equity shown in financial statements as well as valid 2nd lien.
>
> . . . Houston Sharpe—building, Graham, North Carolina, Highway 85; 100 (sic) acres land, Graham, North Carolina . . .
>
> 8. Names, addresses, and exact amount owing on 1st Deeds on above properties will be supplied us.

The Hotel Owners partnership was to have its attorney examine the title to the property occupied by the motel and each of the collateral properties listed in condition (7), render title opinions, prepare deeds of trust and perform certain other specified services.

The information listed in condition (8) was to be supplied to plaintiff by the partners themselves to substantiate information already obtained by Tennent. Prior to the delivery of the commitment letter, the Hotel Owners partners had provided personal financial statements to Mr. Tennent. These reflected a certain total equity position (excess of property values over current encumbrances thereon) of the partners in the properties listed in condition (7) of the commitment letter. The financial statement forms were supplied by plaintiff; however, at the time of trial they were no longer in plaintiff's files. Tennent testified that the forms called for the value of the real estate as well as the mortgage, mortgage balance and mortgage holder; but that he could not remember whether the NCNB mortgage was listed on Mr. Sharpe's financial statement. The balances due on the first mort-

gages were needed to compute plaintiff's equity position. Mr. Tennent testified that the "primary thing" for plaintiff was attaining an equity position of approximately $400,000 in the lease transaction by the second liens sought to be attached to the collateral properties. Although it was the equity position and not the particular status of first or second lien that mattered, Tennent admitted that at no time was the equity level sought communicated by plaintiff to defendants.

Hotel Owners employed defendants to assist them with their obligations under the commitment letter. Charles McMillan, a partner of Hotel Owners, contacted defendant Miller by telephone. During this conversation McMillan had before him Tennent's handwritten checklist. The document was later furnished to Miller by McMillan. Miller testified that among other services, he undertook to perform "item number twelve (b) as it relates to a letter on each property stating it's a valid second lien and that it's properly recorded." This item roughly parallels condition (7) of the commitment letter. The task defendants specifically undertook is written as follows:

> 12(b) Title search and letter on each property stating it is a valid second lien and that we are properly recorded. Attorney must be qualified R/E man.

Defendant undertook no responsibilities for determining or acquiring the appraisal values or first lien current balances due with respect to the collateral properties. These tasks are listed as items twelve (c) and (d) on Tennent's checklist.

> (12)(c) Appraisal on each property in simple letter form from a qualified appraiser. Appraisal shall be satisfactory to ULC and reflect appx. value or mor . . . as listed on financial statements.
>
> (12)(d) The names of 1st mortgage holders and account numbers will be supplied along with evidence (Amortization Schedule or letter) of balance on 1st loan.

Item 12(d) roughly parallels condition (8) of the commitment letter.

As to the information listed in item 12(d), Miller testified that he and Mr. McMillan determined that "because of the problems of

going through banks when you had no particular privity, it would require some letter to get access to that, that the partners, themselves would obtain that information as to their individual loans." Mr. Miller further testified that as Mr. Sharpe was not available at that time to provide his own information, McMillan, who was Sharpe's business partner and public accountant, undertook to get the payoff balances on Sharpe's obligations. Mr. Tennent testified that Mr. Sharpe was unavailable because "he was incarcerated in the federal penitentiary."

The following picture emerges from the documents and witnesses' testimony: (1) the plaintiff had some equity position information on the collateral properties from the Hotel Owners partners themselves; (2) plaintiff nonetheless wanted verification of that information from outside sources, and items (12)(b)-(d) reflect three separate sources of verification for the information—a title search, a real estate appraisal, and possibly a bank or financial institution letter regarding first mortgage payoff balances; (3) the purpose of defendants' item (12)(b) "title rundown" letter was to inform plaintiff as to what liens were against the property, thus substantiating the information already provided by the Hotel Owners, and to verify that once properly recorded, plaintiff's deeds of trusts would be valid second liens; and (4) verification of the equity shown in the financial statements would be made by plaintiff subtracting the item 12(d) balances due on first mortgage from the item (12)(c) appraised values of the property. Defendants were not looked to for the first mortgage payoff balances.

Defendants then examined the public records of Alamance County and reported their findings to plaintiff in a letter dated 9 May 1974. Deeds of trust were attached, and the letter stated that when the deeds were properly recorded, they would be valid second liens on the property subject only to the matters disclosed therein. Defendants neither discovered nor reported the existence of a first deed of trust in favor of NCNB on a 9.97 acre tract of land owned by Houston P. Sharpe. With respect to the Sharpe property, defendant's title examination letter disclosed only a deed of trust in favor of First Federal and described the subject tract as follows:

> This Deed of Trust covers a 400 foot deep tract of the subject premises fronting on Maple Street and is described as a 2.136 acre tract.

Attached to the title rundown letter is "Exhibit E—2.136 Acre Tract," which refers to the Sharpe property and indicates that the 2.136 acre tract is "a *portion* of a 9.97 acre tract." (Emphasis added.)

Plaintiff's officer, Tennent, admitted that as a result of defendants' services, "so far as I know, we got a valid second lien on the property before closing." Tennent received two other documents relevant to our inquiry prior to the closing of the transaction on 24 May 1974. The first, a letter dated 10 May 1974 from Mr. McMillan, listed the outstanding first mortgage balances on properties owned by McMillan and Sharpe.[1] Tennent believes he received this letter on or about 21 May 1974. The McMillan letter lists the following first mortgage balances due for the Sharpe property as called for in the plaintiff's checklist and commitment letter:

> 3. Houston P. Sharpe—Building, 426 South Maple Street, Graham, N.C.
> Loan #111011522 First Federal Savings and Loan, Burlington, N.C.
> Balance May 10, 1974—$169,061.79
>
> 4. Houston P. Sharpe—7 1/2 acres land 426 South Maple Street, Graham, N.C.
> Loan #00018 North Carolina National Bank
> Balance May 10, 1974—$30,468.75

The second document is an appraisal letter dated 10 May 1974 sent by J. Richard Dodson to plaintiff. The letter gives a description and market values for each of the collateral properties. The Sharpe property is described as follows:

1. Although Mr. McMillan's letter was not introduced into evidence, the letter was used during the cross-examination of plaintiff's officer, William Tennent. The letter also formed the basis of the trial court's findings of fact regarding the plaintiff's contributory negligence. Therefore, we deem it appropriate to take judicial notice of the letter's contents as they appear in our own record of *United Leasing I.*

> 4. An industrial plant located at 426 S. Maple Street . . . The building contains a total area of 30,000 S.F. . . . The land is approximately 10 acres with 478 feet on S. Maple Street . . . .

A separate column listed the total market values for each property. Mr. Tennent subtracted $169,000 from the $370,000 Sharpe total to compute plaintiff's expected second lien equity position. According to his calculations, the appraisal letter verified the equities as shown in the previously received financial statements of the Hotel Owners partners.[2] Thus, by 21 May 1974 plaintiff had received the desired information from the three sources listed in checklist items (12)(b)-(d).

A comparison of the 9 May 1974 title letter from defendant Miller and the 10 May 1974 balances due letter from McMillan raised a question in Tennent's mind whether the Sharpe tract involved split acreage, and was therefore subject to the two first deeds of trust reported by McMillan. On the one hand, the Miller letter reported a 9.97 acre tract subject only to a deed of trust covering a *400 foot deep tract* of the premises, *fronting on Maple Street,* described as a *2.136 acre tract,* in favor of First Federal. On the other hand, the McMillan letter reported the First Federal deed of trust as covering a *building at 426 South Maple Street* with a balance due of approximately $169,000 and a deed of trust in favor of NCNB on *7 1/2 acres of land at 426 South Maple Street* with a balance due of approximately $30,000.

In addition, the appraisal letter referred to the Sharpe property as an industrial plant located at 426 S. Maple Street and approximately 10 acres of land, with 478 feet on S. Maple Street. This description reflects Tennent's own previous description as shown in his handwritten checklist and 1 May commitment letter—a building and 10 acres of land. Mr. Tennent knew that the total acreage involved on the Sharpe tract did not exceed 10 acres. All of the descriptions of the Sharpe property in Tennent's possession together give a picture of a 9.97 acre tract with an industrial plant, fronting on S. Maple Street, covering approximate-

2. It is unclear to this Court how the calculations which omitted the NCNB balance due could verify the financial statement of Mr. Sharpe unless Sharpe's financial statement also omitted the NCNB information.

ly 2.136 acres and a remaining portion of approximately 7 1/2 acres.

The only discrepancy went to the existence of the NCNB deed of trust on the approximately 7 1/2 acres which were not covered by the 2.136 acre deed of trust in favor of First Federal. Mr. Sharpe, however, was "impossible" to contact. Mr. Tennent attempted unsuccessfully to contact McMillan, Sharpe's accountant. Mr. Tennent did not attempt to discuss the question of a lien discrepancy with defendant Miller despite the fact that he had intended to rely upon defendants' title search to tell him what liens existed against the collateral properties. Tennent testified, "I made the judgment that the lien involved only the hundred and sixty-nine thousand dollars." In other words, although the discrepancy was unresolved, it was Tennent's decision to disregard the information provided by Sharpe's partner and accountant as to the existence of the NCNB lien and rely solely upon the appraisal and defendants' title letter to determine plaintiff's equity position. Mr. Tennent admitted that he was anxious to get the transaction done as "time was of the essence" due to plaintiff's fiscal year ending 31 May 1974. Within a few days after receipt of the McMillan letter, Tennent authorized Miller to close the leasing agreement. A letter dated 27 May 1974 sent from Mr. Miller to Mr. Tennent reflects the fact that Miller received further instructions regarding the closing from Tennent in telephone conversations on 22 and 23 May 1974, one or two days after receipt of the McMillan letter. Yet, at no time did Tennent inquire of Miller about the possibility of a deed of trust on the Sharpe property having been overlooked in Miller's title search, despite the opportunity presented by their continued communication about the transaction.

C

The trial court found plaintiff's failure to resolve the questions raised concerning the existence of an encumbrance in favor of NCNB on the Sharpe property to be a proximate cause of harm to the plaintiff. This finding is amply supported by the record and conclusive on appeal.

Plaintiff argues that it was entitled to rely solely upon defendant's title rundown letter for information regarding liens on

the Sharpe property and should not be charged with notice of the NCNB deed of trust under the facts of this case. We do not agree.

The case of *Perkins v. Langdon*, 237 N.C. 159, 74 S.E. 2d 634 (1953) is instructive on the issue of constructive notice. The court there stated:

> ordinarily where a party has information which is reasonably calculated to excite attention and stimulate inquiry, he is charged with constructive notice of all that reasonable inquiry would have disclosed, the theory being that knowledge which one has or ought to have under the circumstances is in legal contemplation imputed to him. (Citations omitted.)
>
> But to charge one with notice, the activating information known to the party sought to be charged must ordinarily be such as may reasonably be said to excite inquiry respecting the particular fact or facts necessary to be disclosed in order to fix the party charged with notice. (Citations omitted.)
>
> Also implicit in the principles that underlie the doctrine of constructive notice is that concept that before one is affected with notice of whatever reasonable inquiry would disclose, the circumstances must be such as to impose on the person sought to be charged a duty to make inquiry. (Citations omitted.)

237 N.C. at 167-68, 74 S.E. 2d at 641-42.

Applying these principles to the actions of Mr. Tennent regarding NCNB deed of trust information received from McMillan, it is apparent that this "activating information" did "excite inquiry" on the part of Mr. Tennent. He took some action to inquire as to the correctness of that information in seeking to contact Mr. McMillan. The circumstances of receipt of this information were such to impose on Mr. Tennent a duty to make a reasonable inquiry. Tennent was on the eve of closing a $350,000 lease transaction in which he desired to attain a $400,000 equity position and received information which, if correct, would adversely affect that equity position. Finally, Mr. Tennent failed to make a *reasonable* inquiry because he did not inquire of defendants, the title attorneys involved, with respect to the apparent conflict in first mortgage information regarding the

Sharpe property. Therefore, plaintiff is chargeable with notice of the NCNB deed of trust on the Sharpe property.

The key factual point in the determination of contributory negligence in the present action is that plaintiff received notice prior to closing its lease transaction with Hotel Owners, of the likely existence of the NCNB deed of trust against the Houston P. Sharpe property. While no single description of the Sharpe property before Mr. Tennent precisely mirrored any other, the failure to resolve the question that arose in his mind regarding the NCNB deed of trust, and Tennent's decision to compute his equity position, the key figure in the transaction, without taking into account the reported $30,468.75 balance due was unmistakably a proximate cause of plaintiff's subsequent failure to obtain the satisfaction it expected from the collateral properties once the lease went into default.

The trial judge, in evaluating the sufficiency of plaintiff's evidence, was entitled to view the failure of Mr. Tennent to resolve the question regarding the NCNB deed of trust by undertaking a reasonable inquiry prior to closing the transaction as negligence on Tennent's part imputable to his employer, the plaintiff, without regard to whether there is other evidence which might sustain contrary findings. *Bryant v. Kelly, supra; Gibbs v. Heavlin, supra.* The record shows that plaintiff was contributorily negligent and the court did not err in granting the involuntary dismissal.

In view of our conclusion on the issue on plaintiff's contributory negligence, we need not address the other questions presented.

Affirmed.

Chief Judge MORRIS and Judge BECTON concur.

ONSLOW WHOLESALE PLUMBING & ELECTRICAL SUPPLY, INC. v. LEONARD FISHER AND J. DANIEL FISHER

No. 814SC1275

(Filed 21 December 1982)

Corporations § 14— directive to officer to purchase stock for corporation—officer's purchase of stock for himself—breach of fiduciary duties

Where defendant was the general manager and an officer and director of plaintiff corporation, a resolution by the original shareholders of the corporation gave the corporation the right of first refusal to purchase any stock of the shareholders, a directive given to defendant by plaintiff's president and chairman of its board of directors to purchase for plaintiff the stock of named shareholders constituted board action pursuant to the provisions of G.S. 55-29(a)(3), and defendant made no objection at the time plaintiff's president and board chairman directed him to purchase the stock for plaintiff, defendant's purchase of the stock for his own benefit constituted a breach of his statutory fiduciary duty as an officer and director under G.S. 55-35, a breach of his duty under his contract of employment as general manager to follow the "orders, advice, and direction" of plaintiff's board of directors, and a breach of his fiduciary duty as an agent of plaintiff corporation to carry out the directive of the board of directors. Therefore, plaintiff corporation was entitled to an order requiring defendant to transfer such shares of stock to the plaintiff.

Judge HEDRICK dissents.

APPEAL by plaintiff from *Barefoot, Judge.* Judgment entered 27 July 1981 in Superior Court, ONSLOW County. Heard in the Court of Appeals 16 September 1982.

This action arose after defendant Leonard Fisher purchased 25,000 shares of plaintiff corporation's stock. Subsequent to this purchase, the defendant transferred 1,000 shares to his son, who is also named as a defendant. In its complaint, plaintiff alleged that on 23 August 1979 plaintiff and defendant Leonard Fisher entered into a renewal contract whereby plaintiff employed defendant as its general manager; that on 1 May 1981 plaintiff's president Dan Rand, acting for plaintiff, instructed defendant to purchase the shares held by three named shareholders on behalf of plaintiff, and that defendant thereafter informed Rand that he had purchased these shares for himself. Plaintiff alleged that by disregarding the instructions given to him, the defendant breached a fiduciary duty owed to plaintiff and acted in bad faith. Plaintiff further alleged that defendant intended to gain control of

the corporation at the next meeting and to increase his salary substantially. Plaintiff prayed for punitive damages.

In a second claim for relief, plaintiff alleged that at the time of the purchase of the stock by defendant Leonard Fisher, defendant was also a director and vice-president of plaintiff; and that his conduct constituted a violation of his statutory duty as a director and officer. Plaintiff further alleged that by purchasing the shares for himself, defendant diverted a corporate opportunity.

In the final claim for relief, plaintiff alleged that defendant had breached his employment agreement. Plaintiff prayed for an order declaring that defendant and his son hold the stock in trust for plaintiff; that the stock be transferred to plaintiff; that plaintiff be allowed to discharge defendant; and that plaintiff be awarded punitive damages.

In response to this complaint, defendants moved for summary judgment. From a judgment granting summary judgment in defendants' favor and denying plaintiff's motion for partial summary judgment, plaintiff appeals.

White, Allen, Hooten, Hodges & Hines, by John M. Martin, for plaintiff-appellant.

Jeffrey S. Miller, for defendant-appellees.

HILL, Judge.

Plaintiff has assigned error to the granting of defendants' motion for summary judgment on two grounds. It first argues that "the uncontradicted facts in the pleadings, affidavits, deposition and transcript affirmatively showed that the defendant, Leonard Fisher, violated his fiduciary duties owed to the plaintiff as its general manager, agent, officer and director by purchasing for his own benefit those shares of stock which he had been directed to purchase on behalf of the plaintiff corporation." Plaintiff then argues that the uncontradicted facts show that plaintiff had the power pursuant to G.S. 55-52(c)(4) to acquire its own shares. Plaintiff also assigns error to the denial of its motion for partial summary judgment.

"Where a motion for summary judgment is granted, the critical questions for determination upon appeal are whether on

the basis of the materials presented to the trial court, there is a genuine issue as to any material fact and whether the movant is entitled to judgment as a matter of law." *Oliver v. Roberts*, 49 N.C. App. 311, 314, 271 S.E. 2d 399, 401 (1980). After examining the undisputed facts, we have determined that the trial court erroneously awarded summary judgment on all issues in defendants' favor. The facts instead show that defendant Leonard Fisher violated a fiduciary duty owed to plaintiff corporation.

The following undisputed facts are gleaned from the record: On 13 June 1973 plaintiff corporation was formed and shares of stock were issued to ten shareholders. On 16 July 1973 the shareholders unanimously adopted a resolution giving plaintiff first option or right of refusal to purchase any of their stock. On 5 November 1973 defendant was employed as plaintiff's general manager. An employment contract was later executed by plaintiff and defendant wherein defendant agreed to be general manager "subject to the general supervision and pursuant to the orders, advice and direction of corporation's Board of Directors." The contract further provided:

SECTION TWO

BEST EFFORTS OF MANAGER

> Manager agrees that he will at all times faithfully, industriously, and to the best of his ability, experience, and talents, perform all of the duties that may be required of and from him pursuant to the express and implicit terms hereof, to the reasonable satisfaction of employer.

In 1979 defendant became vice-president of plaintiff corporation. Earlier, defendant had been given and had exercised an option to purchase stock in plaintiff. In the latter part of April or early May 1981, defendant met with Dan Rand, plaintiff's president and chairman of the board of directors, and Donald Scott, plaintiff's certified public accountant. At this meeting, the three men discussed the hiring of defendant's son by plaintiff. Also at this meeting, Rand instructed defendant to purchase for the corporation all outstanding shares of stock other than those owned by Dan Russell, Rand and defendant. In his deposition, defendant testified that he attended this meeting as general manager of the corporation. Defendant further testified:

> I did not object at that time to the corporation buying in the stock. I didn't say that the corporation didn't have the right or the power or the authority to do it. I didn't say that, but at that time they didn't because the Board of Directors hadn't met and instructed me to buy it. . . . I did not tell Dan Rand, at any time during the meeting, that I would not purchase this stock on behalf of the corporation.

After the meeting, defendant purchased shares of stock in his own behalf from Norman Mercer, James Batchelor and Marshall Batchelor. Defendant never informed these shareholders that he had been instructed to purchase their shares for plaintiff.

Based upon the foregoing undisputed evidence and the pertinent statutes governing corporations, defendant breached a fiduciary duty owing to plaintiff when he purchased the stock of James and Marshall Batchelor. There, however, appears to be a genuine issue of material fact as to whether defendant breached this duty when he purchased Norman Mercer's stock. Defendant testified that before purchasing Mercer's shares, he informed Rand of the asking price and was told not to purchase the stock at this price. If a jury should find this testimony to be true, then plaintiff would have exercised its right of first refusal to purchase the stock.

At the time of the stock purchase at issue, defendant was both a director and officer of plaintiff corporation. G.S. 55-35 provides that "[o]fficers and directors shall be deemed to stand in a fiduciary relation to the corporation and to its shareholders and shall discharge the duties of their respective positions in good faith, and with that diligence and care which ordinarily prudent men would exercise under similar circumstances in like positions." As general manager of plaintiff, defendant had a contractual duty to follow the "orders, advice, and direction" of plaintiff's board of directors. Defendant breached both his statutory and contractual duties when he disobeyed Rand's instruction to purchase stock in plaintiff's behalf.

Defendant's argument, that he was under no duty to purchase the stock for plaintiff since the board of directors had not instructed him to purchase the stock, is without merit. There was undisputed evidence that the board of directors customarily made decisions on an informal basis. G.S. 55-29(a)(3) characterizes action

taken by the required majority of directors without a meeting as board action if "[t]he directors . . . are accustomed to take informal action and this custom is generally known to the shareholders and if all the directors . . . know of the action in question and no director . . . makes prompt objection thereto." On the date that Rand instructed defendant to purchase stock in plaintiff's name, the board of directors consisted of Rand, Dan Russell, Norman Mercer and defendant. The record shows that Rand informed Russell of this action and that Russell made no objection. Defendant admitted that he did not object at the time Rand instructed him to purchase the stock. He also admitted that he and Rand discussed a price that defendant should offer per share. Defendant's conduct could be construed only as consensual. Mercer was never made aware of plaintiff's intention to buy his stock because of defendant's failure to inform him. Defendant intentionally disregarded the directive to purchase Mercer's stock for plaintiff and, thereby, effectively denied Mercer the right either to object or consent to such purchase. This Court will not allow defendant to benefit from his wrongdoing and, therefore, finds no merit to the argument that Mercer objected to plaintiff's purchase of his stock by selling this stock to defendant.

The undisputed facts further show that defendant breached his fiduciary duty as an agent of plaintiff corporation when he disobeyed the directive to purchase stock on plaintiff's behalf. This Court has been unable to find a North Carolina case involving a similar fact situation. The Virginia courts, however, have provided us with a pertinent case. In *Kessler v. Commonwealth Doctors Hospital, Inc.*, 212 Va. 497, 185 S.E. 2d 43 (1971), the Supreme Court of Virginia affirmed the chancellor's decision that Kessler breached a fiduciary duty when he purchased shares of stock in the defendant corporation. The facts therein show that in 1966 a resolution was passed by the board of directors fixing a deadline for the purchase of stock by the directors. The resolution provided that if by a specified date a director had given no notification of his intention to buy stock, then the director who was the licensed agent to sell the stock could dispose of the unclaimed stock among the directors willing to purchase. Kessler was designated the licensed agent. He was also a director and vice-president of defendant corporation. The court found that "Kessler did owe a fiduciary duty to the corporation of which he

was an officer, a director and the Licensed Agent for the sale of stock, to carry out his assigned responsibilities." *Id.*, at 503-504, 185 S.E. 2d at 46. The Court concluded:

> We construe the corporate resolution of December 15, 1966, to require that Kessler consult all interested directors before selling unclaimed shares to himself or any other director. This the chancellor found that he had failed to do. Even if he acted in good faith, this failure constituted a breach of his duty to Commonwealth. Kessler could purchase the unclaimed shares for himself only if he complied with the terms of the board resolution or made a full disclosure of his intentions to the corporation.

Id., at 503-504, 185 S.E. 2d at 47. In the matter now before us, defendant also breached a duty to plaintiff corporation by willfully failing to carry out the directive of the board of directors.

An examination of agency law bolsters our position. "An agent is a fiduciary with respect to the matters within the scope of his agency." 3 Am. Jur. 2d *Agency* § 199 (1962). As general manager, defendant accepted his employment "subject to the general supervision and pursuant to the orders, advice, and direction of corporation's Board of Directors." As an officer and director, defendant was required to discharge his duties in good faith "and with that diligence and care which ordinarily prudent men would exercise under similar circumstances in like positions." *See* G.S. 55-35. The directive given to defendant by plaintiff's president and chairman of the board of directors constituted board action and was therefore within the scope of defendant's agency. Rand had every reason to believe that defendant would carry out this directive faithfully, since he voiced no objection and since he had been an excellent employee. Defendant then breached his fiduciary duty to plaintiff by secretly purchasing the Batchelors' shares of stock for himself.

> It is a familiar and universally recognized doctrine that a person who undertakes to act as agent for another cannot be permitted to deal in the agency matter on his own account and for his own benefit without the consent of his principal, freely given with full knowledge of every detail known to the agent which might affect the transaction. The agent in such cases cannot thus, without the knowledge and consent of the

> principal, unite his personal and his representative character in the same transaction. . . . In all cases the principal is entitled to the best effort and unbiased judgment of his agent, and an agent is not permitted to assume two distinct and opposite characters in the same transaction—acting for himself and pretending to act for his principal.

3 Am. Jur. 2d *Agency* § 220 (1962). *See also Moore v. Bryson*, 11 N.C. App. 260, 181 S.E. 2d 113 (1971). Defendant was instructed by the plaintiff's president and chairman of the board of directors to buy stock for plaintiff. By his silence and conduct he acquiesced in this action and pretended to act for plaintiff. Defendant instead acted for himself.

The issue of whether plaintiff had the power to acquire its own shares of stock has no bearing upon our conclusion that defendant breached a fiduciary duty. Assuming *arguendo* that the plaintiff's purchase of its stock was *ultra vires*, defendant as a shareholder acquiesced to the purchase and is barred from raising this defense. *See Victor v. Mills*, 148 N.C. 107, 61 S.E. 648 (1908).

An issue was also raised as to whether defendant was aware of the original shareholders' resolution giving plaintiff right of first refusal to purchase their stock. Defendant testified that he was unaware of such a restriction. There was also no evidence that the pertinent stock certificates contained a restriction. Restrictions on the transfer of stock must be stated on the certificate in order to be valid against transferees without notice. R. Robinson, N.C. Corporation Law and Practice § 7-10 (2d Edition 1974). *See also* G.S. 25-8-204. Regardless of the existence of such a restriction and defendant's awareness of it, defendant cannot assume the role of plaintiff's agent in purchasing its stock and then legally purchase the stock for himself.

Defendant relies heavily upon a Pennsylvania case to support his position that he had the right to purchase the stock for himself. In *Vulcanized Rubber & Plastics Company v. Scheckter*, 400 Pa. 405, 162 A. 2d 400 (1960), two of the defendants were lawyers and accountants employed by Vulcanized Rubber & Plastics Company (hereinafter, "the Corporation"). During the period in question, both the Corporation and a syndicate, composed of directors, officers and employees of the Corporation, were attempting to buy the Corporation's common shares. The

syndicate members, which included defendants, entered into a "gentlemen's agreement" that they would not purchase the stock individually. Defendants breached this agreement. The lower court issued a preliminary injunction restraining defendants from voting their stock on the basis that the Corporation had shown a breach of fiduciary duty. The Pennsylvania Supreme Court reversed the order and granted a preliminary injunction. The Court held that the "corporation, as a corporate entity separate and apart from its management group, had no interest in purchasing the stock in issue, nor did it have any corporate interest or connection with the Vulcanized Stock Syndicate which could result in the appellee being legally harmed by the conduct of the appellants." *Id.* at 413, 162 A. 2d at 405. In reaching this conclusion, the *Scheckter* Court cited the following rule:

> Generally speaking, a corporation as such has no interest in its outstanding stock, or in dealings by its officers, directors or shareholders with respect thereto. [Citations omitted.] As a result, in and of itself, there can be nothing improper so far as the corporate entity is concerned with one of its fiduciaries, be he officer, director or otherwise, buying up a controlling number of shares. [Citations omitted.] Nor can it be of any consequence, therefore, if the control is secretly acquired (which as a practical matter will usually be the case, for to do so otherwise will result in a rise in the market price).

Id., at 411-412, 162 A. 2d at 404-405. This general rule should not apply to the situation where an individual as director and shareholder of a corporation consents to the corporation's purchase of its own stock and thereafter by his conduct leads the corporation to believe that he will act as the corporation's agent in the stock purchase, but instead buys the stock for himself.

We also find that the holding in *Scheckter* is not controlling since the facts therein are significantly different from the facts here. In *Scheckter* the Court emphasized, "There being no indication in the record that the board of directors as a body ever considered purchasing any stock, there could not be any existing corporate interest therein." *Id.*, at 415-416, 162 A. 2d at 406. In the record before this Court, there was undisputed evidence that the plaintiff corporation had purchased its stock in the past. In

Scheckter, the record also showed that the corporation would have been financially burdened by any stock purchase. The undisputed facts here reveal that plaintiff had ample surplus available to purchase the shares of stock at issue. Finally, and most importantly, none of the defendants in *Scheckter* had been personally instructed by the corporation's president and chairman of the board of directors to purchase stock for the corporation. Defendant held himself out as an agent of the corporation and in equity and good conscience was bound to act in good faith.

Based upon the record before us, the trial court was required to find as a matter of law that defendant breached its fiduciary duty to plaintiff when he personally purchased the stock of James and Marshall Batchelor. Plaintiff is therefore entitled to an order requiring defendant to transfer these shares to plaintiff.

This Court finds plaintiff's request for an order allowing it to discharge defendant to be a moot issue. Under his employment contract, defendant's employment was to expire 31 August 1982. The contract was to be considered renewed for periods of one year, provided neither party submits a notice of termination.

Plaintiff also sought punitive damages but failed to allege any right to receive either nominal or compensatory damages. A party is not entitled to punitive damages unless a cause of action otherwise exists and at least nominal damages are recoverable. *Clemmons v. Insurance Co.*, 274 N.C. 416, 163 S.E. 2d 761 (1968). Furthermore, plaintiff sought an adequate equitable remedy.

To summarize our holding:

We affirm summary judgment in favor of defendants on the issue of punitive damages.

In all other respects we reverse summary judgment in favor of defendants and find plaintiff to be entitled to summary judgment on the issue of breach of fiduciary duty in regard to defendant Leonard Fisher's purchase of shares of stock from James and Marshall Batchelor.

The matter is remanded for trial on the issue of breach of fiduciary duty in regard to defendant Leonard Fisher's purchase of shares of stock from Norman Mercer.

Affirmed in part; reversed in part and remanded to the trial court for disposition in accordance with the provisions set out herein.

Judge MARTIN concurs.

Judge HEDRICK dissents.

JOHN T. ROPER v. EDWARD H. THOMAS, JESSE M. WALLER, EDWARDS & WARREN, PROFESSIONAL ASSOCIATION, AND JOSEPH WARREN, III

No. 8226SC80

(Filed 21 December 1982)

1. **Rules of Civil Procedure § 15.1— amendments to complaint—no abuse of discretion by trial judge**

The trial judge did not abuse his discretion in an action by a limited partner against the general partners by allowing plaintiff to amend his complaint since (1) none of the amendments could have surprised the defendants, (2) they referred to and were a part of matters that had appeared before in the pleadings, previous amendments and in a deposition of one of the defendants, and (3) the defendants showed no prejudice as a result of the amendments being offered or allowed. G.S. 1A-1, Rules 15(a) and 15(b).

2. **Rules of Civil Procedure § 15— amendments to complaint—relation back—not barred by statute of limitations**

In an action by a limited partner against the general partners to recover the amount of his investments in a limited partnership, the trial court did not err in finding plaintiff's amendments to his complaint related back and were not barred by the statute of limitations. The original complaint generally asserted breach of the partnership agreement and no new, entirely different cause of action was interposed by the amendments. The theory of breach of the partnership agreement was simply expanded to include with specificity another breach, and defendants were on notice of the theory of the suit from the date of filing. G.S. 1A-1, Rule 15(c).

3. **Partnership § 6— action by limited partner against general partners not premature**

An action by a limited partner against the general partners to recover the amount of his investments in a limited partnership was not premature even though plaintiff had not demanded a formal accounting of partnership affairs pursuant to G.S. 59-10 since receiving a formal accounting would have been fruitless. The partnership was a single purpose partnership project and all of its assets were extinguished by a foreclosure.

4. Partnership § 3— breach of obligation under partnership agreement—refusal to apply "business judgment" test—no error

In an action by a limited partner against the general partners of a limited partnership, the trial court did not err in refusing to apply the "business judgment" test in evaluating the defendants' actions where defendants breached their obligations under the partnership agreement and pursued a course of conduct that an ordinary person may reasonably have foreseen as injurious to others.

5. Partnership § 3— duties created by limited partnership agreement on part of general partners

A limited partnership agreement created a duty on the part of the general partners to (1) obtain permanent financing, (2) pay cost overruns before permanent financing was obtained, and (3) pay the construction loan.

6. Partnership § 3— defendant's negligence as proximate cause of plaintiff's injury—sufficiency of evidence

In an action by a limited partner against the general partners to recover the amount of his investments in a limited partnership, the trial court did not err in finding plaintiff had established that defendants' negligence, and not a myriad of outside circumstances, was the cause of plaintiff's injury or loss.

7. Partnership § 6— refusal to certify witnesses as experts in troubled real estate ventures—proper

In an action by a limited partner against the general partners, the trial judge did not err in refusing to certify defendants' witnesses as experts in troubled real estate ventures and in apartment project development since their testimony would have dealt substantially with defendants' actions after their having negligently started the project without permanent or any other type of long term financing, and efforts to salvage the project already in progress were immaterial.

8. Judges § 5— denial of motion for recusal proper

A trial judge properly found that no grounds existed for recusal of another trial judge who called the attorneys for both plaintiff and defendants into his chambers and advised them that, based on the testimony before him, the defendants were absolutely liable to the plaintiff and inquired about settlement possibilities.

APPEAL by defendants Edward H. Thomas and Jesse M. Waller from *Burroughs, Judge.* Judgment entered 2 June 1981 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 15 November 1982.

This is an action by a limited partner against the general partners to recover the amount of his investments in a limited partnership formed under G.S. 59-2 for the purpose of acquiring lands and constructing an apartment complex thereon in Colum-

bia, South Carolina. Plaintiff was allowed to amend his complaint on several occasions over defendants' objections. Defendants' motions to dismiss made at the end of plaintiff's evidence and at the end of all the evidence were dismissed. The trial judge heard the evidence, made findings of fact and conclusions of law, and entered judgment for the plaintiff for the loss sustained by him in the partnership. Defendants appealed.

Boyle, Alexander, Hord & Smith, by Robert C. Hord, Jr., for plaintiff-appellee.

Parker Whedon for defendant-appellants.

HILL, Judge.

In November, 1972, the plaintiff and 21 other people became limited partners with the defendants, Edward H. Thomas and Jesse M. Waller. The parties executed a limited partnership agreement (hereinafter referred to as "LPA"). The partnership was formed to provide for the construction and operation of a 208-unit apartment complex to be known as Fountain Lake Apartments located in Columbia, South Carolina. Prior to the execution of the LPA, all of the partners were furnished with a Private Placement Memorandum (hereinafter referred to as "PPM") outlining the proposed project and its potential risks, profits, and tax consequences. Plaintiff invested a total of $31,200, purchasing two units in the partnership.

Construction of the project began in January, 1973, financed by funds from a construction loan made by Cameron Brown Investment Group. The general contractor on the project was Lone Star Builders of South Carolina, Inc., in which the general partners were principal stockholders. This fact was not disclosed to the limited partners in the PPM or LPA, nor was a marketing needs survey conducted for the City of Columbia.

The construction project encountered difficulties from the beginning, including weather, soil problems, withdrawal of subcontractors, escalating costs and interest rates. When completed, the project had a cost overrun, which the general partners were obligated to pay and did not. A soft rental market added to the woes, and at no time was the project more than 51 per cent occupied. Rental income was approximately $18,000 less per month

than what was required to pay the monthly operating expenses plus principal and interest payments on the projected permanent loan. The general partners were unable to obtain permanent financing, which they were obligated to do under the PPM and LPA. Although the construction loan was extended six months by the lender, the loan was foreclosed subsequently, and plaintiff lost his total investment of $31,200. (He was, however, able to recoup a part of the loss as a tax benefit. By the same token, he must add back as income any sums recouped in this lawsuit.) Further facts will be set forth in the body of the opinion.

[1] Defendants bring forth eight assignments of error. By their first assignment, they contend the trial judge erred in granting plaintiff leave to amend his complaint both before trial and during trial and in refusing to allow defendants to file one defense in an amended answer.

The original complaint was filed 24 March 1977. In March 1979, plaintiff, having taken the deposition of the defendant Thomas, moved the court for permission to amend his complaint to assert negligence by defendants in performing duties imposed on them as general partners. The trial judge on 19 April 1979 entered an order allowing the motion to amend. Defendants answered the amendments allowed by the court and moved to amend their answer. This motion was allowed by the trial judge. A subsequent motion to amend the answer, however, apparently was denied.

On 27 May 1981, plaintiff further moved the court for an order allowing him to amend his complaint to show defendants had not complied with the terms of the partnership agreement obligating them to pay excess construction costs. This motion was made in order to conform to the evidence which plaintiff would present arising out of defendant Thomas's deposition. Plaintiff alleged such amendment would constitute no surprise to defendants.

On 1 June 1981, plaintiff further moved to amend his complaint by asserting a misuse by general partners of the funds advanced by the limited partners on projects unrelated to the purposes of the partnership. Plaintiff alleged such matters were not new and would tend to clarify the pleadings already filed.

The trial judge in his findings of fact in the judgment entered 2 June 1981 allowed the motions and ascertained they related back to matters already before the court.

It is fundamental to the concepts embodied in Rules 15(a) and 15(b) of the North Carolina Rules of Civil Procedure that amendments to pleadings and relation back of such amendments should be liberal in their allowance and application. The rule, in fact, encourages liberal amendment of pleadings. *McGinnis v. Robinson*, 43 N.C. App. 1, 258 S.E. 2d 84 (1979). Discretion in the trial judge is not unlimited, however, and the amendment should not be granted when the opposing party would be prejudiced. N.C. Rules Civ. Pro. 15(a) and 15(b); *Auman v. Easter*, 36 N.C. App. 551, 244 S.E. 2d 728, *disc. rev. denied*, 295 N.C. 548, 248 S.E. 2d 725 (1978).

We find no error in this assignment. None of the amendments brought out any new material or in any way could have surprised the defendants. They referred to and were a part of matters that had appeared before in the pleadings, previous amendments, and in the deposition of the defendant Thomas. The defendants showed no prejudice as a result of the amendments being offered or allowed. Neither did defendants request a continuance of the case because of the substance of the amendments. The conclusion of the trial judge that "[i]n the interest of justice and in order to allow a full hearing of the cause on its merits, the amendments were allowed" is amply supported by the findings of fact and the record.

[2] Defendants next argue plaintiff's amendments of 27 May 1981 and June 1, 1981 do not relate back, and thus any cause of action thereunder is barred by the statute of limitations.

Under Rule 15(c) of the North Carolina Rules of Civil Procedure, claims asserted in amended pleadings are generally deemed to relate back to the time of interposing of the original pleadings, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences to be proved pursuant to the amended pleading.

In the case *sub judice*, defendants contend plaintiff has sought by his amendments to introduce new claims for transactions of which he had been aware since 1973, and during trial to assert a new theory of the case based on negligence. Defendants

further contend that any claims plaintiff may have based on failure to pay cost overruns or the failure to obtain permanent financing should have been made at the commencement of the suit, because there is a question whether the general partners were under an obligation to pay the cost overruns or to obtain permanent financing, two theories of liability on which plaintiff had not previously relied. We do not agree.

The original complaint generally asserted breach of the partnership agreement, and no new, entirely different cause of action has been interposed by the amendments. The amendments speak specifically to the partnership agreement and the obligations of the general partners under the agreement. Therefore, the amendments relate back to the time of filing the original complaint. The theory of breach of the partnership agreement was simply expanded to include with specificity another breach, and defendants were on notice of the theory of the suit from the date of filing.

Limited partners are sometimes called silent partners. Because their duties are generally limited in the partnership agreement, they cannot be held to know all that a general partner knows. Hence, additional knowledge may come to the attention of a limited partner later than it comes to a general partner. In this case, knowledge of the breach of the partnership agreement by the general partners in failing to obtain permanent financing was pleaded shortly after plaintiff learned of it through the Thomas deposition. *Condominium Assoc. v. Scholz Co.*, 47 N.C. App. 518, 268 S.E. 2d 12, *disc. rev. denied*, 301 N.C. 527, 273 S.E. 2d 454 (1980), offers guidance. In that case, plaintiff sued an architect and general contractor to recover damages resulting from an alleged substandard underground water system. In its original complaint, plaintiff asserted that the architect failed to supervise and inspect the construction and thus negligently allowed the substandard piping to be installed. Later, plaintiff sought to amend its complaint to assert that the architect had negligently designed the piping system. This Court deemed such an amendment to be a proper one, as the original pleading gave sufficient notice of the complained of occurrence. In this case, the original complaint alleged a breach of contract of a partnership agreement with respect to the building of an apartment project for a limited partnership and contained general allegations about the duties of the general partners. The amendments sought by plaintiff and al-

lowed by the court met the notice test of the Rule since they had to do with the partners' breach of the obligations imposed on them under the LPA. Furthermore, the amendments tended to clarify that which was before the court and to conform to the evidence. We overrule this assignment.

[3] By their next assignment, defendants raise the question whether plaintiff's suit is premature, arguing the trial court erred in refusing to find plaintiff had no standing to initiate suit for individual recovery at this time. We do not agree.

As a general rule, one partner cannot sue another partner at law until there has been a complete settlement of the partnership affairs and a balance struck. *Bennett v. Trust Co.*, 265 N.C. 148, 143 S.E. 2d 312 (1965). Defendants point out that limited partnerships are creatures of statute, limiting the rights as well as liabilities of limited partners. Among these is the right to demand a formal account of partnership affairs. G.S. 59-10. Defendants point out that plaintiff never attempted to exercise this right.

The general rule, as cited by defendants, is correct, but there are well recognized exceptions. Justice Brogden, in *Pugh v. Newbern*, 193 N.C. 258, 261, 136 S.E. 707, 708-709 (1927), noted the exceptions:

> A partner may maintain an action at law against his copartner upon claims growing out of the following state of facts:
>
> * * * * * *
>
> (5) Where the partnership is terminated, all debts paid, and the partnership affairs otherwise adjusted with nothing remaining to be done but to pay over the amounts due by one to the other, such amount involving no complicated reckoning.
>
> (6) Where the partnership is for a single venture or special purpose which has been accomplished, and nothing remains to be done except to pay over the claimant's share.
>
> (7) When the joint property has been wrongfully destroyed or converted.

Demanding and waiting until plaintiff received a formal accounting would have been fruitless. This was a single purpose

partnership project. All of its assets were extinguished by the foreclosure. Plaintiff had no further obligations and no rights in any partnership property. The case falls within the guidelines set out above, and the ruling of the trial judge is affirmed in this assignment.

[4] By their fourth assignment of error, defendants contend the trial judge erred in refusing to apply the "business judgment" test in evaluating the defendant's actions. We find no merit in this assignment.

The court made the following findings of fact and conclusions of law, *inter alia*:

> (10) FACT: The defendants were experienced in developing, building, managing, acting as general partners, and obtaining financing for apartment projects for limited partnerships; the defendants prior to beginning the project, had no contingency plan for an adverse change in construction, financial or market conditions on the limited partnership project; the defendants developed no contingency plan as the project began to falter; instead the defendants continued on to complete 100% of the project as originally planned; the project was begun in 1973 and was ultimately foreclosed in the Fall of 1976.
>
> CONCLUSION OF LAW: Such acts of the defendants were acts of negligence and such negligence was a proximate cause of the plaintiff's damage.
>
> (11) FACT: Adverse market, construction, financing and other factors arose during the limited partnership project.
>
> CONCLUSION OF LAW: Such adverse factors were not legally sufficient to relieve the defendants of their obligations under the PPM and LPA; the law cannot protect the defendants from a bad bargain; the bargain was legal and binding on the parties; any failure of the project was a proximate result of the defendants' failure to meet their financial obligations to the plaintiff.
>
> (12) FACT: Both Mr. Thomas and Mr. Waller were general partners in the Fountain Lake Limited Partnership Agreement.

CONCLUSION OF LAW: As general partners, Messrs. Thomas and Waller are jointly and severally liable for any damage the plaintiff may have suffered as a proximate result of the defendants' breach of the PPM and LPA.

Defendants contend a general partner may be likened to a corporate director who may be personally liable for gross neglect of his duties, mismanagement, fraud and deceit resulting in loss to a third person, but not for error of judgment made in good faith. *Milling Co., Inc. v. Sutton*, 9 N.C. App. 181, 175 S.E. 2d 746 (1970). Defendants' arguments are meritless. The judge, recognizing the defendants as general partners in the project, concluded defendants were jointly and severally liable for such damages the plaintiff may have suffered as a proximate result of defendants' breach of the PPM and LPA. In effect, the judge treated the matter as a negligent breach of contractual obligation. Defendants were experienced in developing, building, managing, acting as general partners, and obtaining financing for apartment projects for limited partnerships. The record reveals that no permanent plan for financing existed before or during construction, but the general partners were aware that the construction loan stipulated a date by which permanent financing had to be obtained. Of the eighteen apartment projects built by defendants, this was the first one they had begun constructing without permanent financing arranged in advance. The defendant Thomas acknowledged the riskiness of commencing a construction project without first having a commitment for permanent financing and indicated he did not talk about the potential risks to the limited partners. Defendants admitted they were obligated to manage the project and obtain financing for construction as well as the permanent loan, and that they failed to do so. It is apparent defendants essentially had no plan except to hang on in the face of escalating costs and cost overruns.

Defendants breached their obligations under the partnership agreement. They pursued a course of conduct that an ordinary person may reasonably have foreseen as injurious to others. They were negligent in performance of the contract with the plaintiff. *Insurance Co. v. Sprinkler Co.*, 266 N.C. 134, 146 S.E. 2d 53 (1966). We find no error in this assignment.

[5] By their next assignment of error, defendants contend the LPA created no absolute duty on the part of the general partners

to (1) obtain permanent financing, (2) pay cost overruns before permanent financing was obtained, or (3) repay the construction loan. We do not agree.

The trial judge found as a fact that such duties were imposed, and failure by the general partners to perform these duties was a proximate cause of the failure of the project and a material breach of the LPA. In the body of the PPM under the section entitled "Partnership Capital," a paragraph designated "Investment of General Partners" says:

> The General Partners agree to make capital contributions to pay any construction costs in excess of the contributions of the Limited Partners and the first mortgage proceeds obtained. However, no excess construction costs are anticipated.

In paragraph 7 of the LPA entitled "Capital Contributions of the General Partners," the following language appears:

> The General Partners agree to construct on behalf of the Limited Partnership the Fountain Lake Apartments for a cost not to exceed $358,800 in excess of the permanent (first mortgage) loan on such apartments, and further agree to contribute to the capital of the Limited Partnership any costs in excess of such difference.

The PPM under the section entitled "Liabilities of General Partners" provides:

> The General Partners will be personally liable for repayment of the construction loan obtained for the purpose of building the Fountain Lake Apartments. Permanent financing will be arranged so that neither the General Partners nor the Limited Partners will be personally liable for repayment of the indebtedness. The lender will look solely to the assets of the Partnership for satisfaction of its loan.

Defendants contend there is nothing in the agreement that requires the general partners to obtain permanent financing. Rather, they point to the section of the LPA that provides:

> The purposes of this Limited Partnership are:
>
> (c) To arrange construction and permanent financing on the most favorable terms available.

Defendants contend that under this provision they had the duty to attempt to obtain financing, but they certainly did not guarantee to do so.

According to the testimony of defendant Thomas, the general partners admit they were to manage the project and obtain financing for the project—both permanent and construction loan financing. Another witness testified that Mr. Thomas admitted the general partners were responsible for getting the permanent loan and were also responsible for payment of the excess cost overruns referred to previously.

The word "will" is a mandatory word imposing a definite obligation. The general partners by their actions in the management of the project, in addition to the inactivity of the limited partners, and the testimony of the defendant Thomas provide substantial evidence of the general partners' duty to obtain permanent financing.

The language by which the general partners agreed to contribute to the capital of the limited partnership any costs in excess of the first mortgage is clear, as is their obligation to pay any construction costs in excess of the contributions of the limited partners. Defendants cannot hide behind their failure to obtain permanent financing for the project. When a permanent loan was not obtained, the construction loan became the first mortgage permanent loan. Their failure to obtain permanent financing before construction put defendants on notice that they assumed the risks of failing to obtain financing later. The assignment is overruled.

It is elementary that in a negligence action the burden is on the plaintiff to establish that defendant's negligence was the proximate cause of plaintiff's injury or loss. *Rappaport v. Days Inn*, 296 N.C. 382, 250 S.E. 2d 245 (1979). In contract actions, plaintiff also has the burden of establishing the requisite causal connection. *Lane v. R.R.*, 192 N.C. 287, 134 S.E. 855 (1926).

[6] Defendants argue that plaintiff has presented insufficient evidence of the causal connection. Defendants argue that a myriad of circumstances was the cause of the project's failure, and the purported negligence of the defendants was not among them. Defendants' arguments are fruitless. Plaintiff contends

defendants were negligent in fulfilling contractual obligations to construct the project—obligations clearly assumed by defendants in the LPA and PPM. Defendants negligently failed to meet their obligation. They failed to arrange for permanent financing before construction and failed to pay the cost overruns. They also failed to pay off the construction loan because they had not arranged for permanent financing. These were separate and distinct acts to be done by defendants as a part of construction. Because they were not done, the construction mortgage was foreclosed, and the projects lost. Expert testimony to establish this causal relationship is not necessary. The fact that the project sustained additional costs of construction is a risk of the general partners. The fact that the project did not rent substantially occurred after the breach by defendants.

The award by the trial judge to plaintiff of his initial investment plus interest was the natural and probable result of the breaches by the defendants. We find no merit in defendants' contention.

[7] Nor do we find error in the judge's refusal to certify defendants' witnesses as experts in troubled real estate ventures and in apartment project development and his exclusion of their testimony. The testimony of these witnesses would have shown the actions of the defendants were consistent with standard business practices at the time, but that the project would have failed even if the defendants had obtained the permanent financing; that the defendants did everything possible to salvage the project. Such testimony would have dealt substantially with defendants' actions after their negligently having started the project without permanent or any other type of long term financing. Efforts to salvage the project already in distress are immaterial, as is testimony that the project would have failed even if completed.

[8] Plaintiff called as an adverse witness defendant Edward H. Thomas. At the conclusion of testimony by Thomas, the trial judge called the attorneys for both plaintiff and defendants into his chambers and advised them that based on the testimony before him the defendants were absolutely liable to the plaintiff, regardless of further evidence, and inquired about settlement possibilities. Nothing in the record indicates the judge could not

proceed with the trial fairly and impartially. On the following day, the defendants filed a motion for order of recusal. Immediately thereafter, the matter was heard by the Honorable Frank W. Snepp, Jr., who found facts, and concluded that no grounds existed for recusal and denied the motion.

Plaintiff's brief sets forth additional facts tending to show the trial judge thought settlement of the case would be in order. These statements are not a part of the record and will not be considered by us.

It is apparent from the order of Judge Snepp that the conference conducted by Judge Burroughs was held for the purpose of exploring settlement possibilities, a function to be commended to all trial judges in civil cases. The conference was not held in the presence of the jury. Only the judge and the attorneys—all officers of the court—were present. Neither the record nor the order details the conversation between Judge Burroughs and the attorneys. Nevertheless, we hold Judge Snepp did not abuse his discretion by his order dismissing the motion for recusal, finding that no grounds existed for recusal and that defendants' motion for mistrial should be heard by the presiding judge.

In the trial of the case we find the defendants received a fair trial, free from prejudicial error. The judgment of the court is

Affirmed.

Judges VAUGHN and ARNOLD concur.

SUSAN B. BY HER GUARDIAN AD LITEM AND LISA S. BY HER GUARDIAN AD LITEM ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED v. GEORGE PLANAVSKY, M.D., INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; VIRGINIA RITCHIE, R.N., INDIVIDUALLY AND IN HER OFFICIAL CAPACITY; CLAIRE OPPENHEIM, R.N., INDIVIDUALLY AND IN HER OFFICIAL CAPACITY; T. M. HAIZLIP, M.D., INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; JETTIE KNICKERBOCKER, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY; CYNTHIA SAUBER, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY; AND A. G. TOLLEY, M.D., INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY

No. 8210SC5

(Filed 21 December 1982)

1. **Constitutional Law § 17— summary judgment on claim of denial of access to counsel proper**

The trial court properly entered summary judgment as to minor plaintiffs' (42 U.S.C. §§ 1983 and 1985) claims concerning the alleged denial of their rights to or access to counsel of their choice while in a mental institution since the forecast of evidence did not show that defendant medical personnel denied plaintiffs their rights to the advice of counsel.

2. **Insane Persons § 13— Rights of Minor Patients Act—defendants not answerable in money damages—defendants not immune from injunctive relief**

Pursuant to the provisions of G.S. 122-24, a section of the Rights of Minor Patients Act, defendants, medical personnel at Dorothea Dix Hospital, may not be held answerable in money damages for their acts towards plaintiffs, minor patients; however, defendants are not immune under G.S. 122-24 from plaintiffs' claims for injunctive relief. The question of plaintiffs' entitlement to injunctive relief, however, was mooted by the facts that (1) plaintiffs did not seek an injunction *pendente lite* and (2) by the time the matter came on for hearing, neither plaintiff was a patient at Dix.

3. **Infants § 4— duty of mental institution to report child abuse of minor patient**

Where the forecast of evidence before the trial court showed one incident of physically offensive conduct between a minor patient at a mental institution and a male staff member wherein the male staff member rubbed his hands on her leg while the two of them were riding in a hospital van, the single, isolated incident of physically offensive conduct, not resulting in any physical harm, did not show a situation involving child abuse requiring a report under G.S. 7A-543.

APPEAL by plaintiffs from *Bailey, Judge.* Judgment entered 26 October 1981 in Superior Court, WAKE County. Heard in the Court of Appeals 19 October 1982.

At all times pertinent to this case, plaintiffs were minors undergoing voluntary treatment as patients at Dorothea Dix

Hospital, a facility operated by the State of North Carolina for the treatment of mentally disordered persons. Defendant Planavsky, a child psychiatrist, was Director of the Adolescent Treatment Program of the Child and Youth Division of Dix Hospital; defendant Ritchie, a licensed registered nurse in psychiatric nursing, was Assistant Program Director and Nursing Coordinator for the Cherry-Ashby Program at Dix, the program in which plaintiffs were enrolled, and was supervised by Planavsky; defendant Oppenheim, a licensed registered nurse in psychiatric nursing, was a Nursing Supervisor and Coordinator of Group Living in the Adolescent Treatment Program at Dix, and was supervised by Ritchie; defendant Haizlip, a child psychiatrist, was Director of the Division of Children and Youth Services at Dix and exercised general supervision over the Cherry-Ashby Adolescent Program; defendant Knickerbocker, a licensed registered nurse, was employed as a nurse in the Adolescent Treatment Program at Dix; defendant Sauber was a Clinical Social Worker in the Adolescent Treatment Program at Dix; and defendant Tolley, a psychiatrist, was the Director of Dix Hospital.

Plaintiffs' complaint, filed 12 March 1981, asserts claims for relief for alleged violations by defendants of plaintiffs' rights under 42 U.S.C. § 1983 (the Civil Rights Act of 1871); 42 U.S.C. § 1985 (Right To Be Free From Conspiracies Act); 20 U.S.C. § 1401 *et seq.* (Education for All Handicapped Children Act); G.S. 115-363, *et seq.* (Special Education Act); G.S. 122-55.13 (Rights of Minor Patients Act); and G.S. 7A-543 (Duty To Report Child Abuse Or Neglect Act). Plaintiffs sought to represent a class of similarly situated persons, pursuant to G.S. 1A-1, Rule 23 of the Rules of Civil Procedure. Plaintiffs alleged that they and the members of the alleged class were entitled to declaratory and injunctive relief, and that plaintiffs Susan B. and Lisa S. were entitled to monetary damages. Plaintiffs also prayed for attorneys' fees pursuant to 42 U.S.C. § 1988. The factual allegations in the complaint generally alleged that defendants had conspired to deny and had denied Susan B. and Lisa S. their rights to legal counsel and to independent mental health evaluation while Susan and Lisa were patients at Dix Hospital, and that defendants had conspired to deny and had denied such rights to the alleged class represented by Susan and Lisa.

Defendants answered, asserting affirmative defenses of official standing, good faith, absence of malice, and immunity and

otherwise entering general denials of plaintiffs' essential allegations of defendants' actionable conduct. Defendants also denied plaintiffs' standing to prosecute plaintiffs' action on behalf of a class.

Plaintiffs later amended their complaint to include allegations that plaintiff Lisa S. was denied use of a "program" telephone to contact an attorney, was told that she did not need to see attorney Heinberg because Heinberg was a civil rights lawyer, and that Lisa's activities were restricted for 25 minutes because Lisa failed to notify "staff" of her appointment with legal counsel. These allegations were generally denied.

The record on appeal discloses that plaintiff Susan B. exited her Dorothea Dix Hospital treatment on March 1981 and Lisa S. exited in June 1981. On 10 August 1981, defendants filed their motion for summary judgment. At the time their motion was heard, the trial court had before it the depositions of both plaintiffs, of Anne Crowell, Susan's mother, of Margaret Rundell, Lisa's guardian *ad Litem*, and of defendants Sauber, Oppenheim, Ritchie, Knickerbocker and Planavsky, and the affidavits of defendants Planavsky, Ritchie, Oppenheim, Haizlip, Knickerbocker, Sauber and Tolley. The contents and implications of this evidentiary material will be discussed as necessary in the body of our opinion.

Following a hearing on defendants' motion, Judge Bailey entered summary judgment for all defendants.

The evidentiary context upon which the trial court granted summary judgment for all defendants on all claims for relief is as follows. Susan B. testified on deposition that while she was a patient at Dix, one Craig Robertson, a male staff employee at Dix rubbed his hand on her leg while the two of them were riding in a hospital van. Susan reported the incident to defendant Oppenheim. Following discussions with Oppenheim as to what they should do about the incident, Susan "dropped" her complaint. When Susan was admitted to Dix, she met with Ms. Dorothy Thompson, an attorney, regarding Susan's admissions hearing. Upon request, Susan met with Ms. Thompson subsequent to Susan's admittance. Susan was not punished for meeting with Ms. Thompson. In February, 1981 Susan telephoned Ms. Christine Heinberg and Deborah Greenblatt, attorneys, and met with

Heinberg. Soon thereafter, Susan's "outside" privileges were taken away by defendants Knickerbocker and Oppenheim for about a week.

Lisa S. testified on deposition that she was able to contact attorneys when she desired, but that in February, 1981, after meeting with attorneys Heinberg and Thompson, she lost her "privileges." Lisa also testified that on one occasion, defendant Ritchie told her that Lisa did not need to see attorney Heinberg, that Heinberg was a "civil rights" lawyer, and that Lisa should see the patient advocate.

Margaret Rundell, an attorney who became Lisa's guardian *ad Litem*, testified on deposition that she found contacting Lisa difficult, and that hospital staff members "inhibited" such contact, but that she was able to meet with Lisa frequently.

Anne Crowell, Susan's mother, testified on deposition that while Susan was seeking outside, independent mental health evaluation, defendant Sauber inhibited and resisted such efforts, advising Mrs. Crowell that such evaluations were against "program" policy, and that after Susan began such independent evaluation, defendant Planavsky told Mrs. Crowell that she would have to make an "immediate" decision as to whether Susan would continue as a patient at Dix. Mrs. Crowell testified that Susan was punished for seeking such independent evaluation, implicating defendants Sauber, Knickerbocker and Oppenheim.

Defendants Planavsky and Oppenheim testified on deposition as to the alleged incident between Susan and a male staff member. Planavsky discussed Susan's complaint with Oppenheim and evaluated the situation. Based on his evaluation and Oppenheim's informing him that Susan did not want to pursue the complaint, no report was made of that incident to the Department of Social Services. Because of subsequent incidents involving the same male staff member, the staff member was discharged and a report was submitted to Social Services.

On deposition, defendants Planavsky, Sauber, Oppenheim, Ritchie, and Knickerbocker testified about policy and practices respecting patient's contacts with legal counsel and patient's resort to independent mental health evaluations. Each defendant also addressed these matters with respect to Susan and Lisa.

What may be gleaned from their testimony is that all these defendants were unreceptive to the use of outside legal counsel by plaintiffs and other patients, but did not act so as to prevent plaintiffs from having access to counsel, either "program" counsel or outside counsel. Their testimony did make it clear, however, that patients were not allowed to use hospital staff telephones to call counsel or to receive calls from counsel, but were required to either place their calls through a staff member or to use a pay telephone located on the premises. The pay phone did not have a number on it, thus making it impossible for anyone to call a patient on that phone; therefore, all calls from counsel to a patient would necessarily have to be routed through a staff member. The testimony of these defendants generally reflected an underlying, if not manifest, distrust of patient contact with outside legal counsel. The same must be said for what this evidence shows with respect to their attitude about and reaction to outside, or independent, mental health evaluations for Dix patients.

Defendants Planavsky, Haizlip, Tolley, Knickerbocker, Oppenheim, Ritchie and Sauber submitted affidavits in which they asserted that plaintiffs were treated in accordance with medically accepted and approved standards, practices and procedures and that their actions taken toward plaintiffs were done in good faith, without malice, and with reasonable grounds to believe their actions toward plaintiffs were in accordance with the laws of North Carolina and with Dix Hospital policies, procedures, and practice.

From summary judgment entered in favor of all defendants on all claims for relief, plaintiffs have appealed.

Carolina Legal Assistance for the Mentally Handicapped, Inc., by Christine Heinberg and Deborah Greenblatt, and Smith, Patterson, Follin, Curtis, James & Harkavy, by Melinda Lawrence, for plaintiffs.

Attorney General Rufus L. Edmisten, by Special Deputy Attorney General William F. O'Connell and Assistant Attorney General Reginald L. Watkins, for all defendants.

Young, Moore, Henderson & Alvis, P.A., by Joseph C. Moore, III, for defendant George Planavsky, M.D.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by John H. Anderson, for defendants A. G. Tolley, M.D. and T. M. Haizlip, M.D.

WELLS, Judge.

I

Plaintiffs' claims for relief under 42 U.S.C. §§ 1983 and 1985.

[1] The forecast of evidence in this case does not show that defendants, or any of them, denied plaintiffs their rights to the advice of counsel, but rather shows that plaintiffs sought and obtained the advice and assistance of counsel during plaintiffs' period of commitment to Dix Hospital. While the forecast of evidence does regrettably show that defendants manifested a significant degree of resentment toward and disapproval of plaintiffs' use of "outside" counsel, such resentment and disapproval did not result in a denial of plaintiffs' rights in any respect. Under this forecast of evidence, the trial court correctly entered summary judgment as to plaintiffs' (42 U.S.C. §§ 1983 and 1985) claims on their alleged denial of their rights to or access to counsel of their choice.

II

Plaintiffs' claims for relief under G.S. 122-55.13 and .14.[1]

[2] First, we hold that pursuant to the provisions of G.S. 122-24,[2] defendants may not be held answerable in money damages for

1. § 122-55.13. *Declaration of policy on rights of minor patients.*

It is the policy of North Carolina to insure basic rights to each minor patient of a treatment facility. These rights include the right to dignity, humane care, and proper adult supervision and guidance. In recognition of his status as a developing individual, the minor shall be provided opportunities to enable him to mature physically, emotionally, intellectually, socially, and vocationally. In view of the physical, emotional, and intellectual immaturity of the minor, the treatment facility shall stand in loco parentis to the minor when he is in residence.

§ 122-55.14. *Rights of minor patients.*

(a) Each minor patient of a treatment facility may at all reasonable times:

(1) Communicate and consult with the agency or individual having legal custody of him; and

their acts towards plaintiffs as alleged in plaintiffs' complaint, all of such acts or actions falling within the provisions of G.S. 122-24. We hold, however, that defendants are not immune under G.S. 122-24 from plaintiffs' claims for injunctive relief; otherwise, the provisions of G.S. 122-55.13 and .14 would be meaningless. It is clear to us from the depositions of Mrs. Crowell and defendants Planavsky, Sauber, and Oppenheim, that there were genuine, material issues of fact raised with respect to Susan B.'s entitlement to injunctive relief as to her need and desire for private mental health evaluation. We are frank to note that the attitude of Dr. Planavsky in this respect—as reflected by Mrs. Crowell's deposition—raises rather serious factual implications with respect to patients' rights to such private mental health advice or treatment. Plaintiffs did not seek an injunction *pendente lite*, however, and by the time this matter came on for hearing before Judge Bailey on defendants' motion for summary judgment, neither plaintiff was a patient at Dix. The question of plaintiffs' entitlement to injunctive relief was mooted by these circumstances, and the trial court therefore properly entered summary judgment as to this aspect of plaintiffs' action.

III

Plaintiffs' claims for relief under
20 U.S.C. § 1401 et seq. and G.S. 115-363 et seq.

These statutes deal with educational entitlements of handicapped children. While we recognize that mentally disturbed minors are within the statutory classification of handicapped children or children with special needs, neither the allegations in plaintiffs' complaint nor the forecast of evidence shows a valid claim under these statutes. We note that plaintiffs made no at-

(2) Communicate and consult with legal counsel and private mental health or mental retardation specialists of his or his legal custodian's or guardian's choice, at his own expense.

2. § 122-24. *Administrators, chiefs of medical services and staff members not personally liable.*

No administrator, chief of medical services or any staff member under the supervision and direction of the administrator or chief of medical services of any State hospital shall be personally liable for any act or thing done under or in pursuance of any of the provisions of this Chapter.

tempt in their brief to support these claims with argument or authority. Summary judgment as to these claims was properly entered.

IV

Plaintiff Susan B.'s Claim
for relief under G.S. 7A-543.

[3] The statute, in pertinent part, provides:

§ 7A-543. *Duty to report child abuse or neglect.*

> Any person or institution who has cause to suspect that any juvenile is abused or neglected shall report the case of that juvenile to the Director of the Department of Social Services in the county where the juvenile resides or is found. The report may be made orally, by telephone, or in writing. The report shall include information as is known to the person making it including the name and address of the juvenile; the name and address of the juvenile's parent, guardian, or caretaker; the age of the juvenile; the present whereabouts of the juvenile if not at the home address; the nature and extent of any injury or condition resulting from abuse or neglect and any other information which the person making the report believes might be helpful in establishing the need for protective services or court intervention.

The forecast of evidence before the trial court shows one incident of physically offensive contact between Susan B. and a male staff member. We hold that this single, isolated incident of physically offensive conduct, not resulting in any physical harm, does not show a situation involving child abuse requiring a report under the statute. We are careful to note, however, that we do not condone the response of those defendants who either chose to pressure Susan to confront the offending staff member in their (staff member) presence or who apparently failed to vigorously pursue and investigate her complaint. While there was no statutory violation involved, it appears to us that the staff's duty to Susan (and to other female patients in the unit) was compromised by the staff attitude and inaction as to this incident. We nevertheless hold that summary judgment was properly entered for defendants as to this claim.

In the materials before the trial court, it showed that essential elements of each of plaintiffs' claims were either nonexistent or that plaintiffs could not produce evidence to support essential elements of their claims. Summary judgment was therefore properly entered in this case. *Lowe v. Bradford,* 305 N.C. 366, 289 S.E. 2d 363 (1982).

The forecast of evidence before the trial court does not indicate that there exists a class of persons, or any other persons, committed as voluntary patients to Dix Hospital who are or may be entitled to any relief similar to the claims asserted by plaintiffs in this action. *See* G.S. 1A-1, Rule 23 of the Rules of Civil Procedure. Summary judgment was appropriately entered as to this aspect of plaintiffs' action.

The judgment of the trial court must be and is

Affirmed.

Judges VAUGHN and WHICHARD concur.

EARL H. BYRD, JR. v. RODNEY A. MORTENSON, M.D., P.A., AND RODNEY A. MORTENSON, M.D.

No. 8110SC1263

(Filed 21 December 1982)

1. **Rules of Civil Procedure § 55.1— insurer's failure to obtain counsel—entry of default—abuse of discretion in failure to set aside**

The trial court in a medical malpractice action abused its discretion in refusing to set aside an entry of default against defendant where defendant immediately contacted his insurer when he learned of the suit; defendant forwarded all relevant medical and office records to the insurer in a timely manner; defendant acted in conformity with his insurer's instructions, which was a reasonable response given the insurer's superior expertise in such a matter; the insurer failed to obtain counsel to defend the suit because of illness of its claims manager; and defendant's lawyer immediately contacted the office of the clerk of superior court to enter an appearance when he was contacted by the insurer to defend the suit. G.S. 1A-1, Rule 55(d).

2. **Pleadings § 9.1; Rules of Civil Procedure § 6— failure to file answer in time—excusable neglect—extension of time**

Defendant's failure to file answer was the result of excusable neglect, and the trial court should have granted defendant an extension of time to file

answer after the time for filing had expired, where defendant immediately contacted his insurer when he learned of the suit, defendant forwarded relevant information to the insurer in a timely manner, and the insurer failed to obtain counsel to defend the suit until after time for filing answer had expired. G.S. 1A-1, Rule 6(b).

Judge MARTIN (Robert M.) dissenting.

APPEAL by defendants from *Bailey, Judge.* Judgment entered 14 September 1981 in Superior Court, WAKE County. Heard in the Court of Appeals 15 September 1982.

Plaintiff brought this claim for relief for medical malpractice on 24 February 1981 against the individual defendant, an orthopedic surgeon, and the professional association that the defendant was employed by. The suit was based on a tendon transfer operation that defendant performed on plaintiff's left forearm and subsequent treatment of that arm. Although this case deals with medical malpractice, its resolution on appeal depends primarily on the North Carolina Rules of Civil Procedure.

The defendant association was served with a copy of the summons and complaint through its registered process agent on 26 February. The individual defendant was served on 3 March.

After being informed of the action against him on 26 February, defendant contacted his insurance carrier, who instructed him to forward medical documents and notes relevant to the case. The carrier's claims manager informed defendant on that date that the carrier would retain attorney Perry C. Henson for him. The relevant documents were forwarded to the carrier on 11 March and received the following day. They were placed in the carrier's "incidental" file rather than the pending suit file pursuant to the claims manager's instructions given by telephone on 12 March.

A default was entered against the defendant association on 3 April because it filed no responsive pleading within 30 days as required by G.S. 1A-1, Rule 12(a)(1). Default was entered pursuant to G.S. 1A-1, Rule 55(a) by the Wake County Assistant Clerk of Superior Court. A similar default was entered against the individual defendant for the same reason on 6 April.

Immediately after learning of the 3 April default, the process agent for the defendant association notified the carrier on 8 April of the default against the association and demanded that the carrier retain a lawyer for the defendants. The carrier's prior inaction on the matter was explained to the process agent as resulting from the claims manager's illness. The claims manager was out of work from 9 March to 16 March and was admitted to the hospital on 4 April. The carrier contacted attorney Henson on 8 April.

After being contacted by the carrier, Henson immediately notified the Deputy Clerk of Superior Court of Wake County by telephone and informed her that he was making an appearance for the defendants. The court file was marked to reflect that fact. Henson was first informed of the 6 April default against the individual defendant in this conversation. The Deputy Clerk then informed the plaintiff's attorney of Henson's actions.

On the same day, Henson sent a letter to the Deputy Clerk confirming their conversation. Copies were sent to the attorneys for the plaintiff and received by them on 10 April. The letter was placed in the court file when it was received on 9 April at 2:08 p.m.

On 9 April at 3:27 p.m., Superior Court Judge A. P. Godwin, Jr. entered judgment by default in this action.

Pursuant to G.S. 1A-1, Rules 55 and 60, the defendants moved in a motion filed on 16 April to vacate the defaults and default judgment previously entered. Affidavits in support of the motion were filed on 28 April.

This action was heard on 10 July. The trial judge vacated the 9 April default judgment because the defendants made an appearance on 8 April and did not receive the three days notice required prior to a hearing on a default judgment as G.S. 1A-1, Rule 55(b)(2) mandates.

Defendants' motion to set aside the defaults was not ruled upon. An oral motion in court to be permitted to file an answer or to have an extension of time to answer was denied.

In motions filed on 13 July, defendants sought to vacate the entries of default and to extend the time for an answer. On 14 July, plaintiff filed a motion to strike from the record of the 10 July hearing the defendants' motion for extension of time.

The matter was heard on 14 September in Wake County Superior Court. The trial judge denied defendants' motions and entered a default judgment on 23 September. Defendants gave notice of appeal to this Court on the same day.

Cheshire, Manning & Parker, by Joseph B. Cheshire V, Thomas C. Manning and Barbara A. Smith, and Bode, Bode & Call, by Robert V. Bode, attorneys for plaintiff-appellee.

Perry C. Henson and Perry C. Henson, Jr., attorneys for defendant-appellants.

ARNOLD, Judge.

[1] Defendants' primary attack on appeal is on the trial judge's refusal to set aside the defaults against them.

For the entry of a default to be disturbed, as those entered by the Clerk of Superior Court on 3 and 6 April in this case, G.S. 1A-1, Rule 55(d) requires that "good cause" be shown. That determination is in the trial judge's discretion and will not be disturbed absent an abuse of discretion. *Frye v. Wiles,* 33 N.C. App. 581, 235 S.E. 2d 889 (1977). *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).

This Court follows the principle that "[i]nasmuch as the law generally disfavors default judgments, any doubt should be resolved in favor of setting aside an entry of default so the case may be decided on its merits." *Peebles v. Moore,* 48 N.C. App. 497, 504-5, 269 S.E. 2d 694, 698 (1980), *modified* 302 N.C. 351, 275 S.E. 2d 833 (1981). At the same time "the rules which require responsive pleadings within a limited time serve important social goals, and a party should not be permitted to flout them with impunity." *Acceptance Corp. v. Samuels,* 11 N.C. App. 504, 510, 181 S.E. 2d 794, 798 (1971).

Two decisions strongly support defendants' position here. In *Whaley v. Rhodes,* 10 N.C. App. 109, 177 S.E. 2d 735 (1970), the

Court set aside entry of a default under Rule 55(d). The default had been entered after the defendant failed to answer plaintiff's complaint. *Whaley* found that the defendant showed "good cause" for failure to file an answer because he had turned the plaintiff's complaint over to his insurance agent "who assured him that . . . the insurance company . . . would take care of the matter. . . ." 10 N.C. App. at 109, 177 S.E. 2d at 736.

In the recent case of *Peebles*, the Court set aside entry of default on facts analogous to this case. That decision was based on the insurer's misplacing of the insured's file, which resulted in an answer being filed seven days late. *Peebles* concluded "defendant's failure timely to file his answer was due to an inadvertence on the part of defendant's insurer . . . ." 48 N.C. App. at 507, 269 S.E. 2d at 700.

Although defendant here did not turn over a copy of the complaint to his insurer, he took sufficient action to justify setting aside the defaults against him. First, he immediately contacted his insurer when he learned of the suit. Second, he forwarded all relevant medical and office records to the insurer in a timely manner. Third, he acted in conformity with his insurer's instructions, which was a reasonable response given the insurer's superior expertise in these matters. It should also be noted that his lawyer immediately contacted the Clerk of Superior Court's office to enter an appearance when he discovered that he was the defendant's counsel.

The cases cited by plaintiff do not appear to be dispositive on the default issue. For example, *Howell v. Haliburten*, 22 N.C. App. 40, 205 S.E. 2d 617 (1974), is distinguishable on the facts. In that case, the insurer waited ten months after receiving notice of the suit before contacting local counsel to take care of the matter. The time lapse was much shorter here. *Britt v. Georgia-Pacific Corp.*, 46 N.C. App. 107, 264 S.E. 2d 395 (1980), is also not determinative since the delay there was caused by the defendant's in-house legal department misplacing the papers.

In *Peebles*, the court reversed the trial court's refusal to set aside an entry of default on facts similar to those in this case, where defendant's failure to file a timely answer was due to the insurer's inadvertence.

Other similarities between *Peebles* and this case justify following its holding here. The court thought it important, for example, that an answer was filed promptly when the mistake was discovered. In the present case defendants sought "other and further relief as to the court may seem just and proper" in their 15 April motion and sought time to file an answer in a 13 July motion.

Peebles also pointed to a lack of prejudice to the plaintiff and injustice to the defendant as factors in the default decision. The only prejudice to plaintiff here is in the sense that he may have to try a case that he has won without a trial. That, however, is not the type of prejudice that *Peebles* seeks to avoid. Thus, the injustice to the defendant in not having a review of his defense on the merits with the resultant harm to his reputation and ability to make a living outweighs any possible prejudice to the plaintiff. "[W]e believe that justice will best be served by allowing this case to be tried on its merits." *Peebles*, 48 N.C. App. at 507, 269 S.E. 2d at 700.

In *Clark v. Clark*, 301 N.C. 123, 129, 271 S.E. 2d 58, 63 (1980), our Supreme Court said: "A judge is subject to reversal for abuse of discretion only upon a showing by a litigant that the challenged actions are manifestly unsupported by reason." Based on the record before us, and in our advantage of hindsight, we cannot say that the trial court's refusal to set aside the defaults against defendants was not "manifestly unsupported by reason." As a result, we reverse the trial court's refusal to set aside the defaults against the defendants.

[2] The defendants' second assignment of error is that they should have been allowed an extension of time to file an answer. Where a party seeks an extension of time to answer after the expiration of the 30-day limit, the judge may permit the answer if he finds that "the failure to act was the result of excusable neglect." G.S. 1A-1, Rule 6(b).

In *Norris v. West*, 35 N.C. App. 21, 239 S.E. 2d 715 (1978), the court upheld a finding of excusable neglect under Rule 6(b) on facts less compelling than these. Relying on a conversation with the deputy sheriff who served him with a copy of the summons and complaint, the defendant in *Norris* believed that he was only required to get the papers to his insurance agent within 30 days.

As a result, the papers did not reach the insurer's attorney until after the expiration of the stated time to file an answer. If *Norris* found excusable neglect when the defendant waited 27 days to contact his insurance agent, the requisite excuse is certainly found here where defendant contacted his insurer as soon as he learned of the suit against him. Upon remand, defendant shall be allowed to file an answer in this case.

Reversed and remanded.

Judge WHICHARD concurs.

Judge MARTIN dissents.

Judge MARTIN (Robert M.) dissenting.

I am of the opinion that the record below does not disclose a manifest abuse of discretion entitling this Court to interfere with the trial judge's refusal to vacate the default entry.

The North Carolina Supreme Court, in *Settee v. Electric Ry.*, 170 N.C. 365, 367, 86 S.E. 1050, 1050-51 (1915), attempted to shed some light on the meaning of "abuse of discretion" stating that

> The discretion of the judge . . . is not an arbitrary one to be exercised capriciously or according to his absolute will, but reasonably and with the object solely of presenting what may seem to him an inequitable result. The power is an inherent one, and is regarded as essential to the proper administration of the law. . . . While the necessity for exercising this discretion, in any given case, is not to be determined by the mere inclination of the judge, but by a sound and enlightened judgment in an effort to attain the end of all law, namely, the doing of even and exact justice, we will yet not supervise it, except, perhaps, in extreme circumstances, not at all likely to arise; and it is therefore practically unlimited.

That Court has been reluctant to find an abuse of discretion and in most instances has carefully guarded the trial courts' discretionary powers.

While it has been recognized that it is "practically impossible to fashion a rule which could generally pinpoint where a trial judge's discretion in any matter ends and an abuse thereof begins," *Worthington v. Bynum and Cogdell v. Bynum*, 305 N.C. 478, 484, 290 S.E. 2d 599, 604 (1982), I do not feel this case deserves different treatment than those cited in the majority opinion in which the trial judges' decisions to deny or grant defendants' motions to vacate entry of default were upheld on appeal. Although the majority may disagree with the able and conscientious trial judge, there is sufficient evidence to warrant his denial of defendant's motion to vacate entry of default. First, defendant failed to include a copy of the complaint and summons with the medical records which he mailed to his insurer, a fact which may account for the improper placement of the medical records in the insurer's "incidental" file. Second, defendant did not check back with his insurer or his assigned counsel, even though he was never contacted once he had mailed the records to his insurer.

In my opinion the majority has "substituted what it considered to be its own better judgment . . . and did not strictly review the record for the singular cause of determining whether . . . [the judge] had clearly abused *his* discretion. . . ." *Id.* at 486, 290 S.E. 2d at 604. Since I "believe that our appellate courts should place great faith and confidence in the ability of our trial judges to make the right decision, fairly and without partiality," *Id.* at 487, 290 S.E. 2d at 605, I cannot participate in the majority's finding of an abuse of discretion on the part of the trial judge.

STATE OF NORTH CAROLINA v. ANDRE RUSH PETTIFORD

No. 8215SC452

(Filed 21 December 1982)

1. Assault and Battery § 15.3— assault with a deadly weapon with intent to kill inflicting serious injury—instructions concerning "serious injury"

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, the trial court did not err in instructing the jury that "a bullet wound to the head with the bullet lodging in the head is a serious in-

jury" therefore taking the question from the jury since the evidence was not conflicting and was such that reasonable minds could not differ as to the serious nature of the injuries inflicted.

2. Assault and Battery § 15.2— assault with a deadly weapon with intent to kill inflicting serious bodily injury—instructions on deadly weapon

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, the trial court did not err in its instructions to the jury by stating that "a pistol or revolver is a deadly weapon" since the pistol defendant used to shoot the victim at close range causing a metal slug to lodge in the victim's head was a deadly weapon as a matter of law.

APPEAL by defendant from *Battle, Judge.* Judgment entered in ORANGE County Superior Court 17 September 1981. Heard in the Court of Appeals 9 November 1982.

Defendant, Andre Rush Pettiford, was indicted for assault with a deadly weapon with intent to kill inflicting serious injury. A jury found defendant guilty as charged. From judgment of the trial court imposing an active sentence of imprisonment, defendant appealed.

Attorney General Rufus L. 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.

WELLS, Judge.

The evidence for the State tended to show that during the course of an argument, defendant shot Lanny Watkins at close range in the face with a handgun—a small caliber pistol. Watkins was treated by Dr. Craig Price, who testified that he removed a metallic fragment which he believed to be a bullet from the frontal sinus area of Watkins' skull. Dr. Price testified that Watkins had a small entry wound with a large bruise on his eyebrow; that he found no powder burns on Watkins; that Watkins never lost consciousness and remained fully lucid up to the time of his treatment; and that Watkins suffered no impairment as a result of the injury. Watkins testified that he was hospitalized for ten days as a result of his injury.

Defendant's evidence was that the gun he pointed at Watkins was a .38 caliber pellet gun.

[1] By his first assignment of error, defendant contends that the trial court erred in instructing the jury that "a bullet wound to the head with the bullet lodging in the head is a serious injury." Defendant argues that the question of whether an injury is serious is for the jury and that, by its instruction, the trial court kept that question from the jury. The dispositive issue raised by defendant's argument is whether in all cases such as the one now before us, the determination of whether an injury is serious must be resolved by the jury, on the facts of each case. Previous decisions of our appellate courts disclose substantially conflicting answers to this question. The issue may arise as follows: one, is there sufficient evidence to bring the case to the jury on the issue of serious injury; two, does the evidence justify submitting a lesser included offense of assault, without the element of serious injury; and three, does the evidence allow a peremptory instruction on the element of serious injury. The underlying question is the same: whether a jury issue has been raised by the evidence as to the degree or nature of the injury inflicted.

The cases where the question was taken from the jury follow.

In *State v. Daniels*, 59 N.C. App. 63, 295 S.E. 2d 508 (1982) the victim was shot twice in the upper part of his body with a .32 caliber pistol, was hospitalized for 21 days, required surgery to remove one bullet, the other bullet remaining in the victim's body near the spine. Defendant offered no evidence as to the victim's injuries. The trial judge gave a peremptory instruction. In upholding a peremptory instruction we held that ". . . the evidence of . . . injuries was uncontradicted, and [the] injuries were obviously serious. Although the instructions were erroneous, there was no prejudicial error because no reasonable trier of fact could have found that there was no serious injury."

In *State v. Pugh*, 48 N.C. App. 175, 268 S.E. 2d 242 (1980), the victim was stabbed in the breast and upper arm with a large butcher knife. We found no error in the trial court's refusing to submit to the jury the lesser included offense of assault with a deadly weapon, holding that defendant "inflicted serious bodily injury."

In *State v. Davis*, 33 N.C. App. 262, 234 S.E. 2d 762 (1977),[1] the victim was struck in the back of the head, required surgery, was hospitalized for nine days, and had medical and hospital bills totaling $16,080.00. The trial judge gave a peremptory instruction and refused to submit the lesser included offense of assault with a deadly weapon. In finding no error, we held that ". . . Where, as in the case at bar, the State's evidence . . . is uncontradicted and the injuries could not conceivably be considered anything but serious," then the trial court may give a peremptory instruction and should not submit the lesser included offense to the jury.

In *State v. Springs*, 33 N.C. App. 61, 234 S.E. 2d 193, *disc. rev. denied*, 293 N.C. 163, 236 S.E. 2d 707 (1977),[2] the victim was shot in the chest with a shotgun at close range, was unconscious for three days, was hospitalized for eight days, and lost two ribs and a lung. In upholding the trial court's peremptory instruction as to the serious nature of the injuries, we emphasized that the evidence as to injuries was "uncontradicted."

For other cases of similar import, *see State v. Williams*, 31 N.C. App. 111, 228 S.E. 2d 668, *disc. rev. denied*, 291 N.C. 450, 230 S.E. 2d 767 (1976); *State v. Turner*, 21 N.C. App. 608, 205 S.E. 2d 628, *appeal dismissed*, 285 N.C. 668, 207 S.E. 2d 751 (1974); *State v. Brown*, 21 N.C. App. 552, 204 S.E. 2d 861 (1974).

The cases which have held that the issue of serious injury should be answered by the jury follow.

The leading case in this category seems to be *State v. Jones*, 258 N.C. 89, 128 S.E. 2d 1 (1962). In *Jones*, the victim was shot in the back and arm with a shotgun. The trial court gave the following instruction:

> "I instruct you in this case if you find beyond a reasonable doubt the assault was made with a gun under such circumstances as calculated to create a breach of the peace that would outrage the sensibilities of the community, it would be an assault with a deadly weapon inflicting serious injury."

In holding that instruction to be such error as to require a new trial, Justice Higgins, writing for the court, said:

1. Relied on by us in *Pugh*.

2. Relied on by us in *Davis* and *Daniels*.

The term "inflicts serious injury" means physical or bodily injury resulting from an assault with a deadly weapon with intent to kill. The injury must be serious but it must fall short of causing death. Further definition seems neither wise nor desirable. Whether such serious injury has been inflicted must be determined according to the particular facts of each case.

Whether the assault is calculated to create a breach of the peace that would outrage the sensibilities of the community does not adequately or correctly describe the infliction of serious injury contemplated by G.S. 14-32. A simple assault committed by a prizefighter upon a cripple at a Legion convention may be calculated to create a breach of the peace that would outrage the sensibilities of the community. The instruction given by the court does not properly define the serious injury contemplated by the statute under which the indictment was drawn. The court did not give any other definition.

The prosecuting witness was shot in the back and arm with a .410 shotgun, loaded with bird shot. He went to the hospital where 17 shot were removed. Whether the shot were removed by a knife, tweezers, or the fingernails, is undisclosed. How deep the shot penetrated into the flesh after passing through the clothing; whether the witness remained in the hospital half an hour, overnight, or a week, are matters also undisclosed.

The evidence is sufficient to go to the jury on the question of serious injury, but the jury must make the finding under a correct charge.

Jones was relied on by our Supreme Court in *State v. Ferguson*, 261 N.C. 558, 135 S.E. 2d 626 (1964), where the Court held that evidence of an automobile-related "whiplash" injury was sufficient to take the case to the jury on the element of serious injury.

Ferguson and *Jones* were relied on by the Court in *State v. Joyner*, 295 N.C. 55, 243 S.E. 2d 367 (1978), in holding that the injuries inflicted in the victim's rectum by insertion of a soft drink bottle were sufficient to take the case to the jury on the element

of serious injury. The Court's opinion in *Joyner* included dicta, however, to the effect that whether serious injury has been inflicted must be determined according to the facts of each particular case, again citing *Ferguson* and *Jones*. *See also State v. Boone*, 307 N.C. 198, 297 S.E. 2d 585 (1982).

Ferguson and *Jones* were relied on by this Court in *State v. Rotenberry*, 54 N.C. App. 504, 284 S.E. 2d 197 (1981), *cert. denied*, 305 N.C. 306, 290 S.E. 2d 705 (1982), another shotgun incident, where the victim was struck in the arm and hand with 42 pellets, was bleeding from his wounds, and was taken to a hospital where doctors were unable to remove all of the pellets. We held that the evidence was sufficient to take the case to the jury on the element of serious injury. *See also State v. Musselwhite*, 59 N.C. App. 477, 297 S.E. 2d 181 (1982).

Of similar import are our decisions in *State v. Whitted*, 14 N.C. App. 62, 187 S.E. 2d 391 (1972), where the victim was shot in the abdomen with a pistol, lost consciousness, was hospitalized for 13 days, lost 35 pounds, and suffered apparent permanent nerve damage; *State v. Shankle*, 7 N.C. App. 564, 172 S.E. 2d 904 (1970), where the victim was shot in the wrist by a rifle and was treated in a doctor's office; and *State v. Parker*, 7 N.C. App. 191, 171 S.E. 2d 665 (1970), where the victim was stabbed in the neck and ear with a steak knife and was treated in a hospital emergency room.

We are not persuaded that *Ferguson* and *Jones* requires submitting the issue of seriousness of the injury to the jury in this case. In both *Ferguson* and *Jones*, the evidence before the court left the question open: *i.e.*, the court recognized that under the evidence in those cases, reasonable minds might differ as to whether the injuries were serious. We believe the better rule is that where, as here, the evidence is not conflicting[3] and is such that reasonable minds could not differ as to the serious nature of the injuries inflicted, the issue may properly be resolved by the Court by a peremptory instruction.[4] We find support for our

3. The term "uncontradicted" as used by us in *Daniels*, *Davis* and *Springs* does not seem entirely appropriate. It may be said that a plea of not guilty "contradicts" all evidence necessary for the State to carry its burden of proof on all elements of the offense charged.

4. In appropriate cases, the issue may also be resolved by the Court's refusing to submit a lesser offense not including serious injury.

reasoning in the historical position taken by our appellate courts in deadly weapon cases, upholding the authority of our trial courts to classify weapons as deadly as a matter of law, a question we next address in this case.

In this case, we are persuaded that reasonable minds could not differ as to whether "a bullet wound to the head with the bullet lodging in the head is a serious injury" and that the instruction given by the trial court in this case was correct. This assignment is overruled.

[2] Defendant next assigns as error the portion of the charge to the jury pertaining to the definition of a "deadly weapon." The court charged that

> A deadly weapon is an instrument likely to produce death or great bodily harm under the circumstances of its use. A pistol or revolver is a deadly weapon.

Defendant contends that this charge amounted to a declaration that a pellet gun is a deadly weapon *per se* and as such it was error. We disagree.

First, the instruction given did not state that a pellet gun was a deadly weapon; it indicated that a pistol or revolver was a deadly weapon. Such an instruction is not error. Any instrument which is likely to cause death or great bodily harm under the circumstances of its use is a deadly weapon. *State v. Joyner, supra,* and cases cited therein. A pistol is a deadly weapon *per se. State v. Reives,* 29 N.C. App. 11, 222 S.E. 2d 727, *cert. denied,* 289 N.C. 728, 224 S.E. 2d 675 (1976).

Second, it would not have been error in the present case to instruct that the weapon defendant allegedly used was a deadly weapon *per se.* In *State v. Parker,* 7 N.C. App. 191, 171 S.E. 2d 665 (1970), the prosecuting witness was stabbed in the neck and ear with a steak knife having a keen point and a four and one-half inch sawtooth blade. The victim was treated with three stitches, had a stiff neck for a week and a half and eventually needed further treatment for a knot which developed in his neck. This court held that under such circumstances it was not error for the trial court to declare the weapon deadly *per se.* Defendant relies on *State v. Alston,* 305 N.C. 647, 290 S.E. 2d 614 (1982), for the propo-

sition that a pellet gun is not a deadly weapon. In *Alston*, there was conflicting evidence before the jury as to whether the weapon used in a robbery was a rifle, a pellet gun, or a BB rifle. The Court held that while the evidence that it was a BB rifle indicated that the victims' lives were not endangered, the jury was properly allowed to decide whether the defendant was guilty of robbery with a firearm or other dangerous weapon. Defendant misinterprets *Alston;* implicit in *Alston* is the rule that a pellet gun is a "firearm or other dangerous weapon."

Under the circumstances of the present case, it would not have been error to instruct that the pistol defendant used was a deadly weapon as a matter of law. The victim was shot at close range and a metal slug lodged in his head. Certainly the weapon he was shot with was likely to cause death or great bodily harm under such circumstances. This assignment is overruled.

Defendant's other assignments of error pertaining to jury instructions and verdict forms are without merit and are overruled.

No error.

Judges VAUGHN and WHICHARD concur.

STATE OF NORTH CAROLINA v. JOHN LEE ABEE, AND DARRELL RAY JONES

No. 8225SC465

(Filed 21 December 1982)

1. **Criminal Law § 138— sexual offense—aggravating circumstance that crime was heinous, atrocious or cruel**

In imposing a sentence for a second degree sexual offense, the trial court properly found as an aggravating factor that the offense was "especially heinous, atrocious or cruel" since (1) this factor is not an element of second degree sexual offense, and (2) the facts in the case support such a finding.

2. **Criminal Law § 138— sexual offense—findings as to aggravating factors**

The facts in the record supported aggravating factors found by the court that a second degree sexual offense occurred "during a course of conduct wherein the victim was repeatedly beaten," that the conduct was "equivalent to terrorizing the victim," and that the victim was restrained and removed

"from one place to another," and such factors were reasonably related to the purposes of sentencing as required by G.S. 15A-1340.4.

3. **Criminal Law § 138— sexual offense—acts constituting offense considered as aggravating factors**

In imposing a sentence for a second degree sexual offense, the trial court erred in considering as aggravating factors that repeated acts of fellatio occurred and that defendant inserted his finger into the victim's rectum, since the trial court thus considered as aggravating factors the very evidence required to prove the offense charged in violation of G.S. 15A-1340.4. However, such error was not prejudicial where defendant failed to show that the result would have been different if such factors had not been considered by the trial court. G.S. 15A-1442(6); G.S. 15A-1443(a).

4. **Criminal Law § 138— aggravating factors outweighed by mitigating factors—sentence exceeding statutory presumption**

The fact that the number of mitigating factors found by the trial court was greater than the aggravating factors did not preclude the trial court from finding that the aggravating factors outweighed the mitigating factors and from entering a sentence exceeding the statutory presumption.

5. **Criminal Law § 134.4— youthful offender—sufficiency of "no benefit" finding**

Marking the box beside the statement "that the defendant will not benefit from being sentenced as a youthful offender" on the sentencing form constituted a sufficient "no benefit" finding to comply with G.S. 148-49.14.

6. **Criminal Law § 138— sufficiency of evidence to support aggravating factor**

The evidence supported the trial court's finding as an aggravating factor that a second degree sexual offense "was committed during a course of conduct wherein the victim was repeatedly beaten with fists, resulting in bodily injury and abused, by fingers inserted in his rectum."

Judge JOHNSON dissenting.

APPEAL by defendants from *Ferrell, Judge.* Judgment entered 15 December 1981 in Superior Court, BURKE County. Heard in the Court of Appeals 8 November 1982.

This case arises from acts performed by the two defendants on a ten-year old boy on 5 August 1981.

The evidence showed that the defendants and a third man were drinking alcohol on the day in question. They went to a railroad trestle over a creek near Morganton, where they saw the victim. After being told to come up on the trestle, the victim did so. The defendants then forced him to go to an area on the bank of the creek.

Abee threatened the victim and told him that he was going to kill his family. He ordered the victim to take off his clothes, ripped his shirt and threw the clothes into the creek. A third man with the defendants had suggested that they take the victim's clothes off, throw them in the creek and make him walk home naked.

Abee told the boy to bend over and pushed him down. Both defendants forced the victim to perform fellatio on them more than once. Abee stuck his finger in the victim's anus. Jones attempted to put his penis in the victim's rectum.

The victim testified that he smelled alcohol on the defendants' breath and saw them drink alcohol. Both defendants kicked and hit him. Abee hit him on the jaw and chipped his tooth. After Jones left the riverbank and went back up to the trestle, Abee continued to hit the victim in an effort to get him to give money to Abee. The victim offered to give him $150 but Abee continued to hit him. Jones and a third man left the scene. Abee left a few minutes later.

The victim crawled up the bank and went to a nearby used car lot, where he was given a towel and the police were called. He was then taken to a hospital, where he was treated and released after a few hours.

Both defendants were indicted on two counts of first degree sexual offense in violation of G.S. 14-27.4 and one of kidnapping in violation of G.S. 14-39. After being examined by psychiatrists at Dorothea Dix Hospital in Raleigh, both defendants were adjudged competent to proceed.

On 15 December 1981, both defendants pled guilty to one count of second-degree sexual offense in violation of G.S. 14-27.5. The other two charges were dismissed against each defendant. Both were given credit for time already served, sentence was to be set by the judge without recommendation from the District Attorney and work release and committed youthful offender's status were to be requested by the defendants' attorneys.

A sentencing hearing was held where evidence was presented that established a factual basis for the guilty pleas. The trial judge sentenced Abee to twenty years imprisonment after finding that the eight aggravating factors outweighed the nine mitigating ones. This sentence was less than the forty-year max-

imum allowed by G.S. 14-1.1, but greater than the twelve-year presumptive sentence under G.S. 15A-1340.4(f)(2). Although Abee was not given committed youthful offender status, he was recommended for work release when eligible.

Jones was given an eighteen-year sentence and was recommended for work release, even though he was denied committed youthful offender status. The trial judge found that the seven aggravating factors outweighed the twelve mitigating ones in his case.

Motions for appropriate relief were filed by both defendants soon after the trial ended. Because the trial judge did not rule on them within ten days, they were deemed denied. Both defendants then appealed to this Court.

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

Ellis L. Aycock for defendant Jones.

Byrd, Triggs, Mull & Ledford, by John R. Mull, for defendant Abee.

ARNOLD, Judge.

All of the assignments of error by both defendants attack their sentences, which were greater than the presumptive sentence under G.S. 15A-1340.4(f). We consider the appeals separately to avoid confusion of the issues.

ABEE'S APPEAL

[1] Abee attacks the trial court's finding of six of the eight aggravating factors. He first argues that the elements of second-degree sexual offense were considered as aggravating factors in violation of G.S. 15A-1340.4. Abee points to the court's finding as an aggravating factor that the offense was "especially heinous, atrocious, or cruel."

We reject this argument because this factor is not an element of second-degree sexual offense under G.S. 14-27.5, which requires "a sexual act with another person . . . [b]y force and against the will of the other person. . . ." In addition, the facts of this case support a finding by the trial judge that the offense was "especially heinous, atrocious, or cruel."

[2] There are sufficient facts in the record to support the aggravating factors that the offense occurred "during a course of conduct wherein the victim was repeatedly beaten," and that the conduct was "equivalent to terrorizing the victim" and that he was restrained and removed "from one place to another." We find that these three aggravating factors are "proved by the preponderance of the evidence and . . . are reasonably related to the purposes of sentencing," as G.S. 15A-1340.4 requires.

It should be noted that the statute does not require a specific fact finding on each factor to be considered in sentencing, as Abee argues in his second assignment of error. All that is necessary is that the record support the factor by a "preponderance of the evidence."

[3] Defendant is correct that the aggravating factors of repeated acts of fellatio and that Abee inserted his finger into the victim's rectum were improperly considered. G.S. 15A-1340.4 prohibits using "evidence necessary to prove an element of the offense . . . to prove any factor in aggravation. . . ."

In this case, second-degree sexual offense requires a "sexual act." G.S. 14-27.5(a). G.S. 14-27.1(4) includes in the definition of "sexual act" the acts of "fellatio" and "the penetration . . . by any object into the . . . anal opening of another person's body." Thus, the very evidence required to prove the offense that Abee pled guilty to was also considered as a factor in aggravation, as prohibited by the statute. We do not find it important that more than one act of fellatio occurred while G.S. 14-27.5(a) only requires one "sexual act." The same evidence was still used in a prohibited manner.

But we do not find this error to require a remand. As was held in *State v. Ahearn*, 59 N.C. App. 44, 295 S.E. 2d 621 (1982), defendant must show both prejudice and that a different result would have occurred if the factors had been properly considered. Even though the trial judge in *Ahearn* considered some aggravating factors not supported by the evidence, the court found no grounds for a reversal. It relied on G.S. 15A-1442(6), which requires a showing of prejudice before reversal, and G.S. 15A-1443 (a), which defines prejudice as a reasonable possibility that the result would have been different had the error not been commit-

ted. We agree with the rationale of *Ahearn* and find no reversible error here.

[4] Abee's assignments of error three and four attack the sentence as not being the result of a proper weighing of factors. He argues in essence that because the mitigating factors are greater in number that the sentence should have been lower than the statutory presumption of twelve years.

We reject this argument because G.S. 15A-1340.4 does not remove all discretion in sentencing from trial judges. Just because the number of mitigating factors was greater than the aggravating ones does not preclude the trial judge from finding that the aggravating factors outweigh the mitigating ones.

> The discretionary task of weighing mitigating and aggravating factors is not a simple matter of mathematics. . . . The number of factors found is only one consideration in determining which factors outweigh others. . . . The balance struck by the trial judge will not be disturbed if there is support in the record for his determination.

State v. Davis, 58 N.C. App. 330, 333-34, 293 S.E. 2d 658, 661 (1982).

[5] Abee's final attack is on the finding by the trial judge that he would not benefit from sentencing as a committed youthful offender. G.S. 148-49.14 allows a court in its discretion to sentence as committed youthful offenders those under twenty-one who have been convicted of an offense punishable by imprisonment. The statute requires that a "no benefit" finding be made on the record before sentence is imposed.

We hold that marking the box beside the statement "that the defendant will not benefit from being sentenced as a youthful offender" on the sentencing form is sufficient to comply with the statute. All cases on this point cited by both parties were decided before the 1 July 1981 effective date of the Fair Sentencing Act and the use of the new sentencing form. As a result, they are distinguishable on the facts. It should be pointed out, however, that G.S. 148-49.14 has been interpreted not to require "any specific language in order for the 'no benefit' finding to be effec-

tive." *State v. White*, 37 N.C. App. 394, 399, 246 S.E. 2d 71, 74 (1978).

After consideration of the arguments discussed above, we find no abuse of discretion in the denial of Abee's motion for appropriate relief and no error on his appeal.

No error.

JONES' APPEAL

[6] Jones contends that there is no evidence that he inserted his finger or any object into the victim's anus. As a result, he argues that it was error for the trial judge to find this as an aggravating factor.

We do not find this to be error for two reasons. First, the aggravating factor that Jones points to states in full:

> The offense was committed during a course of conduct wherein the victim was repeatedly beaten with fists, resulting in bodily injury and abused, by fingers inserted in his rectum; . . . .

When the trial judge listed aggravating factors in Abee's case, a semicolon was put between the bodily injury factor and the abuse factor. We interpret the lack of such a punctuation mark in Jones' case to mean that the entire phrase was one aggravating factor. This aggravating factor is supported by competent evidence.

Second, the ability of Jones to show prejudice from this factor is weakened because his sentence was two years shorter than Abee's. This is especially true given the fact that the aggravating factors listed for both defendants were identical except for the one difference in punctuation in this aggravating factor.

Ten of Jones' eleven assignments of error are substantially similar to Abee's arguments and do not warrant discussion. After a careful consideration of Jones' arguments on those ten alleged mistakes, we find no error for the reasons stated above.

No error.

Judge HILL concurs.

Judge JOHNSON dissents.

Judge JOHNSON dissenting.

Although the majority finds that the trial court erred by considering in aggravation "evidence necessary to prove an element of the offense," it holds that the error is not prejudicial unless the defendants show that a different result would have been reached had the court not erroneously considered the evidence. The situation presented in *State v. Ahearn, supra,* relied upon by the majority, is distinguishable. The issue in the case under discussion does not relate to either (1) consideration of some aggravating factors not supported by the evidence or (2) the discretionary task of weighing mitigating and aggravating factors to increase or reduce sentences from the presumptive term. The trial court has *no discretion* to even *consider* evidence necessary to prove an element of the offense in aggravation according to the clear terms of G.S. 15A-1340.4. Therefore, the rationale of *Ahearn* is inapplicable to the question presented in this case. I would hold that consideration of evidence necessary to prove an element of the offense to prove any factor in aggravation violates the intent and spirit of basic fairness of the Fair Sentencing Act and is therefore, reversible per se. See Judge Wells' dissenting opinion in *State v. Ahearn, supra.*

It is my opinion that the cases should be remanded for a new hearing to determine an appropriate sentence.

CEBUS WATSON v. JUANITA JACKSON WHITE & LEROY WHITE

No. 8110SC1390

(Filed 21 December 1982)

1. Negligence § 38— last clear chance—failure to instruct error

In a tort action in which plaintiff alleged defendant negligently hit him while he was crossing the street and defendant alleged that plaintiff was con-

tributorily negligent, the trial court erred in failing to instruct on the doctrine of last clear chance. The evidence tended to show that the road was well lit; that defendant could have had an unobstructed view of plaintiff as he crossed the road in defendant's lane; that plaintiff was hit when he was either at the edge of the road or on the shoulder; and that defendant's right front fender was damaged in the collision. This evidence would permit the jury to find that if defendant had kept a proper lookout, she could have avoided the accident by swerving slightly to her left.

2. **Evidence § 19.1— exclusion of testimony concerning similar conditions at accident scene—no abuse of discretion**

The appellate court could not say that the trial court abused its discretion by excluding a witness's testimony regarding the lighting and other conditions on similar occasions at an accident scene.

3. **Insurance § 104; Trial §§ 11, 50.1— jury argument—improper remarks implying defendant uninsured**

In a tort action, defense counsel's remark: "Can you imagine what a low jury verdict would do to that family?" implied that defendant would have to pay the verdict herself because she was uninsured. Although insurance relates directly to the issue of damages, it was conceivable that counsel's remark influenced the jury on their findings of liability as well; therefore, the trial judge erred in overruling plaintiff's objections and in failing to caution the jury to disregard the remarks.

4. **Pleadings § 37; Rules of Civil Procedure §§ 8.2, 15— admissions in pleadings—error in refusing to submit proposed instructions**

The trial judge erred in refusing to submit plaintiff's proposed instructions to the jury concerning the effect of defendant's admissions in the pleadings where (1) defendant failed to deny certain allegations found in plaintiff's complaint in her answer, pursuant to G.S. 1A-1, Rule 8(d), (2) moved to amend her answer to deny the allegations and (3) after the amendment, the admissions were evidentiary admissions.

5. **Negligence § 34— denial of defendant's motion for directed verdict in negligence action proper**

The trial court did not err in denying defendant's motion for directed verdict since defendant admitted that she was negligent in her answer, and plaintiff introduced more than a scintilla of evidence to support his case.

Judge WEBB dissenting in part and concurring in part.

APPEAL by plaintiff from *Hobgood, Judge.* Judgment entered 17 April 1981 in Superior Court, WAKE County. Heard in the Court of Appeals 12 October 1982.

Plaintiff filed a complaint alleging defendant negligently hit him while he was crossing the street. Defendants alleged that

plaintiff was contributorily negligent. Plaintiff filed a reply alleging last clear chance.

The evidence tends to show the following. On 12 October 1979, at 5:30 a.m., plaintiff ran out of gas and stopped on the side of the road. Mr. Hill gave him a ride to the Community Grocery Store. Mr. Hill stopped his truck on Rock Quarry Road, across from the store. According to plaintiff, he got out of the truck and looked both ways before he crossed the street. He did not see any cars or headlights approaching. He walked around in back of the truck, crossed the street, and was on the shoulder of the road, outside the white line, when he was hit by defendant's car. Plaintiff testified that the lights on the gas pumps were on, and he could see across the entire road. Plaintiff was severely injured by the accident.

Defendant, Juanita White, testified that she was headed east driving to work on 12 October 1979 on Rock Quarry Road. She saw a truck stopped in the westbound lane of traffic. She did not know if it was partially on the shoulder. She could see the grocery store and the gas pumps. She said that she saw "a blur, maybe a ghost like figure . . . crossing the road." The blur was somewhere between the center and right side of her car. She said that she did not slow down, blow her horn, or take any evasive action before she hit plaintiff. She was not blinded by headlights or any other lights, but, she said, "they may have, you know, sort of distracted me." She was positive that she stayed in her lane when she hit plaintiff. She stopped after she hit him. Her right fender was damaged.

Mr. Hill testified that he did not recall exactly where plaintiff was when he was hit, but thought he was close to the right hand side of the road.

Mr. Goodwin, the operator of the Community Grocery Store, said that he saw Mr. Watson go around Mr. Hill's truck and run across the road. He saw defendant's car hit plaintiff when he was very near the shoulder of the road. Defendant's car remained in her lane.

After all the evidence was presented, defendant moved to amend her answer to deny every allegation in plaintiff's complaint. The trial court granted the motion.

The jury's verdict was that defendant was negligent and plaintiff was contributorily negligent.

Blanchard, Tucker, Twiggs, Denson and Earls, by Douglas B. Abrams, for plaintiff appellant.

Ragsdale and Liggett, by Jane Flowers Finch and George R. Ragsdale, for defendant appellees.

VAUGHN, Judge.

[1] Plaintiff presents five assignments of error. His first argument is that the trial court erred in failing to submit to the jury the issue of last clear chance.

In charging the jury in any civil action, the judge shall "declare and explain the law arising on the evidence given in the case." G.S. 1A-1, Rule 51. If a party contends that certain acts or omissions constitute a claim for relief or a defense against the other party, the trial court must submit the issue if there is evidence which, when viewed in the light most favorable to the proponent, will support a reasonable inference of each essential element of the claim or defense asserted. *Cockrell v. Cromartie Transport Company,* 295 N.C. 444, 245 S.E. 2d 497 (1978).

The doctrine of last clear chance, which is related to the determination of proximate cause, imposes liability on defendant only when she had a last clear chance to avoid injury. *Stephens v. Mann,* 50 N.C. App. 133, 272 S.E. 2d 771 (1980), *review denied,* 302 N.C. 221, 276 S.E. 2d 919 (1981). The elements of the doctrine of last clear chance are the following: (1) plaintiff, by his own negligence, placed himself in a position of peril (or a position of peril to which he was inadvertent); (2) defendant saw, or by the exercise of reasonable care should have seen, and understood the perilous position of plaintiff; (3) defendant should have seen or discovered plaintiff's perilous condition in time to have avoided injuring him; (4) notwithstanding such notice, defendant failed or refused to use every reasonable means at his command to avoid the impending injury; and (5) plaintiff was injured as a result of defendant's failure or refusal to avoid the impending injury. *Wray v. Hughes,* 44 N.C. App. 678, 262 S.E. 2d 307, *review denied,* 300 N.C. 203, 269 S.E. 2d 628 (1980).

The doctrine of last clear chance was discussed by Justice Lake in *Exum v. Boyles*, 272 N.C. 567, 158 S.E. 2d 845 (1968). In that case, decedent had a flat left rear tire as he was driving north on Highway 301 at night. He stopped his car on the shoulder of the road, with his headlights, taillights and interior lights on. He was wearing a white T-shirt and grey trousers. Defendant, who was also northbound, had his headlights on low beam. When decedent was changing his tire, defendant hit him with a force sufficient to knock him forty or fifty feet, and inflict fatal injuries. Defendant said that although he saw decedent's car he did not see the decedent until he struck him. The trial judge refused to submit to the jury the issue of last clear chance. The jury found that defendant was negligent and decedent was contributorily negligent. Justice Lake concluded that the trial judge should have submitted the issue of last clear chance to the jury.

According to Justice Lake,

> The doctrine of the last clear chance originated in the case of *Davies v. Mann*, 10 M. & W. 547, 152 Eng. Rep. 588, the "Fettered Ass Case." There, the plaintiff fettered the forefeet of his animal and turned it out upon the highway to graze. Thereafter, the defendant's horses and wagon came at an excessive speed down a hill and ran over and killed the fettered animal which was unable to get out of the way. The defendant's driver was "some little distance behind the horses." The court sustained a verdict and judgment for the plaintiff on the ground that, even if the plaintiff's animal was unlawfully upon the highway, the defendant "might, by proper care, have avoided injuring the animal, and did not." The basis of the decision was that the defendant's negligence, under such circumstances, was the proximate cause of the damage to the plaintiff's property.
>
> Thus, in *Davies v. Mann*, the plaintiff's negligence, or wrongful act, had placed his property in a position of danger of injury by a passing vehicle. Subsequently, when it was no longer possible for the plaintiff (or his animal) to avoid the peril, the defendant negligently permitted his vehicle to proceed along the highway in a dangerous manner and to strike the plaintiff's animal. There is nothing in the report of the case to indicate that the defendant's driver actually saw the

> plaintiff's animal before it was struck. It thus appears that the plaintiff was allowed to recover on the ground that, had the defendant's driver been where he should have been and maintained the lookout he should have maintained, he would have seen the plaintiff's animal in time to avoid the collision.

Exum v. Boyles, 272 N.C. at 573-574, 158 S.E. 2d at 851.

Justice Lake observed that "the doctrine of the last clear chance is not a single rule, but is a series of different rules applicable to differing factual situations." *Exum v. Boyles*, 272 N.C. at 575, 158 S.E. 2d at 852.

The Restatement of Torts, Second, lists several rules of last clear chance:

> § 479. Last Clear Chance: Helpless Plaintiff. A plaintiff who has negligently subjected himself to a risk of harm from the defendant's subsequent negligence may recover for harm caused thereby if, immediately preceding the harm,
>
> (a) the plaintiff is unable to avoid it by the exercise of reasonable vigilance and care, and
>
> (b) the defendant is negligent in failing to utilize with reasonable care and competence his then existing opportunity to avoid the harm, when he
>
> (i) knows of the plaintiff's situation and realizes or has reason to realize the peril involved in it or
>
> (ii) *would discover the situation and thus have reason to realize the peril, if he were to exercise the vigilance which it is then his duty to the plaintiff to exercise.* (Emphasis added.)

The evidence in this case tended to show that the road in front of the grocery store was well lit, defendant could have had an unobstructed view of plaintiff as he crossed the road in defendant's lane, plaintiff was hit when he was either at the edge of the road or on the shoulder, and defendant's right front fender was damaged in the collision. This evidence would permit the jury to find that if defendant had kept a proper lookout she could have avoided the accident by swerving slightly to her left. Indeed, this is most likely the basis upon which the jury found defendant

negligent. Having found both plaintiff and defendant negligent, the jury should have then been allowed to consider whether defendant should have seen plaintiff's perilous condition in time to avoid striking him, and whether defendant used every reasonable means at her command to avoid the impending injury.

[2] Plaintiff's second assignment of error is that the trial court erred in excluding Ms. Stancil's testimony regarding the lighting and other conditions on similar occasions at the accident scene. The assignment of error is without merit. Whether the conditions at another time are admissible rests largely in the discretion of the trial judge, and we cannot say that he abused his discretion in this case.

[3] Plaintiff's third assignment of error is that the trial court erred in allowing defendant's counsel to make the following alleged improper and prejudicial remarks in his argument to the jury:

> Mr. Ragsdale: First thing she did was say a prayer.
>
> Mr. Abrams: Objection.
>
> Court: Overruled.
>
> Mr. Ragsdale: Now they object to prayer. Can you imagine what a low jury verdict would do to that family.
>
> Mr. Abrams: Objection to what a verdict would do.
>
> Court: Overruled. Argument of contention.
>
> Mr. Ragsdale: Can you imagine what a jury verdict, a low jury verdict, a little one, five thousand dollars, would do to that little family.

These remarks are clearly improper and prejudicial. In *Scallon v. Hooper*, --- N.C. App. ---, 293 S.E. 2d 843 (1982), the plaintiff assigned as error defendant's argument to the jury that "defendant would be 'legally obligated to pay every single dollar of [the] verdict . . . ' and that the jury must deal 'cautiously and fairly with the estate and the property of Philip Hooper.' " This Court held that the argument implied that defendant had no insurance coverage and that the award of substantial damages would be a significant burden on defendant. Since punitive damages were not

sought, the wealth or poverty of defendant was not at issue, and the argument was unfair to plaintiff and improper.

In this case counsel's remark: "Can you imagine what a low jury verdict would do to that family" implied that defendant would have to pay the verdict herself because she was uninsured. This is similar to the implication in *Scallon v. Hooper, supra*, and is improper. Defendant contends that the improper remark was not prejudicial because the jury did not reach the issue of damages. Although insurance, or the lack of insurance, relates directly to the issue of damages, it is conceivable that counsel's remark influenced the jury on their finding of liability as well, since finding plaintiff contributorily negligent would result in no damages when the issue of last clear chance was not presented to the jury. We find that the trial judge erred in overruling plaintiff's objections and failing to caution the jury to disregard the remarks.

[4] Plaintiff's fourth assignment of error is that the trial court erred in failing to instruct the jury on the effect of defendant's admissions in the pleadings. According to Brandis on North Carolina Evidence:

> [There are] two classes of pleadings: (1) the final pleadings defining the issues and on which the case goes to trial, and (2) other pleadings in the same or another case which do not serve to define the issues in the case being litigated. An admission in a pleading of the first class is a *judicial* admission, conclusively establishing the fact for the purposes of that case and eliminating it entirely from the issues to be tried. . . .
>
> Pleadings of the second class, while not defining issues in the case being litigated, nevertheless reflect something which a party has once said . . . and qualify as *evidential* admissions. This class includes: pleadings . . . in the same case which, though once serving to define issues, have been withdrawn, amended to strike out admissions, or otherwise superseded. . . . (Emphasis in original.)

2 Brandis on North Carolina Evidence § 177 (1982).

The relevant paragraphs of plaintiff's complaint contained the following:

12. The defendant, Juanita J. White, operated the said vehicle carelessly and negligently in that she:

. . .

c. Failed to reduce speed when such was necessary to avoid colliding with the plaintiff, Cebus Watson, and when such was necessary to avoid injury to the plaintiff Cebus Watson, in violation of North Carolina General Statute Section [20-141(m)];

d. Drove at a speed and in a manner so that she was unable to stop within the radius of her headlights in violation of the duty to use due care and keep a proper lookout;

e. Drove the car off the highway, striking the plaintiff, Cebus Watson, and causing the plaintiff severe and permanent bodily injuries.

Defendant did not deny these allegations in her answer, so they were deemed admitted. G.S. 1A-1, Rule 8(d). After the closing arguments, the trial court allowed defendant's motion to amend her answer to deny paragraphs 12(c), (d), and (e) in plaintiff's complaint.

Before defendant amended her answer the admitted allegations were judicial admissions which conclusively established those facts. These admissions did not need to be introduced into evidence. After the amendment, the admissions were evidentiary admissions. Since defendant's admissions were relevant, the trial judge erred in refusing to submit plaintiff's proposed instructions to the jury.

[5] Defendant's cross assignment of error is that the trial court erred in denying defendant's motions for a directed verdict.

The trial court should deny a motion for a directed verdict when, viewing the evidence in the light most favorable to the nonmovant and giving the nonmovant the benefit of all reasonable inferences, it finds more than a scintilla of evidence to support the nonmovant's prima facie case. *Hunt v. Montgomery Ward and Company, Inc.*, 49 N.C. App. 642, 272 S.E. 2d 357 (1980). Since defendant admitted that she was negligent in her answer, and plaintiff introduced some evidence that he was not negligent because he looked both ways before he crossed the street, did not

see any cars or headlights, and he was hit after he crossed the street and was standing on the shoulder of the road, there was more than a scintilla of evidence to support plaintiff's case, and defendant's motion for directed verdict was properly denied.

For the reasons stated, there must be a new trial.

New trial.

Judge WELLS concurs.

Judge WEBB dissents in part and concurs in part.

Judge WEBB dissenting in part, concurring in part.

I dissent from that part of the majority opinion which holds it was error not to submit an issue as to last clear chance.

I believe that last clear chance, as applied to this case, would allow recovery for the plaintiff although the jury found he was contributorily negligent if the jury could also find that after the plaintiff, by his negligence, had placed himself in a position from which he was unable to escape, the defendant's failure to use due care was a proximate cause of the injury. I do not believe the jury could so find from the evidence in this record. It was not until the defendant's vehicle was so close to the plaintiff that the plaintiff was unable to move out of its path that the plaintiff was in a position of helpless peril. The defendant's vehicle was then only a fraction of a second away from the plaintiff. I do not believe we should hold that a jury could find that the defendant could reasonably have avoided the accident in this short period of time.

In *Exum v. Boyles*, 272 N.C. 567, 158 S.E. 2d 845 (1968) Justice Lake was careful to point out that the deceased was standing beside a vehicle and would have had to run around one end or the other of the vehicle to avoid the accident. The plaintiff in that case was in the position of helpless peril for several seconds, allowing the defendant in that case an opportunity to avoid the injury. The defendant in this case had no such opportunity. I would affirm the superior court in its refusal to submit the issue of last clear chance.

I vote with the majority in all other aspects.

STATE OF NORTH CAROLINA v. DONNELL HICKS

STATE OF NORTH CAROLINA v. JOHN DAVID JONES

STATE OF NORTH CAROLINA v. LINDA COOPER

No. 822SC562

(Filed 21 December 1982)

1. **Searches and Seizures § 44— contention that search warrant invalid on face—right of trial court to conduct voir dire**

When a defendant moves to suppress evidence obtained by a search warrant upon the ground that there was no probable cause for issuance of the search warrant, the scope of the court's review of the magistrate's determination of probable cause is not confined to the affidavit alone. Therefore, where a search warrant was allegedly invalid on its face for lack of facts to show probable cause, it could be made valid by *voir dire* testimony and contemporary, unattached written memorandum, which, when taken all together, showed legal probable cause to search for illicit controlled substances.

2. **Searches and Seizures § 47— handwritten note of magistrate—proper to include in suppression hearing**

The trial court did not err in admitting a magistrate's handwritten notes which contained additional information recorded by the magistrate as received under oath from an affiant when the magistrate prepared the search warrant since the magistrate made his notes on the exhibit contemporaneously from information supplied by the affiant under oath, the paper was not attached to the warrant in order to protect the identity of the informant, the notes were kept in the magistrate's own office drawer, and the paper was in the same condition as it was at the time of the issuance of the search warrant. Defendants were not prejudiced by the admission of the notes, and as required by statute, the magistrate's additional information was recorded. G.S. 15A-245(a).

APPEAL by defendants from *Small, Judge.* Judgment entered 22 February 1982 in Superior Court, WASHINGTON County. Heard in the Court of Appeals 6 December 1982.

Identical separate bills of indictment of two counts charged each defendant with the felony of possession with intent to deliver a controlled substance, approximately 20 pounds of marijuana, and with felonious possession of approximately 20 pounds of marijuana, as reflected by case No. 81CRS1334. Case No. 81CRS1337 contains 4 counts. The parties stipulated that the offenses charged against each defendant in the separate indictments were identical. The offenses were (1) felony possession of

cocaine, (2) conspiracy to commit the felony of trafficking in cocaine with each codefendant, (3) possession of cocaine with intent to deliver, and (4) possession of more than one gram of cocaine.

After their motion to suppress evidence seized under a search warrant was denied, defendants entered pleas of guilty in the several cases. Defendants appeal after judgment from the trial court's denial of the motion to suppress.

Attorney General Edmisten by Assistant Attorney General David Gordon for the State.

Wilkinson & Vosburgh by John A. Wilkinson and James R. Vosburgh for defendant appellants.

BRASWELL, Judge.

Defendants' two questions presented on appeal raise the basic issue of whether a search warrant, allegedly invalid on its face for lack of facts to show probable cause, can be made valid by *voir dire* testimony and contemporary, unattached written memorandum, which, when taken all together, show legal probable cause to search for illicit controlled substances. We answer yes, and hold that the trial judge's findings of facts were supported by the evidence.

The challenged portion of the affidavit for the search warrant reads:

> There is probable cause to believe that certain property, to wit: . . . illegal drugs (constitutes evidence of) . . . a crime, to wit: possession of illegal drgus [sic] for the purpose of sale and the property is located (in the place) (in the vehicle) . . . described as follows: Room 31 is located to the right of the main office of Pine Tree Motel, which is located on highway 64 West diagnally [sic] across from Monroe Street entrance into highway 64 and directly across the street from Smith-Douglas Fertilizer Plant. The vehicle is a 1979 2-door Buick off white with a florida [sic] registration license no. DEA-725.
>
> The applicant swears to the following facts to establish probable cause for the issuance of a search warrant: Plymouth Police Dept. received a tip from a confidential informer that illegal drugs were being brought into plymouth

> [sic] and that the person bringing them would be staying at the Pine Tree Motel. The police put a watch on the motel and observed an unusual amount of traffic going into room 31. Among those entering were known drug users. . . . The vehicle has been observed in the area in the past parked at residences where known drug users reside. The vehicle has a Florida registration.

During the suppression hearing, Magistrate W. B. Blackburn, the warrant-issuing official, and Sgt. Bill Mizelle of the Plymouth Police Department, the affiant in the warrant, testified. State's Exhibit MSX-1, notes on "a sheet of yellow paper from a legal tablet," was introduced into evidence. This exhibit contained additional information recorded by Magistrate Blackburn as received under oath from Sgt. Mizelle. The exhibit reads:

> Mrs. Harrell, Pine Tree Mot. called earlier and said lots of phone calls at Room 31; she listened in; drug deals; drugs in room.
>
> DO NOT USE MRS. HARRELL'S NAME!
>
> Stake out; Linda Cooper and others in room; he not want use other names . . . haven't checked out. Linda Cooper has record.
>
> Stake out Room 31 diagonally from Monroe Street across S. D. Fert. right of main office; two blocks.

Magistrate Blackburn testified that when he prepared the search warrant, he used some of the information contained in the handwritten notes on MSX-1, and that after he had written the information, he placed the notes in a drawer and kept them. They were in a lower drawer in his office where he kept his receipt book, and he retained the notes until he presented them at this *voir dire* hearing. Though aware of a place on the search warrant application for the magistrate to indicate that he had received additional information at the time of issuance of the document, he did not check the same. The magistrate testified that he knew that Mrs. Harrell was the informant, and that Linda Cooper had been tried and found guilty of dealing in marijuana, but he did not place all the information he received in the search warrant.

The defendants' first exception is directed to the court's conducting an evidentiary hearing, contending that the search war-

rant was invalid on its face as a matter of law. Defendants' second, and last, exception concerns the court's overruling the objection to receiving into evidence State's Exhibit MSX-1, the handwritten notes of the magistrate.

The problems of probable cause deal with "factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar v. United States*, 338 U.S. 160, 175, 69 S.Ct. 1302, 1310, 93 L.Ed. 1879, 1890 (1949). In *Carroll v. United States*, 267 U.S. 132, 161, 45 S.Ct. 280, 288, 69 L.Ed. 543, 555 (1925), the Court notes and quotes with approval from *McCarthy v. DeArmit*, 99 Pa. 63, 69 (1881): "The substance of all the definitions [of probable cause] is a reasonable ground for belief in guilt." *State v. Jones*, 299 N.C. 298, 261 S.E. 2d 860 (1980); *State v. Harris*, 43 N.C. App. 184, 258 S.E. 2d 415 (1979).

The additional information known under oath to Magistrate Blackburn was the name and address of the informant, Mrs. Harrell, Pine Tree Motel, Plymouth, North Carolina; that the informant, by listening in on telephone conversations, knew that drugs were then in Room 31 and that drug deals were going on. He knew that Linda Cooper, one of the people in Room 31, had a record, and that she had been found guilty of dealing in marijuana. This information from the evidentiary hearing, when taken with the information on the face of the search warrant, reveals probable cause existed at the time the search warrant was issued.

[1] The defendants challenge the right of the trial court to conduct a *voir dire*, contending that as a matter of law the search warrant is invalid on its face. In making this contention, defendants overlook that it is they who made the motion to suppress. It is always appropriate for the trial court to conduct a hearing on a motion to suppress. In such hearing the burden of proof is on the State. The State is not relegated to producing or introducing the search warrant alone, but may offer other evidence to show probable cause existed at the time of the issuing of the search warrant, if in truth it has any to offer. We agree with the State in its brief that "[t]he scope of the court's review of the magistrate's determination of probable cause is not confined to the affidavit alone."

As said by this Court in *State v. Logan*, 18 N.C. App. 557, 558, 197 S.E. 2d 238, 239 (1973), *cert. denied*, 285 N.C. 666 (1974):

> When a defendant moves to suppress evidence obtained by a search warrant upon the ground that there was no probable cause for issuance of the search warrant, the inquiry before the court is whether the issuance of the warrant comports with G.S. 15-26, and whether the magistrate was justified in finding probable cause. The court should determine from an examination of the affidavit and warrant whether . . . (2) the attached affidavit *indicates the basis* for the finding of probable cause; . . . If the affidavit *indicates the basis* for the finding of probable cause, but is not in itself sufficient to establish probable cause, testimony of witnesses will be necessary to establish whether there was in fact sufficient evidence before the magistrate to justify his finding of probable cause to issue the search warrant.

Logan further holds, at page 559, 197 S.E. 2d at 240:

> The proper inquiry is whether there were sufficient facts before the magistrate at the time of issuing the search warrant to justify the magistrate's finding of probable cause, and whether the warrant complies with the statute.

See, State v. Hamlin, 36 N.C. App. 605, 244 S.E. 2d 481 (1978); *State v. Beddard*, 35 N.C. App. 212, 241 S.E. 2d 83 (1978); *State v. Howell*, 18 N.C. App. 610, 197 S.E. 2d 616 (1973).

[2] G.S. 15A-245(a) is relied on by the defendants as the basis upon which to exclude State's Exhibit MSX-1. The statute provides:

> (a) Before acting on the application, the issuing official may examine on oath the applicant or any other person who may possess pertinent information, but information other than that contained in the affidavit may not be considered by the issuing official in determining whether probable cause exists for the issuance of the warrant *unless the information is either recorded or contemporaneously summarized in the record or on the face of the warrant by the issuing official.* (Emphasis added.)

The evidence shows that the magistrate made his notes on the exhibit contemporaneously from information supplied by the affiant under oath, that the paper was not attached to the war-

rant in order to protect the identity of the informant, that the notes were kept in the magistrate's own office drawer, and that the paper was in the same condition as it was at the time of the issuance of the search warrant. By the evidence produced at the suppression hearing, the defendants were aided in their preparation for trial in that actual knowledge of the informant was discovered. The informant could have been subpoenaed for trial. Defendants were not prejudiced.

As required by statute, the magistrate's additional information was recorded. It is not required that the additional information be recorded in the Register of Deeds' or Clerk of Superior Court's office, or any one location to the exclusion of all other places. The failure of the magistrate to check the blank box on the form for additional information is not fatal under all of these facts. As held in *United States v. Ventresca*, 380 U.S. 102, 108, 85 S.Ct. 741, 746, 13 L.Ed. 2d 684, 689 (1965):

> These decisions reflect the recognition that the Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract. If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion.

And, as stated in *Aguilar v. Texas*, 378 U.S. 108, 111, 84 S.Ct. 1509, 1512, 12 L.Ed. 2d 723, 726 (1964):

> Thus, when a search is based upon a magistrate's, rather than a police officer's, determination of probable cause, the reviewing courts will accept evidence of a less 'judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant,' ibid., and will sustain the judicial determination so long as 'there was substantial basis for [the magistrate] to conclude that narcotics were probably present. . . .'

Quoting *Jones v. United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed. 2d 697, 78 A.L.R. 2d 233 (1960).

The trial court did not err in holding the *voir dire* hearing on the motion to suppress. The court's rulings allowing Exhibit

MSX-1 to be received in evidence and denying the defendants' motion to suppress the evidence obtained under the search warrant were proper.

Affirmed.

Judges ARNOLD and JOHNSON concur.

COUNTY OF LENOIR, EX REL. ALICE FAYE DUDLEY v. JIMMY LEE DAWSON

No. 818DC1271

(Filed 21 December 1982)

1. **Bastards § 10— action to establish paternity—reason for denying paternity of another child—irrelevancy**

In an action to establish paternity and to obtain child support, defendant's testimony that he had denied paternity of another child born to plaintiff because he had "heard some people in the community talking about it to the effect that it was not mine" was irrelevant and properly excluded; furthermore, the exclusion of such testimony was not prejudicial where defendant's reason for denying paternity of the other child was adequately conveyed to the jury prior to the exclusion of such testimony. G.S. 110-135.

2. **Bastards § 10— action to establish paternity—sufficiency of evidence**

Plaintiff's evidence was sufficient for the jury in an action to establish paternity although the evidence showed that the child was born 289 days after plaintiff testified that she and defendant last had sexual relations and there was no expert medical testimony as to whether the term of plaintiff's pregnancy could have extended beyond ten lunar months, or 280 days.

3. **Trial § 39— failure to reach verdict—dismissal not required—further deliberations**

The trial court did not err in failing to dismiss the case and in giving the jury further instructions and permitting the jury to deliberate further when the jury returned to the courtroom and reported that "with the evidence presented on both sides, there was no decision made," since the jury's statement did not indicate that it had found plaintiff's evidence to be insufficient.

4. **Trial § 39— inability of jury to reach verdict—further instructions—comment on wasted judicial resources from mistrial**

It is error for the judge in a civil case to instruct the jury, upon the jury's failure to reach a verdict, that a mistrial will mean that another jury will have to be selected to hear the case again and that it will take another week or more of the court's time to hear the case again. G.S. 15A-1235; G.S. 49-14.

APPEAL by defendant from *Jones, Judge.* Judgment entered 31 March 1981 in District Court, LENOIR County. Heard in the Court of Appeals 15 September 1982.

This action to establish paternity and for child support was brought by Lenoir County (the County) on behalf of Alice Dudley against defendant Jimmy Lee Dawson. The Complaint alleges that Alice Dudley is the mother of an infant child, Teneisha Dudley; that Jimmy Dawson is the biological father of Teneisha; and that Jimmy Dawson has failed to contribute to the child's support despite demands by plaintiff and Alice Dudley and despite the fact that Jimmy Dawson is an able-bodied man capable of contributing to the child's support. Having made payments to Alice Dudley for child support under the AFDC program, the County prays that defendant (i) be adjudicated the father of Teneisha Dudley; (ii) be adjudicated a responsible parent under N.C. Gen. Stat. § 110-135 (1981); and (iii) be ordered to satisfy the debt the County incurred under the AFDC program.

William D. Spence for defendant appellant.

Marcus and Whitley, by Robert E. Whitley, for plaintiff appellee.

BECTON, Judge.

I

The issues on appeal concern evidentiary matters, denial of defendant's motion for directed verdict, the trial court's use of an "Allen Charge"[1] when the jury indicated that it had not reached a decision, whether the trial court expressed an opinion to the jury during its jury instructions, and the trial court's failure to make a specific finding that defendant was the father of the child before accepting the jury's verdict and entering a judgment requiring defendant to pay child support. We resolve the "Allen Charge" issue in defendant's favor and grant a new trial. Because the evidentiary issues may arise on retrial, we address them also.

II

[1] At trial, Alice Dudley testified that she has three children born out of wedlock, two of whom were fathered by the defend-

1. *Allen v. United States*, 164 U.S. 492, 41 L.Ed. 528, 17 S.Ct. 154 (1896).

ant. The second child, Teneisha, is the child whom this appeal concerns. Without objection, Alice Dudley also testified that she took defendant to court to obtain money for the first child, Tonya. To show that he had not arbitrarily denied paternity of the first child, defendant sought to testify that he had "heard some people in the community talking about it to the effect that it was not mine." Defendant first contends that the exclusion of this testimony by the trial court was prejudicial and constitutes reversible error.

Even if defendant did not offer this testimony for the truth of the matter asserted, we are not convinced it is relevant. More important, defendant's reason for denying paternity was adequately conveyed to the jury before the trial court excluded the testimony that is the subject of this assignment of error. Without objection, defendant testified as follows:

> I did have sexual relations with her [Alice Dudley] from 1973 to 1976 until the first child was born, Tonya. She did come and tell me that she was pregnant with Tonya. I told her I would take care of it and later on she carried me to court. I don't know why she took me to court. I was sending the child money mostly every month. I denied the first child was mine the day she took me to court because of her taking me to court. I was already taking care of it and then after she took me to court we had the blood test.
>
> Q. Have you heard something in the community that made you change your mind?
>
> A. That is right.

In view of this explanation concerning defendant's denial of paternity of Tonya, we cannot say that prejudicial error occurred in the exclusion of the proffered testimony.

III

[2] Because the County's evidence shows (i) that Alice Dudley's last menstrual period prior to the birth of Teneisha was in January of 1978; (ii) that Alice Dudley did not have sex with the defendant after the last of January 1978; and (iii) that the child was born 17 November 1978, some nine calendar months and seventeen days after January 1978, defendant contends that the

trial court erred in denying his motion for a directed verdict made at the close of all the evidence. Although "it is a matter of common knowledge that the term of pregnancy is ten lunar months, or 280 days," *State v. Forte*, 222 N.C. 537, 539, 23 S.E. 2d 842, 844 (1943), we reject defendant's argument that testimony by a qualified medical expert as to whether the term of Alice Dudley's particular pregnancy could have extended beyond 280 days was required. Although the child, Teneisha, was born at least 289 days after the last time Alice Dudley could have become pregnant by the defendant, plaintiff's evidence, in this paternity action, was sufficient to be submitted to the jury.

Byerly v. Tolbert, 250 N.C. 27, 108 S.E. 2d 29 (1959), which defendant cites, is distinguishable. The issue in that case was whether a child born approximately 322 days after the death of the intestate was entitled to recover any of the wrongful death proceeds. The *Byerly* Court held that a child born to intestate's widow more than ten (10) lunar months or 280 days after the death of the intestate is presumed not *en ventre sa mere*. This presumption, however, is rebuttable. Expert medical testimony is not needed in the case *sub judice* when the child was born 289 days after the date Alice Dudley testified she and defendant last had sexual relations. Children are often born two weeks late. Defendant's motion for directed verdict was properly denied.

IV

[3] After deliberating for fifty-two minutes, the jury returned to the court room and said: "Your Honor, with the evidence presented on both sides, there was no decision made." Defendant next contends that the trial court should have discharged the jury and dismissed the case rather than to have given an "Allen Charge" since the jury's statement indicated that the County had not proven its case beyond a reasonable doubt, and not that the jury had failed to reach a verdict. We hold that the trial court did not err in failing to discharge the jury and dismiss the case.

First, the jury did not say, unequivocally, that it was unable to reach a verdict. Second, the following issue was submitted to the jury: "Is the defendant, Jimmy Lee Dawson, the father of Teneisha Lashon Dudley, who was born to Alice Faye Dudley on November 17, 1978?" Significantly, the jury did not find plaintiff's evidence insufficient by answering the issue "No." Third, after

the jury made its statement, the trial judge said: "The court understands the foreman of the jury, you have not reached a verdict, is that correct?" The foreman replied: "Yes, sir."

V

[4] We must now determine if the trial court's instruction on the failure to reach a verdict coerced the jury. After being advised by the foreman that the jury had not reached a verdict, the trial court gave the following instruction:

> COURT: Please listen to me for just one moment. I presume you Ladies and Gentlemen realize that a disagreement means in not reaching a verdict it means of course it will take another week or more time in the Court at some other time to be consumed for the trial of this action again. I don't want to force you or coerce you in any way to reach a verdict but it is your duty to try to reconcile your differences and reach a verdict if it can be done without any surrender of one's conscientious convictions. You have heard the evidence in the case and a mistrial of course will mean that another jury will have to be selected to hear the case and evidence again presented. The Court recognizes the fact that there are sometimes reasons why jurors cannot agree. The Court wants to emphasize the fact that it is your duty to do whatever you can to reason the matter to try and reason the matter over together as reasonable men and women to reconcile your differences if such is possible without the surrender of conscientious convictions and to reach a verdict. I will let you resume your deliberations and see if you can. If you can't you sound your alarm at the deliberation door again and you will be admitted. If you do reach a verdict sound your alarm and you will be admitted back in the courtroom.

Were this a criminal case, the resolution of the issue presented by these instructions would be simple. Our legislature, realizing that the "Allen" or so-called "dynamite" charge has been the subject of much criticism,[2] and considering the standards approved by the American Bar Association,[3] enacted N.C. Gen. Stat.

2. *See* Annot., 41 A.L.R. 3d 1154 (1972) and *State v. Alston*, 294 N.C. 577, 592, 243 S.E. 2d 354, 364 (1978).

3. *See*, American Bar Association Standards Relating To Trial By Jury, § 5.4 (approved draft 1968).

§ 15A-1235 (1978). This statute "represents a choice of the 'weak' charge approved in the ABA standards, as opposed to the 'strong' charge traditionally used in federal courts and the 'even stronger charges authorized under North Carolina case law.'" *State v. Easterling*, 300 N.C. 594, 608, 268 S.E. 2d 800, 809 (1980). Under N.C. Gen. Stat. § 15A-1235, trial judges are prohibited from mentioning or suggesting that wasted jury and judicial resources might occur as a result of mistrials in criminal cases. *State v. Easterling; State v. Alston*, 294 N.C. 577, 243 S.E. 2d 354 (1978); *State v. Lamb*, 44 N.C. App. 251, 261 S.E. 2d 130 (1979), *disc. review denied*, 299 N.C. 739, 267 S.E. 2d 667 (1980).

This is not a criminal case, however. A paternity suit under N.C. Gen. Stat. § 49-14 (1981) is a civil action, even though the "beyond a reasonable doubt" standard is employed. *Bell v. Martin*, 299 N.C. 715, 722, 264 S.E. 2d 101, 106 (1980), *reh'g denied*, 300 N.C. 380 (1980). But the purposes underlying the efforts to mollify the "Allen Charge" seem equally applicable in criminal and civil cases. The "Allen Charge" is filled with psychological pressures designed to pressure deadlocked juries to reach a verdict. And, as we said in *State v. Lamb*, "this potentially coercive device has been rebounding through the *civil* and criminal justice systems for over eighty years." (Emphasis added.) 44 N.C. App. at 253, 261 S.E. 2d at 131 (1979). To charge a jury, in civil or in criminal cases, that failure to reach a verdict will mean another week or more of the court's time for the retrial of this case, and that a mistrial will mean that another jury will have to be selected to hear the case and evidence again, is "legally inaccurate and simply not true as any trial lawyer knows." *State v. Lamb*, 44 N.C. App. at 254, 261 S.E. 2d at 132.

Interestingly enough, N.C.P.I.—Civil, 150.50 "Failure of Jury to Reach Verdict" (replacement October 1980), which was being used at the time of this trial, takes the conservative approach and follows *State v. Lamb* and G.S. § 15A-1235. Those instructions do not mention that a mistrial will probably necessitate the selection of another jury to rehear the case and evidence or that more time of the court will be spent on the retrial of the case.

Considering then, (1) the efforts to mollify the effect of the "Allen Charge" in North Carolina; (2) the purposes underlying G.S. § 15A-1235; and (3) the potentially coercive impact of the instructions in this case as they urge the jury to consider ex-

traneous and improper matters and as they inaccurately state the law, we hold the challenged instructions to be error. No jury, civil or criminal, should be given instructions that effectively coerce a verdict. For the foregoing reasons, defendant is entitled to a

New trial.

Chief Judge MORRIS and Judge JOHNSON concur.

ZICKGRAF HARDWOOD COMPANY, D/B/A NANTAHALA LUMBER COMPANY
v. RALPH SEAY AND WIFE, JIMMIE N. SEAY

No. 8130SC1403

(Filed 21 December 1982)

1. **Accounts § 2— insufficient evidence to find account stated formed**

The trial court erred in denying the femme defendant's motions for a directed verdict and motion for judgment notwithstanding the jury verdict for plaintiff on an account stated where the evidence showed that the account was created by express agreement between the femme defendant's husband and plaintiff's agent; that the femme defendant was not a party to that agreement; that the account itself, invoices and monthly statements were only in the name of the femme defendant's husband; and that the femme defendant neither participated in the opening of the account nor sought credit with the plaintiff in her own name.

2. **Principal and Agent § 1— relationship of husband and wife—insufficient to establish agency**

The fact that the femme defendant indirectly received and enjoyed the benefit of her husband's contract with the plaintiff via maintenance and support which she was entitled to receive from her husband under the law was insufficient to establish a business relationship and agreement between the defendants.

3. **Partnership § 1.2— evidence of wife as co-owner of business insufficient**

The record was devoid of any evidence that the femme defendant was an owner or principal of her husband's building business where, at most, the evidence showed that the femme defendant was an employee of her husband who performed mainly secretarial and bookkeeping tasks at his direction.

APPEAL by defendant from *Thornburg, Judge.* Judgment entered 27 July 1981 in Superior Court, MACON County. Heard in the Court of Appeals 13 October 1982.

Plaintiff instituted this action against defendants Ralph Seay and his wife, Jimmie N. Seay for recovery upon an open account. The plaintiff, Zickgraf Hardwood Co., d/b/a Nantahala Lumber Co., alleged in its complaint and amended complaint that the defendants purchased building materials, goods and supplies from the plaintiff, upon an open account between 1 January 1977 and 30 June 1977, and that there was a balance due on said account of $8,186.49 which the defendants refused to pay.

In their answer, defendants denied the material allegations of the complaint and specifically denied that the defendant Jimmie N. Seay had ever purchased any building materials, goods and supplies from the plaintiff on her own behalf or in any other capacity upon an open account.

The matter came on for jury trial. The defendants unsuccessfully moved for a directed verdict at the close of plaintiff's evidence and at the close of all the evidence. The jury returned a verdict against both defendants on an account stated, finding that Mrs. Seay was principal or an owner in the business. The defendants' motions for judgment notwithstanding the verdict or in the alternative for a new trial were denied and defendant Jimmie N. Seay appeals.

McKeever, Edwards, Davis & Hays, P.A., by Fred H. Moody, Jr., for defendant appellant.

Jones, Key, Melvin & Patton, P.A., by Russell R. Bowling for plaintiff appellee.

JOHNSON, Judge.

This is an appeal from a jury verdict for plaintiff on an account stated. The issue on appeal is whether the trial court should have granted the defendant wife's motions for directed verdict because she was not a partner in the business and was not otherwise liable on the account. For the reasons stated below, we conclude that a directed verdict in favor of Jimmie Seay should have been entered and the case against her dismissed.

It is well settled that a motion for directed verdict under Rule 50 of the North Carolina Rules of Civil Procedure may be granted only if the evidence is insufficient, as a matter of law, to

support a verdict for the plaintiff. *See e.g., Arnold v. Sharpe,* 296 N.C. 533, 251 S.E. 2d 452 (1979); *Trust Co. v. Smith,* 44 N.C. App. 685, 262 S.E. 2d 646 (1980). In determining motions for directed verdict and for judgment notwithstanding the verdict, the court must consider all relevant evidence admitted at trial in a light most favorable to the plaintiff with contradictions and conflicts resolved in plaintiff's favor. *Johnson v. Clay,* 38 N.C. App. 542, 248 S.E. 2d 382 (1978).

At trial, the plaintiff's evidence disclosed that the plaintiff was a corporation engaged in the business of selling building materials and supplies, and that the defendant Ralph Seay purchased building materials on credit under an account in the name of "Mr. Ralph Seay, Builder," or "Ralph Seay," from William Roten, plaintiff's credit manager. Purchases were made by way of invoices written by plaintiff's agents. Each invoice was addressed to "Ralph Seay." During this period plaintiff mailed monthly statements of the account, each addressed to Ralph Seay. Roten testified that none of the statements for these accounts had Mrs. Jimmie Seay's name on them.

Plaintiff received several payments on the Ralph Seay account by cashier's checks and by checks drawn on the bank account of Twin Oaks Company. Ralph Seay was the payor on each cashier's check. Ralph Seay signed all but one of the Twin Oaks checks. That one check was signed by Jimmie Seay at her husband's direction. Apparently a difference developed between Mr. Seay and plaintiff as to the balance due on the account. In August 1978, Mr. Seay instructed Mrs. Seay that the business no longer owed plaintiff money on the account.

Mrs. Seay accompanied her husband to the plaintiff's place of business more than once, picked up the materials he ordered, and signed some of the invoices to evidence receipt of various goods sold.

On several occasions when Mr. Roten talked with Ralph Seay, Jimmie Seay was present. On one occasion when Roten visited a building site he saw the Seays trying to determine a paint color for the kitchen. Jimmie Seay never "sat down with" Roten to calculate materials according to a set of building plans. Roten observed Jimmie in Ralph's office on three occasions; she was answering the phone and had various papers on her desk. On

recross-examination Roten testified that he believed that Twin Oaks Company belonged to both Seays.

> I base my belief that it was their company because when a man and his wife own a business, they own a business. I was never told any different and I therefore, believe that Mr. and Mrs. Ralph Seay own Twin Oaks Company. I base my belief on the fact that they were married and that I was never told any different.

After September 1978, Roten spoke with Mr. Seay about his account twice by telephone. The first time, Mrs. Seay answered the phone, and Roten believes that before calling Mr. Seay to the phone she told him that something would be coming in.

Jimmie Seay testified that she worked as a part-time office employee for her husband, keeping the ledgers current, making out the payroll and answering the telephone. Since she knew how much money was in the bank, Mr. Seay would discuss making the payments to plaintiff with her, and Mrs. Seay would then write out a check. Jimmie Seay further testified that she wrote the checks at her husband's direction and never personally discussed Mr. Seay's account with any one from the plaintiff company. She was present when Mr. Seay made arrangements about the accounts but she never requested credit with plaintiff for herself nor signed any credit agreement or other contract concerning credit with plaintiff.

On cross-examination Jimmie Seay stated that she had no other employment. Her husband did not pay her directly for her work in the form of wages, but rather, he "put the food on the table" for her and the children and provided for their general living expenses from the business money. The Twin Oaks Company was a name Mr. Seay chose. Mr. Seay provided the money for that account. Mrs. Seay never wrote a check from the Twin Oaks Company bank account for any of her personal expenses. The Seays also had a personal bank account. Ralph Seay never transferred any funds from the Twin Oaks Account to their personal account, although he did transfer funds from the personal account to the Twin Oaks Company.

Ralph Seay's testimony corroborated the material aspects of Mrs. Seay's testimony.

[1] The evidence presented was insufficient as a matter of law to support a verdict obligating Jimmie Seay, as a principal, to pay the account. The plaintiff's theory of the case and the issue eventually submitted to the jury was that the plaintiff's account was an account stated.

> "An account stated may be defined, broadly, as an agreement between the parties to an account based upon prior transactions between them, with respect to the correctness of the separate items composing the account, and the balance, if any, in favor of the one or the other. The amount or balance so agreed upon constitutes a new and independent cause of action, superseding and merging the antecedent causes of action represented by the particular constituent items; it is a liquidated debt, as binding as if evidence by a note, bill or bond." 1 Am. Jur. 272, Accounts and Accounting, Section 16.

Teer Co. v. Dickerson, Inc., 257 N.C. 522, 530, 126 S.E. 2d 500, 506 (1962).

In this case, the account was created by express agreement between Ralph Seay and plaintiff's agent. Jimmie Seay was not a party to that agreement. The account itself, invoices and monthly statements bore only the name of Ralph Seay. Jimmie Seay neither participated in the opening of the Ralph Seay account, nor sought credit with plaintiff in her own name. The record is devoid of any formal act by Jimmie Seay which would directly obligate her to pay plaintiff's account.

[2] We note that, as a general rule, the relationship of husband and wife standing alone, does not create any presumption or proof that the husband is authorized to act as the agent for his wife. *Air Conditioning v. Douglass*, 241 N.C. 170, 84 S.E. 2d 828 (1954). Plaintiff cites *Norburn v. Mackie*, 262 N.C. 16, 136 S.E. 2d 279 (1964) for the proposition that the agency of the husband for the wife may be shown by direct evidence or by evidence of such facts and circumstances as will authorize a reasonable and logical inference that the husband is empowered to act for his wife. Furthermore, that only slight evidence of the agency of the husband for the wife suffices where she receives, retains and enjoys the benefit of the contract. *Id.* at 23, 136 S.E. 2d at 284. Plaintiff argues that because Jimmie Seay indirectly received and enjoyed

the benefit of her husband's contract with the plaintiff, she should be charged as the principal of the building business, and bound by the acts of her husband acting as her agent.

The only evidence plaintiff points to in support of this argument is the fact that money generated by the building business provided Mrs. Seay and the Seay children with their support and income. Viewed in the light most favorable to plaintiff, this evidence shows only that Mrs. Seay received the maintenance and support which she was entitled to receive from her husband under the law. This cannot be used to establish a business relationship and agreement between Mr. and Mrs. Seay. *Supply Co. v. Reynolds*, 249 N.C. 612, 107 S.E. 2d 80 (1959).

[3] Plaintiff also argues that the facts and circumstances of this case support the determination that a partnership exists by virtue of Jimmie Seay's participation in the management and control of the building business as a co-owner.

The Uniform Partnership Act defines a partnership as "an association of two or more persons to carry on as co-owners a business for profit." G.S. 59-36(a).

A partnership is a combination of two or more persons of their property, effects, labor, or skill in a common business or venture, under an agreement to share the profits or losses in equal or specified proportions, and constituting each member an agent of the others in matters appertaining to the partnership and within the scope of its business. *Johnson v. Gill*, 235 N.C. 40, 68 S.E. 2d 788 (1952). The record is devoid of any evidence that Mrs. Seay was an owner or principal of her husband's building business. At most, the evidence shows that Mrs. Seay was an employee of her husband who performed mainly secretarial and bookkeeping tasks at his direction. The record shows that it was Mrs. Seay's responsibility to keep the payroll and financial paperwork in order. When a payment was due, she discussed the financial matters of the business with her husband only to the extent of informing him of the balance present in the business bank account.

There is no evidence of Jimmie Seay's having made independent managerial decisions or having exercised independent control over the affairs of the business. Plaintiff's agent admitted that

Jimmie Seay never sat down with him to calculate what materials would be needed for a particular job. He merely believed that because defendants were husband and wife, they both owned the Twin Oaks Company.

The Seays' personal bank account was separate from the Twin Oaks bank account. Significantly, Mrs. Seay never drew money from the Twin Oaks account for her personal use. The fact that Mr. Seay did not formally cause a paycheck to be issued to Mrs. Seay in return for her office work does not give rise to the inference that Mrs. Seay was a co-owner of the business, receiving a share of the profits rather than wages as an employee. G.S. 59-37(4)(b).

The evidence was insufficient as a matter of law to support a jury verdict against defendant Jimmie Seay under a theory of either agency or partnership. The trial court erred in denying defendant's motion for directed verdict at the close of all the evidence.

Reversed.

Chief Judge MORRIS and Judge BECTON concur.

IN RE: FORECLOSURE OF A DEED OF TRUST GIVEN BY BILL M. TAYLOR AND WIFE, LINDA B. TAYLOR TO J. KENYON WILSON, JR., TRUSTEE, DATED JUNE 4, 1976, RECORDED IN BOOK 372, PAGE 186, PASQUOTANK COUNTY REGISTRY, BY G. ELVIN SMALL, III, SUBSTITUTE TRUSTEE

No. 811SC1309

(Filed 21 December 1982)

Mortgages and Deeds of Trust § 15— installment contract for sale of security property—conveyance within meaning of due-on-sale clause

A contract for the sale, on an installment payment basis, of real property subject to a deed of trust transferred equitable title to the purchaser and constituted a "conveyance" which triggered the operation of a due-on-sale clause in the note and deed of trust.

APPEAL by respondents from *Small, Judge.* Order filed 2 October 1981 in Superior Court, PASQUOTANK County. Heard in the Court of Appeals 17 September 1982.

Respondents appeal from an order authorizing foreclosure of a deed of trust.

Wilson & Ellis, by M. H. Hood Ellis and David W. Boone, for petitioner appellee.

LeRoy, Wells, Shaw, Hornthal & Riley, by Mark M. Maland, for respondent appellants.

Brooks, Pierce, McLendon, Humphrey & Leonard, by L. P. McLendon, Jr., Edward C. Winslow, III, and Randall A. Underwood, for North Carolina Savings and Loan League, amicus curiae.

WHICHARD, Judge.

I.

Where the language of a promissory note and deed of trust clearly bestows such a right, a savings and loan may demand full and present payment of the balance of a loan, secured by a deed of trust upon real property, if the borrowers breach their covenant not to convey the security property without the lender's consent; and if the borrowers fail to comply with the demand for payment, the lender may institute foreclosure proceedings upon the security property. *In re Foreclosure of Bonder*, 306 N.C. 451, 293 S.E. 2d 798 (1982) (residential property); *Crockett v. Savings & Loan Assoc.*, 289 N.C. 620, 224 S.E. 2d 580 (1976) (commercial property).

The issue here is whether a contract for sale, on an installment payment basis, of real property subject to a deed of trust, constitutes a "conveyance" which triggers operation of a due-on-sale clause. We hold that it does.

II.

Petitioner, Albemarle Savings and Loan Association, loaned respondents money with which to purchase real property. The debt was secured by a combined note and deed of trust which contained a "due-on-sale" clause providing that "upon any conveyance of the property . . . without the prior consent of the Association . . . the holder of this note may exercise the option of treating the remainder of the debt as immediately due and collectible." The instrument further provided that if respondents

failed to perform any of the obligations imposed thereunder, petitioner could treat all sums owed as due and collectible; and on non-payment thereof, followed by petitioner's request, the trustee would have the right and duty to foreclose on the security property.

Respondents thereafter, without petitioner's prior consent, executed an instrument captioned "contract of sale," the subject of which, in part, was the property which secured respondents' note and deed of trust to petitioner. The instrument described respondents as "Seller" and provided that "Seller hereby sells and agrees to convey" the subject property. The purchaser was to pay a portion of the purchase price upon execution of the contract and a further portion on or before the first day of the following year. It was to pay the balance in monthly installments which precisely equalled the monthly payments on respondents' note and deed of trust with petitioner. It could pay these installments either to respondents or directly to petitioner.

The instrument further provided that the purchaser would thereafter pay all taxes and assessments on the property, and would keep the property insured and pay the premiums. It granted the purchaser entitlement to immediate possession of the property, to be retained absent default in its terms and conditions. It provided that respondents would be responsible for a realtor's commission upon execution of the contract. Upon completion of the payments and performance of the other contract conditions, respondents were to convey the subject property to the purchaser free of encumbrances.

This "contract of sale" was recorded with the Register of Deeds of Pasquotank County. Petitioner learned of the contract and notified respondents that it was exercising its right to accelerate payment of the balance due on their obligation. Upon respondents' failure to pay the balance due or to modify the provisions of the note and deed of trust, petitioner instituted foreclosure proceedings.

From an order authorizing foreclosure, respondents appeal.

III.

The validity of the due-on-sale clause is established by *Bonder* and *Crockett*, *supra*, and respondents do not assert other-

wise. They contend, rather, that the installment sales contract was not a "conveyance" within the meaning of that term as used in the controlling instrument, and that it thus did not trigger petitioner's right to accelerate the debt. The basis of their contention is that they made only an executory promise to convey, not an actual transfer of legal title.

IV.

Respondents' contention regards form over substance. The transaction clearly granted the purchaser all the benefits and responsibilities of ownership. The instrument expressly stated that respondents were "sell[ing] and agree[ing] to convey." The payment arrangement was the evident equivalent of payment to respondents' for their equity and assumption of their indebtedness. The purchaser became responsible for taxes, assessments, and insurance. Immediate possession went to the purchaser. Respondents became liable for payment of a realtor's commission upon execution of the contract, not upon subsequent execution of the deed. The evident substance of the transaction, then, was a completed conveyance of all equitable interest in the security property, leaving only the formality of a subsequent transfer by deed of the legal title.

V.

The vendee in an executory contract for the sale of land holds an equitable interest therein. *See Scott v. Jordan*, 235 N.C. 244, 69 S.E. 2d 557 (1952). Absent inability of the vendor to convey, or express stipulation to the contrary, the risk of loss of property subject to such a contract falls on the vendee, who is treated as the equitable owner. *See Warehouse Co. v. Warehouse Corp.*, 185 N.C. 518, 550-51, 117 S.E. 625, 627 (1923); *Webster's Real Estate Law in North Carolina* § 151 (Hetrick rev. ed. 1981). *See also* G.S. 39-39(2). The relation between vendor and vendee in an executory contract for sale of land is legally analogous to, and follows the same general rules as, the relation between mortgagee and mortgagor. *Brannock v. Fletcher*, 271 N.C. 65, 70, 155 S.E. 2d 532, 539 (1967). "As between the parties, the vendor may be considered a mortgagee and the vendee a mortgagor." *Id.* at 71, 155 S.E. 2d at 539. A mortgagee holds legal title, but only as security for the debt. *Gregg v. Williamson*, 246 N.C. 356, 358-59, 98 S.E. 2d 481, 484 (1957). The mortgagor holds beneficial title in

the equity of redemption which, absent provision to the contrary, he may freely transfer. *See Pearce v. Watkins*, 219 N.C. 636, 14 S.E. 2d 653 (1941); *Webster's, supra*, § 267.

Pursuant to the foregoing principles, the "contract of sale" here fully transferred to the purchaser the equitable interest in the property which secured petitioner's loan to respondents.

VI.

In *Terry v. Born*, 24 Wash. App. 652, 654, 604 P. 2d 504, 506 (1979), the court stated: "Although the term 'conveyance' in a strict legal sense means a transfer of legal title to land . . . it also denotes any transfer of title, legal or equitable. [Citation omitted.] We hold that the challenged transfer of the equitable interest . . . was a 'conveyance.'"

In *Mutual Federal Savings & Loan Association v. Wisconsin Wire Works*, 58 Wis. 2d 99, 105, 205 N.W. 2d 762, 766 (1973), the court stated:

> The term "convey" applies to any transfer of title to the mortgaged property whether legal or equitable. By the execution of a land contract which conveyed equitable title . . . [the grantor] conveyed away the mortgaged premises. The contractual term is not ambiguous. In the parlance of both laymen and lawyers, a land contract is a conveyance.

In *Krause v. Columbia Savings and Loan Association*, --- Colo. App. ---, ---, 631 P. 2d 1158, 1160 (1981), we find:

> Although an installment sale may take a different form and more time to complete than an outright sale, the difference is one of procedure and not substance. It is a "sale or transfer of the real property" for purposes of the due on sale clause in the deed of trust.

In *Century Federal Savings & Loan Association v. Van Glahn*, 144 N.J. Super. 48, 57, 364 A. 2d 558, 563 (1976), the court held that "a long-term contract which transfers equitable title is a 'change of ownership' sufficient to invoke [an] acceleration clause." *See also Tucker v. Lassen Savings and Loan Association*, 12 Cal. 3d 629, 637, 526 P. 2d 1169, 1173-74, 116 Cal. Rptr. 633, 637-38 (1974) (one who executes an installment land sales contract

conveys "*an interest* in the property—to wit, his equitable interest"); *Bellingham First Federal Savings & Loan Association v. Garrison*, 87 Wash. 2d 437, 439, 553 P. 2d 1090, 1091 (1976) (installment sales contract was an "inter vivos transfer" within meaning of mortgage clause prohibiting such without written consent of mortgagee); *Black's Law Dictionary* 301 (5th ed.) ("conveyance" includes "[a]n instrument by which *some* estate or interest in lands is transferred from one person to another") (emphasis supplied).

VII.

We concur in the foregoing reasoning. The transaction here was a transparent subterfuge designed to circumvent *Crockett* and *Bonder*. To permit it to nullify application of petitioner's due-on-sale clause would be altogether inconsistent with those decisions. As stated in *Williams v. First Federal Savings & Loan Association, Etc.*, 651 F. 2d 910, 918 (4th Cir. 1981):

> There can be no doubt that, had a customary real estate deed been employed to accomplish directly the essentially identical result . . . , the due-on-sale clause would have been triggered. If one travels by by-roads rather than use an interstate highway, but ends up at the same destination, the journey has nonetheless taken place.

VIII.

We hold that the installment contract for sale of the security property transferred equitable title therein to the purchaser and constituted a "conveyance" within the meaning and intent of that term as used in petitioner's due-on-sale clause. Petitioner thus was entitled to accelerate the balance of respondents' debt when respondents entered the contract without petitioner's prior consent; and on non-payment of the sum then due, petitioner was entitled to foreclose on the security property.

The order authorizing foreclosure is therefore

Affirmed.

Judges MARTIN (Robert M.) and ARNOLD concur.

STATE OF NORTH CAROLINA v. WILLARD JORDAN KIDD

No. 8215SC425

(Filed 21 December 1982)

1. **Assault and Battery § 15.7— assault with a deadly weapon inflicting serious injury—instruction on self-defense not required**

The trial court properly refused to apply the law of self-defense to evidence of the assault on a prosecuting witness since defendant's testimony did not indicate that he was in actual or apparent danger of imminent death or great bodily harm.

2. **Assault and Battery § 13— prior assault by prosecuting witness—no knowledge by defendant—testimony incompetent**

The trial court properly failed to permit a prosecuting witness's wife to testify that her husband had broken one of her ribs since there was no evidence that the assault occurred in defendant's presence or that defendant had knowledge of the assault on the day he attacked the prosecuting witness.

3. **Criminal Law § 161.1— failure to note exceptions or to place excluded answers in record**

Where defendant failed to note any exception to the court's denial of certain questions and failed to place the answers which the witness would have given in the record for the appellate court's consideration, there was no basis for determining whether the rulings were prejudicial. App. R. 10.

4. **Criminal Law § 88.2— restrictions on cross-examination of State's witnesses —no prejudicial error**

The trial court did not err in restricting defendant's cross-examination of three of the State's witnesses where the questions were irrelevant at the time the questions were posed.

APPEAL by defendant from *McLelland, Judge.* Judgment entered 1 July 1981 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 20 October 1982.

Defendant was indicted on charges of assaulting Sterling Rumley and his son Barry with a deadly weapon with the intent to kill and inflicting serious injuries. From verdicts of guilty of assault on Sterling Rumley inflicting serious injury and of assault on Barry Rumley with a deadly weapon inflicting serious injury, defendant appeals.

Evidence for the State tends to show that on the afternoon of 8 January 1981, defendant's son, Larry Kidd, came to the Rumleys' garage. Larry had been drinking and swung a hammer at

Barry. After Barry threw Larry out of the garage and locked it, Larry broke down the door. Barry ran to his father's house, told his mother to telephone defendant and tell him to come and get his son. Barry then told his father Sterling about the broken door. Sterling went to the garage. There Larry ran toward him and kicked him in the shoulder. Minutes later Sterling and Barry saw defendant driving toward the garage. The Rumleys and Larry started walking toward the truck. Defendant stopped his truck, got out with a double-barrel shotgun and pointed it at Barry. Barry turned to run and was shot in the leg. Defendant then hit Sterling over the head and in the stomach with the shotgun. The cut on his head required sixteen stitches. Barry underwent surgery on his leg and is still having physical problems related to the injury. Sterling and Barry both testified that they never threatened defendant.

Defendant's evidence tends to show that on the afternoon in question, his son's wife, Molly, informed him that Larry was at the Rumleys' garage and had been seriously hurt. She told him that Sterling had gone to get a gun. Defendant drove to his house and obtained a shotgun. As he neared the garage, he saw the Rumleys chasing his son up the road. After defendant stopped his truck, Sterling came up to him and began cursing. Defendant observed Sterling's left hand go toward his pocket. Believing that Sterling was reaching for a gun, defendant grabbed the shotgun in the bed of his truck and hit Sterling over the head. Sterling then told his son to get a gun. As Barry was walking away from defendant, defendant told him that he did not need a gun. Barry continued walking and defendant then fired his shotgun merely to scare Barry. The bullet ricocheted and hit Barry in the leg. Defendant testified that he believed Sterling had a gun in his pocket, because he had known Sterling to carry concealed weapons and because he had recently seen guns in the Rumleys' garage.

Attorney General Edmisten, by Associate Attorney Floyd M. Lewis, for the State.

Daniel H. Monroe, for the defendant-appellant.

ARNOLD, Judge.

[1] Defendant's first assignment of error concerns alleged errors in the charge. He contends that the trial judge erred in giving in-

structions on the law of self-defense only as to defendant's assault on Sterling Rumley and in affirmatively charging the jury that they might not consider the law of self-defense as to defendant's assault on Barry Rumley. He argues that the jury could have logically inferred from his evidence "that he was in apparent danger of death or great bodily harm if he allowed Barry to keep on going to get the gun." We disagree. Defendant gave the following testimony at trial:

> When—when he [Sterling] hollered and told Barry to get the gun, I told him, I said, "Son, come back. You do not need a gun." And . . . he kept going and I said, "Come back, son. You don't need a gun." Told him twice. Well, I was still watching Sterling and I shot low. I didn't shoot at him. I shot just to scare him, but hoping it would turn him back, and I maintain that the shot hit the highway and ricocheted up to his leg.

Defendant later admitted that Barry had never threatened him. Defendant's testimony is similar to testimony given by the defendant in *State v. Dial*, 38 N.C. App. 529, 248 S.E. 2d 366 (1978). Dial testified that the prosecuting witness told him she had an ice pick and was going to "mark" him; and that he "then pulled out his pistol and 'tried to scare her to leave out or something or another, and it just fired off and shot her.' " *Dial*, 38 N.C. App. at 530-31, 248 S.E. 2d at 367 (1978). Dial admitted that the prosecuting witness never produced the ice pick and made no threatening gestures toward him. We held: "The defendant's testimony, if taken as true, did not indicate that he acted with the intent to defend himself from an attack which he felt would cause him death or bodily harm. Instead, his testimony specifically indicated an unintentional and accidental firing of the pistol." *Dial*, 38 N.C. App. at 532, 248 S.E. 2d at 368. The jury was then given proper instructions on the law of accident and misadventure.

In the case now before us, the trial court also properly refused to apply the law of self-defense to evidence of the assault on Barry Rumley, because defendant's testimony does not indicate that he was in actual or apparent danger of imminent death or great bodily harm. We note, however, that the trial court was not required to instruct on accident or misadventure as in *Dial*, since the evidence shows that defendant intentionally fired the shotgun.

[2] Defendant next assigns error to the trial court's refusal to allow defense counsel to question Sterling Rumley's wife concerning a complaint for divorce she had filed against her husband and to allow this complaint into evidence. Defendant argues that the complaint was relevant to show his reasonable apprehension of death or bodily harm. In the complaint, Mrs. Rumley alleged that her husband broke one of her ribs on 15 November 1980. Such evidence would be admissible to show defendant's reasonable apprehension of death or bodily harm, only if the assault by Sterling on his wife occurred in defendant's presence or if defendant had knowledge of the assault on the day he attacked Sterling. *See State v. Mize*, 19 N.C. App. 663, 199 S.E. 2d 729 (1973). The record before us contains no sworn testimony that defendant possessed the requisite knowledge. Evidence of Sterling's assault on his wife was, therefore, properly excluded.

[3] Defendant has also assigned error to the court's refusal to allow him to question Mrs. Rumley regarding her husband's violent temper and other alleged acts of violence committed by him. He stresses that such evidence, whether known to him or not, is relevant to show which party was the actual aggressor. *See Mize*, 19 N.C. App. at 665-66, 199 S.E. 2d at 730. This matter, however, is not before us on appeal for two reasons. First, defendant failed to note any exception to the court's denial of these questions. Pursuant to App. R. 10, only exceptions noted in the record and made the basis for assignments of error will be considered on appeal. Second, even had exceptions to these questions been noted properly, defendant failed to place the answers which Mrs. Rumley would have given in the record for our consideration. We therefore cannot determine whether the rulings were prejudicial. *Mize*, 19 N.C. App. at 665, 199 S.E. 2d at 730-31.

[4] Defendant's final assignment of error goes to restrictions placed upon cross-examination of three of the State's witnesses. Our examination of the record reveals no prejudicial error.

Winston McBane testified for the State that on 8 January 1981, he went to investigate a shot coming from the vicinity of the Rumleys' garage. Defendant approached him holding a gun and said, "Get the hell down the road, goddam it. Don't stop here." Sterling ran to McBane's car and told McBane that defendant had shot his son. On cross-examination McBane testified that

he drank "[m]aybe a couple of beers" on 8 January 1981. On recross-examination defense counsel attempted to ask McBane why he drank the beers on the day of the assaults. The court sustained objection to this question. Defendant now assigns error to this restriction of cross-examination, alleging that he was denied his right to impeach the witness. We find no merit to this argument. The record shows that McBane had already given testimony about his drinking on the date at issue. The question posed by the defense on recross-examination was irrelevant, and the trial court did not abuse its discretion in disallowing it. 1 Brandis, N.C. Evidence § 35 (2nd rev. ed. 1982).

During the cross-examination of Sterling Rumley, defense counsel asked him if he had not assaulted his wife by breaking her ribs on 15 November 1980. During the cross-examination of Barry Rumley, defense counsel asked him if his father had ever shot him or had fist fights with him prior to the date at issue. The trial court sustained objections to both questions. Defendant argues that these questions were relevant to show the character of the witness Sterling Rumley for violence and the reasonableness of defendant's apprehension. These questions were relevant, however, only if there was evidence to show that the assault was committed in self-defense. At the time these questions were posed, no evidence on the issue of self-defense had been introduced. The court's rulings were proper and did not preclude similar questioning at a later time. *State v. Tann*, 57 N.C. App. 527, 291 S.E. 2d 824 (1982). We also point out that the defendant failed to place in the record any of the answers the three witnesses would have given. As previously noted, this Court is unable to determine whether the trial court's refusal to allow these questions was prejudicial. *See Mize, supra.*

Defendant received a trial free of prejudicial error.

No error.

Judges HILL and JOHNSON concur.

TIMOTHY ALPHONSO WALLACE, MINOR, BY HIS GUARDIAN AD LITEM, BRUCE MAGERS, AND ERNEST WALLACE, JR., MINOR, BY HIS GUARDIAN AD LITEM, BRUCE MAGERS, LEE BENTON WALLACE AND SHIRLEY T. WALLACE v. CECIL TAYLOR EVANS

No. 8221SC170

(Filed 21 December 1982)

1. **Automobiles and Other Vehicles § 63.2— striking children on bicycle in roadway—sufficiency of evidence of negligence**

In an action to recover for injuries sustained by the minor plaintiffs when the bicycle they were riding was struck by defendant's vehicle, plaintiffs' evidence was sufficient to be submitted to the jury on the issue of defendant's negligence where it would permit a finding that defendant, in the exercise of a proper lookout, could have seen the minor plaintiffs from some 200 feet away as he approached the driveway from which they emerged into the road, and that by maintaining a proper lookout and exercising due care and caution thereafter, he could have averted the collision. G.S. 1A-1, Rule 50(b).

2. **Rules of Civil Procedure § 42— severance of damages and negligence issues—necessary findings by trial court**

In order for the trial court to exercise its discretion under G.S. 1A-1, Rule 42(b) to sever the negligence issue from the damages issue in an action to recover for injuries sustained by minor plaintiffs when they were struck by defendant's vehicle, it should enter findings and conclusions which clearly establish that severance is appropriate "in furtherance of convenience or to avoid prejudice."

APPEAL by plaintiffs from *Walker (H. H.), Judge.* Judgment entered 18 September 1981 in Superior Court, FORSYTH County. Heard in the Court of Appeals 9 December 1982.

Plaintiffs Timothy Alphonso Wallace and Ernest Wallace, Jr., by their guardian *ad litem*, seek recovery for injuries allegedly caused by defendant's negligence. Plaintiffs Lee Benton Wallace and Shirley T. Wallace, parents of the minor plaintiffs, seek recovery for expenses they allegedly have incurred or will incur because of the injuries sustained by the minor plaintiffs.

From a directed verdict for defendant at the close of plaintiffs' evidence, plaintiffs appeal.

Frye, Booth & Porter, by Leslie G. Frye, for plaintiff appellants.

Henson and Henson, by Perry C. Henson and Paul D. Coates, for defendant appellee.

WHICHARD, Judge.

Settled principles establish that the purpose of a G.S. 1A-1, Rule 50(a) motion for directed verdict is to test the legal sufficiency of the evidence to take the case to the jury and to support a verdict for plaintiffs; that in determining such a motion the evidence should be considered in the light most favorable to plaintiffs, and the plaintiffs should be given the benefit of all reasonable inferences; and that the motion should be denied if there is any evidence more than a scintilla to support plaintiffs' prima facie case in all its constituent elements. *Manganello v. Permastone, Inc.*, 291 N.C. 666, 670, 231 S.E. 2d 678, 680 (1977); *Koonce v. May*, 59 N.C. App. 633, 634, 298 S.E. 2d 69, 71 (1982); *Everhart v. LeBrun*, 52 N.C. App. 139, 141, 277 S.E. 2d 816, 818 (1981); *Hunt v. Montgomery Ward and Co.*, 49 N.C. App. 642, 644-45, 272 S.E. 2d 357, 359-60 (1980). The evidence for plaintiffs here, viewed, as required, pursuant to these principles, showed the following:

Plaintiff Ernest Wallace, Jr. (hereafter Ernest), age eleven, while riding a bicycle on which his brother, plaintiff Timothy Wallace (hereafter Timothy), age seven, was a passenger, was struck by a pickup truck operated by defendant. Both minor plaintiffs sustained serious injuries as a result of the collision, which occurred on a clear June day when Ernest drove the bicycle from a driveway onto the road on which defendant was operating his truck.

Defendant drove his truck at approximately twenty miles per hour in a westerly direction over the crest of a hill, from whence the road was "downgrade" in the direction of the driveway from which the minor plaintiffs emerged. The crest of the hill was approximately 200 feet from the driveway, and a path led from a wooded area onto the road at or near the crest of the hill.

When Ernest first looked up the road as he propelled the bicycle down the driveway, he did not see any approaching vehicles. He proceeded toward the road to a point past a bush, at which point he could see defendant's vehicle which was then at or near the path located approximately 200 feet from the driveway. Even though he saw defendant's vehicle he nevertheless proceeded into the road, because "it looked like [he] had enough time to turn around."

Timothy also observed defendant's vehicle after the minor plaintiffs passed the bush. He, too, first observed it when it was at or near the path located approximately 200 feet from the driveway. The view of the driveway from the point at which the path led from the wooded area onto the road was somewhat obscured by trees; but granting plaintiffs the benefit of all reasonable inferences, as required, defendant conceivably could have seen the minor plaintiffs when they passed the bush and were able to see defendant's vehicle some 200 feet from the point at which they entered the road.

Defendant's motion for directed verdict was based on two grounds—first, that plaintiffs had failed to offer evidence of any negligence on the part of defendant, and second, that plaintiff Ernest Wallace, Jr., was contributorily negligent as a matter of law. The court expressly granted the motion on the basis of absence of evidence of negligence on the part of defendant. Defendant's brief expressly states that he does not contend the evidence showed contributory negligence as a matter of law. Further, both minor plaintiffs were between the ages of seven and fourteen years; and "a child between the ages of seven and fourteen years may not be held guilty of contributory negligence as a matter of law." *Anderson v. Butler*, 284 N.C. 723, 731, 202 S.E. 2d 585, 590 (1974). *See also Adkins v. Carter*, 40 N.C. App. 258, 260, 252 S.E. 2d 268, 270 (1979); *Johnson v. Clay*, 38 N.C. App. 542, 546-47, 248 S.E. 2d 382, 385 (1978). Whether the evidence would support a jury finding of negligence on the part of defendant is thus the sole issue.

In *Koonce v. May, supra*, this Court reviewed the decisional precedents in cases similar to that here. On the basis of those precedents it concluded that evidence that playmates of plaintiff there observed the vehicle of defendant there about sixty feet away from the end of the driveway from which plaintiff had emerged into the street on which defendant's vehicle struck him sufficed to justify an inference that defendant could have seen that children were playing near the street in her direction of travel; and that the jury could reasonably have found therefrom that defendant, by maintaining a proper lookout, could have observed plaintiff in time to have avoided the collision by stopping or taking evasive action.

[1] Reiteration here of the review of decisional precedents set forth in *Koonce* would serve no purpose. It will suffice to say that the evidence here permitted a finding of the possibility of observation of the minor plaintiffs by defendant from a distance of some 200 feet away, as opposed to sixty feet in *Koonce*, both minor plaintiffs having observed defendant's vehicle at this distance. From that evidence the jury here, like that in *Koonce*, "could have reasonably found that defendant failed to see [the minor] plaintiff[s] when [he] was first able to and that had [he] seen [them] at that time, [he] could have avoided the collision by stopping or taking evasive action." *Koonce*, 59 N.C. App. at 637, 298 S.E. 2d at 73. It "could reasonably have found that defendant was not keeping a proper lookout and that [he] never saw [the minor] plaintiff[s] until after the collision and that [he] failed to respond in any manner to [the minor] plaintiff[s'] presence in the street until after the collision." *Id.* There thus "was evidence from which the jury could have concluded that [the minor] plaintiff[s] [were] in the street for a sufficient length of time to give defendant an opportunity to exercise due care to avoid colliding with [them]." *Id.*

Justice (later Chief Justice) Parker once referred to a matter similar to this and *Koonce* as "a borderline case." *Ennis v. Dupree*, 258 N.C. 141, 145, 128 S.E. 2d 231, 234 (1962). Considering the evidence in the light most favorable to plaintiffs, however, we believe it would permit, but not compel, a finding that defendant, in the exercise of a proper lookout, could have seen the minor plaintiffs from some 200 feet away as he approached the driveway from which they emerged into the road; and that by maintaining a proper lookout and exercising due care and caution thereafter, he could have averted the collision. Defendant's motion for directed verdict thus was improperly granted.

As in *Koonce*, we again emphasize the following procedural point:

> Where the question of granting a directed verdict is a close one, the better practice is for the trial judge to reserve his decision on the motion and allow the case to be submitted to the jury. If the jury returns a verdict in favor of the moving party, no decision on the motion is necessary and an appeal may be avoided. If the jury finds for the nonmoving party,

> the judge may reconsider the motion and enter a judgment notwithstanding the verdict under G.S. 1A-1, Rule 50(b), provided he is convinced the evidence was insufficient. On appeal, if the motion proves to have been improperly granted, the appellate court then has the option of ordering entry of the judgment on the verdict, thereby eliminating the expense and delay involved in a retrial.

Manganello, supra, 291 N.C. at 669-70, 231 S.E. 2d at 680.

[2] Plaintiffs also assign error to allowance of defendant's oral motion at the pre-trial conference to sever the negligence issues from the damages issue and to limit trial to the negligence issues. Because the issue may arise upon retrial, we make the following observations:

G.S. 1A-1, Rule 42(b) provides: "The court may in furtherance of convenience or to avoid prejudice . . . upon timely motion order a separate trial . . . of any separate issue . . . or issues." "Whether . . . there should be severance rests in the sound discretion of the trial judge." *Insurance Co. v. Transfer, Inc.*, 14 N.C. App. 481, 484, 188 S.E. 2d 612, 614 (1972). *See also Board of Transportation v. Royster*, 40 N.C. App. 1, 5, 251 S.E. 2d 921, 924 (1979).

While severance is discretionary, the rule provides for exercise of that discretion only "in furtherance of convenience or to avoid prejudice." G.S. 1A-1, Rule 42(b). The comment to the rule indicates that it was enacted in view of "the multisided law suit made possible by these rules" for the purpose of "guard[ing] against the occasion where a suit of unmanageable size is thrust on the court." G.S. 1A-1, Rule 42(b) comment. That is not the situation presented here.

A commentary on the generally equivalent federal rule has noted the discretionary power to sever issues, but observed: "Nevertheless, a single trial generally tends to lessen the delay, expense and inconvenience to all concerned, and the courts have emphasized that separate trials should not be ordered unless such a disposition is clearly necessary." 5 J. Moore, J. Lucas & J. Wicker, *Moore's Federal Practice*, ¶ 42.03(1), pp. 42-37, -38 (2d ed. 1982).

Upon remand a single trial of the negligence and damages issues is recommended. If the court exercises its discretion to sever the issues, it should enter findings and conclusions which clearly establish that severance is appropriate "in furtherance of convenience or to avoid prejudice." G.S. 1A-1, Rule 42(b).

Reversed and remanded.

Judges VAUGHN and WELLS concur.

STATE OF NORTH CAROLINA v. JOEL ROY BLACKWOOD

No. 8221SC325

(Filed 21 December 1982)

1. **Searches and Seizures § 43— affidavit not supporting motion to suppress—denial proper**

The trial court properly refused to grant defendant's written pretrial motion to suppress items taken pursuant to a search warrant where defendant submitted an affidavit in support of his motion which contained no facts relevant to the seizure of the items. G.S. 15A-977(a), (c)(2).

2. **Searches and Seizures § 43— denial of oral motion at trial to suppress evidence—no new facts subsequent to pre-trial motion to suppress—refusal proper**

The trial court did not err in refusing to hear defendant's oral motion at trial to suppress certain evidence where defendant did not claim the discovery of additional pertinent facts subsequent to the pre-trial denial of his motion to suppress. G.S. 15A-975(c).

3. **Constitutional Law § 48— failure to attach factually sufficient affidavit to pre-trial motion to suppress—no ineffective assistance of counsel**

The record did not support defendant's contention that he was denied his Sixth Amendment constitutional right to effective assistance of counsel where he did not have a factually sufficient affidavit to his pre-trial motion to suppress.

4. **Criminal Law § 92.2— consolidation of related charges proper**

There was no error in the consolidation of two counts of felonious possession with intent to sell or deliver marijuana where both charges clearly related to a series of connected acts and transactions.

5. Criminal Law § 138— Fair Sentencing Act—aggravating and mitigating circumstances—unsupported by evidence—contradictory

The trial court erred in the sentencing phase of defendant's trial by finding as aggravating factors that defendant (1) "did not at any time [offer] assistance to the arresting officers or the District Attorney" and (2) "did not offer aid in the apprehension of other felons" since the record contained no evidence of any affirmative action by defendant to hinder efforts by the arresting officers or the district attorney and since assisting in the aid and apprehension of other felons necessitates implicating himself in unlawful activities. Further, the court's findings concerning defendant's prior convictions were contradictory.

APPEAL by defendant from *Walker, H. H., Judge.* Judgments entered 9 November 1981 in Superior Court, FORSYTH County. Heard in the Court of Appeals 15 October 1982.

Defendant appeals from judgments of imprisonment entered upon jury verdicts of guilty of two counts of felonious possession with intent to sell or deliver marijuana. A co-defendant appealed separately. *See State v. Thobourne*, 59 N.C. App. 584, 297 S.E. 2d 774 (1982).

Attorney General Edmisten, by Associate Attorney Walter M. Smith, for the State.

H. Glenn Davis for defendant appellant.

WHICHARD, Judge.

[1] Defendant first contends the court erred in refusing to grant his written pretrial motion to suppress, *inter alia*, items taken pursuant to a search warrant from two motel rooms which defendant allegedly had occupied. This evidence led to one of defendant's convictions for felonious possession of marijuana with the intent to sell or deliver.

G.S. 15A-977(a) requires that a pretrial motion to suppress be in writing and accompanied by an affidavit containing facts supporting it. The court may summarily deny the motion if the "affidavit does not as a matter of law support the ground alleged." G.S. 15A-977(c)(2).

Defendant submitted an affidavit which contained no facts relevant to the seizure of marijuana from the motel rooms. The affidavit related solely to the seizure of marijuana from a truck defendant was driving, which seizure led to defendant's other con-

viction for felonious possession with intent to sell or deliver marijuana. We thus find no error in the court's summary denial of defendant's pretrial motion to suppress items seized from the motel rooms. *See State v. Satterfield*, 300 N.C. 621, 625, 268 S.E. 2d 510, 513-14 (1980); *State v. Smith*, 50 N.C. App. 188, 189-90, 272 S.E. 2d 621, 622-23 (1980).

[2] Defendant next assigns error to the refusal to hear his oral motion at trial to suppress the marijuana seized from the motel rooms. He had made the above-referred-to pretrial motion to suppress, *inter alia*, this same evidence, and his motion was denied.

The court may allow a defendant to renew at trial a motion to suppress denied before trial "upon a showing by the defendant, that additional pertinent facts have been discovered by the defendant which he could not have discovered with reasonable diligence before the determination of the motion," and if the motion could not be renewed before trial due to the "time of discovery of alleged new facts." G.S. 15A-975(c). *See State v. Satterfield, supra*, 300 N.C. at 625, 268 S.E. 2d at 514. Defendant has the burden of establishing that his motion to suppress is timely and proper in form. *Id.* at 625, 268 S.E. 2d at 513-14.

Defendant here does not claim the discovery of additional pertinent facts subsequent to the pretrial denial of his motion to suppress. The court thus properly refused to hear his oral renewal of the motion at trial.

[3] Defendant next contends the failure of his trial counsel to attach a factually sufficient affidavit to his pretrial motion to suppress constitutes denial of his constitutional right to effective assistance of counsel.

The sixth amendment does not guarantee "errorless counsel." *State v. Sneed*, 284 N.C. 606, 612, 201 S.E. 2d 867, 871 (1974). "The Courts . . . have consistently required a stringent standard of proof on the question of whether an accused has been denied Constitutionally effective representation." *Id.* at 613, 201 S.E. 2d at 871. A criminal defendant is not denied his constitutional right to counsel unless it is established that "the attorney's representation is so lacking that the trial has become a farce and a mockery of justice." *Id.* at 612, 201 S.E. 2d at 871; *accord, State v. Hutchins*, 303 N.C. 321, 335, 279 S.E. 2d 788, 797 (1981). There are no

fixed rules for determining when the foregoing test is satisfied. The totality of circumstances in each individual case must be examined. *Hutchins, supra*, 303 N.C. at 336, 279 S.E. 2d at 798.

The alleged failure of defense counsel here to submit a supporting affidavit containing sufficient factual allegations did not render the trial "a farce and a mockery of justice." *Hutchins* and *Sneed, supra*. We note that the record contains no suggestion of any supporting facts which defense counsel should have known and included in the affidavit.

Defendant further argues that, because the insufficiency of the affidavit is attributable to error of counsel, "in the best interest and protection of the rights of the accused, the [c]ourt should have heard evidence on the motion to suppress the contraband in the motel." Although "[i]t is the duty of the trial judge . . . to see that the essential rights of an accused are preserved," the judge should not interfere in the attorney-client relationship " '[i]n the absence of such gross incompetence or faithlessness of counsel as should be apparent to the trial judge and thus call for action by him.' " *State v. Sneed, supra*, 284 N.C. at 614-15, 201 S.E. 2d at 872-73, *quoting United States v. Handy*, 203 F. 2d 407, 427 (3d Cir. 1953). The record here contains no suggestion of "gross incompetence or faithlessness of counsel." The court thus properly declined to hear evidence on defendant's motion to suppress.

[4] Defendant next contends the introduction of the large quantity of marijuana seized from the two motel rooms prejudiced him in his trial on the charge stemming from the seizure of a much smaller quantity of marijuana from the truck he was driving. He presumably asserts error in the consolidation for trial of the two charges against him.

When a defendant is charged with two or more offenses that "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," consolidation is authorized in the discretion of the court. G.S. 15A-926(a). Both charges here stem from defendant's possession with intent to sell marijuana within a limited geographical area and period of time. The charges clearly related to a series of connected acts and transactions, and there was no abuse of discretion in their consolidation. *See State v. Greene*, 294

N.C. 418, 241 S.E. 2d 662 (1978); *see also State v. Anderson*, 281 N.C. 261, 264-65, 188 S.E. 2d 336, 339 (1972).

[5] Defendant finally assigns error to the court's consideration of mitigating and aggravating circumstances at the sentencing stage. He first contends the court improperly found as aggravating factors that defendant (1) "did not at any time [offer] assistance to the arresting officers or the District Attorney," and (2) "did not offer aid in the apprehension of other felons."

In addition to specified factors which must be considered, the sentencing judge "may consider any aggravating and mitigating factors that he finds are proved by the preponderance of the evidence, and that are reasonably related to the purposes of sentencing." G.S. 15A-1340.4(a). It is error, however, to consider factors such that "the severity of the sentence imposed relate[s] to the defendant's plea of not guilty." *State v. Bright*, 301 N.C. 243, 261, 271 S.E. 2d 368, 379 (1980). "Defendant had the right to plead not guilty, and he should not and cannot be punished for exercising that right." *State v. Boone*, 293 N.C. 702, 712-13, 239 S.E. 2d 459, 465 (1977).

At the sentencing hearing the district attorney requested that the court find as an aggravating factor that defendant "did not voluntarily acknowledge any wrongdoing to law enforcement officers at the arrest or . . . in the early stage of the proceedings or later." Clearly, if the court had considered defendant's failure to "acknowledge any wrongdoing" it would have impermissibly punished defendant for his not-guilty plea. The court altered the district attorney's suggested language, however, and found instead that defendant failed to "[offer] assistance" to authorities. The record contains no evidence of any affirmative action by defendant to hinder efforts by the arresting officers or the district attorney. What assistance defendant could have offered that would not have required an acknowledgement of his own wrongdoing is not readily apparent. Consideration of this factor thus potentially infringes impermissibly on defendant's right to plead not guilty. Similarly, insofar as defendant's failure to aid in the apprehension of other felons necessitates implicating himself in unlawful activities, consideration of such failure to offer aid is impermissible.

Further, the court found as an aggravating factor that "defendant has a prior conviction or convictions for criminal offenses punishable by more than 60 days' confinement," but also found as a mitigating factor that "defendant has no record of criminal convictions or a record consisting solely of misdemeanors punishable by not more than 60 days' imprisonment." The record does not establish which of these contradictory findings is erroneous, but one or the other has to be.

Because of consideration of impermissible factors, and the finding of contradictory factors, the case is remanded for resentencing.

No error in the trial; remanded for resentencing.

Judges MARTIN (Robert M.) and ARNOLD concur.

MANHATTAN LIFE INSURANCE COMPANY v. LACY J. MILLER MACHINE COMPANY, INC.

No. 8122SC1319

(Filed 21 December 1982)

1. **Insurance § 12— key man life insurance—insured not active and working full time—policy void ab initio**

The insured was not "active and working full time" as an employee of the corporate beneficiary of a "key man" life insurance policy at the time the policy became effective, and the policy was void *ab initio*, where officers of the corporate beneficiary had obtained a temporary restraining order barring any participation by the insured in the affairs of the corporation prior to the time the policy became effective.

2. **Rules of Civil Procedure § 56.1— summary judgment while discovery procedures pending**

The trial court did not abuse its discretion in hearing and ruling on a motion for summary judgment while discovery procedures were pending where the undisputed facts resolved the matter against the party seeking a continuance of the hearing.

APPEAL by defendant from *Hairston, Judge.* Order entered 18 May 1981 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 20 September 1982.

The Manhattan Life Insurance Company (Manhattan) brought a declaratory judgment action in which it sought to have a "key man" insurance policy, effective on and after 1 February 1980, rescinded and declared *void ab initio*, because the insurance application contained false material statements. The policy was issued on the life of Lacy J. Miller. It was signed by Lacy J. Miller and by Joseph T. Buie, Jr., in his capacities as vice-president, secretary and treasurer of the Lacy J. Miller Machine Company, Inc. (the Miller Company). The Miller Company was the applicant for, and owner and beneficiary of, the policy. From 21 January 1980 and through the effective date of the policy, a temporary restraining order, sought by and granted to the officers of the Miller Company, was in force. That decree provided as follows:

> 1. That a temporary restraining order is, and the same is hereby issued, enjoining the defendant [Lacy J. Miller], his agents, employees, associates or any other person under his supervision or direction, and acting in consort with the defendant, from taking or attempting to take any action whatsoever with regard to the assets, funds, obligations, rights, employees of the plaintiff corporation, and the defendant is further enjoined from taking from the corporate plaintiff, any loan, salary, bonus, funds, assets and from attempting to fire or hire employees or agents of the plaintiff corporation, and from selling or attempting to sell any assets of the corporate plaintiff, whatsoever, until further orders of this Court.
>
> 2. It is further ordered that the plaintiffs, pending hearing on this matter and final determination on the merits, shall be allowed to continue operation of the corporate plaintiff. . . .

Manhattan argues that the temporary restraining order barred, as a matter of law, any participation by Lacy J. Miller in the affairs of the Miller Company; that the Miller Company's officers knew he was so barred when they signed the insurance policy application; that, as a result, the material information on the application was false; and that the contract of insurance was *void ab initio* and should be rescinded. Manhattan moved for summary judgment, and the motion was granted.

The Miller Company argues that summary judgment was improperly granted because an issue of material fact exists as to, among other things, whether Lacy Miller was an active employee of the defendant company at the time the insurance policy went into effect. We reject each of the Miller Company's arguments and affirm the judgment below. We will address defendant's arguments in order and discuss additional facts as needed for the analysis.

Cansler, Lockhart, Parker & Young, P.A., by Thomas Ashe Lockhart and George K. Evans, Jr., for plaintiff appellee.

Wilson, Biesecker, Tripp & Sink, by Joe E. Biesecker, and House, Blanco & Osborn, P.A., by Lawrence U. McGee, for defendant appellant.

BECTON, Judge.

I

The purpose of summary judgment is to "pierce" the pleadings and determine whether a genuine issue of material fact exists. *Singleton v. Stewart,* 280 N.C. 460, 464, 186 S.E. 2d 400, 403 (1972). Should there exist any issue of material fact, the reviewing court must deny the motion. *Id.*

[1] The Miller Company first argues that there is a material factual dispute concerning whether Lacy Miller was "active and working full time" within the meaning of the insurance policy. The Miller Company cites numerous cases for the proposition that a person need not be physically at the office forty (40) hours per week in order to be considered an active and full time employee. We agree that the usefulness or active status of an employee is as much a function of his employer's needs and demands as any other criterion. However, the Miller Company proffers no authority upon which we could rule that an employee who has been *legally barred* from both his employer's premises and his former duties *by agents of that employer* is, nevertheless, an "active and full time" employee. That dearth of authority is not surprising. Indeed, we find it difficult to understand how the Miller Company officers, the plaintiffs in the action to get the restraining order, so alarmed by Lacy Miller's alleged incompetence that they sought extraordinary equitable relief against him on 21 January 1980,

could nevertheless consider him a valued member of their firm just eleven days later. One is led to speculate whether the Miller Company's change of heart was motivated by its status as beneficiary of the policy proceeds.

We need look no further than the restraining order to conclude that no issue of fact exists on this point. The restraining order enjoined Lacy Miller from "taking or attempting to take any action whatsoever with regard to the assets, funds, obligations, rights . . . from attempting to fire or hire employees or agents of [Miller Machine Company], and from selling or attempting to sell any assets of the [Miller Machine Company]." Lacy Miller was stripped of all the duties, rights and responsibilities he had to the company he founded by the temporary restraining order. For the defendants to consider Lacy Miller an officer of the Company after they had obtained the restraining order on 21 January 1980 requires more than legal ingenuity; it requires a resort to intellectual gymnastics. We hold that, because of the temporary restraining order entered for the defendants, Lacy Miller was not active and working full time as a matter of law.

II

Defendant's second and third arguments concern whether Manhattan waived its requirement that an insured be active and working full time to qualify for protection, and whether Roger Brooks, the person who solicited the insurance application, was an agent of Manhattan.

Assuming, *arguendo,* that Roger Brooks was an agent of Manhattan when he solicited, submitted and sold the "key man" policy on the life of Lacy J. Miller, the Miller Company's argument is still without merit. Without the knowledge of Roger Brooks, defendants purposely took action to remove Lacy J. Miller from any and all meaningful involvement with the Company. Key man insurance is, by definition, designed to fund buy-out or stock redemption plans upon the death of major shareholders, senior officers, and the like. Lacy Miller was in no manner a "key man," by reason of the temporary restraining order; he was thus ineligible for protection under the policy by its own terms and defendant's actions. Thus the policy was *void ab initio,* and no issue of fact exists as to these contentions of the Miller Company.

III

[2] Finally, the Miller Company asserts that its motion to continue the hearing on plaintiff's motion for summary judgment should have been allowed because discovery procedures were pending. The decision to grant or deny a continuance is solely within the discretion of the trial judge, and his decision will not be reviewed absent a manifest abuse of discretion. *Wood v. Brown*, 25 N.C. App. 241, 243, 212 S.E. 2d 690, 691, *cert. denied*, 287 N.C. 469, 215 S.E. 2d 626 (1975). We find no abuse here. Generally, it is error for a court to hear and rule on a motion for summary judgment when discovery procedures which might lead to evidence relevant to the motion are pending. *Conover v. Newton*, 297 N.C. 506, 256 S.E. 2d 216 (1979). That rule presupposes that any information gleaned will be useful. When, as here, undisputed facts themselves resolve the matter against the party seeking the continuance, the general rule does not apply. We find neither error nor any abuse of the trial judge's discretion in denying the motion to continue.

IV

In summary: We hold that Lacy Miller could not have been an employee of the Miller Machine Company as a matter of law by reason of the temporary restraining order granted the Miller Company on 21 June 1980 and that therefore the purported insurance contract was *void ab initio*. Summary judgment for Manhattan Life Insurance Company was proper.

Affirmed.

Chief Judge MORRIS and Judge JOHNSON concur.

DEEP RUN MILLING COMPANY v. BRUCE TAL WILLIAMS AND WIFE, MARY ALICE WILLIAMS

No. 828SC33

(Filed 21 December 1982)

1. **Quasi Contracts and Restitution § 2.1— implied contract—sufficiency of evidence**

The trial court properly failed to direct a verdict for the femme defendant on the issue of an implied contract concerning the delivery of hog feed by plaintiff to defendants where the evidence tended to show that the femme defendant considered the hog operation as well as the debt to plaintiff to be that of herself and her husband.

2. **Rules of Civil Procedure § 51.1— failure to review evidence in charge to jury—prejudicial error**

A trial court's failure to review any evidence and thus apply the law to the evidence was prejudicial error. G.S. 1A-1, Rule 51(a).

APPEAL by defendant from *Barefoot, Judge.* Judgment entered 1 October 1981 in Superior Court, LENOIR County. Heard in the Court of Appeals 20 October 1982.

Plaintiff, Deep Run Milling Company, instituted this action by filing a complaint to collect the balance of an account allegedly owed by the husband and wife defendants, Bruce Tal Williams and Mary Alice Williams. The defendants answered, denying the essential allegations of the complaint. The case came on for trial. After the plaintiff rested its case and at the close of all the evidence, defendant Mary Alice Williams moved for a directed verdict. These motions were denied. A directed verdict was entered against the defendant husband, Bruce Tal Williams. The jury returned a verdict in favor of the plaintiff against the defendant wife, Mary Alice Williams. Defendant Mary Alice Williams unsuccessfully moved for judgment notwithstanding the verdict and, in the alternative, a new trial. From the denial of her motions, defendant Mary Alice Williams appeals.

White, Allen, Hooten, Hodges & Hines, P.A., by John M. Martin, for defendant appellant.

William F. Simpson, Jr., for plaintiff appellee.

JOHNSON, Judge.

This is an appeal from a jury verdict against defendant Mary Alice Williams on an account due. The issues dispositive of this

appeal are whether the trial court erred in its denial of defendant's motion for a directed verdict and whether the trial court erred in its instructions to the jury.

[1] The plaintiff's theory of the case, and the issue ultimately submitted to the jury, was whether an implied contract existed between Mary Alice Williams and the plaintiff, Deep Run Milling Company.

It is well settled that a motion for directed verdict under Rule 50 of the North Carolina Rules of Civil Procedure may be granted only if the evidence is insufficient, as a matter of law, to support a verdict for the plaintiff. See *e.g., Arnold v. Sharpe*, 296 N.C. 533, 251 S.E. 2d 452 (1979); *Trust Co. v. Smith*, 44 N.C. App. 685, 262 S.E. 2d 646 (1980). In determining motions for directed verdict and for judgment notwithstanding the verdict, the Court must consider all relevant evidence admitted at trial in a light most favorable to the plaintiff with contradictions and conflicts resolved in plaintiff's favor. *Johnson v. Clay*, 38 N.C. App. 542, 248 S.E. 2d 382 (1978). A directed verdict for the defendant is not properly allowed unless it appears, as matter of law, that a recovery cannot be had by the plaintiff upon any view of the facts which the evidence reasonably tends to establish. *Manganello v. Permastone, Inc.*, 291 N.C. 666, 231 S.E. 2d 678 (1977).

The evidence discloses that the plaintiff and defendant Bruce Tal Williams entered into an oral contract in 1977 or 1978 whereby the plaintiff agreed to deliver hog feed to Mr. Williams and he, in turn, agreed to pay for the feed when the hogs were "topped out," weighing between 200 and 240 pounds. The defendant-wife was not present when this agreement was made. Plaintiff then began delivering feed to Mr. Williams, who began paying plaintiff for the feed as the hogs were topped out. Plaintiff's president, Norman Davis, testified that he had known Bruce and Mary Alice Williams for over 20 years.

The hog operation was started by Mr. Williams sometime in 1979. The account with plaintiff was in the name of Bruce Tal Williams only, and all delivery tickets were in his name only. At times, Mrs. Williams, as well as other family members, would call to request a feed delivery or would pick up feed from plaintiff. All deliveries were made pursuant to the initial agreement be-

tween plaintiff and Mr. Williams. The account was an ongoing transaction which began on the day the agreement was made.

On several occasions when Norman Davis delivered feed, Mrs. Williams was the only one home. When payments began slowing down, Davis went to the house to see Mr. Williams. Davis began to believe that some hogs had reached the specified weight and been sold, but without his having received payment for the feed as agreed.

On direct examination, plaintiff's president stated,

> I went to their home and talked with Mrs. Williams several times about it. She said: "We are going to pay you," and "I do not know just when we can." I told her I needed my money, and she stated that she did not know when I would be paid, but that they were going to pay me.

Davis had several more conversations with each of the Williams separately about the debt.

On cross-examination Davis stated,

> I did not have any contact with Mrs. Williams concerning the account until Mr. Williams got behind in his payment. I went to their home and Mr. Williams was not there. I talked with Mrs. Williams about the account and she stated that they were going to pay me but did not know when.

Defendant Mary Alice Williams testified that the hog operation was located on land in which her mother owned a life estate. The Williams' home was also located upon this property. Mrs. Williams would take a life estate in the property upon the death of her mother. Both Mr. and Mrs. Williams were regularly employed at jobs outside the home. The hog operation and the hogs belonged to her husband. Mrs. Williams testified further that when her husband was unable to get to the mill in time to order feed she would do so, and she would occasionally help him with the hogs when he was ill. Mr. Williams had been ill often during the past few years. Mrs. Williams denied making any statements to Norman Davis, or anyone at Deep Run Milling Company to show that she would be responsible for her husband's account.

On cross-examination Mrs. Williams stated,

> One time we took some hogs to my mother's house to feed separately and then to kill for my mother and my aunt. My mother and my aunt had planned to pay us for the hogs when they were killed and we would then take the money to Norman (Davis). Norman did not agree. That is when Norman missed the hogs. Instead of killing them, we decided that the best thing to do was to sell them, and we gave the check to Norman.

The evidence shows that the account was expressly created by defendant Bruce Tal Williams and plaintiff. The account was in Mr. Williams' name only. As no express agreement regarding the account existed between Mrs. Williams and plaintiff, an implied contract between these parties could exist. *Concrete Co. v. Lumber Co.*, 256 N.C. 709, 124 S.E. 2d 905 (1962), and *Bryson v. Hutton*, 41 N.C. App. 575, 255 S.E. 2d 258 (1979), cited by defendant in support of her argument, are inapplicable. Mrs. Williams is not chargeable with an implied contract simply because she received the goods, but rather, by virtue of her own actions and representations to plaintiff's president.

While conflicts exist in the evidence, these must be resolved in the plaintiff's favor in passing upon a motion for directed verdict. *Johnson v. Clay, supra.*

It is reasonable to infer from the testimony set forth above that Mrs. Williams' action in taking some hogs to her mother and her use of the word "we" when referring to that act, and in her conversations with Norman Davis, indicate that she considered the hog operation as well as the debt to plaintiff to be that of herself and her husband. The evidence was, therefore, sufficient to support a jury verdict for plaintiff on the issue of implied contract. The trial court correctly denied defendant's motion for directed verdict.

[2] Defendant next assigns error to the trial court's failure to review the evidence in its charge to the jury. We find error and reverse.

At no point in its charge to the jury did the trial court review the evidence presented. In fact, the court instructed the jury as follows:

> I have not reviewed the evidence in this case but you will recall the evidence as it was presented to you during the trial. It is your duty to recall the evidence as it was presented to you.

It is indeed the duty of the jury to recall the evidence presented. However, it is also the duty of the trial court to explain the law and apply it to the evidence presented. G.S. 1A-1, Rule 51(a).

> The trial judge is required to declare and explain the law arising on the evidence given in the case. G.S. 1A-1, Rule 51(a) . . . This rule is a continuation of the requirement contained in former G.S. 1-180 . . . As such, it creates a substantial legal right in the parties . . . and vests in trial courts the duty, without a request for special instruction, to explain the law and apply it to the evidence on all substantial features of the case . . . A failure to do so constitutes prejudicial error for which the aggrieved party is entitled to a new trial. (Citations omitted.)

Board of Transportation v. Rand, 299 N.C. 476, 483, 263 S.E. 2d 565, 570 (1980). In order for the trial court to discharge its duty under Rule 51 the court must "give the jury a clear mandate as to what facts, for which there was support in the evidence, it would have to find in order to answer the issue either in the affirmative or in the negative." *Owens v. Harnett Transfer*, 42 N.C. App. 532, 540, 257 S.E. 2d 136, 141 (1979).

The trial court's failure to review any evidence and thus apply the law to the evidence is prejudicial error.

New trial.

Judges ARNOLD and HILL concur.

FRANCIS D. LAGASSE AND WIFE, SANDRA R. LAGASSE v. DON GARDNER, D/B/A SHOM CONSTRUCTION COMPANY

No. 8129SC1346

(Filed 21 December 1982)

1. **Evidence § 47— violation of building code—expert testimony—code not in evidence**

The trial court did not err in allowing testimony by two expert witnesses concerning requirements and violations of the State Building Code although the Code was not in evidence and the trial court did not take judicial notice of the Code.

2. **Evidence § 47.1— expert testimony without hypothetical questions**

Expert witnesses were properly allowed to state opinions, without the use of hypothetical questions, as to the likelihood that the walls as built in plaintiffs' house would cause structural cracks in the basement floor. G.S. 8-58.12.

3. **Contracts § 29.2— breach of contract in construction of house—measure of damages**

In an action for breach of contract by failing to complete a house for plaintiffs in a workmanlike manner, the cause is remanded for a determination by the trial court as to whether the defects found could be readily remedied without substantial destruction of any part of the house, in which case the measure of damages would be the cost of repairs, or whether a substantial part of what had been done must be undone in order to correct the deficiencies, in which case the measure of damages would be the difference between the value of the house contracted for and the value of the house built.

APPEAL by defendant from *Freeman, Judge.* Judgment entered 17 July 1981 in Superior Court, TRANSYLVANIA County. Heard in the Court of Appeals 22 September 1982.

This is an action for breach of contract based on defendant's failure to complete plaintiffs' home in a workmanlike manner. The issues on appeal relate to the admissibility of evidence, the findings of fact and conclusions of law, and the measure of damages used by the trial court.

Averette & Barton, by H. Paul Averette, Jr., for defendant appellant.

Ramsey, White, Cilley & Dalton, by William R. White, for plaintiff appellees.

BECTON, Judge.

I

At trial, without a jury, plaintiffs' evidence tended to show that they entered into a contract with defendant, Shom Construction Company, for the construction of a Nationwide Modular Home. After moving into the house, plaintiffs found structural defects—no footing under the basement floor—and cracks in the walls and floor. Plaintiffs also testified that paint cracked and peeled off and that defendant failed to rough-grade the yard. Further, two experts in construction testified, among other things, (1) that an eight-inch retaining wall was used instead of the twelve-inch retaining wall required by the North Carolina State Building Code (Code); (2) that window and door lintels did not conform to the Code; (3) that there was no termite shield; (4) that the basement wall was out of plumb about one-quarter of an inch; and (5) that a two by twelve inch strap which should have been placed on each truss was not installed, causing a two-inch separation at the peak of the roof. The cost of repairs of the defects was estimated at $10,000 to $12,000.

Defendant, through his testimony and the testimony of other witnesses, responded to each of plaintiffs' allegations by showing that he was willing to correct certain alleged defects that had never been brought to his attention; that the house was built according to the contract and conformed to the Code; and that none of the alleged defects affected the house structurally.

Judgment was entered in favor of plaintiffs, and plaintiffs were awarded damages of $10,000. Defendant appealed.

II

[1] Combining related assignments of error, defendant first argues that the trial court erred by allowing testimony by the two expert witnesses concerning requirements and violations of the Code and by making findings based on the experts' testimony, when (i) the Code was not in evidence; (ii) the trial court did not take judicial notice of the Code; and (iii) neither the Code nor the particular sections relied upon was pleaded as required by county ordinance. We have three responses. First, the North Carolina State Building Code is a statewide Code, not a county ordinance.

See N.C. Gen. Stat. § 143-138(e) (1981). Second, plaintiffs' Amended Complaint refers to the Code, and defendant, therefore, cannot claim surprise. Third, essentially identical testimony to that complained of by defendant was admitted without objection. The expert witness Rowe testified that Transylvania County had enacted the statewide Code. Finally, the formal taking of judicial notice was not necessary under the facts of this case.

III

[2] Defendant next argues that the trial court erred in (i) allowing the expert witnesses to testify about the likely result of building a load-bearing wall at the edge of a floating slab; (ii) the likelihood of structural cracks in the basement floor as a result of building a load-bearing wall at the edge of the floating slab; and (iii) the structural stability of the house based on the defects in the basement wall and floor. We find no error in this aspect of the trial. N.C. Gen. Stat. § 8-58.12 (1981) allows opinion testimony without hypothetical questions. Further, the expert witness Rowe testified that when a slab floor in a basement is built about four inches thick on a "floating slab," with certain conditions present, the wall would get "out of plumb." Rowe testified that the walls as built in plaintiffs' house were likely to cause structural cracks in the basement floor.

IV

[3] Defendant finally contends that the trial court used the wrong measure of damages and, therefore, erred when it found as a fact and concluded, as a matter of law, that plaintiffs were damaged in the sum of $10,000. Defendant argues that damages for defects or omissions in the performance of a building contract, when part of the work must be undone and when plaintiff is already in possession of the house, are measured, not by the cost of repairs, but by determining the difference in value between what the house cost and what it is worth. *See, Robbins v. Trading Post, Inc.*, 251 N.C. 663, 111 S.E. 2d 884 (1960).

In this case, the trial court, after making the following findings of fact concerning defects and deficiencies in "workmanship," specifically found "[t]hat the reasonable costs of repair of these matters will be $10,000:"

4. That the footings in the house constructed by defendant construction company do not extend three inches beyond the load-bearing walls, as required by the North Carolina Building Code and the contract between the parties.

5. That 8-inch concrete block was used on load-bearing walls on which there was a fill in excess of 4 feet against these walls; that the use of 8-inch block instead of 12-inch block under these circumstances does not comply with the North Carolina Building Code or the contract between the parties.

6. That the Defendant construction company did not use masonry caps as set forth in the material specifications and its failure to do so constitutes a violation of the North Carolina Building Code.

7. That the Defendant construction company failed to install termite shields on the house as required by the material specifications.

8. That the Defendant construction company did not complete the painting of the house as specified in the material specifications.

9. That the Defendant construction company did not extend metal lintels at least 4 inches over beyond the aperture as required by the North Carolina Building Code.

10. That the Defendant construction company installed no anchor bolts as required by the material specifications and the North Carolina Building Code.

Based on the facts found, the trial court concluded that "defendant Shom Construction Company breached its contract with the plaintiffs and that the plaintiffs have been damaged as a result of said breach in the sum of $10,000. . . ." In *Robbins*, our Supreme Court said:

'The fundamental principle which underlies the decisions regarding the measure of damages for defects or omissions in the performance of a building or construction contract is that a party is entitled to have what he contracts for or its equivalent. What the equivalent is depends upon the cir-

> cumstances of the case. In a majority of jurisdictions, where the defects are such that they may be remedied without the destruction of any substantial part of the benefit which the owner's property has received by reason of the contractor's work, the equivalent to which the owner is entitled is the cost of making the work conform to the contract. But where, in order to conform the work to the contract requirements, a substantial part of what has been done must be undone, and the contractor has acted in good faith, or the owner has taken possession, the latter is not permitted to recover the cost of making the change, but may recover the difference in value.' [Citations omitted.] The difference referred to is the difference between the value of the house contracted for and the value of the house built—the values to be determined as of the date of tender or delivery of possession to owner.
>
> Since there must be a new trial the following observations are in order. Defendant's evidence tends to show that such defects as do exist may be readily remedied without substantial destruction of any part of the building. Should the jury accept this view, the measure of damages is the cost of labor and material to make the building conform to the contract. [Citations omitted.] Plaintiffs' evidence tends to show that in order to remedy deficiencies a substantial part of what has been done must be undone. If the jury accepts plaintiffs' theory of the case, the measure of damages is the "difference in value" rule stated above.

Robbins v. Trading Post, Inc., 251 N.C. at 666-67, 111 S.E. 2d at 887 (1960). *See also, Patrick v. Mitchell*, 44 N.C. App. 357, 260 S.E. 2d 809 (1979).

Defendant, in the case *sub judice*, did not attempt to show that the alleged defects could be remedied without substantial destruction of any part of the house. Plaintiffs' experts, on the other hand, testified at length about the changes that need to be made, about how to make these changes, and about the labor and material cost for making the changes. On the basis of the evidence presented, the trial court, as finder of the facts, should have determined if the defects found (1) could be "readily remedied without substantial destruction of any part of the [house]," and (2) should have further determined if a "substantial

part of what has been done must be undone" to remedy the deficiencies. *Robbins*, 251 N.C. at 666-67, 111 S.E. 2d at 887 (1960). Having failed to do so, the trial court erred.

We find no error in the other parts of the trial, and this case is, therefore, remanded so the trial court can determine, based on its findings of fact, whether the measure of damages is the "cost of repairs" or the difference between the value of the house contracted for and the value of the house built.

Remanded.

Chief Judge MORRIS and Judge JOHNSON concur.

A. J. ROSE AND WIFE, DORA W. ROSE v. GUILFORD COUNTY, BY AND THROUGH THE GUILFORD COUNTY COMMISSIONERS

No. 8218SC116

(Filed 21 December 1982)

1. **Rules of Civil Procedure § 56.3— affidavits filed on day of summary judgment hearing—inadmissible**

   Pursuant to G.S. 1A-1, Rule 56(c) the trial court properly ruled that plaintiffs' affidavits, which were filed on the day of the summary judgment hearing, were inadmissible.

2. **Municipal Corporations § 30.3— zoning change—summary judgment for defendants improper**

   The trial court erred in entering summary judgment for defendant county concerning a zoning change involving plaintiffs' property where the allegations in plaintiffs' complaint tended to show that there was no substantial change in the rezoned property, and that defendant acted in an unreasonable, discriminatory, illegal, arbitrary, and capricious manner by preventing them from having mobile homes on their property.

APPEAL by plaintiffs from *Wood, Judge*. Judgment entered 1 December 1981 in Superior Court, GUILFORD County. Heard in the Court of Appeals 18 November 1982.

In November 1979, the Guilford County Commissioners rezoned plaintiffs' property from A-1 to R-20S. Plaintiffs brought this action to have the rezoning set aside. Plaintiffs' verified com-

plaint alleged they owned their tract of land, consisting of thirty-seven acres, for nineteen years. Prior to 1979, their land was zoned A-1 which permitted mobile homes. Plaintiffs already had two mobile homes on their property, and they wanted to install two more. Their complaint also alleged:

> V. That some of the adjoining property owners became dissatisfied when they received the information that some additional mobile homes would be located on the Plaintiffs' land and that as a result thereof, some of the adjoining property owners filed a petition with Guilford County requesting that approximately 100 acres of land, which included the Plaintiffs' land, be rezoned from A-1 Agriculture to R-20S and that the sole motive of the adjoining property owners was not to rezone their land for the purpose of building houses, but solely to rezone the property for the purpose of changing zoning from A-1 Agriculture to R-20S, so as to prevent the plaintiffs from erecting additional mobile homes on their property as they proposed to do so.
>
> VI. That the Guilford County Commissioners on November 19, 1979, did change the zoning of the Plaintiffs' property, together with others consisting of approximately 100 acres, more or less, from A-1 Agriculture to R-20S, and as a result of said rezoning, the plaintiffs have been greatly damaged and that they are no longer able to use their land as they contemplated and that the said rezoning was done solely for the purpose of defeating the Plaintiffs' right to install mobile homes on their property as they were allowed to do under the A-1 Agriculture zoning as it previously existed.
>
> . . .
>
> VIII. That the actions of the Guilford County Commissioners in rezoning the Plaintiffs' property from A-1 Agriculture to R-20S is unreasonable, discriminatory, illegal, arbitrary, capricious, and constitutes a taking of plaintiffs' property without due process of law.
>
> IX. That no evidence whatsoever was presented at the meeting of the County Commissioners at the time the rezoning was passed, to the effect that there had been any substantial change in the condition of the character and nature of said lands. . . .

Defendants filed an answer which admitted it changed the zoning of plaintiffs' property, and denied the other material allegations in the complaint.

Defendants' motion for summary judgment was granted based solely on the pleadings.

R. Horace Swiggett, Jr., and Herman Winfree, for plaintiff appellants.

Deputy County Attorney Margaret A. Dudley, for defendant appellees.

VAUGHN, Judge.

[1] Plaintiffs' first argument is that the trial court erred in ruling that plaintiffs' affidavits, which were filed on the day of the summary judgment hearing, were inadmissible. We do not agree. G.S. 1A-1, Rule 56(c) provides, in part: "The adverse party prior to the day of hearing may serve opposing affidavits." This rule was explained in *Nationwide Mutual Insurance Company v. Chantos*, 21 N.C. App. 129, 203 S.E. 2d 421 (1974):

> It is clear that opposing affidavits are to be served prior to the day of the hearing. It follows that the clear intent of the legislature is that supporting affidavits should be filed and served sufficiently in advance of the hearing to permit opposing affidavits to be filed prior to the day of the hearing.

Nationwide Insurance Company v. Chantos, 21 N.C. App. at 130, 203 S.E. 2d at 423. *Accord, Rockingham Square Shopping Center, Inc. v. Integon Life Insurance Corp.*, 52 N.C. App. 633, 279 S.E. 2d 918, *review denied*, 304 N.C. 196, 285 S.E. 2d 101 (1981).

[2] Plaintiffs' second argument is that the trial court erred in granting summary judgment for defendant because there is a genuine issue of fact. We agree.

Summary judgment should be rendered "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). Since the trial judge only considered the pleadings in making his determination,

the motion for summary judgment was, in effect, a motion for judgment on the pleadings under G.S. 1A-1, Rule 12(c). *Burton v. Kenyon*, 46 N.C. App. 309, 264 S.E. 2d 808 (1980). When a motion for judgment on the pleadings is made, "[t]he trial court is required to view the facts and permissible inferences in the light most favorable to the nonmoving party. All well pleaded factual allegations in the nonmoving party's pleadings are taken as true. . . ." *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E. 2d 494, 499 (1974). *See also Town of Bladenboro v. McKeithan*, 44 N.C. App. 459, 261 S.E. 2d 260, *appeal dismissed*, 300 N.C. 202, 282 S.E. 2d 228 (1980). Pleadings comply with our present concept of notice pleading if the allegations in the complaint give defendant sufficient notice of the nature and basis of plaintiffs' claim to file an answer, and the face of the complaint shows no insurmountable bar to recovery. *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970). The allegations in plaintiffs' complaint, taken as true, tend to show that there was no substantial change in the rezoned property, and defendants acted in an unreasonable, discriminatory, illegal, arbitrary, and capricious manner. This clearly gave defendants sufficient notice of the nature and basis of plaintiffs' claim. Although the county commissioners have the power to rezone property when reasonably necessary for public health, safety, morals or welfare, this authority is limited in that it may not be exercised arbitrarily or capriciously. This concept was explained in *Allred v. City of Raleigh*, 277 N.C. 530, 178 S.E. 2d 432 (1971). In *Allred*, the corporate defendant bought a 9.26 acre tract, which was zoned R-4. The corporate defendant's request that the property be rezoned from R-4 to Shopping Center was denied. Several years later the corporate defendant twice filed applications requesting the property be rezoned to R-10, and submitted plans for high rise luxury apartments. Eventually, the city council adopted the rezoning ordinance. Plaintiffs attacked the ordinance on the ground that it exceeded and conflicted with the authority conferred by the enabling legislation. The Court discussed the relevant zoning statutes, now in G.S. 160A-381 through G.S. 160A-392, and determined that one of the fundamental concepts of zoning is that "[s]uch regulations shall be made in accordance with a comprehensive plan. . . ." G.S. 160-174 [repealed by session laws 1971, c. 698, s. 2, effective 1 January 1972, current statute is G.S. 160A-383]. The Court held the ordinance invalid and unenforceable because they found that the city council

did not determine that the 9.26 acre tract and the surrounding circumstances justified rezoning the tract to R-10. Instead, the city council based its actions on its approval of the applicant's plans to build high rise luxury apartments. The Court held that disregarding the fundamental concepts of zoning may be arbitrary and capricious. "Rezoning must be effected by the exercise of legislative power rather than by special arrangements with the owner of a particular tract or parcel of land." *Allred v. City of Raleigh*, 277 N.C. at 545, 178 S.E. 2d at 441. *See also Blades v. City of Raleigh*, 280 N.C. 531, 187 S.E. 2d 35 (1972).

In this case, plaintiffs' allegations indicate that the surrounding circumstances and location of the property has not changed, and the rezoning was arbitrary and capricious. Since the pleadings give defendants sufficient notice of the nature and basis of plaintiffs' claim to enable them to answer, and there is no insurmountable bar to recovery on the face of the complaint, the judgment on the pleadings should be reversed.

Reversed.

Judges WELLS and WHICHARD concur.

STATE OF NORTH CAROLINA v. JAMES HARGROVE

No. 8210SC443

(Filed 21 December 1982)

1. Criminal Law § 75.14— mental capacity to confess or waive rights

The trial court's conclusion that defendant's in-custody statement was admissible in evidence was supported by the court's findings, including findings that the arresting officer was aware that defendant was not very literate, that the officer was particularly careful to advise defendant what his rights were and to assure himself that the defendant fully understood what his rights were, and that defendant signed a waiver of rights form which very carefully explained in ordinary English the nature of the rights being foregone by defendant.

2. Criminal Law § 116.1— instruction on failure of defendant to testify—neither error nor plain error

The trial court's instruction that the jury should not consider defendant's failure to testify "standing alone in your deliberations at all" was neither error nor "plain error" reviewable under Appellate Procedure Rule 2 even though defendant failed to object thereto at the trial. G.S. 15A-1231(b).

APPEAL by defendant from *Bailey, Judge.* Judgment entered 18 November 1981 in Superior Court, WAKE County. Heard in the Court of Appeals 9 November 1982.

Defendant was convicted of the armed robbery of Michael Smith. The State's evidence tended to show that on 6 July 1981, at or about midnight, Michael Smith was travelling on Highway 264 east of Raleigh when his car began to smoke. He pulled into what he thought was a gas station and began to tinker with the engine. Two men, one of whom Smith later identified as the defendant, drove up in a green Pontiac and discussed Smith's car trouble with him. As Smith was bending near the engine, the defendant pointed a handgun in his face, demanded his money, and the other man took his wallet. In addition to Michael Smith's money, the two men took his AM-FM converter and a hawkbill knife. Defendant and the other man fled in the Pontiac and were later apprehended near Zebulon.

Defendant's evidence was conflicting. His first statement to the Sheriff's department was that he was at home asleep at the time of the robbery; that Bruce Wilson came to his house and asked for a ride to Zebulon; and that as they were en route he was stopped by police. The next morning the defendant admitted having been with Wilson during the early morning hours of 7 July; that Wilson suggested robbing someone, but that he refused; that they saw Smith having car trouble, stopped to help (at Wilson's suggestion) and that the next thing the defendant knew, Wilson was robbing Smith. Defendant did not take part in the robbery.

From a verdict of guilty of armed robbery and a fourteen-year active prison sentence, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General William B. Ray, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Nora B. Henry, for defendant appellant.

BECTON, Judge.

The defendant brings forth ten (10) assignments of error and makes four arguments on appeal. Arguments one, two, and three each concern the propriety of the admission of defendant's statements and will therefore be treated together. Defendant, by his fourth argument, takes exception to a portion of the jury charge.

I

[1] Defendant contends that his custodial statements should not have been admitted because they were coerced and made without a knowing and intelligent waiver of his right against compelled self-incrimination. He argues also that the evidence concerning that contention was in conflict, that the trial court failed to make findings of fact and conclusions of law concerning the alleged coercion, and that the trial court thereby committed reversible error.

The State offered evidence, through the arresting officer's testimony, tending to show that no promises were made or coercive measures employed against defendant. Defendant sought to establish that he had had little education, that he could not read well, and that, while in custody, he signed his statement, without knowledge of what he was signing. Defense counsel also elicited testimony on cross examination that defendant was apparently neither very intelligent nor alert.

The rule concerning the admissibility of custodial confessions is set forth by the North Carolina Supreme Court in *State v. Riddick*, 291 N.C. 399, 408, 230 S.E. 2d 506, 512 (1976):

> When the admissibility of an in-custody confession is challenged the trial judge must conduct a *voir dire* to determine whether the requirements of *Miranda* have been met and whether the confession was in fact voluntarily made. . . . If there is a *material* conflict in the evidence on *voir dire* he *must* [make findings of fact to show the basis of his ruling] in order to resolve the conflicts. [Citations omitted.]

The trial court in the case before us made the following pertinent findings of fact to support its conclusion that defendant's motion to suppress his statements was without merit:

That the defendant, Hargrove, was brought to the Wake County Courthouse for questioning and for the purpose of obtaining a warrant for carrying a concealed weapon. That he was *fully advised* of his rights by Deputy Sheriff Holloman, who was aware that the defendant, Hargrove, was semiliterate, and was *particularly careful to advise him what his rights were and to assure himself that the defendant fully understood what his rights were.* That the defendant signed a form which amounts to a waiver, but the word waiver is not used, and on the other hand, *the form very carefully explains in ordinary English what nature of rights are being foregone.* . . . [Emphasis added.]

Because these findings are supported by competent evidence, we hold that they are sufficient to support the trial court's ruling, and that the defendant's custodial statements were properly admitted.

II

[2] Defendant's fourth and final argument concerns that portion of the jury charge that purported to explain the significance and use properly accorded a defendant's decision not to testify in his own behalf. He contends, first, that the instruction directed undue attention to that tactical decision; and second, that the trial court, in admonishing the jury not to consider the defendant's absence from the stand "standing alone" suggested that the jury could consider that fact in connection with other evidence.

We must determine whether the assigned error was properly preserved for appellate review. Since the defendant failed to request a jury instruction conference as he was required to do by statute, this assignment of error is not reviewable unless the defendant entered a contemporaneous objection to the challenged portion of the charge, or objected, at the end of the instructions and before the jury returned. N.C. Gen. Stat. § 15A-1231(b) (1978); *State v. Bennett,* --- N.C. App. ---, --- S.E. 2d --- (filed 16 November 1982). The record before us discloses no evidence that defendant raised any objections to the instructions he now challenges at trial; thus, the alleged error was not properly preserved for our attention. Defendant nevertheless contends that the trial court's statement, "You may not consider this fact [defendant's failure to testify] *standing alone* in your deliberations

at all," constituted error so egregious that it rises to the level of plain error, and, as a result, is reviewable under Rule 2 of the Rules of Appellate Procedure.

Although it is the better practice not to give an instruction concerning a defendant's failure to testify unless the defendant requests it, the giving of an unrequested instruction is not error if it correctly states the law. *State v. Potter*, 20 N.C. App. 292, 201 S.E. 2d 205 (1973). The rule is:

> "Any instruction . . . [concerning a defendant's failure to testify] is incomplete and prejudicially erroneous unless it makes clear to the jury that the defendant has the right to offer or to refrain from offering evidence as he sees fit and that his failure to testify should not be considered by the jury as basis for any inference adverse to him. . . ."

State v. Caron, 288 N.C. 467, 473, 219 S.E. 2d 68, 72 (1975), *cert. denied* 425 U.S. 971, 48 L.Ed. 2d 794, 96 S.Ct. 2168 (1976). We find that the challenged instruction adequately comports with this rule. The charge constitutes neither error nor "plain error."

We therefore find that defendant's trial contained

No error.

Judges HEDRICK and WEBB concur.

MARIA MERCEDES WOOD v. ALLEN F. WOOD

No. 8226DC9

(Filed 21 December 1982)

Judgments § 37.4— failure to assert compulsory counterclaim in prior divorce action—res judicata

Where plaintiff filed a complaint seeking alimony, child support, and custody of the children on the same day judgment was entered in an action for divorce from bed and board instituted by her husband, the trial court did not err in granting summary judgment in favor of her husband and ruling that *res judicata* applied to her suit since the wife should have asserted her rights in the prior trial and compulsory counterclaimed as part of her answer.

Wood v. Wood

APPEAL by plaintiff from *Lanning, Judge.* Judgment entered 6 August 1981 in District Court, MECKLENBURG County. Heard in the Court of Appeals 18 October 1982.

Plaintiff appeals a dismissal of her complaint seeking alimony, child support, custody of the children born of the marriage and attorney fees. The trial court granted summary judgment in favor of the defendant, ruled that *res judicata* applied to the present suit, and denied plaintiff's claim for back child support.

Cole, Ruff & Stokes, by James L. Cole, for plaintiff-appellant.

Wardlaw, Knox, Knox, Freeman & Scofield, by H. Edward Knox and John S. Freeman, for defendant-appellee.

HILL, Judge.

On 27 December 1979, Allen F. Wood, the defendant herein, filed an action for divorce from bed and board, alleging indignities committed against him by his wife, Maria Mercedes Wood, the plaintiff herein. Plaintiff-wife filed an answer and counterclaim on 5 January 1980 in which she sought alimony, basing her suit on indignities committed against her by her husband. The court issued a consent judgment that was later set aside on grounds that the wife had withdrawn her consent before the signing of the consent judgment by the court. The matter came on for trial on 18 May 1981. On the second day of trial, the wife sought leave to file supplemental pleadings to allege inadequate support and abandonment, the latter purportedly having occurred in February, 1980. The trial court denied the motion. The jury returned a verdict finding that neither party had offered, without provocation, indignities to the other. The trial court entered judgment denying relief and dismissing the parties' claim and counterclaim.

Plaintiff did not appeal from the judgment in the prior action or from the denial of her motion to file supplemental pleadings. Instead, she commenced the present action on the same day judgment was entered in the previous action. Her complaint alleged abandonment by the husband in February, 1980 and raised other theories that she subsequently abandoned. Defendant filed his answer, pleading *res judicata* as to alimony and moving for sum-

mary judgment. The trial court granted defendant's motion for summary judgment and dismissed plaintiff's claim for alimony. The court on the day judgment was signed entered an order awarding custody, child support and other relief to plaintiff-wife, and visitation rights to defendant-husband, but declined to award the wife retroactive child support. Plaintiff gave notice of appeal from the judgment dismissing her alimony claim. An appeal from an award of attorney fees to plaintiff has been settled and paid, and is not before us at this time.

By her first assignment of error, plaintiff argues the trial court erred in granting summary judgment for defendant based on *res judicata*, i.e., that all matters alleged and sought to be asserted by plaintiff in this action were previously litigated between the parties in the prior action and determined adversely to the plaintiff, or were available to the plaintiff at the time and could have been litigated and determined in the exercise of due diligence. We find no error and overrule this assignment.

Res judicata applies to divorce proceedings as well as other civil actions. *Young v. Young*, 21 N.C. App. 424, 204 S.E. 2d 711 (1974). In *Young*, Judge Campbell, speaking for this Court, said:

> "Where a second action or proceeding is between the same parties as a first action or proceeding, the judgment in the former action or proceeding is conclusive in the latter not only as to all matters actually litigated and determined but also as to all matters which could properly have been litigated and determined in the former action or proceeding."

Id., at 425, 204 S.E. 2d at 712 (citations omitted).

The present action was filed on 22 May 1981, the same day judgment in the first action was rendered. The complaint alleged abandonment and nonsupport by the husband as of 28 February 1980. On the date of the alleged abandonment, the prior case was pending, having been filed 27 December 1979. The wife's counterclaim had been filed in January, 1980. The prior action was not tried until May, 1981, some sixteen months after the counterclaim by the wife was filed. Wife failed to file a timely motion to file supplemental pleadings, but did not move to amend her answer at the time of trial. The trial court disallowed the motion. Both Rule 13 and Rule 15 of the North Carolina Rules of

Civil Procedure provide that amendments to the pleadings may be made with permission of the court. We find no abuse of judicial discretion. Plaintiff had enough time in which to file an amendment to her answer and counterclaim.

Plaintiff's argument that defendant's notice of appeal deprived the trial court of jurisdiction thereafter is without merit. Discovery occurred after defendant filed notice of appeal, and it became apparent that defendant had abandoned his appeal. Furthermore, had plaintiff desired, she could have appealed from the trial court's denial of her motion to amend in the prior case.

We conclude wife should have asserted her rights in the prior trial in a compulsory counterclaim as part of her answer. *Hudspeth v. Bunzey,* 35 N.C. App. 231, 241 S.E. 2d 119, *disc. rev. denied,* 294 N.C. 736, 244 S.E. 2d 154 (1978). Her failure to do so, coupled with the judgment entered therein, bars her from asserting her claim now. The judgment is *res judicata.* This and plaintiff's second related assignment are overruled.

The trial court found that defendant paid criminally inadequate child support; that he did so willfully in a calculated effort to starve his wife into selling the family home. The trial court, however, made no finding that the sums paid by plaintiff for support of the children represented the father's obligation. The measure of defendant's liability to plaintiff is the amount actually expended by plaintiff which represented the defendant's share of support. *Hicks v. Hicks,* 34 N.C. App. 128, 130, 237 S.E. 2d 307, 309 (1977). Plaintiff's claim for retroactive child support is therefore denied.

The decision of the trial court is

Affirmed.

Judges ARNOLD and JOHNSON concur.

COMMUNITY PROJECTS FOR STUDENTS, INC. v. GERALD WILDER, NORTHERN NASH SENIOR HIGH SCHOOL AND NASH COUNTY BOARD OF EDUCATION

No. 827DC120

(Filed 21 December 1982)

Schools § 4— items ordered by choral director for fund-raising project—no liability by school board

In an action to recover for decorative oil lamps ordered from plaintiff by a high school teacher and choral director as a fund-raising project for the chorus, plaintiff's evidence was insufficient to establish a contract between plaintiff and defendant board of education upon a theory of (1) express authority of the teacher and choral director to enter into the contract; (2) implied or apparent authority of the teacher and choral director to enter into the contract; or (3) ratification of the contract by the board. G.S. 115-52.

APPEAL by plaintiff from *Ezzell, Judge.* Order entered 23 September 1981, in District Court, NASH County. Heard in the Court of Appeals 18 November 1982.

Plaintiff is a corporation in the business of selling various products which schools may use for fund-raising activities. In October of 1979, Kenneth Segal, a salesman from the company, visited Northern Nash Senior High School, a public school operated by the Nash County Board of Education. Segal approached the principal of the school, Donald L. Johnson, about the feasibility of selling his merchandise to school organizations or clubs. He was directed to Gerald Wilder, a teacher and choral director, who had indicated to the principal that he wanted to raise funds for the purchase of robes for the school chorus. After talking with Segal, Wilder personally signed two purchase orders on 26 October 1979 for the purchase of 870 decorative oil lamps from the plaintiff. The lamps were shipped on or about 14 November 1979 to Wilder at the school along with invoices totaling $4,106.40. Wilder, who had been the sponsor for this fund-raising project, ended his employment as teacher and choral director on 18 February 1980. By letter dated 2 April 1980, the principal of the school sent two checks in the amount of $1,272.40 to plaintiff and requested credit on the unsold lamps being returned under separate cover. The account was credited with the payments made and value of returned merchandise, leaving a sum owing of $2,458.40. Despite demand by plaintiff, no further payments were made on the account.

On 4 November 1980, plaintiff filed this action for monies due against Wilder, the high school, the Board of Education, and the individual members of the Board. On 14 January 1982 summary judgment was granted in favor of the individual members of the Board. Prior to trial, a motion was granted to remove Northern Nash Senior High School as a party defendant under Rule 12(b)(6). At the close of plaintiff's evidence at the 21 September 1981 hearing, the trial judge granted a motion for directed verdict in favor of the Nash County Board of Education. Plaintiff has appealed from the entry of this order. No appeal has been taken from the order of a mistrial in favor of defendant Wilder.

Moore, Diedrick, Whitaker & Carlisle, by Joy Sykes, for plaintiff-appellant.

Valentine, Adams & Lamar, by L. Wardlaw Lamar, for defendant-appellee.

WELLS, Judge.

The sole assignment of error in this appeal is to the trial court's granting a directed verdict in favor of the Nash County Board of Education. We therefore must resolve whether the evidence, viewed in the light most favorable to the plaintiff, was sufficient to establish a contract between plaintiff and the Board. Plaintiff contends that it produced evidence sufficient to submit its case to the jury on at least one of three legal theories: (1) the express authority of Wilder to enter into the contract, (2) the implied or apparent authority of Wilder to contract, or (3) the ratification of the contract by the principal of the school. We disagree and affirm the judgment below.

Under the system of public education in this state, local school boards alone have the duty or authority to enter into or authorize purchases of supplies and equipment for the respective local school systems. G.S. 115-52, as it was worded in 1979 (now recodified in G.S. 115C-522(a)) provided as follows:

§ 115-52. *Purchase of equipment and supplies.*—

It shall be the duty of county and city boards of education to purchase or exchange all supplies, equipment and materials in accordance with contracts made by or with the

approval of the Department of Administration. Title to instructional supplies, office supplies, fuel and janitorial supplies, enumerated in the current expense fund budget and purchased out of State funds, shall be taken in the name of the county or city board of education which shall be responsible for the custody and replacement: Provided, that no contracts shall be made by any county or city administrative unit for purchases unless provision has been made in the budget of such unit to provide payment therefor, or unless surplus funds are on hand to pay for same, and in order to protect the State purchase contracts, it is hereby made the mandatory duty upon the part of the governing authorities of such local units to pay for such purchases promptly in accordance with the terms of the contract of purchase.

There was no evidence tending to show that any contract was entered into between plaintiff and defendant Board of Education, much less a contract meeting the requirements of G.S. 115-52. Plaintiff, therefore, cannot maintain its action on the theory of Wilder's express authority to obligate defendant Board of Education.

Neither can plaintiff prevail on the theory of Wilder's apparent authority to obligate defendant Board of Education. Those who deal with public officials are deemed to have notice of the nature and extent of the authority of such officials to bind their principal. *Keith v. Henderson County,* 204 N.C. 21, 167 S.E. 481 (1933); *compare O'Grady v. Bank,* 296 N.C. 212, 250 S.E. 2d 587 (1978).

Plaintiff's only evidence of ratification tended to show that the principal of the school, not defendant Board, acted in such a way as to ratify the sale. Defendant Board of Education alone had authority to ratify the sale of plaintiff's goods to the school and, therefore, plaintiff's theory of ratification is of no avail to it in this action. *See Equipment Co. v. Anders,* 265 N.C. 393, 144 S.E. 2d 252 (1965).[1]

1. G.S. 115-35(f) (now recodified as G.S. 115C-47(6)) provided a means by which a Board of Education could authorize solicitations and fund-raising activities in the schools under its jurisdiction. There was no evidence that the Nash County School Board had acted pursuant to G.S. 115-35(f) and, therefore, the statute is not applicable to the present case.

Plaintiff's evidence, taken as true, considered in the light most favorable to plaintiff, giving plaintiff the benefit of every reasonable inference to be drawn therefrom, *Manganello v. Permastone, Inc.*, 291 N.C. 666, 231 S.E. 2d 678 (1977); *Everhart v. LeBrun*, 52 N.C. App. 139, 277 S.E. 2d 816 (1981), was insufficient, as a matter of law, to justify a verdict for plaintiff against defendant Board of Education, and the judgment below must therefore be and is

Affirmed.

Judges VAUGHN and WHICHARD concur.

STATE OF NORTH CAROLINA v. BRUCE ALAN SCHNEIDER

No. 8226SC531

(Filed 21 December 1982)

Searches and Seizures § 11— warrantless search of automobile—probable cause—suppression of evidence error

Pursuant to the recent cases of *United States v. Ross*, --- U.S. --- (1982) and *Michigan v. Thomas*, --- U.S. --- (1982), the trial court erred in suppressing evidence of marijuana found in the trunk of defendant's automobile since the record fully supported the court's finding that the officers had probable cause to believe the trunk of defendant's car contained marijuana.

APPEAL by the State from *Grist, Judge.* Order entered 4 March 1982 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 17 November 1982.

The State of North Carolina, pursuant to G.S. 15A-1445(b) and G.S. 15A-979(c), appeals from an order suppressing evidence in two cases pending against defendant who is charged with possession of marijuana with intent to sell and deliver, conspiracy to sell and deliver and to possess with intent to sell and deliver marijuana, and possession of more than 100 but less than 1,000 pounds of marijuana.

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

J. Marshall Haywood and Lyle J. Yurko for defendant-appellee.

HILL, Judge.

The parties stipulated to the facts of this case. A. C. Cummings was an undercover agent for the State. On 21 June 1981, he met with a Mr. Lindsay during daylight hours at the Lindsay residence in Charlotte for the purpose of purchasing a large quantity of marijuana. Working with Cummings on this occasion were fourteen or fifteen law enforcement agents.

Lindsay displayed some 88 pounds of marijuana to Cummings and telephoned a person whom he called "Bruce" about the purchase price and the remainder of marijuana to be purchased. Cummings went to his car where he picked up a bowling ball bag filled with money, walked back to a window outside the house and exhibited the contents of the bag to Lindsay, who told "Bruce" to bring the contraband. Cummings then deposited the bag in his car, advised the other agents of the progress made, and went into the house. Lindsay told him the rest of the marijuana would be delivered in three to five minutes. Some five minutes later, a 1977 Oldsmobile driven by defendant backed down a private drive to a side porch of Lindsay's residence. The defendant got out of the car. Lindsay came out of the house. Both defendant and Lindsay were placed under arrest, handcuffed, and "neutralized" several yards from the vehicle. The automobile remained parked on private property, and was later determined to be owned by defendant.

After the arrest of Schneider and Lindsay, Agent Cummings entered the vehicle, took the key from the ignition and opened the trunk. Therein Agent Cummings saw several bales which he recognized as marijuana and identified by its odor. Cummings closed the trunk and secured a search warrant while the car remained under guard by the law enforcement officers. After procuring the search warrant, Cummings returned to the vehicle and seized 187 pounds of marijuana located in the trunk.

At trial, defendant moved to suppress evidence of the marijuana. The trial court made findings of fact, concluding that the initial search of defendant's automobile trunk was not incidental to the defendant's arrest; that the trunk of the car was not in the area within the defendant's immediate control, and despite the fact Agent Cummings had probable cause to believe the trunk of defendant's car contained the controlled substance at the time of

the initial search, the search and seizure could not be justified under the "automobile exception" to the warrant requirements of the fourth and fourteenth amendments. He then suppressed the use of the contraband as evidence by the State.

Over the years, certain well-defined exceptions to warrantless searches and seizures have been made, mostly dealing with the search and seizures of automobiles and their contents. A two-prong test—i.e., does the warrantless search arise as a result of probable cause and under exigent circumstances which make the search imperative—has been imposed on one who seeks to justify the warrantless search. *State v. Allison*, 298 N.C. 135, 257 S.E. 2d 417 (1979); *State v. McCloud*, 276 N.C. 518, 173 S.E. 2d 753 (1970).

However, the United States Supreme Court in the recent case of *United States v. Ross*, --- U.S. ---, 102 S.Ct. ---, 72 L.Ed. 2d 572 (1982), has extended the rules of search and seizure of automobiles when the arresting officers have probable cause to believe contraband is in the vehicle. Justice Stevens, speaking for the *Ross* majority, said:

> "On reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure . . . the search and seizure are valid . . . ."

Id., at ---, 102 S.Ct. at ---, 72 L.Ed. 2d at 581, *quoting Carroll v. United States*, 267 U.S. 132, 149, 45 S.Ct. 280, 69 L.Ed. 543 (1925).

> The scope of a warrantless search based on probable cause is no narrower—and no broader—than the scope of a search authorized by a warrant supported by probable cause. Only the prior approval of a magistrate is waived . . . .

Id., at ---, 102 S.Ct. at ---, 72 L.Ed. 2d at 593.

The United States Supreme Court seems to expand the rule further in *Michigan v. Thomas*, --- U.S. ---, 102 S.Ct. ---, 73 L.Ed. 2d 750, 753 (1982), where the Court noted: "It is thus clear that the justification to conduct such a warrantless search does not vanish once the car has been immobilized; nor does it depend

upon a reviewing court's assessment of the likelihood in each particular case that the car would have been driven away, or that its contents would have been tampered with, during the period required for the police to obtain a warrant."

In the case before this Court, the trial court found as a fact:

> That Agent Cummings had probable cause to believe that the trunk of the defendant's vehicle contained the controlled substance marijuana at the time of the original search.

No exception was taken by defendant. The record supports the finding. Without question, the officers had probable cause to believe the trunk of the car contained marijuana. By looking into the trunk, the officer did nothing more than confirm that which he had reason to believe. As a precaution, he subsequently secured a search warrant, but this becomes immaterial in the face of *Ross, supra,* and *Thomas, supra.*

Based on the two cases of the United States Supreme Court cited herein, the order of the trial judge is

Reversed.

Judges ARNOLD and JOHNSON concur.

STATE OF NORTH CAROLINA v. WALKER LEVON GRAINGER

No. 8218SC469

(Filed 21 December 1982)

Constitutional Law § 67— disclosure of identity of informant not required

The State was not required to disclose the identity of a confidential informant who was not a participant in the crime but was a mere tipster who informed officers that defendant would be leaving a certain residence with cocaine in his possession.

APPEAL by defendant from *Long, Judge.* Judgment entered 31 August 1981 in Superior Court, GUILFORD County. Heard in the Court of Appeals 8 November 1982.

Defendant was charged in proper bills of indictment with carrying a concealed weapon in violation of G.S. 14-269 and two

counts of possession with intent to sell and deliver a controlled substance in violation of G.S. 90-95(a)(1)(b). He appeals from judgments entered on his conviction of these charges.

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

Bruce C. Fraser and McNairy, Clifford & Clendenin, by Locke Clifford, for defendant-appellant.

HILL, Judge.

Defendant makes two assignments of error that he consolidates for argument: (1) whether the trial court erred in denying defendant's motion to suppress evidence of contraband found in defendant's possession; and (2) whether the court erred in denying defendant's motion to disclose a confidential informant. Defendant in essence argues that the trial court's failure to order disclosure warranted suppression of the evidence at trial and justifies reversal or a new trial. We find no error in the judgments below.

The evidence offered at trial reveals that an informant advised the North Carolina State Bureau of Investigation (hereinafter, "S.B.I.") that defendant might be delivering cocaine to a private residence in Greensboro on 5 January 1981. Acting on the information, a team of officers led by Agent M. D. Robertson began surveillance of Carl M. Harmon, Jr.'s home in Greensboro around midnight on 5 January 1981. At 4:30 a.m., the informant told the officers that defendant would leave the house shortly, carrying about an ounce of cocaine and a gun. The officers followed defendant when he drove away from the house at about 5:00 a.m. They stopped him and found in the search incident to his warrantless arrest a gun and controlled substances.

At a pretrial hearing, the court denied defendant's motion to suppress evidence of the contraband, finding there was sufficient probable cause to support the warrantless arrest and search. The court denied without prejudice defendant's request for disclosure of the informant's identity on grounds that the informant was a "mere tipster." Defendant later renewed his motions, which were denied by the trial court. The jury found defendant guilty. Judgment was entered against him 31 August 1981. Defendant's mo-

tion for appropriate relief was denied 24 November 1981, the court concluding after an *in camera* examination that "the informant was not present at the arrest of [defendant] and was not a participant in the offenses for which [defendant] stands convicted. The State is not required to reveal his identity."

Nondisclosure of an informant's identity is a privilege justified by the need for effective law enforcement; but where the informant's identity and potential testimony are essential to a fair determination of the case or material to the defense, the privilege must give way and the informant's name be disclosed if the defendant is to be prosecuted. *Roviaro v. United States*, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed. 2d 639 (1957); *State v. Watson*, 303 N.C. 533, 279 S.E. 2d 580 (1981); *State v. Brown*, 29 N.C. App. 409, 224 S.E. 2d 193, *disc. rev. denied*, 290 N.C. 552, 226 S.E. 2d 511 (1976). "However, before the courts should even begin the balancing of competing interests . . . a defendant who requests that the identity of a confidential informant be revealed must make a sufficient showing that the particular circumstances in [the] case mandates such disclosure." *State v. Watson, supra* at 537, 279 S.E. 2d at 582 (citations omitted). Defendant has not made a sufficient showing.

The United States Supreme Court in *Roviaro, supra*, found that disclosure is mandated if the informant participated in the alleged crime and is thus a material witness who might be helpful to the defense. The privilege of nondisclosure, however, ordinarily applies where the informant is neither a participant in the offense, nor helps arrange its commission, but is a mere tipster who only supplies a lead to law enforcement officers. *See McLawhorn v. State of North Carolina*, 484 F. 2d 1 (1973). State court decisions similarly hold that disclosure is required only where the informant is an actual participant. *See State v. Hodges*, 51 N.C. App. 229, 275 S.E. 2d 533 (1981); *State v. Cameron*, 283 N.C. 191, 195 S.E. 2d 481 (1973).

The facts here are distinguishable from the cases in line with *Roviaro* that require disclosure. Here, the informant was a tipster. The evidence shows the informant told the S.B.I. that defendant might make a drug delivery at the Harmon residence on 5 January 1981. On the morning of the arrest, the informant told S.B.I. agents that defendant would be leaving the Harmon residence with cocaine in his possession. There is simply no

evidence of the informant's actual participation in the crime; nor is there any evidence that the informant was with defendant when he left the Harmon residence or when he was arrested for possession of contraband, or at any other relevant time. *Cf., Roviaro v. United States, supra; State v. Hodges, supra.*

Furthermore, although defendant speculates that the informant was Carl McNeil Harmon, Jr., any one of five or six other people present at the Harmon residence on 6 January 1981 could have been the informant. Defendant made no effort to subpoena any of these potential witnesses. Although defendant knew Harmon's possible significance to an entrapment defense five months before trial, he did not issue a subpoena for Harmon until two days before trial. *Cf. State v. Hodges, supra.* He then expected the court to order disclosure of the informant's identity on the mere assertion of entrapment.

We hold that the court correctly denied both defendant's motion to disclose the informant's identity and his motion to suppress evidence.

In the trial of this case, we find

No error.

Judges ARNOLD and JOHNSON concur.

STATE OF NORTH CAROLINA v. JACKIE WATTS

No. 825SC489

(Filed 21 December 1982)

Escape § 1— defense of duress—five requirements

The defense of duress will be available to prisoners who have escaped where defendants meet five requirements including a requirement that the prisoner immediately report to the proper authorities when he obtains a position of safety from the immediate threat. Therefore, where defendant failed to meet the reporting requirement, the trial court properly refused to charge on the defense of duress. G.S. 148-45.

State v. Watts

APPEAL by defendant from *Rouse, Judge.* Judgment entered 14 January 1982 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 15 November 1982.

Defendant appeals from the judgment entered on his conviction for felonious escape in violation of G.S. 148-45.

Attorney General Edmisten, by Special Deputy Attorney General Lester V. Chalmers, Jr., for the State.

Bruce H. Jackson, Jr. for defendant-appellant.

HILL, Judge.

Defendant escaped from the New Hanover county unit of the Department of Correction on 1 November 1981. He was apprehended thirteen days later.

Defendant's evidence tends to show that he was forced to flee the New Hanover prison because of a well-founded fear that he would suffer serious bodily injury and possibly death at the hands of a Department of Correction officer who worked there. Defendant testified he had been assaulted by the officer and received medical treatment for his injuries; that the officer had threatened to kill him; that defendant had reported the problem to the prison superintendent who had advised defendant to "keep it to yourself," and "get out of my office." Evidence offered by other witnesses corroborated defendant's testimony. Defendant said he had planned to turn himself in to the Wilmington Police Department the night he was arrested. The State offered no evidence in rebuttal.

At the pre-charge conference in chambers, defendant's counsel asked the court to charge on the defense of coercion or duress. The court denied the request and charged that the prison guard's conduct was not a defense to the charge of escape. Defendant's attorney excepted to the charge as given and to the court's refusal to charge on the defense of duress.

This is a case of first impression before the courts of North Carolina. The question has been addressed, however, by the United States Supreme Court and several state courts. *See People v. Lovercamp*, 43 Cal. App. 3d 823, 118 Cal. Rep. 110, 69 A.L.R. 3d 668 (1974); *People v. Harmon*, 53 Mich. App. 482, 220

N.W. 2d 212 (1974), *aff'd*, 394 Mich. 625, 232 N.W. 2d 187 (1975); *People v. Unger*, 33 Ill. App. 3d 770, 338 N.E. 2d 442 (1975), *aff'd*, 66 Ill. 2d 333, 362 N.E. 2d 319 (1977); *U.S. v. Bailey*, 444 U.S. 394, 100 S.Ct. 624, 62 L.Ed. 2d 575 (1980).

In *Lovercamp, supra*, the defendants had been attacked by other inmates demanding sexual favors. The prison authorities failed to provide defendants with adequate protection, and defendants escaped. Defendants were apprehended, tried and convicted of felonious escape. On appeal, the judgment was reversed and the case remanded for a new trial because defendants had been denied an opportunity to offer evidence of duress. In a well-reasoned opinion, Gardner, P.J., speaking for the California Court of Appeals, said:

> . . . such a prisoner escaping against his will would owe a duty to use reasonable efforts to render himself again to the custody of the law enforcement agency at the first available opportunity. . . .
>
> . . . we hold that the proper rule is that a limited defense of necessity is available if the following conditions exist:
>
> (1) The prisoner is faced with a specific threat of death, forcible sexual attack or substantial bodily injury in the immediate future;
>
> (2) There is no time for a complaint to the authorities or there exists a history of futile complaints which make any result from such complaints illusory;
>
> (3) There is no time or opportunity to resort to courts;
>
> (4) There is no evidence of force or violence used towards prison personnel or other "innocent" persons in the escape; and
>
> (5) The prisoner immediately reports to the proper authorities when he has attained a position of safety from the immediate threat.

43 Cal. App. 3d at 831-832, 118 Cal. Rep. at 115, 69 A.L.R. 3d at 676.

We adopt the guidelines set forth by the *Lovercamp* court and hold that the defense of duress will be available where a

defendant meets all five requirements. Defendant herein has not met the fifth requirement. He had been away from the New Hanover prison unit for thirteen days before he was arrested for escape. Defendant contends he was waiting to turn himself in to a specific officer. To limit surrender to a specific person, however, is unreasonable. A delay of thirteen days is unjustifiable under the circumstances of this case.

The trial court properly refused to charge on the defense of duress.

No error.

Judges ARNOLD and JOHNSON concur.

DORIS JEAN LEFLER, EMPLOYEE-PLAINTIFF v. LEXINGTON CITY SCHOOLS, EMPLOYER, SHELBY MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8110IC1391

(Filed 21 December 1982)

Master and Servant § 65.2— workers' compensation—back injury while emptying trash—necessity for further findings

Where the evidence in a workers' compensation case showed that plaintiff cafeteria worker experienced a pain in her back while helping the janitor and the cafeteria manager empty a trash can into a dumpster, that although plaintiff had helped empty a trash can during the previous school year, she had not done so in the present school year, and that plaintiff had never helped with a can heavy enough to require three people to lift it, the Industrial Commission erred in concluding that plaintiff was not injured in an accident without making findings as to whether plaintiff's assistance in carrying and emptying the trash can constituted an interruption of plaintiff's work routine and the introduction thereby of unusual conditions likely to result in unexpected consequences, and the case is remanded for such findings.

APPEAL by plaintiff from order of North Carolina Industrial Commission entered 7 October 1981. Heard in the Court of Appeals 12 October 1982.

The plaintiff has appealed from an adverse ruling by the North Carolina Industrial Commission. The evidence before the Hearing Commissioner was that in the fall of 1979 the plaintiff

had been employed for approximately twelve years by the defendant school system. At that time, she was working in the school cafeteria. The plaintiff had on some occasions in the past helped the janitor carry a trash can to the dumpster but she testified she had not done so in the fall of 1979 prior to the event in controversy in this case. On 20 December 1979, the trash can was unusually heavy and the janitor could not lift it by himself. At the request of Thelma Brown, the cafeteria manager, the plaintiff assisted Mrs. Brown and the janitor in carrying and emptying the trash can. While emptying the trash can, the plaintiff experienced a pain in her back. Plaintiff testified that she slipped on the gravel and trash on the ground around the dumpster and grasped the trash can to keep from falling. The janitor and Mrs. Brown each testified they did not see the plaintiff slip at the time they were emptying the trash can and did not remember anything pull on the trash can.

The Hearing Commissioner found that the janitor ordinarily did not require assistance in emptying the trash can, but that on this day it was too heavy to lift and the janitor asked Mrs. Brown and the plaintiff to help him. As the plaintiff was helping with the emptying of the trash can, she felt a pain in her back. The Hearing Commissioner found that the plaintiff did not slip on gravel or trash on the ground, and did not twist as the trash can was being emptied. He found that "the plaintiff accordingly did not sustain an injury by accident arising out of and in the course of her employment." The Hearing Commissioner denied the plaintiff any recovery and the Full Commission affirmed. Commissioner Coy M. Vance dissented.

The plaintiff appealed.

Stoner, Bowers and Gray, by Carl W. Gray, for plaintiff appellant.

Brinkley, Walser, McGirt, Miller and Smith, by G. Thompson Miller, for defendant appellees.

WEBB, Judge.

We reverse and remand. The Industrial Commission chose not to believe the testimony of the plaintiff that she slipped while emptying the trash can. They concluded that the plaintiff "accord-

ingly" was not injured in an accident. We are bound by the Industrial Commission's finding of fact as to the slippage by the plaintiff. We do not believe this disposes of the case, however, as there was other evidence of accident upon which the Industrial Commission did not make adequate findings of fact. *See Harrell v. J. P. Stevens*, 45 N.C. App. 197, 262 S.E. 2d 830, *cert. denied*, 300 N.C. 196, 269 S.E. 2d 623 (1980).

An accident "involves the interruption of the work routine and introduction thereby of unusual conditions likely to result in unexpected consequences." *O'Neal v. Blacksmith Shop*, 45 N.C. App. 90, 92, 262 S.E. 2d 385, 386 (1980), *citing Harding v. Thomas & Howard Co.*, 256 N.C. 427, 124 S.E. 2d 109 (1962); *see Key v. Wagner Woodcraft, Inc.*, 33 N.C. App. 310, 235 S.E. 2d 254 (1977). As pointed out by Commissioner Vance, there was evidence in this case that although plaintiff had helped empty a trash can during the previous school year, she had not done so in the 1979-80 school year and had never helped with a can heavy enough to require three people to lift it. The Commission made some findings of fact on this evidence, but did not make sufficient findings as to whether this was an interruption of the plaintiff's work routine and the introduction thereby of unusual conditions likely to result in unexpected consequences. We reverse and remand for findings of fact and a conclusion on this feature of the case.

Reversed and remanded.

Judges VAUGHN and WELLS concur.

STATE OF NORTH CAROLINA v. RONALD WEATHERFORD

No. 8216SC616

(Filed 21 December 1982)

Searches and Seizures § 24— search warrant—sufficiency of affidavit—information supplied by informant

An affidavit underlying a search warrant showed probable cause sufficient to justify its issuance where it indicated that an informant personally had seen one of the allegedly stolen items on the described premises, and it indicated that (1) the informant was known to the affiant to be of good character and

reputation, and (2) the informant had described details of two larcenies with such certainty as to produce belief that the information was true.

APPEAL by defendant from *Bailey, Judge.* Judgment entered 18 February 1982 in Superior Court, SCOTLAND County. Heard in the Court of Appeals 9 December 1982.

Defendant pled guilty to felonious possession of marijuana following denial of his motion to suppress evidence seized pursuant to a search warrant. He appeals, pursuant to G.S. 15A-979(b), from denial of the motion to suppress.

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

Locklear, Brooks & Jacobs, by Arnold Locklear, for defendant appellant.

WHICHARD, Judge.

Defendant contends the court erred in refusing to suppress the fruits of a search pursuant to a warrant therefor, because the affidavit underlying the warrant did not show probable cause sufficient to justify its issuance. We disagree, and accordingly affirm.

An "affidavit is 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, 575-76, 180 S.E. 2d 755, 765 (1971). To supply reasonable cause to believe the objects sought are on the described premises, the affidavit supporting a search warrant must provide the magistrate with underlying circumstances from which to judge the validity of an informant's conclusion that the articles sought are at the place to be searched. *Aguilar v. Texas,* 378 U.S. 108, 114, 84 S.Ct. 1509, 1514, 12 L.Ed. 2d 723, 729 (1964); *State v. Hayes,* 291 N.C. 293, 298-99, 230 S.E. 2d 146, 149-50 (1976); *State v. Edwards,* 286 N.C. 162, 209 S.E. 2d 758 (1974); *State v. Campbell,* 282 N.C. 125, 191 S.E. 2d 752 (1972); *State v. Whitley,* 58 N.C. App. 539, 293 S.E. 2d 838, 840-41, *disc. rev. denied,* 306 N.C. 750, 295 S.E. 2d 763 (1982). Where an informant states to the affiant that he personally has seen the stolen items described in the war-

rant in defendant's possession at the described premises, the affidavit is generally sufficient to show probable cause to believe that the items were possessed at the premises to be searched. *See, e.g., Hayes, supra,* 291 N.C. at 299, 230 S.E. 2d at 150; *State v. Graves,* 16 N.C. App. 389, 391-92, 192 S.E. 2d 122, 124 (1972); *State v. Shirley,* 12 N.C. App. 440, 443-45, 183 S.E. 2d 880, 882-83, *cert. denied,* 279 N.C. 729, 184 S.E. 2d 885 (1971).

> [A] "two-pronged" test [determines] whether an affidavit is sufficient to show probable cause. First, the affidavit must contain facts from which the issuing officer could determine that there are reasonable grounds to believe that illegal activity is being carried on or that contraband is present in the place to be searched. Secondly, if an unidentified informant has supplied all or a part of the information contained in the affidavit, some of the underlying facts and circumstances which show that the informant is credible or that the information is reliable must be set forth before the issuing officer.

Hayes, 291 N.C. at 299, 230 S.E. 2d at 149-50. "Each case must be decided on its own facts and 'reviewing courts are to pay deference to judicial determinations of probable cause, and "the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants."' " *State v. Jones,* 299 N.C. 298, 304, 261 S.E. 2d 860, 864 (1980).

The affidavit here described certain property allegedly stolen pursuant to a breaking and entering and then recited the following:

> The applicant swears to the following facts to establish probable cause for the issuance of a search warrant: A confidential informer, known to me to be of good characte[r] and reputation described details of two larcenies known to he [sic] with such certainty so as to cause me to believe the information and knowledge to be true. This informant says that he has seen the mentioned air conditioner [one of the items allegedly stolen] on these premises. [Illegible] guess that it is there now [Illegible].

This information satisfied the first prong of the foregoing test, *viz.,* that there were reasonable grounds to believe contraband

was present at the place to be searched, by indicating that the informant personally had seen one of the allegedly stolen items on the described premises. *See Hayes, supra; State v. Chapman*, 24 N.C. App. 462, 466, 211 S.E. 2d 489, 492 (1975); *Graves, supra; Shirley, supra.* It satisfied the second prong of the test, *viz.*, the requirement of "underlying facts and circumstances which show that the informant is credible or that the information is reliable," *Hayes, supra*, by indicating that (1) the informant was known to the affiant to be of good character and reputation, and (2) the informant had described details of two larcenies with such certainty as to produce belief that the information was true. An "informant's reliability may reasonably be inferred from the very nature of his detailed report." *State v. Ellington*, 18 N.C. App. 273, 277, 196 S.E. 2d 629, 632, *aff'd*, 284 N.C. 198, 200 S.E. 2d 177 (1973); *see also Chapman, supra*, 24 N.C. App. at 466-67, 211 S.E. 2d at 492.

The affidavit thus "contained a substantial basis for crediting the hearsay," *United States v. Harris*, 403 U.S. 573, 581, 29 L.Ed. 2d 723, 732, 91 S.Ct. 2075, 2081 (1971), and "it would induce a prudent and disinterested magistrate to . . . conclude that the informant's information was reliable and not a [casual] rumor or a conclusory fabrication," *Chapman*, 24 N.C. App. at 467, 211 S.E. 2d at 493. It was, then, sufficient to warrant a finding of probable cause to search the designated premises, and the court did not err in denying the motion to suppress.

Affirmed.

Judges VAUGHN and WELLS concur.

STATE OF NORTH CAROLINA v. ROBERT HASKINS, JR.

No. 823SC589

(Filed 21 December 1982)

1. Receiving Stolen Goods § 5.1— possession of stolen property—sufficiency of evidence of guilty knowledge

The State's evidence was sufficient for the jury to find that defendant possessed stolen property "knowing or having reasonable grounds to believe the same to have been feloniously stolen or taken" in violation of G.S. 14-71.1

where it tended to show that three guns were stolen from the victim's home; on the day the guns were stolen, defendant attempted to sell in the same community, at considerably less than their true value, guns which fit the description of those taken from the victim's home; defendant related a story which differed from that of his companion as to acquisition of the guns; and defendant was observed on that day in a car which contained a shotgun similar to a shotgun taken from the victim's home.

2. Criminal Law § 163— assignment of error to the charge—failure to object at trial

An assignment of error to the trial court's instructions was not properly before the appellate court for review where defendant failed to object to such portion of the charge before the jury retired. Appellate Rule 10(b)(2).

3. Criminal Law § 113.7— mere presence at crime scene—refusal to give requested instruction

The trial court did not err in refusing to give defendant's requested instruction that mere presence at the scene of a crime does not make a person guilty of the crime where the evidence established that defendant was an active participant in the crime charged rather than a mere bystander.

APPEAL by defendant from *Reid, Judge.* Judgment entered 20 January 1982 in Superior Court, CRAVEN County. Heard in the Court of Appeals 7 December 1982.

Defendant appeals from a judgment of imprisonment entered upon his conviction of possession of stolen property.

Attorney General Edmisten, by Special Deputy Attorney General John R. B. Matthis and Assistant Attorney General James C. Gulick, for the State.

John H. Harmon for defendant appellant.

WHICHARD, Judge.

[1] Defendant contends the court erred in denying his motion to dismiss. He argues the evidence failed to establish that he possessed stolen property "knowing or having reasonable grounds to believe the same to have been feloniously stolen or taken," as required by G.S. 14-71.1.

The requisite guilty knowledge may be inferred from incriminating circumstances. *See State v. Allen*, 45 N.C. App. 417, 421, 263 S.E. 2d 630, 633 (1980); *State v. Hart*, 14 N.C. App. 120, 122, 187 S.E. 2d 351, 352, *cert. denied*, 281 N.C. 625, 190 S.E. 2d 469 (1972). *See also State v. Bizzell*, 53 N.C. App. 450, 457, 281

S.E. 2d 57, 61 (1981) (Whichard, J., dissenting). The motion was properly denied if there was competent evidence to support the allegations in the indictment. The evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom. Contradictions and discrepancies are for the jury to resolve and do not warrant dismissal. *State v. Summitt*, 301 N.C. 591, 600, 273 S.E. 2d 425, 430, *cert. denied*, 451 U.S. 970, 68 L.Ed. 2d 349, 101 S.Ct. 2048 (1981); *State v. McKinney*, 288 N.C. 113, 117, 215 S.E. 2d 578, 581-82 (1975).

The State's evidence tended to show the following:

Zeb Harrison had kept three guns in his home in New Bern—a .22 automatic Revelation rifle, a .35 caliber Marlin rifle, and a .12 gauge automatic five shot Remington model 1100. The guns were there when he left on 26 October 1981, but were missing when he returned. He had given no one permission to go into the house or to remove the guns.

On the same day defendant and a companion went to a gun shop in New Bern and attempted to sell a .35 caliber Marlin rifle and a Remington model 1100 shotgun. Defendant told the proprietor he wanted to sell the guns because he had to make a trailer payment that afternoon. He also told him he had bought the shotgun about a year earlier. His companion subsequently told the proprietor, however, that he had bought the shotgun about three years earlier. The proprietor "got jitterous" because of these conflicting accounts and declined to purchase the guns. He also noted that defendant and his companion wanted $150 for guns which were worth approximately $500.

On the same day defendant and his companion also approached Dick McLawhorn about buying the guns. Defendant told McLawhorn he wanted $175 for the guns or $100 for each if they were purchased separately. McLawhorn told defendant he only had $40, and defendant sold him the .35 Marlin for $40. Defendant's companion took the money, but gave it to defendant. McLawhorn took the gun to the Sheriff's Department and told officers there that he had purchased a gun he had heard was stolen.

On the same day a police officer stopped a car driven by defendant's companion in which defendant was a passenger. He

observed a .12 gauge shotgun on the rear seat. A brown paper bag on the seat between defendant and his companion contained .35 caliber ammunition and .12 gauge shotgun shells.

Viewed, as required, in the light most favorable to the State, the foregoing evidence sufficed to raise more than a suspicion or conjecture as to defendant's guilt. Defendant's attempts, on the day Harrison's guns were stolen, to sell in the same community, at considerably less than their true value, guns which fit the description of those taken from Harrison; his relating a story which differed from that of his companion as to acquisition of the guns; and his being observed on that day in a car which contained a .12 gauge shotgun, when one of the items taken from Harrison's home was a .12 gauge shotgun, combined to constitute incriminating circumstances sufficient to permit the jury to infer that defendant possessed the guns which had been taken from Harrison's house "knowing or having reasonable grounds to believe the same to have been feloniously stolen or taken." G.S. 14-71.1. *See Allen, supra; Hart, supra.* The motion to dismiss thus was properly denied.

[2] Defendant next contends the court erred in instructing on the elements of felonious possession of stolen property. Defendant did not, however, object at trial to the portion of the charge to which he now assigns error. The case was tried subsequent to the effective date of present Rule 10(b)(2), Rules of Appellate Procedure, which makes objection before the jury retires a condition of assigning error to a portion of the charge. The record clearly establishes that defendant had opportunity to make the objection before the jury retired. This assignment of error thus is not before us for review.

[3] Defendant finally contends the court erred in denying his requested instruction that mere presence at the scene of a crime does not make a person guilty of the crime. When a requested instruction is not supported by the evidence, the court does not err in refusing to give it. *See State v. Moore*, 301 N.C. 262, 275, 271 S.E. 2d 242, 250 (1980); *State v. Bailey*, 254 N.C. 380, 386, 119 S.E. 2d 165, 170 (1961). The evidence here established defendant as the person who went to a gun shop wanting to sell the guns, made the initial approach about selling them to McLawhorn, and told both the shop proprietor and McLawhorn that he needed the

money to make a trailer payment. It also established that he received the money from the sale to McLawhorn. It thus clearly showed him to be an active participant rather than a mere bystander, and the court therefore did not err in denying the requested instruction.

No error.

Judges VAUGHN and WELLS concur.

STATE OF NORTH CAROLINA v. PATRICIA TREANTS

No. 824SC241

(Filed 21 December 1982)

Searches and Seizures § 19— city police officer executing search within one mile of city limits—proper

Under G.S. 15A-402 and G.S. 160A-286, a city police officer was acting within his "territorial jurisdiction" when he executed a search of defendant's business premises located outside the city limits but within one mile of the city limits. G.S. 15A-247.

APPEAL by plaintiff from *Strickland, Judge.* Order entered 4 February 1982 in Superior Court, ONSLOW County. Heard in the Court of Appeals 24 September 1982.

On 7 November 1981 a Jacksonville police officer entered defendant's business for the purpose of executing a search of the defendant's business premises located outside the city limits of Jacksonville but within one mile of the city limits of Jacksonville. The defendant was charged with resisting, delaying or obstructing a police officer in the discharge of his duties.

Upon the call of this case for trial in Onslow County District Court and prior to the presentation of any evidence in the case, the district attorney asked the court for a ruling upon the legal question of whether or not a Jacksonville police officer has authority under G.S. § 15A-247 to execute a search warrant outside the city limits of Jacksonville but within one mile of the city limits. After hearing arguments by the district attorney and the

attorney for the defendant, the court ruled that a Jacksonville police officer would have no authority to execute a search warrant outside of the city limits of Jacksonville but within one mile of the city limits of Jacksonville and that the defendant would have the right to resist, delay, and obstruct the Jacksonville police officer in the performance of such an act. The State gave notice of appeal to the Superior Court of Onslow County from the entry of the said order.

When this matter came on for hearing in the Superior Court of Onslow County the judge entered an order affirming the ruling of the Onslow County District Court. From the entry of this order the State objected, excepted, and gave notice of appeal to the North Carolina Court of Appeals.

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

Jeffrey S. Miller, for defendant-appellee.

MARTIN (Robert M.), Judge.

The State contends that the trial court erred when it dismissed this action on the grounds that the municipal police officer had no authority to execute a search warrant outside the city limits but within one mile thereof. We agree with the State and reverse the trial court's dismissal.

N.C. Gen. Stat. § 15A-247 states that "a search warrant may be executed by any law enforcement officer acting within his territorial jurisdiction, whose investigative authority encompasses the crime or crimes involved." N.C. Gen. Stat. § 15A-402 and N.C. Gen. Stat. § 160A-286 must be analyzed to determine what area the territorial jurisdiction of a municipal law enforcement officer actually encompasses. N.C. Gen. Stat. § 15A-402 defines the territorial jurisdiction of officers to make arrests. It provides that

> (b) Territorial Jurisdiction of County and City Officers. —Law enforcement officers of cities and counties may arrest persons within their particular cities or counties and on any property and rights-of-way owned by the city or county outside its limits.

> (c) City Officers, Outside Territory.—Law enforcement officers of cities may arrest persons at any point which is one mile or less from the nearest point in the boundary of such city.

N.C. Gen. Stat. § 160A-286 extends the extraterritorial power of city police officers beyond the mere power to arrest found in § 15A-402(c), providing that

> In addition to their authority within the corporate limits, city policemen shall have all the powers invested in law-enforcement officers by statute or common law within one mile of the corporate limits of the city, and on all property owned by or leased to the city wherever located. . . .

We understand the language of § 160A-286 to extend the power to execute a search to cover the territory within one mile outside of the corporate city limits, since city police officers already have the power to execute search warrants within the corporate limits. Because the police officer was acting within his "territorial jurisdiction" as extended by § 160A-286, the defendant had no right to resist, delay, or obstruct the search being conducted pursuant to a warrant.

For the foregoing reasons we find that the trial court's order dismissing the State's complaint must be

Reversed.

Judges ARNOLD and WHICHARD concur.

STATE OF NORTH CAROLINA v. RICKY L. WOODRUP

No. 824SC483

(Filed 21 December 1982)

1. Criminal Law § 163— failure to give instructions—entire charge not in record on appeal

Defendant's contention that the trial court erred in failing to give requested instructions and in failing to give instructions required by the evidence will not be considered on appeal where defendant failed to include

the charge of the court either in the record on appeal or as an appendix to his brief. Appellate Rules 9(c)(1) and 28(b)(4).

2. **Criminal Law § 86.4— impeachment of defendant—prior indictments for crime**

Cross-examination of defendant as to whether he had previously pled guilty to felonious larceny after three counts of larceny were reduced to one count had the effect of asking defendant whether he had been indicted for other crimes and was improper.

APPEAL by defendant from *Barefoot, Judge.* Judgment entered 6 April 1981 in ONSLOW County Superior Court. Heard in the Court of Appeals 11 November 1982.

Defendant was convicted by a jury of robbery with a firearm. From judgment imposing an active sentence of 30 years, defendant has appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Marilyn R. Rich, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Marc D. Towler, for defendant.

WELLS, Judge.

[1] In his first, second, fourth, fifth, and sixth arguments, defendant contends that the trial court erred in failing to give instructions requested by defendant or by failing to give other instructions required by the evidence. In order for us to give these arguments effective appellate review, it is necessary for us to review the trial court's entire charge to the jury. Defendant has not included the charge of the Court either in the record on appeal or as an appendix to his brief. This violation of the provisions of Rule 9(c)(1) and Rule 28(b)(4) of the Rules of Appellate Procedure requires that we not consider these questions. *See State v. Wilson,* 58 N.C. App. 818, 294 S.E. 2d 780 (1982).

[2] In his third argument, defendant contends that the trial court erred in overruling his objection to impeachment cross-examination. Defendant's assignment of error is based upon the following portions of the State's cross-examination of defendant.

> Q: In 1974, sir, you pled guilty to felonious larceny, is that correct?

A: Felonious larceny, yes.

Q: And that was reduced to three counts of larceny from one count of larceny?

MR. DONLEY: Objection.

THE COURT: Overruled. EXCEPTION NO. 5

Q: Wasn't it, sir?

A: Yes.

Q: Okay, it was also a breaking and entering in a building also, didn't you.

A: No.

Q: You didn't break in a building?

A: No.

As noted by defendant in his brief, the district attorney obviously intended to ask defendant if three counts against him had been reduced to one. These questions clearly had the effect of asking the defendant whether he had been *indicted* for two counts of larceny. In *State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174 (1971), our Supreme Court held that it is reversible error to allow such questions for the purpose of impeaching a defendant in a criminal trial. *See also State v. Shane*, 304 N.C. 643, 285 S.E. 2d 813 (1982). The testimony of the victim in this case squarely conflicted with defendant's version of the events which led to defendant's arrest and conviction. Defendant's credibility was, therefore, critical to his defense. We are persuaded defendant was prejudiced by the trial court's action in allowing the prosecutor to ask defendant about *indictments* for larceny. For this error, there must be a

New trial.

Judges VAUGHN and WHICHARD concur.

STATE OF NORTH CAROLINA v. BOBBY RAY MILLER

No. 8219SC212

(Filed 21 December 1982)

Robbery § 5.2— armed robbery—instructions sufficient

In a prosecution for armed robbery, the trial court sufficiently applied the law to the evidence in the jury instructions. G.S. 15A-1232.

APPEAL by defendant from *Washington, Judge.* Judgment entered 22 October 1981 in Superior Court, ROWAN County. Heard in the Court of Appeals 22 September 1982.

Defendant was indicted for armed robbery. At trial the evidence favoring the State included Mr. Tripp's testimony that on 30 July 1981 the defendant approached him as he was entering his apartment, that defendant took a revolver out of his pants pocket and stated that he would kill Mr. Tripp if he did not give him all his money and that Mr. Tripp handed over $34.00 to the defendant.

The State also presented the testimony of a witness who stated that she knew the defendant because she worked with him, that she lived in the same neighborhood as Mr. Tripp, and that she had seen and spoken with the defendant in front of her home shortly before Mr. Tripp was robbed.

The investigating police officer testified that the defendant at first denied being in that neighborhood on the afternoon in question, but later admitted being in the vicinity when told of his co-worker's signed statement that she had spoken with the defendant.

The defendant testified in his own behalf stating that he was in the neighborhood in question on that afternoon because his car had broken down and he was walking to his aunt's or grandmother's house to get help. He denied knowing Mr. Tripp, denied seeing him on the day in question, denied having taken any money from him, and denied possessing a revolver. He also testified that when he heard the police were looking for him he went to the police station where he denied knowledge of the robbery.

Defendant also presented the testimony of Lorenzo McLean who recounted basically the same story as the defendant, stating that he and defendant were in the defendant's car, that the car had broken down, that the defendant left to get help at his grandmother's house and that the defendant came back alone about 15 minutes later and got the car started.

On this evidence, defendant was convicted of armed robbery and from that judgment defendant appeals.

Attorney General Edmisten, by Special Deputy Attorney General John R. B. Matthis and Assistant Attorney General James C. Gulick, for the State.

Davis & Corriher, by Robert M. Davis, for the defendant-appellant.

MARTIN (Robert M.), Judge.

The defendant has presented one question on appeal, that being whether the trial court erred in its charge to the jury. Specifically, defendant contends that the trial court erred by failing to apply the law to the evidence in the jury instructions.

N.C. Gen. Stat. § 15A-1232 provides that:

> Jury instructions; explanation of law; opinion prohibited. —In instructing the jury, the judge must declare and explain the law arising on the evidence. He is not required to state the evidence except to the extent necessary to explain the application of the law to the evidence. He must not express an opinion whether a fact has been proved.

In *State v. Williams*, 290 N.C. 770, 228 S.E. 2d 241 (1976), another armed robbery case, our Supreme Court outlined what is required by § 15A-1232. That opinion stated that

> Ordinarily, a statement of the applicable law and the contentions of the parties, without applying the law to the substantive features of the case arising on the evidence, is insufficient under the rule of G.S. 1-180. [Citations omitted.] However, where the evidence is simple, direct, and without equivocation and complication, an explanation of the law and a statement of the evidence in the form of contentions is a sufficient compliance with the statute.

Id. at 773, 228 S.E. 2d at 243.

We believe that the contentions of the parties presently before us are no more equivocal or complicated than those under consideration in *Williams.* "While the charge is not a model to be followed, it is our opinion that under the factual situation here it is a sufficient compliance with the requirements of G.S. 1-180." (Predecessor to N.C. Gen. Stat. 15A-1232.) *State v. Best,* 265 N.C. 477, 480, 144 S.E. 2d 416, 418 (1965).

We find in the trial court's charge to the jury

No error.

Judges ARNOLD and WHICHARD concur.

STATE OF NORTH CAROLINA v. KENTON R. KELLUM

No. 821SC275

(Filed 21 December 1982)

1. **Health § 3— duty to maintain sanitary system of sewage disposal—misdemeanor when fail to do so**

G.S. 130-160(a) required defendant to maintain a sanitary system of sewage disposal at his place of business, and G.S. 130-203 made it a misdemeanor for him to fail to do so.

2. **Statutes § 3— maintenance of sanitary sewage disposal system—statute not vague**

G.S. 130-160 which requires maintenance of a sanitary sewage disposal system is not unconstitutionally vague.

3. **Health § 3— maintenance of sanitary sewage disposal system—motion to dismiss properly denied**

The trial court properly denied defendant's motion to dismiss a prosecution for failure to provide a sanitary system of sewage disposal at his place of business where the evidence showed there were six septic tanks serving defendant's trailer park and four of them were malfunctioning on or about the date alleged in the warrant.

4. **Health § 3— failure to maintain sanitary sewage disposal system—elements of misdemeanor**

Knowledge of a defect or a failure to correct it after being requested to do so are not elements of the misdemeanor of failing to provide a sanitary system of sewage disposal for a place of business.

5. Criminal Law § 114.3— instructions regarding burden of proof of the State—no comment on the evidence

In a prosecution for failure to maintain a sanitary system of sewage disposal, the trial court did not comment on the evidence when it stated in its charge to the jury what the State had to prove.

6. Health § 3— failure to maintain sanitary sewage disposal system—no requirement of willfulness

There is no requirement of willfulness for anyone who violates the provisions of G.S. 130-160 by failing to provide a sanitary sewage disposal system. G.S. 130-203.

APPEAL by defendant from *Small, Judge.* Judgment entered 16 November 1981 in Superior Court, PASQUOTANK County. Heard in the Court of Appeals 12 October 1982.

The defendant was charged in a warrant with failing on or about 8 July 1981 to provide a sanitary system of sewage disposal for a place of business controlled by him in violation of G.S. 130-160(a). He was found guilty in the District Court and appealed to the Superior Court for a trial de novo.

The State's evidence showed that the defendant owned and operated a trailer park on Highway 17 in Pasquotank County. In January 1981 he was notified by Luther Daughtry, a sanitarian with the Four County District Health Department, that the septic tank system at the trailer park was not functioning properly in violation of G.S. 130-160(a). The defendant was directed to correct this malfunction. Mr. Daughtry communicated on several occasions with the defendant in 1981 in an attempt to have the problems corrected. Defendant was unable to do so. Mr. Daughtry testified further that on 2 July 1981 he examined the septic tank system and it was not functioning properly.

The jury found the defendant guilty as charged and he appealed from the imposition of a suspended sentence.

Attorney General Edmisten, by Assistant Attorney General Robert R. Reilly, for the State.

Trimpi, Thompson and Nash, by Thomas P. Nash, IV and John G. Trimpi, for defendant appellant.

WEBB, Judge.

The statute the defendant has been convicted of violating is G.S. 130-160 (now repealed) which provides in part:

> "(a) Any person owning or controlling any single or multiple family residence, place of business or place of public assembly shall provide a sanitary system of sewage disposal consisting of an approved privy, an approved septic tank system, or a connection to a public or community sewerage system . . . ."

Subsections (b), (c), and (d) of G.S. 130-160 provide for review and approval of sanitary sewage disposal systems by the Commission for Health Services and local boards of health. G.S. 130-203 provides that anyone who violates a provision of the Chapter or willfully fails to perform any act required by the Chapter shall be guilty of a misdemeanor.

[1] The defendant first assigns error to the denial of his motion to quash the warrant. He argues that G.S. 130-160 is an enabling statute allowing the creation of local health boards to oversee the health needs of citizens. He contends the purpose of the statute is to require a sewage disposal system that may be regulated by the proper agencies under G.S. 130-160(b), (c), and (d) to provide a good sewage system, and it is not its purpose to make it a crime not to provide a sanitary sewage system. He argues that the word "sanitary" is surplusage to this section and that if G.S. 130-160(a) applies to sanitary systems only, an unsanitary system may not be regulated under G.S. 130-160(b), (c), and (d).

We give the defendant good marks for an ingenious interpretation of G.S. 130-160, but we cannot accept it in this case. We believe the plain words of the statute require us to hold that under G.S. 130-160(a), the defendant is required to maintain a sanitary system of sewage disposal, and that G.S. 130-203 makes it a misdemeanor for him not to do so. The defendant's first assignment of error is overruled.

[2] In his second assignment of error the defendant contends that the statute is unconstitutionally vague:

> "It has been recognized that a statute is so vague as to violate . . . due process . . . where its language is such that

men of common intelligence must necessarily guess at its meaning.

* * *

. . . If a statute is so designed that persons of ordinary intelligence who would be law abiding can tell what conduct must be to conform to its requirements and it is susceptible of uniform interpretation and application by those charged with the responsibility of enforcing it, it is invulnerable to an attack for vagueness."

16A Am. Jur. 2d *Constitutional Law* § 818 (1979) at 988-989. We do not believe a person of ordinary intelligence would have any difficulty in understanding that G.S. 130-160 requires the maintenance by the defendant of a sanitary sewage disposal system. This means a system that is not dangerous to the health of the public by polluting the environment in the area which the system serves. The defendant's second assignment of error is overruled.

[3] In his third assignment of error the defendant argues that his motion to dismiss should have been allowed. He says this should have been done because the evidence showed there were several units serving the trailer park and some of them worked properly; that the State offered no evidence to show whether the systems had a 3,000 gallon or more designed capacity, so it is impossible to say which rules and regulations would be applicable and that all the evidence showed that at one time all the units worked properly. The evidence showed there were six septic tanks serving the trailer park and four of them were malfunctioning. The fact that two were working properly does not mean the defendant was operating a sanitary system. It does not matter whether a system has a 3,000 gallon or more designed capacity. Whatever the design capacity, the defendant was required to operate a sanitary system. The fact that all the systems worked properly at one time does not answer the question. The question is whether they all worked properly on 8 July 1981. The defendant's third assignment of error is overruled.

[4] In his fourth through seventh assignments of error the defendant brings forward exceptions to the charge. The court charged the jury that in order to convict the defendant, the State

had to prove (1) that the defendant controlled a place of business and (2) that he failed to provide a sanitary system of sewage disposal for that place of business. The defendant argues the court should have charged further that the State had to prove the defendant had knowledge of the defective system and that he had failed to comply with a request to correct the defective system. The statute does not make knowledge of a defect or a failure to correct it after being requested to do so elements of the misdemeanor. We do not believe we should add either of them as elements. The defendant's fourth assignment of error is overruled.

In his fifth assignment of error the defendant argues the court should have charged that in order to convict the defendant, the jury had to find all the septic tank systems were defective. For the reasons stated in this opinion, this assignment of error is overruled.

[5] In his sixth assignment of error the defendant argues the judge commented on the evidence by charging as follows:

> "So I instruct you that if you find from the evidence beyond a reasonable doubt that on or about July 8, 1981, K. R. Kellum controlled a place of business conducted in the name of Kellum's trailer park, on highway 17, in Pasquotank County, and provided a septic tank system of sewage disposal which was not approved because he had connected more units or trailers to the system than had been approved for it, and then failed to maintain a septic tank system of sewage disposal so that it disposed of the sewage in a sanitary manner, it would be your duty to return a verdict of guilty as charged."

The defendant argues that the judge commented on the evidence when he set forth his conclusions as to what he thought the State needed to prove. The defendant does not say why this is commenting on the evidence. The judge, as is the case each time a judge charges a jury, stated to the jury what the State had to prove. This is not a comment on the evidence. The defendant's sixth assignment of error is overruled.

[6] In his seventh assignment of error the defendant contends it was error for the court not to instruct the jury that they could

not convict the defendant unless they found he had willfully violated the provisions of G.S. 130-160. G.S. 130-203 provides in part:

> "Except as otherwise provided in this Chapter, any person who violates any provision of this Chapter *or* who willfully fails to perform any act required, or who willfully does any act prohibited by this Chapter, shall be guilty of a misdemeanor . . . ." (Emphasis added.)

This sentence is in the disjunctive. There is no requirement of willfulness for anyone who violates a provision of the Chapter. This is what the defendant was convicted of doing. The defendant's seventh assignment of error is overruled.

The defendant's eighth and last assignment of error is to the court's signing and entering the judgment. This assignment of error is overruled.

No error.

Judges VAUGHN and WELLS concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 21 DECEMBER 1982

GIBBONS v. LUEHRS No. 8112DC1396	Cumberland (81CVD2400)	Affirmed
GUPTON v. EVERHARDT No. 8219DC541	Rowan (81CVD624)	Dismissed
IN RE BEEKS No. 8228DC501	Buncombe (81J54)	Affirmed
JENKINS v. CRAVEN CO. DEPT. OF SOCIAL SERVICES No. 813SC1088	Craven (80SP217)	Affirmed
JORDAN v. JONES v. D.O.T. No. 8225SC529	Burke (82CVS20)	Reversed
LOEB v. LOEB No. 8115DC1386	Orange (81CVD218) (81CVD219)	Affirmed in Part; Vacated in Part
SPENCER v. SPENCER No. 8121DC1419	Forsyth (75CVD145)	Affirmed
STATE v. COMBS No. 8217SC440	Rockingham (80CR11364)	Affirmed
STATE v. CREWS No. 829SC520	Franklin (81CRS4813)	No Error
STATE v. DOTSON No. 8212SC504	Cumberland (81CRS20441) (81CRS20631)	No Error
STATE v. FREEMAN No. 824SC317	Onslow (81CRS14691)	No Error
STATE v. JOHNSON No. 824SC532	Onslow (81CRS1806) (80CRS24593)	No Error
STATE v. LEWIS No. 821SC545	Pasquotank (79CRS2396)	No Error
STATE v. LOCKLEAR & LOCKLEAR No. 8216SC446	Robeson (81CRS16867) (81CRS18732) (81CRS18733) (81CRS18736) (81CRS17132) (81CRS18730) (81CRS18731)	No Error

STATE v. NORTON No. 824SC459	Sampson (81CRS7214) (81CRS7215)	No Error
STATE v. ROGERS No. 823SC292	Pitt (80CRS10803) (80CRS10803A)	No Error
STATE v. TOLBERT No. 8227SC528	Gaston (81CRS18307)	No Error

STATE OF NORTH CAROLINA v. WILLIAM EDWARD MALLOY

No. 825SC549

(Filed 4 January 1983)

1. **Receiving Stolen Goods § 2— possession of stolen goods—failure to allege possessed property "stolen"—indictment nor statute invalid**

In a prosecution for possession of stolen goods, the bill of indictment followed the language of G.S. § 14-71.1, and the statute does not require that the indictment allege the property allegedly possessed by defendant was "stolen property."

2. **Receiving Stolen Goods § 5.2— possession of stolen property—sufficiency of evidence on element of "possession"**

The evidence was sufficient on the element of "possession" in a prosecution for possession of stolen goods where the evidence tended to show that a gun shop was burglarized; that an undercover law enforcement agent purchased stolen weapons from the defendant on the day after the burglary; that the agent paid the defendant $125.00 after inspecting the weapons in the presence of an unidentified individual, but in close physical proximity to the defendant; and that prior to handing payment to the defendant, the agent received confirmation from the defendant that the purchase price of the weapons was $125.00.

3. **Criminal Law § 162— objection to question but no motion to strike—exception not preserved**

In a prosecution for possession of stolen property where an undercover officer testified that his reason for coming to Wilmington on a certain date was "for the purpose of making undercover purchases of firearms from [defendant]" and where defendant objected to the question but failed to move to strike the answer, the exception was not properly preserved on appeal. Further, there was no prejudice to defendant by the admission of the witness's answer since the officer later testified that he did in fact purchase the two weapons described in the indictment from the defendant.

4. **Criminal Law § 145.5— restitution as condition for work release or parole—supported by evidence**

The trial court's order that defendant pay restitution as a condition of obtaining work release or parole was supported by ample evidence.

Judge BECTON dissenting.

APPEAL by defendant from *Barefoot, Judge.* Judgment entered 6 January 1982 in Superior Court, NEW HANOVER County. Heard in Court of Appeals 17 November 1982.

The defendant was charged in a proper bill of indictment as follows: ". . . did feloniously possess the following items of per-

sonal property, to wit: one Interarms 30/06 rifle mark 5 and one Marlin Glenfield 20 gauge shotgun; the personal property of Charles D. Todd DBA: Todds Gun Shop, having a value of $600.00, having reasonable grounds to believe the same to have been feloniously stolen or taken after the felonious breaking or entering of a building occupied by Charles D. Todd DBA: Todds Gun Shop, used as a business located at 113 S. Front Street, Wilmington, N.C. in violation of G.S. 14-71.1"

The defendant was found guilty as charged, and from a judgment imposing a prison sentence of not less than three nor more than five years, he appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Reginald L. Watkins for the State.

Ernest B. Fullwood for the defendant, appellant.

HEDRICK, Judge.

[1] Defendant's first Assignment of Error is set out in the record as follows: "The indictment fails to state that the personal property allegedly possessed by the defendant was stolen, an essential element of the offense 'possession of stolen goods' as required by G.S. 15A-924(a)(5)." We note the sufficiency of the bill of indictment was not challenged in the trial court. Defendant purports to base his first Assignment of Error on an exception noted in the record to the bill of indictment. Such an exception does not challenge the sufficiency of the bill. However, we treat the Assignment of Error, and defendant's argument in his brief in support thereof, as a motion for appropriate relief on the grounds that the bill of indictment is fatally defective because it fails to allege that the property allegedly possessed by the defendant was "stolen property," an essential element of the offense described in G.S. § 14-71.1. The statute provides in pertinent part:

> If any person shall possess any chattel, property, money, valuable security or other thing whatsoever, the stealing or taking whereof amounts to larceny or a felony, either at common law or by virtue of any statute made or hereafter to be made, such person knowing or having reasonable grounds to believe the same to have been feloniously stolen or taken, he shall be guilty of a criminal offense. . . .

In this case the bill of indictment follows the language of the statute. The language in the bill ". . . asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant . . . of the conduct which is the subject of the accusation." G.S. § 15A-924(a)(5).

If the bill is fatally defective, the statute is also invalid. We are not prepared to declare G.S. § 14-71.1 fatally defective. The Motion for Appropriate Relief is denied.

[2] Next defendant assigns error to the denial of his motions for judgment as of nonsuit, and to set aside the verdict. In his brief, defendant argues that the evidence was not sufficient on the element of "possession." We disagree.

The State's evidence tends to show that Todd's Gun Shop was burglarized on the 23rd or 24th day of September, 1980. All of the guns were taken and no one had been authorized by the owner of the gun shop to enter his business after closing on 23 September 1980. On 25 September 1980 an undercover law enforcement agent purchased weapons identified in the indictment from the defendant. The agent paid the defendant $125.00 after inspecting the weapons in the presence of an unidentified individual, but in close physical proximity to the defendant. Further, prior to handing payment to the defendant, the agent received confirmation from the defendant that the purchase price of the weapons was $125.00. This is apparent from the following excerpt of the agent's testimony:

> I went up to Eddie [the defendant] and said 'A hundred and twenty-five dollars right?' and he said, 'yeah.' I took the hundred and twenty-five dollars out of my pocket and gave it to him.

In view of the above, we hold that there is substantial evidence in this record as to each element of the offense charged in the bill of indictment. From the evidence in the record, the jury could find that the two guns described in the bill of indictment were stolen, that the defendant was in possession of the guns, and that the defendant knew or had reasonable grounds to believe that the guns were stolen. The Assignment of Error is not sustained.

[3] Next, the defendant contends the trial court erred to his prejudice by not sustaining his objection to the following question addressed to the undercover officer who purchased the guns from the defendant:

> Q. What was your reason for coming to Wilmington the 24th of September, 1980?
>
> MR. FULLWOOD: OBJECTION.

The witness responded as follows:

> A. For the purpose of making undercover purchases of firearms from Eddie Malloy.

"Motion to strike must be made immediately after the testimony objected to is given, in order to preserve an exception to the admission of the evidence, and where the answer is not responsive, a motion to strike is necessary." 12 N.C. Index 3d, *Trial* § 15.4 (1978).

The defendant did not move to strike the evidence challenged by this exception. In our opinion, a motion to strike the answer was necessary to preserve an exception to the evidence under the circumstances of this case. Assuming *arguendo* that the evidence challenged by this Assignment of Error was irrelevant, we do not perceive how the defendant could have been prejudiced by its admission since the officer later testified that he in fact did purchase the two weapons described in the indictment from the defendant. The Assignment of Error is not sustained.

[4] Finally, defendant contends the trial court erred in denying his Motion for Appropriate Relief made pursuant to G.S. § 15A-1414(b)(4). The trial court entered an order that the defendant pay restitution to the victim, Charles Todd, in the amount of $1500 "as a condition of attaining work release privilege or parole. . . ." The defendant argues there was no evidence introduced at trial or at the sentencing hearing which supported the order that he pay restitution in the amount of $1500. We disagree.

It is well settled that the trial court has discretionary authority to recommend restitution as a condition of obtaining parole. Further, any order or recommendation of the trial court for restitution must be supported by the evidence. G.S.

§ 15A-1343(d); *State v. Killian*, 37 N.C. App. 234, 245 S.E. 2d 812 (1978). In the present case, the evidence tended to show that a gun shop owned by Charles Todd was burglarized, resulting in major structural damage; that eight guns worth about three thousand dollars were stolen; that knives and other merchandise were stolen; and that the shop was ransacked. In view of these factors, the trial court's order that the defendant pay restitution in the amount of $1500 as a condition of obtaining work release or parole is supported by ample evidence. The defendant had a fair trial free from prejudicial error.

No error.

Judge WEBB concurs.

Judge BECTON dissents.

Judge BECTON dissenting.

This case is exceedingly close, procedurally and factually. Procedurally, the majority upholds the indictment essentially because the majority is "not prepared to declare G.S. § 14-71.1 [the possession of stolen goods statute] fatally defective." Ante, p. 3. Factually, the majority finds no error in Officer Jones' testimony that he came to Wilmington "[f]or the purpose of making undercover purchases of firearms from [the defendant]," because "the officer later testified that he in fact did purchase the two weapons described in the indictment from the defendant." Ante, p. 5. Disagreeing with the majority's procedural and factual resolution of these two points, I dissent.

I

N.C. Gen. Stat. § 15A-924(a)(5) (1981) requires that a criminal pleading contain a plain and concise factual statement asserting facts which support *every element of a criminal offense.* An indictment which is fatally defective because of its failure to charge a criminal offense is not cured by a reference in the indictment to the statute under which one is charged. *State v. Cooke*, 272 N.C. 728, 158 S.E. 2d 820 (1968); *State v. Walker*, 249 N.C. 35, 105 S.E. 2d 101 (1958). Moreover, if an offense is not sufficiently charged in the indictment, appellate courts can, *ex mero motu*, arrest the

judgment. *State v. Cole*, 294 N.C. 304, 310, 240 S.E. 2d 355, 359 (1978); *State v. Walker*, 249 N.C. at 38, 105 S.E. 2d at 104.

In this case, the State sought to charge the defendant William Edward (Eddie) Malloy with the offense of possessing stolen goods. An essential element of this offense is that the goods be stolen. *State v. Davis*, 302 N.C. 370, 373, 275 S.E. 2d 491, 493 (1981). In my view, the indictment in the case *sub judice* is fatally defective because it does not assert, in any language, that the goods allegedly possessed by the defendant were stolen. The indictment included the following language:

> THE JURORS . . . PRESENT that . . . William Edward Malloy unlawfully and wilfully did feloniously possess . . . personal property, to wit: one Interarms 30/06 rifle . . . and one 20-gauge shotgun; the . . . property of Charles D. Todd . . . having a value of $600, having reasonable grounds to believe the same to have been feloniously stolen or taken after the felonious breaking or entering of a building occupied by Charles D. Todd DBA: Todd's Gun Shop. . . .

True, the indictment asserts that defendant had reasonable grounds to believe that the guns were stolen. This, however, is not enough. If there was no theft, then there was no possession of stolen goods. For example, in an earlier case involving receiving stolen goods, our Supreme Court said: "If the property was not stolen or taken from the owner in violation of the statute, as where the original taking was without felonious intent, or was not against the owner's will or consent, the receiver is not guilty of receiving stolen property." *State v. Collins*, 240 N.C. 128, 130, 81 S.E. 2d 270, 272 (1954). The same can be said of possessing stolen goods even though possessing stolen goods and receiving stolen goods are different crimes. *See, State v. Davis*. By way of further example, if Officer Jones had sold or given the defendant an item of personal property valued at more than $400, telling the defendant at the time of delivery that the item of personal property was stolen pursuant to a breaking or entering, and the defendant kept the item of personal property, believing that Officer Jones had told him the truth, the defendant would not be guilty of possessing stolen goods, if the item of personal property had not in fact been stolen.

Simply put, the indictment, in order to be valid, must state that the goods alleged to be possessed by the defendant are stolen. Because the indictment in this case failed to do so, I believe the judgment should be arrested.

The strength of my conviction that the judgment should be arrested should not be questioned because I now address the trial court's evidentiary ruling. The majority addressed the evidentiary issue, and I "follow suit."

II

Considering the following facts, which are set forth in the light most favorable to the State, I believe the trial court erred in allowing Officer Jones to testify that his purpose for coming to Wilmington was to make undercover purchases of firearms from the defendant.

On 23 or 24 September 1980, Todd's Gun Shop was broken into and several guns were removed. Officer Clayton Jones, an undercover agent, came to Wilmington on 24 September 1980 and later that day met defendant, whom he had not previously known. Defendant was in a vacant lot working under an old blue Ford car. Officer Jones testified: "We called him and he came from under the car over to our vehicle. [The defendant] said he didn't have the keys to the car. He told us to ride across the project and see if we could locate an individual who supposedly had the keys to the car." Officer Jones could not find the individuals who had the car keys. On the following day, Officer Jones went back to the vacant lot. He testified:

> As we drove into the parking lot, an individual came to the rear of a red-bottom, black-top Mercury and opened the trunk. I got out of the vehicle, went to the trunk and asked the individual if the weapons worked. He said, "yeah." I checked the firearms to make sure they were operable and then placed the firearms in the trunk of my vehicle. There were two firearms.
>
> After I placed them in the trunk, I went to another vehicle parked in front of the Mercury. Eddie [the defendant] was under the hood of that vehicle talking with Earl Gray. I went up to Eddie and said, "A hundred and twenty-five dollars right?" And he said, "yeah." I took the hundred and twenty-five dollars out of my pocket and gave it to him.

Q. What did you give him the hundred and twenty-five dollars for?

MR. FULLWOOD: Objection.

COURT: Overruled.

The two firearms. He was located two car lengths and a little space in between the two from the rear of the trunk that contained the firearms. I paid him the $125.00 and myself and Earl Gray left the parking lot.

In view of the trial court's decision to admit, over objection, the *officer's motive* for giving defendant one hundred and twenty-five dollars, and considering the paucity of the evidence in this possession of stolen goods case (and I have included *all* the record reveals defendant *said or did*), I believe defendant was prejudiced by the admission of the officer's statement explaining why he came to Wilmington.

Moreover, I do not believe a motion to strike was necessary to preserve an exception to the evidence under the circumstances of this case. Defense counsel objected both after the question was asked and before a response was given and after the response was given. The colloquy is set forth below:

Q. What was your reason for coming to Wilmington on the 24th of September, 1980?

MR. FULLWOOD: Objection.

A. For the purpose of making undercover purchases of firearms from Eddie Malloy.

COURT: What?

MR. FULLWOOD: Objection.

COURT: Would you repeat that?

A. Purpose of making undercover purchases of firearms from Eddie Malloy.

COURT: Overruled.

In my view, the reason for the agent being in Wilmington during September 1980 was not relevant. Further, the response was apparently based on hearsay. More important, however, the

response was prejudicial as it tended to mislead the jury and prejudice the defendant. There is no evidence in this case that defendant owned, possessed, mentioned, saw, or even knew of the presence of the guns in question.

The trial court's ruling on the evidentiary issue addressed would itself warrant a new trial. Again, however, a new trial is the alternative relief defendant seeks. Defendant is entitled, first and foremost, to have the judgment arrested because the indictment is fatally defective.

IN THE MATTER OF THE ARBITRATION BETWEEN FLOYD E. COHOON, JR. AND PETER A. ZIMAN

No. 8110SC1214

(Filed 4 January 1983)

1. **Arbitration and Award § 1— substantial interstate activity—applicability of Federal Arbitration Act**

The evidence was sufficient to support the conclusion that substantial interstate activity was contemplated by the parties to a partnership agreement so that the agreement was covered by the Federal Arbitration Act where it showed that one partner was a resident of South Carolina and the other partner was a resident of North Carolina; the agreement was executed in South Carolina and all funds of the partnership were to be deposited in North Carolina banks; the principal office of the partnership was to be in North Carolina; the partnership was formed as a general real estate business and had real estate dealings in both North and South Carolina; the partners traveled outside their home states on partnership business; and the partnership employed a North Carolina general contractor to build one of its South Carolina shopping centers.

2. **Arbitration and Award § 1— dissolution of partnership—applicability of arbitration agreement**

A dispute between partners as to the manner of dissolution of the partnership was a dispute "arising out of or in connection with" the partnership agreement and was thus subject to arbitration as provided in the agreement. Furthermore, a letter sent by one partner to the other was sufficient to invoke the arbitration clause.

3. **Arbitration and Award § 5— dissolution of partnership—scope of arbitration**

An arbitrator's determination that one partner was entitled to management fees paid to the partnership for the management of two shopping centers came within the scope of the controversy submitted to arbitration as to the manner of dissolution of the partnership.

4. Arbitration and Award § 7— mistake of law by arbitrator—conclusiveness of arbitrator's decision

Even if an arbitrator made a mistake of law in failing to reduce by one-half an amount awarded to one partner in the dissolution of a partnership as full settlement of expenses charged to the partnership by the second partner, the courts have no power to correct such mistake.

5. Arbitration and Award § 7— application of inflation factor to award

An arbitrator could properly apply an inflation factor based upon the average increase in the Consumer Price Index for the pertinent period to an amount awarded to one partner upon dissolution of the partnership.

APPEAL by petitioner from *Herring, Judge.* Judgment entered 17 July 1981 in Superior Court, WAKE County. Heard in the Court of Appeals 2 September 1982.

Petitioner Peter A. Ziman (hereinafter Ziman) appealed from the judgment of the Wake County Superior Court affirming an arbitration award. The arbitration involved dissolution of a partnership, Cozi Investments, Ltd. (hereinafter Cozi), formed by Ziman and respondent Floyd E. Cohoon, Jr. (hereinafter Cohoon) as sole and equal partners. According to the partnership agreement, Cozi was to be involved "in the general real estate business, including, but not limited to development and purchase of real estate and sales and rentals." The agreement provided for arbitration of "[a]ny dispute or misunderstanding arising out of or in connection with this agreement or the interpretation or meaning of any part thereof. . . ." Cozi was engaged in the development of strip shopping centers in North and South Carolina, and during 1979 and 1980 the partners were also involved in the development and management of two Wake County shopping centers, Tryon Hills and Holly Park.

On 27 August 1980 Cohoon sent Ziman a letter by registered mail requesting arbitration on the dissolution of Cozi. Ziman responded that he was agreeable to arbitration. Thereafter the partners met with an arbitrator mutually acceptable to both men. After considering the evidence and arguments of the partners, the arbitrator made the following rulings and awards: that Ziman owed Cohoon $33,797.75 as full settlement of expenses charged to Cozi by Ziman; that Ziman owed Cohoon $5,500 on the sale of Eden I Shopping Center; that Cohoon was entitled to Ziman's share of the management fees paid to Cozi for the daily manage-

ment of Tryon Hills and Holly Park Shopping Centers and that an inflation factor of 102.7% should be applied to all monies owed to Cohoon.

On 30 December 1980 Ziman filed a motion in Wake County Superior Court to confirm, vacate, modify and correct the award. He alleged that pursuant to G.S. 1-567.14 of North Carolina's Uniform Arbitration Act the award of expenses charged to Cozi and of the proceeds from the sale of Eden I, should be reduced by one-half to reflect the equal status of the partners. Ziman also moved that the award of the management fees be vacated, and alleged that the Tryon Hills and Holly Park Shopping Centers were not controlled by Cozi. Finally, Ziman moved to reduce the inflation factor by one-half assuming that the amounts owed to Cohoon accrued evenly over the period from December 1971 to July 1980. Cohoon responded that no basis existed for correcting or vacating the award.

At the hearing on Ziman's motion held before Judge Herring, both parties testified. After considering their testimony and exhibits, Judge Herring confirmed the arbitration award and ordered Ziman to pay Cohoon the sum of $113,672.56 together with interest at the rate of 10% per annum from and after 1 January 1981 through the date of the judgment.

Petitioner Ziman appealed.

Hunter, Wharton & Howell, by John V. Hunter III, for petitioner-appellant.

Poyner, Geraghty, Hartsfield & Townsend, by Lacy H. Reaves and Maria M. Lynch for respondent-appellee.

HEDRICK, Judge.

[1] By Assignment of Error Nos. 1 and 2, Ziman raises issues regarding enforceability of the partnership agreement's arbitration clause and application of the Federal Arbitration Act. Judge Herring concluded in his judgment:

> (3) The Partnership Agreement is "a contract evidencing a transaction involving commerce" within the meaning of § 2 of the Federal Arbitration Act, 9 U.S.C. §§ 1-14 (1976), and the provisions therein with respect to arbitration are valid and enforceable.

Ziman contends that under a recent decision by our Supreme Court, *Board of Education v. Shaver Partnership*, 303 N.C. 408, 279 S.E. 2d 816 (1981), the partnership agreement would not be covered by the Federal Arbitration Act. In *Shaver*, the Court determined that a contract between the Burke County Board of Education and a multi-state architectural firm to design two school buildings was "a contract evidencing a transaction involving commerce." The Court adopted the following approach:

> The significant question, therefore [in determining whether a contract evidences a transaction involving commerce], is not whether, in carrying out the terms of the contract, the parties *did* cross state lines, but whether, at the time they entered into it and accepted the arbitration clause, they *contemplated* substantial interstate activity. Cogent evidence regarding their state of mind at the time would be the terms of the contract, and if it, on its face, evidences interstate traffic . . . the contract should come within § 2. In addition, evidence as to how the parties expected the contract to be performed and how it was performed is relevant to whether substantial interstate activity was contemplated. (Emphasis in original.)

Id. at 417-18, 279 S.E. 2d at 822 (quoting Judge Lumbard's concurring opinion in *Metro Industrial Painting Corp. v. Terminal Construction Co.*, 287 F. 2d 382 (2d Cir. 1961), *cert. denied* 368 U.S. 817 (1961)). Ziman contends that the record on appeal and the partnership agreement reveal no evidence that substantial interstate activity was contemplated. We do not agree.

The partnership agreement showed on its face that Ziman was a resident of South Carolina and Cohoon was a resident of North Carolina. The agreement was executed in South Carolina and all funds of Cozi were to be deposited in North Carolina banks. The principal office of Cozi was to be in North Carolina and the partnership was formed as a general real estate business and had real estate dealings in both North and South Carolina. The partners traveled outside their home states on partnership business and Cozi also employed a North Carolina general contractor to build one of its South Carolina shopping centers. Therefore, the evidence was sufficient to support the conclusion that interstate activity had been contemplated by the parties.

Ziman further contends that even if the Federal Arbitration Act is applicable, it was not properly invoked by Cohoon in the Court below. We disagree. Cohoon's failure to raise the application of the Federal Arbitration Act in his response does not preclude application of the Act. Pursuant to Rule 7 of the North Carolina Rules of Civil Procedure, a response to a motion is not a required pleading. Moreover, Rule 12(b) provides: "If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief." Accordingly, the Act was properly applied.

[2] Ziman's final argument under his first two Assignments of Error is that any agreement of the partners to arbitrate was based upon the exchange of correspondence between the partners and not upon the arbitration clause in the partnership agreement, and he contends Cohoon's letter requesting arbitration was too vague to invoke the partnership agreement's arbitration clause. However, Article 14 of the partnership agreement clearly states:

> Any dispute or misunderstanding arising out of or in connection with this agreement or the interpretation or meaning of any part thereof shall be arbitrated by the parties before some arbitrator mutually acceptable to both parties. Written request for arbitration must be made, said request being dated and mailed by registered mail, to the other partner, addressed to his last known place of residence. . . . The award of the mutually agreed upon arbitrator . . . shall be final and binding upon both parties, and judgment may be entered thereon in any court having jurisdiction.

On 27 August 1980 Cohoon invoked this clause by sending the following letter by registered mail to Ziman:

> Dear Peter:
>
> Because of our past relationship, when I asked to disolve [sic] Cozi Investments in January, I anticipated only abundant cooperation.
>
> It is therefore with some reluctance that I have to revert to that portion of our partnership agreement that requires registered notice and request for arbitration.

> Please accept this as formal notice that I wish to go to arbitration as provided for in Article 14 of our partnership agreement. I suggest that we use either Mr. Richard Krewson or Mr. Frank Plaxco to arbitrate this to a conclusion.
>
> Best personal regards.
>
> Sincerely,
>
> s/ F. E. Cohoon, Jr.

Ziman responded by his letter of September 30, 1980:

> Dear Floyd:
>
> I am agreeable to submit to arbitration the controversy existing between us, with respect to Cozi Investments Limited, as to the amounts, if any, I owe to you upon dissolution of the partnership with respect to your assertion that I owe certain amounts to the partnership because of overdraws on my behalf and in order to equalize our drawing accounts. I am willing to accept as arbitrator Mr. Richard Krewson, one of the arbitrators you previously proposed in your letter to me. If arbitration of these questions by Mr. Krewson is agreeable to you, please write me to that effect and we can proceed.
>
> Cordially,
>
> s/ Peter A. Ziman

Since Article 2 of the partnership agreement describes the manner for dissolution, the dispute between the partners was one "arising out of or in connection" with the agreement and subject to arbitration. Therefore, we hold Cohoon's letter properly invoked the arbitration clause.

[3] By Assignment of Error No. 3 Ziman argues that the trial court erred in confirming that part of the arbitration award which entitled Cohoon to management fees for his services in managing the Tryon Hills and Holly Park Shopping Centers during 1979 and 1980. He argues that this award exceeded the scope of the controversy submitted to arbitration, because the two shopping centers were controlled by partnerships separate from Cozi. However, the evidence indicates that Cohoon and Ziman were general partners in the limited partnerships known as Holly Park

Associates and Tryon Hills Associates; that during 1979 and 1980 the management of Holly Park and Tryon Hills Shopping Centers was part of the business of Cozi; that Cohoon alone managed the two shopping centers and that checks from the limited partnerships, which included payment of management services, were issued to Cozi and deposited in Cozi's bank account. The management fees therefore became assets of Cozi, and the arbitrator properly determined the distribution of Cozi's assets which was clearly within the scope of his powers as arbitrator. *See Federal Commerce & Nav. Co. v. Kanematsu-Gosho, Ltd.*, 457 F. 2d 387 (2nd Cir. 1972).

[4] Assignment of Error No. 4 involves the trial court's failure to reduce the amount awarded to Cohoon by one-half. In his award, the arbitrator found that only Ziman was reimbursed for out-of-pocket expenses incurred while conducting partnership business and that Ziman owed the partnership $42,247.19 (the amount withdrawn by Ziman for out-of-pocket expenses). The arbitrator also found that Ziman had been inconvenienced on partnership business by having to spend more nights away from home than Cohoon and reduced the $42,247.19 award by twenty percent to $33,797.75. Ziman now argues that the arbitrator was initially correct in ruling that he owed $42,247.19 to the partnership, but he contends that the arbitrator's ruling reducing the amount by twenty percent and awarding $33,797.75 to Cohoon "is obviously an inadvertence and a mistake of law which should be corrected both under the Uniform Arbitration Act and general principles of arbitration jurisprudence." Ziman argues that since he and Cohoon were equal partners the amount awarded to Cohoon should be reduced by one-half. We find this argument pointless.

Even if the arbitrator had made a mistake of law, "[i]t is a truism that an arbitration award will not be vacated for a mistaken interpretation of law." (Citations omitted.) *Sobel v. Hertz, Warner & Co.*, 469 F. 2d 1211, 1214 (2nd Cir. 1972). The North Carolina Supreme Court, *quoting Patton v. Garrett*, 116 N.C. 848, 21 S.E. 679 (1895), has also adopted this rule of law:

> "* * * If an arbitrator makes a mistake, either as to law or fact, it is a misfortune of the party, and there is no help for it. There is no right of appeal, and the court has no power to revise the decisions of 'judges who are of the parties' own choosing.' "

Poe & Sons, Inc. v. University, 248 N.C. 617, 625, 104 S.E. 2d 189, 195 (1958).

[5] Ziman next assigns error to the application of an inflation factor to the entire award. The arbitrator ruled that all monies owed to Cohoon be adjusted to compensate for inflation by multiplying the amount owed to Cohoon by the average inflation figure of the Labor Department Statistics for the period December, 1971 to July, 1980. In affirming the arbitrator's award, the trial court applied an inflation factor stipulated by the parties to be the average increase in the Consumer Price Index as determined by the Department of Labor for the pertinent period. Ziman now argues that it was "dubious" as to whether the arbitrator had the power to apply an inflation factor, but he cites no authority to support his contention. We find no merit to this assignment of error.

Ziman's final assignment of error concerns alleged error in the court's calculation of the amount awarded to Cohoon. He contends that the court "went beyond the face of the award, made mathematical errors and exceeded its power." Our examination of the record, however, reveals no evidence of a material miscalculation of figures. We find no basis for this assignment of error.

After considering all of Ziman's assignments of error on appeal, we find that Ziman and Cohoon agreed to submit their disputes to binding arbitration. Ziman presents no evidence of fraud, miscalculation or other error compelling a modification of the arbitration award. Therefore, we affirm the trial court's judgment which affirmed the arbitrator's decision.

Affirmed.

Judges ARNOLD and WELLS concur.

Bowling v. Combs

LONNIE WAYNE BOWLING, SR., ADMINISTRATOR OF THE ESTATE OF AND PERSONAL REPRESENTATIVE OF JESS WILLARD BOWLING, DECEASED v. MATTHEW DAVID COMBS, JR., J. R. ROGERSON AND BROUGHTON T. DAIL, SR., T/A HERTFORD SUPPLY CO.

No. 8213SC72

(Filed 4 January 1983)

1. **Death § 9— wrongful death settlement—failure of administrator to follow statute—relief from voluntary dismissal proper**

The trial court did not err in setting aside a voluntary dismissal entered in an action for the decedent's wrongful death brought by decedent's brother who, as administrator, had purported to settle the action without either approval of a superior court judge or written consent of all parties entitled to receive the damages recovered since when the administrator settled the wrongful death claim with defendant without either approval by a superior court judge or decedent's widow's written consent, he failed to exercise the powers granted him as administrator by G.S. 28A-13-3(a)(23) in conformity with its express provisions. G.S. 28A-18-2(a) and G.S. 29-14.

2. **Death § 10— statute controlling distribution of wrongful death proceeds not in conflict with statute controlling manner in which action may be settled**

An order of the North Carolina Industrial Commission which distributed proceeds of a wrongful death settlement did not alleviate the need for the administrator to obtain the written consent of decedent's widow pursuant to G.S. 28A-13-3(a)(23) since G.S. 97-10.2(f)(1) addresses solely the *distribution* of proceeds of, *inter alia*, a wrongful death settlement, whereas G.S. 28A-13-3(a)(23) controls the *manner* in which a wrongful death action may be settled by an administrator.

3. **Death § 9— wrongful death action—statute concerning abandonment of claim not controlling statute concerning settlement of claim**

G.S. 28A-13-3(a)(23) specifically addresses settlement of wrongful death claims and is thus controlling, even where an administrator's action may also be characterized as abandonment of a claim by the estate within the more general language of G.S. 28A-13-3(a)(15).

4. **Death § 3.2; Rules of Civil Procedure § 60— wrongful death action—new administrator not party plaintiff when move to set aside dismissal—insufficient basis for holding dismissal erroneously entered**

In a wrongful death action where there was a change of administrators and the new administratrix moved to have an earlier voluntary dismissal of the wrongful death action set aside prior to the time she was substituted for the former administrator as a party plaintiff, the technicality that she was not a party plaintiff when she moved to set aside the dismissal or when the motion was granted was not, under the circumstances, a sufficient basis for holding that the order setting aside the dismissal was erroneously entered.

5. Estoppel § 4.7— equitable estoppel—question for jury

The trial court correctly refused to hold that an administratrix was estopped as a matter of law from challenging an earlier administrator's settlement with defendant since the evidence bearing on the issue of estoppel was conflicting and susceptible to diverse inferences.

APPEAL by defendants from *Clark, Judge.* Judgment entered 3 July 1981 in Superior Court, BRUNSWICK County. Heard in the Court of Appeals 11 November 1982.

Walton, Fairley & Jess, by Ray H. Walton, for plaintiff appellee.

W. G. Smith and Bruce H. Jackson, Jr., for defendant appellants.

WHICHARD, Judge.

I.

The issue is whether the court erred in allowing a motion by the decedent's widow to set aside a voluntary dismissal entered in an action for the decedent's wrongful death brought by an administrator who had purported to settle the action without either approval of a superior court judge or written consent of all parties entitled to receive the damages recovered, *see* G.S. 28A-13-3(a)(23); in substituting the widow, following the administrator's resignation and the widow's appointment as successor personal representative, as party plaintiff in the action; and in allowing the widow to prosecute the action to a judgment on a jury verdict. We find no error.

II.

On 22 February 1977 Lonnie Wayne Bowling, Sr. (hereafter Bowling), was appointed administrator of his deceased brother's estate. On 9 August 1977 Bowling, in his capacity as administrator, filed a complaint against defendants seeking damages for the wrongful death of his intestate. On 18 October 1977 he settled with defendants for $60,000 and released all claims against them. This settlement was consummated without either approval of a superior court judge or written consent of all persons entitled to receive damages, *see* G.S. 28A-13-3(a)(23), including Flossie "Lynn" Bowling Benton (hereafter Benton), widow of decedent. On

22 December 1977 Bowling filed a voluntary dismissal with prejudice in the action.

Over two years later Benton sought to revoke Bowling's letters of administration. On 25 January 1980 Bowling was allowed to resign as administrator, and Benton qualified as successor personal representative.

On 15 February 1980 Benton, as administratrix, moved (1) to set aside the 22 December 1977 voluntary dismissal, and (2) that she, as administratrix, be substituted as party plaintiff in the wrongful death action. By order dated 13 March 1980 Judge McLelland set aside the voluntary dismissal.

Defendants thereafter filed answers. Benton was substituted as party plaintiff by order dated 30 June 1980. She adopted the complaint, and the action proceeded to trial.

The jury returned a verdict for plaintiff in the sum of $82,500 and found that Benton was not estopped to share in the recovery. The court entered judgment on the verdict, and credited defendants with the $60,000 previously paid in the October 1977 settlement.

Defendants appeal.

III.

[1] Defendants contend Judge McLelland erred in setting aside the voluntary dismissal, and that the trial judge erred in failing to dismiss the action on the ground that Judge McLelland's order was erroneous. We disagree.

"The right to administer on the estate of an intestate is entirely statutory." *In Re Estate of Edwards*, 234 N.C. 202, 203, 66 S.E. 2d 675, 676 (1951). The right of action for wrongful death is also exclusively statutory. *E.g., Skinner v. Whitley*, 281 N.C. 476, 478, 189 S.E. 2d 230, 231 (1972). Under the Wrongful Death Act, G.S. 28A-18-2, only the "collector of the decedent" or the personal representative—*i.e.*, the administrator of an intestate, or the executor of one who dies testate—may institute an action for wrongful death; and he does so as the representative of the estate. *E.g., Stetson v. Easterling*, 274 N.C. 152, 155, 161 S.E. 2d 531, 533 (1968); *Broadfoot v. Everett*, 270 N.C. 429, 431, 154 S.E. 2d 522, 525 (1967). *See* G.S. 28A-18-2(a), -3. Because the right to an

action for wrongful death "rests entirely upon [the] Act [,] . . . [it] must be asserted in conformity therewith," *Webb v. Eggleston*, 228 N.C. 574, 576, 46 S.E. 2d 700, 702 (1948). Bowling's general powers as administrator, as well as his right to sue for wrongful death as personal representative of the estate, were thus entirely statutory, and could only be exercised in conformity with the applicable statutes.

G.S. 28A-13-3(a)(23) grants to the personal representative of an estate the power

> [t]o maintain actions for the wrongful death of the decedent according to the provisions of Article 18 of this Chapter and to compromise or settle any such claims, whether in litigation or not, *provided that any such settlement shall be subject to the approval of a judge of superior court unless all persons who would be entitled to receive any damages recovered under G.S. 28A-18-2(b)(4) are competent adults and have consented in writing.* [Emphasis supplied.]

G.S. 28A-18-2(a) provides that any recovery for wrongful death is to be distributed according to the Intestate Succession Act, G.S. 29-1 to -30. Benton, as the surviving spouse of decedent, is among the persons entitled to receive any recovery under G.S. 28A-18-2(b)(4). *See* G.S. 29-14. When Bowling settled the wrongful death claim with defendants without either approval by a superior court judge or Benton's written consent, he failed to exercise the powers granted him as administrator by G.S. 28A-13-3(a)(23) in conformity with its express provisions.

When Bowling commenced the wrongful death action as administrator of the estate, he was "acting in the capacity of a trustee or agent of the beneficiary of the estate," *Harrison v. Carter*, 226 N.C. 36, 40, 36 S.E. 2d 700, 703 (1946). In that capacity he failed to exercise his statutory powers in conformity with express provisions of the applicable statute by failing to accord Benton, as a beneficiary of the wrongful death recovery, the statutory protections provided for her benefit. These circumstances constituted a "reason justifying relief from the operation of the" voluntary dismissal, G.S. 1A-1, Rule 60(b)(6); and it was therefore properly set aside. It follows that the court did not err in denying defendants' motion to dismiss on the ground that it was erroneously set aside.

IV.

[2] Benton applied for a lump sum worker's compensation award in May 1977, and the Commission entered an order directing distribution of that award and the $60,000 wrongful death settlement. Defendants argue that Bowling was not required to obtain the written consent of Benton pursuant to G.S. 28A-13-3(a)(23) because "the general language of" that section "is not operative in a case involving the North Carolina Industrial Commission which is specifically empowered . . . to order the distribution of any proceeds recovered in any action against a third party tortfeasor." *See* G.S. 97-10.2(f)(1).

When statutes can be reconciled by any fair construction, that construction must be adopted. *See State v. Massey*, 103 N.C. 356, 358, 9 S.E. 632, 632 (1889). G.S. 97-10.2(f)(1) addresses solely the *distribution* of proceeds of, *inter alia*, a wrongful death settlement, whereas G.S. 28A-13-3(a)(23) controls the *manner* in which a wrongful death action may be settled by an administrator. There is thus no conflict between the statutes, fairly and properly construed, and each remains effective in its respective area of application.

V.

[3] Defendants further contend that G.S. 28A-13-3(a)(15), which authorizes the administrator to abandon claims by the estate, controls over G.S. 28A-13-3(a)(23), which requires written consent of beneficiaries to settle a wrongful death claim. "It is a well established principle of statutory construction that a section of a statute dealing with a specific situation controls, with respect to that situation, other sections which are general in their application." *Utilities Comm. v. Electric Membership Corp.*, 275 N.C. 250, 260, 166 S.E. 2d 663, 670 (1969); *accord, Davis v. Granite Corporation*, 259 N.C. 672, 676, 131 S.E. 2d 335, 338 (1963). G.S. 28A-13-3(a)(23) specifically addresses settlement of wrongful death claims and is thus controlling, even where an administrator's actions may also be characterized as abandonment of a claim by the estate within the more general language of G.S. 28A-13-3(a)(15).

VI.

[4] Defendants next contend that because Benton was not a party to the action at the time she moved to have the voluntary dis-

missal set aside, and was not substituted as party plaintiff until over three months after entry of the order setting aside the dismissal, the order was erroneously entered. Generally, only a party or his legal representative has standing to have an order set aside pursuant to G.S. 1A-1, Rule 60(b); and a stranger to the action may not obtain such relief. *See In re Bank*, 208 N.C. 509, 181 S.E. 621 (1935); *Browne v. Dept. of Social Services*, 22 N.C. App. 476, 478, 206 S.E. 2d 792, 793 (1974); G.S. 1A-1, Rule 60(b); W. Shuford, *North Carolina Civil Practice and Procedure* § 60-4 (2d ed. 1981). Under the discrete circumstances here, however, Benton cannot properly be regarded as a stranger to the action.

Bowling resigned, and Benton was appointed administratrix, on 25 January 1980. The right to prosecute a wrongful death suit belongs exclusively to the personal representative of the estate. *Stetson, Broadfoot, supra;* G.S. 28A-18-2(a), -3. "[U]pon the . . . resignation . . . of a personal representative, who has properly brought an action for wrongful death, the action does not abate." *Harrison v. Carter*, 226 N.C. 36, 40, 36 S.E. 2d 700, 703 (1946). G.S. 28A-10-5(1) provides that a resignation "shall not become effective until [, *inter alia*,] . . . [a] successor has been duly qualified." " 'Where an executor or administrator has been removed or discharged, the suit should be continued in the name of his successor in office.' [Citations omitted.]" *Harrison, supra*, 226 N.C. at 41, 36 S.E. 2d at 703.

Thus, when Benton made her motion in the cause on 15 February 1980, she was, by virtue of her capacity as administratrix, the only person entitled to function as plaintiff in the action. She alone had the legal right to be substituted for Bowling as party plaintiff. While it might have been the better practice to have granted Benton's motion to substitute her as party plaintiff before or simultaneously with the order granting her motion to set aside the dismissal, the 30 June 1980 order which substituted her as party plaintiff cured any defect in the order of procedure. The technicality that Benton was not a party plaintiff when she moved to set aside the dismissal or when the motion was granted is not, under the circumstances, a sufficient basis for holding that the order setting aside the dismissal was erroneously entered.

VII.

[5] Defendants finally assign error to the court's failure to find that Benton was estopped as a matter of law from challenging Bowling's settlement with them.

The minimal elements of equitable estoppel are, as to the party estopped,

> (1) Conduct . . . at least . . . reasonably calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party afterwards attempts to assert; (2) . . . conduct which at least is calculated to induce a reasonably prudent person to believe such conduct was intended or expected to be relied and acted upon; (3) knowledge, actual or constructive, of the real facts.

Hawkins v. Finance Corp., 238 N.C. 174, 177-78, 77 S.E. 2d 669, 672 (1953); *see Peek v. Trust Co.*, 242 N.C. 1, 11-12, 86 S.E. 2d 745, 753 (1955). Additionally, the party asserting estoppel must show, as to his own conduct, "(1) lack of knowledge and the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party sought to be estopped; and (3) action based thereon of such a character as to change his position prejudicially." *Hawkins*, 238 N.C. at 178, 77 S.E. 2d at 672; *see Peek*, 242 N.C. at 12, 86 S.E. 2d at 753.

Defendants offered evidence that Benton was informed as early as April 1977 that attempts to settle the claim were being made; that Bowling informed Benton when the settlement was agreed upon; that Benton approved the $60,000 settlement; that Benton executed an application for a lump sum award from the Industrial Commission, which stated that "[s]ettlement has been made releasing all claims"; and that Benton knowingly acquiesced in the payment of certain bills incurred by her prior to her husband's death. Benton testified, however, that she had no memory of being informed of settlement negotiations prior to October 1977; that sometime after 20 October 1977 she was informed by an attorney that settlement had been made for $60,000, and she "told him [she] had rather not settle for that amount"; that she never received any of the $60,000 settlement; and that she did not recall ever asking Bowling to pay certain bills for her from the estate.

"The rule is that where only one inference can reasonably be drawn from undisputed facts, the question of estoppel is one of law for the court to determine." *Hawkins*, 238 N.C. at 185, 77 S.E. 2d at 677. *See also Peek*, 242 N.C. at 12, 86 S.E. 2d at 753. However,

> [h]ere the evidence bearing on the issue of estoppel was conflicting and susceptible of diverse inferences. While the evidence of the defendant[s] . . . was sufficient to justify the inference that [they] relied upon and [were] misled by the representations of the plaintiff, nevertheless other phases of the evidence justify the opposite inference.

Peek, 242 N.C. at 12, 86 S.E. 2d at 753-54. The court thus correctly refused to hold that Benton was estopped as a matter of law from challenging Bowling's settlement with defendants. The disputed facts were properly submitted to the jury for resolution.

No error.

Judges VAUGHN and WELLS concur.

ROY A. BOWEN, PLAINTIFF v. CRA-MAC CABLE SERVICES, INC., EMPLOYER, LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8110IC1273

(Filed 4 January 1983)

Master and Servant § 81— workers' compensation—estoppel to deny insurance coverage

While the evidence supported the determination by the Industrial Commission that no employer-employee relationship existed between plaintiff cable TV installer and a company insured by defendant at the time plaintiff fell from a ladder while making a cable TV installation, the Commission should have made findings as to whether defendant insurer was estopped to deny workers' compensation insurance coverage for plaintiff where there was evidence tending to show that the owners of the insured company told plaintiff, both before and after the accident, that he and his men were covered by workers' compensation insurance; defendant insurer's nurse went to the hospital and assisted plaintiff in learning how to get from the bed to his wheelchair; an employee of defendant insurer sent the hospital bed, wheelchair and other items to plaintiff's home after his release from the hospital; the payroll given by the insured

company to defendant insurer included some installers; the owners of the insured company intended to purchase workers' compensation coverage for all installers; defendant insurer had paid the claims of other installers who were working as plaintiff did; and after plaintiff's accident, defendant refunded a portion of the premium paid by the insured company because the installers were not covered by the compensation insurance.

APPEAL by plaintiff from the North Carolina Industrial Commission. Opinion and award entered 9 September 1981. Heard in the Court of Appeals 15 September 1982.

Plaintiff was injured when he fell from a ladder while making an installation for cable TV. The hearing examiner denied compensation, concluding that an employer-employee relationship did not exist between plaintiff and Cra-Mac Cable Services, Inc., and the Commission, therefore, had no jurisdiction over plaintiff's claim. The full Commission affirmed the hearing examiner, and plaintiff appeals.

Such facts as are necessary for decision are set out in the opinion.

Robert M. Elliot for plaintiff appellant.

Hutchins, Tyndall, Doughton and Moore, by Richard Tyndall and Richard D. Ramsey, for defendant appellees.

MORRIS, Chief Judge.[1]

The hearing examiner made the following findings of fact:

1. The defendant, Cra-Mac Cable Services, Inc., is engaged in the business of installing and servicing cable T.V. installations. At one time, such defendant employed hourly-wage employees to do cable T.V. installation work. Such persons worked a specific number of hours per day at an hourly wage. Such persons were kept busy by defendant eight hours per day and were supplied a truck by defendant for making service calls. Defendant had control over such persons, and they were employees of the defendant.

2. Sometime prior to 18 June 1980, defendant abandoned its system of having hourly employees to do the cable T.V. in-

1. *The Court's decision in this case was made and written prior to Chief Judge* Morris's retirement.

stallation work. Instead, a contract-type method was used. Under such method, defendant would receive various types of orders or contracts from cable T.V. customers. Each morning, persons who did installation and service work for defendant would gather at defendant's office. Such installers would then be given contracts for various types of cable T.V. work. Different types of contracts would have different prices, depending upon the work to be done under the terms of the contract.

3. After receiving the contracts at defendant's office, the installers, including plaintiff, would proceed to drive their trucks to make various calls for installation work. The various jobs were done according to the specifications in the contracts. After a specific contract was done, the installer would inform the defendant that the contract had been completed. In performing the work, the installers were required to follow certain specifications, and if they did not follow the specifications, they would forfeit the price of that particular contract or job.

4. The installers of defendant, including plaintiff, usually owned trucks or motor vehicles to make the various service calls. They used their own ladders and other tools, with the exception of a special type wrench, in the performing of the various contracts. The defendant had no supervision or right of supervision over the installers, with the exception of the fact that the installers were to perform the contracts in accordance with the specifications.

5. The installers, including plaintiff, were engaged in an independent type business, calling or occupation. They had the independent use of their skill, knowledge, or training in the execution of the work, and most of the installers had learned how to perform the job from other installers with whom they had worked. The installers did a specific piece of work at a fixed price. The installers were not subject to discharge because they adopted one method of doing the work rather than another. The installers were free to use such assistants as they thought proper, and some of the installers, in fact, did use helpers or assistants in the performance of the work. The installers had full control over such assistants. The in-

stallers selected their own time for doing the work within the limits that the various contracts would be performed within a reasonable period of time. The only time requirement was that some of the installation work was to be done during certain hours of the day, because the customers would be at their homes during those certain hours of the day.

6. The installers were paid weekly on the basis of the contracts which they had performed during the week in accordance with the contract prices. No Social Security or withholding tax deductions were made from the monies that were paid to the installers. There was a 10-percent holdback of the pay in order that defendant could pay any gas bills which the installers incurred in having gas supplied to their own trucks.

7. The employer-employee relationship did not exist between plaintiff and defendant Cra-Mac Cable Services, Inc. on 18 June 1980 or prior thereto. On such date, plaintiff sustained an accident when he lost his balance and fell off the ladder which he was on in performing a contract.

The evidence supports these findings, and we agree that the findings support the conclusion that there was no employer-employee relationship between plaintiff and Cra-Mac Cable Services, Inc., (Cra-Mac). Indeed both plaintiff and defendant referred to the installers who worked as plaintiff did as "subs."

Plaintiff, however, contends that the principle of estoppel is applicable. While some jurisdictions do not allow the application of the principle in workers' compensation cases (see e.g. dissenting opinion *Nash v. Meguschar*, --- Ind. 227, 89 N.E. 2d 227 (1949)), our jurisdiction does: " 'The law of estoppel applies in compensation proceedings as in all other cases.' *Biddix v. Rex Mills*, 237 N.C. 660, 665, 75 S.E. 2d 777, 781; *Ammons v. Sneekin's Sons, Inc.*, 257 N.C. 785, 127 S.E. 2d 575. 'That liability for workmen's compensation may be based on estoppel is well established.' *Smith Coal Co. v. Feltner, Ky.*, 260 S.W. 2d 398." *Aldridge v. Motor Co.*, 262 N.C. 248, 251, 136 S.E. 2d 591, 594 (1964). See also *Britt v. Construction Co.*, 35 N.C. App. 23, 240 S.E. 2d 479 (1978); *Allred v. Woodyards, Inc.*, 32 N.C. App. 516, 232 S.E. 2d 879 (1977). And, where estoppel applies, it is not necessary that the Commission find that the relationship of employer-employee

exists. *Garrett v. Garrett and Garrett Farms*, 39 N.C. App. 210, 249 S.E. 2d 808 (1979), *cert. den.* 296 N.C. 736 (1979).

The uncontradicted evidence before the Commission was:

Plaintiff was in business for himself in painting and decorating but, because of the business slump, had to find something else to do. He knew the cable business and, on the recommendation of a former co-worker, called Cra-Mac and talked to Mr. Steve Stone, a supervisor with Cra-Mac. Mr. Stone asked him if he had his equipment, such as truck and ladders. He asked whether the men were covered by insurance, and Mr. Stone replied that they were. Plaintiff had had insurance, but it had lapsed and would never have taken the chance of going to work like that had he known he would not be covered with insurance. Some two weeks after he began to work, "Mr. Stone told us in the meeting room that we were covered by insurance, but not to go out and jump off of a ladder just because we were." After plaintiff's injury, Mr. Stone carried him to the hospital. On the way to the hospital plaintiff said, "Now, Steve, I'm covered for this, aren't I?" He said, "Yes, you are." A nurse from the insurance company came to the hospital and assisted plaintiff in learning how to get from the bed to his wheelchair. A Mrs. Evans, from the insurance company, sent to his home the hospital bed, wheelchair, and everything plaintiff needed in his home after his release from the hospital. Plaintiff's wife testified that when she attempted to give information at the hospital, Mr. Stone told the hospital employee that "this will be covered by the Workmen's Compensation," and he gave the insurance information to the hospital employee. Mr. Craven, an owner of Cra-Mac, assured plaintiff's wife that her husband was covered. He said that the auditors had been to check his books, and he put everything on the table for them to see. He said, "I pay a bill of a high premium for this coverage. Why would I need this coverage if they weren't covered? Because all I have here working is me, Steve and Donna." After the company denied coverage, Mr. Craven told her not to worry, that he had contacted an attorney and would file a suit against Liberty Mutual himself. She talked to Mr. Doug Smith, the insurance agent for Cra-Mac, and he advised her that Cra-Mac did have workmen's compensation insurance.

Mr. Smith testified that he began writing Mr. Craven's insurance in 1977, including Worker's Compensation. "At that time he wanted to include everyone who worked for the company." The payroll he gave Mr. Smith did include some installers. Since then "it has been audited by company auditors." He advised Mr. Craven after the accident that he thought he was covered.

Steve Stone testified that he thought the self-employed installers were covered and told them so. He corroborated the testimony of plaintiff and plaintiff's wife with respect to the information he gave the hospital.

Mr. Gary Craven, part owner and general manager of Cra-Mac, testified that when he procured insurance from Liberty Mutual he intended to purchase coverage for all installers and thought that he had. He made available to the auditors the information for which they asked. He did not know on what they based their premium, but they had been paying claims up until the injury to plaintiff. These were claims submitted by installers working as the plaintiff did. In looking through the files the day of the hearing, he found four such claims which had been paid by Liberty Mutual. In one instance, he personally delivered the checks to the claimant. After plaintiff's claim was denied, he was told by Liberty Mutual that subcontractors were not covered and he should give them only the names of workers from whose wages he would hold taxes. He had thought the subcontractors were covered and had so informed them. He had received a check from the insurance company for premiums paid in 1980. "Since they're not covering the contractors, all they had was Steve, myself, and the secretary. So they refunded me money."

We think the evidence in this case would warrant a finding of fact that would support a conclusion applying the principle of estoppel in this case. However, the hearing examiner failed to find any facts with respect to estoppel with the possible exception of finding of fact No. 8, as follows:

> The defendant insurance carrier, in receiving premiums from defendant Cra-Mac Cable Services, Inc., did not include the monies paid the contractors when the audit was made by the defendant insurance company auditors for the purpose of determining the premium to be paid to defendant insurance carrier. Upon the final audit by defendant insurance carrier,

a reimbursement of premiums paid was made to the defendant Cra-Mac Cable Services, Inc.

Our careful review of the record does not disclose evidence to support the first sentence of that finding.

Plaintiff's assignment of error Nos. 2 and 3 are meritorious. Plaintiff made it clear at the hearing that he relied on estoppel if the employer-employee relationship did not exist. For failure of the Commission to make findings of fact with respect to estoppel, the orders of the Commission must be vacated and the matter remanded to the Commission for findings of fact, conclusions of law, and determination based on the record now before it with respect to the question of estoppel.

Orders vacated and cause remanded.

Judges BECTON and JOHNSON concur.

STATE OF NORTH CAROLINA v. DAVID DOUGLAS COURTRIGHT

No. 8226SC555

(Filed 4 January 1983)

1. **Searches and Seizures § 39— search under warrant for dwelling—search of outbuildings or vehicles within curtilage**

The premises of a dwelling house include, for search and seizure purposes, the area within the curtilage, and a search pursuant to a warrant describing a dwelling does not exceed its lawful scope when outbuildings or vehicles located within the curtilage are also searched.

2. **Searches and Seizures § 39— search warrant for dwelling house—search of automobile partially in yard**

Where defendant's automobile was parked so that it projected six or seven inches into the yard of a dwelling described in a search warrant, and the keys thereto were found by officers inside the dwelling and thus wholly on the premises, the automobile was within the curtilage of the described dwelling and could properly be searched pursuant to the warrant.

3. **Narcotics § 4.3— constructive possession of narcotics in automobile—sufficiency of evidence**

The State's evidence was sufficient to permit the jury to find that defendant had constructive possession of cocaine and marijuana found in an

automobile where it tended to show that the automobile was parked within the curtilage of defendant's home; the home and premises were under defendant's control; a certificate of title and a registration card in defendant's name were found in the glove compartment; and the keys to the vehicle were found by the officers on the kitchen counter inside defendant's home.

4. Criminal Law § 113.1— misstatement of evidence—harmless error

Although the evidence did not support the trial court's charge that defendant offered evidence tending to show that defendant did drive an automobile in which narcotics were found during the two months preceding the crimes charged, such misstatement was not material so as to constitute reversible error where there was ample other evidence from which to infer defendant's constructive possession of the narcotics found in the automobile. G.S. 15A-1443(a).

APPEAL by defendant from *Johnson, Judge.* Judgment entered 5 October 1981 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 18 November 1982.

Defendant appeals from a judgment of imprisonment entered upon his conviction of trafficking in cocaine.[1]

Attorney General Edmisten, by Assistant Attorney General Richard H. Carlton, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Ann B. Petersen, for defendant appellant.

WHICHARD, Judge.

Defendant first challenges the validity of the search of an automobile, from which the narcotics were seized which led to his conviction. Police officers had applied for a warrant to search a "one story single family dwelling . . . located at 5035 Furman Pl., Charlotte, . . . [a] 1979 Ford color tan/blue, [NC] 80 Tag LHJ960," and any occupants of the premises. The items sought were cocaine and quaaludes.

Pursuant to the warrant, officers searched the designated residence and the 1979 Ford, which was parked in the driveway;

1. The statement at the beginning of the record indicates that defendant was also convicted of possession of marijuana, and that he also appealed that conviction. The record, however, does not contain a judgment entered on that conviction. Because we find no error in the contentions presented in defendant's brief, the effect of our decision in any event would be to uphold that conviction as well as the conviction for trafficking in cocaine.

but they found no contraband. They then proceeded to search a 1973 Thunderbird which was not mentioned in either the warrant or the supporting affidavit. The Thunderbird was parked on the street in front of the residence with the wheels on the driver's side of the vehicle projecting off the pavement six or seven inches into the yard. The officers had observed the Thunderbird at defendant's home prior to obtaining the search warrant, and they knew it was registered in defendant's name. Cocaine and marijuana were found in the Thunderbird's trunk; and the Thunderbird title, registered in defendant's name, was found in the glove compartment.

Defendant moved to suppress the seized contraband on grounds that search of the Thunderbird was not within the scope of the warrant, and that the search did not fall within any recognized exception to the fourth amendment prohibition against warrantless searches. The court denied the motion on the ground that the Thunderbird was within the curtilage of the premises described in the warrant.

[1] As a general rule, "if a search warrant validly describes the premises to be searched, a car on the premises may be searched even though the warrant contains no description of the car." *State v. Reid*, 286 N.C. 323, 326, 210 S.E. 2d 422, 424 (1974) (quoting 68 Am. Jur. 2d, Searches and Seizures, § 80, p. 735); *see State v. Logan*, 27 N.C. App. 150, 151, 218 S.E. 2d 213, 214-15 (1975). The premises of a dwelling house include, for search and seizure purposes, the area within the curtilage, and a search pursuant to a warrant describing a dwelling does not exceed its lawful scope when outbuildings or vehicles located within the curtilage are also searched. *See, e.g., State v. Mills*, 246 N.C. 237, 242, 98 S.E. 2d 329, 333 (1957); *State v. Travatello*, 24 N.C. App. 511, 513, 211 S.E. 2d 467, 469 (1975); *State v. Logan, supra.*

The common law concept of curtilage historically includes the "yard, courtyard or other piece of ground included within the fence surrounding a dwelling house." *Fixel v. Wainwright*, 492 F. 2d 480, 483 (5th Cir. 1974). "For search and seizure purposes [the curtilage] includes those outbuildings which are directly and intimately connected with the habitation and in proximity thereto and the land or grounds surrounding the dwelling which are

necessary and convenient and habitually used for family purposes and carrying on domestic employment." *Black's Law Dictionary* 346 (5th ed. 1979). "Whether the place searched is within the curtilage is to be determined from the facts, including its proximity or annexation to the dwelling, its inclusion within the general enclosure surrounding the dwelling, and its use and enjoyment as an adjunct to the domestic economy of the family." *United States v. Stanley*, 597 F. 2d 866, 870 (4th Cir. 1979) (quoting *Care v. United States*, 231 F. 2d 22, 25 (10th Cir.), *cert. denied*, 351 U.S. 932, 76 S.Ct. 788, 100 L.Ed. 1461 (1956)).

Places and things held within the curtilage of premises described in a warrant have included a car parked on the lot surrounding a service station, *State v. Reid*, *supra*, 286 N.C. at 324-26, 210 S.E. 2d at 423-24; and a shed connected to a house-trailer by a thirty-foot concrete walk, *State v. Trapper*, 48 N.C. App. 481, 487, 269 S.E. 2d 680, 684 (1980), *appeal dismissed*, 301 N.C. 405, 273 S.E. 2d 450 (1980), *cert. denied*, 451 U.S. 997, 101 S.Ct. 2338, 68 L.Ed. 2d 856 (1981). A trash receptacle on the premises of an apartment building, however, was held not to be within the curtilage of a defendant's apartment, *United States v. Minker*, 312 F. 2d 632, 634 (3d Cir. 1962), *cert. denied*, 372 U.S. 953, 83 S.Ct. 952, 9 L.Ed. 2d 978 (1963); and a defendant's automobile, parked in a lot used by three other tenants of a mobile home park and in a space neither annexed to his mobile home nor assigned for his exclusive use, was held not to be within the curtilage of his mobile home, *United States v. Stanley*, *supra*, 597 F. 2d at 870.

Although the general public may make occasional use of that portion of defendant's front lawn furtherest from the dwelling, a homeowner's lawn is typically "use[d] and enjoy[ed] as an adjunct to the domestic economy of the family." *Stanley*, *supra*. It is an area within which the owner or possessor assumes the responsibilities and pleasures of ownership or possession. It is thus reasonable to conclude that the curtilage of the dwelling house described in the warrant extends to the line between the front lawn of defendant's home and the pavement of the public street in front of it.

[2] Defendant's Thunderbird was parked so that it projected six or seven inches into the yard; and the keys thereto, which were

essential to control of the vehicle, were found by the officers inside the dwelling and thus wholly on the premises. These facts combine to justify the conclusion that the Thunderbird was within the curtilage of the described dwelling, thereby validating its search pursuant to the warrant.

[3] Defendant next assigns error to the denial of his motions to dismiss on the ground that the evidence is insufficient to support a jury finding that he possessed the narcotics seized from the trunk of the Thunderbird.

> An accused's possession of narcotics may be actual or constructive. He has possession of the contraband material within the meaning of the law when he has both the power and intent to control its disposition or use. Where such materials are found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession. Also, the State may overcome a motion to dismiss . . . by presenting evidence which places the accused "within such close juxtaposition to the narcotic drugs as to justify the jury in concluding that the same was in his possession."

State v. Harvey, 281 N.C. 1, 12-13, 187 S.E. 2d 706, 714 (1972).

We have held that the Thunderbird was parked within the curtilage, and thus on the premises, of defendant's home; and it is undisputed that the home and premises were under defendant's control. The fact that the narcotics were in an automobile, parked on the premises, "in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury." *Harvey, supra.*

Additional evidence on the issue of possession was as follows:

A police officer testified that he had seen the Thunderbird at defendant's home two or three times previously; that a certificate of title and a registration card in defendant's name were found in the glove compartment; and that the keys to the vehicle were found by the officers on the kitchen counter inside defendant's home. The officer acknowledged that he had never seen defendant operate the Thunderbird; and that every time he met defendant

away from defendant's home to purchase drugs, defendant was driving the 1979 Ford described in the search warrant.

Defendant's daughter, who did not live at her parents' home, testified that she saw defendant drive the Thunderbird and the 1979 Ford each about three or four times; that she had not seen him drive the Thunderbird during the period of "October through November of 1980" (the search and seizure occurred on 14 November 1980); and that she, her brother, and her younger sister all occasionally drove the Thunderbird.

Considering this evidence in the light most favorable to the State, and granting the State the benefit of every reasonable inference, *see, e.g., State v. Finney,* 290 N.C. 755, 757, 228 S.E. 2d 433, 434 (1976), the foregoing circumstances were sufficient to allow the jury to draw a reasonable inference that defendant "constructive[ly] possess[ed] [the] contraband material . . . with an intent and capability to maintain control and dominion over it," *State v. Spencer,* 281 N.C. 121, 129, 187 S.E. 2d 779, 784 (1972). Defendant's motion to dismiss thus was properly denied.

[4] Defendant finally contends the court erred when it charged that "defendant has offered evidence which tends to show that from October through November of 1980 . . . the defendant did drive [the Thunderbird]." The only evidence on this point was the testimony of defendant's daughter, who stated that she did *not* see defendant drive the Thunderbird during this period.

Defendant's trial commenced before 1 October 1981, the effective date of Rule 10(b)(2), Rules of Appellate Procedure. His failure to object before the jury retired thus is not fatal, and the following rule is applicable:

> Although the court ordinarily should be informed of an inaccuracy in the summary of the evidence in the charge during or at the conclusion of the instructions so that any error may be corrected, a statement of a material fact not in evidence will constitute reversible error whether or not it is called to the court's attention. [Citations omitted.]

State v. Barbour, 295 N.C. 66, 75, 243 S.E. 2d 380, 385 (1978).

Although the misstatement is relevant to the crucial issue of possession, it was not material so as to constitute reversible er-

ror, because there was ample other evidence, previously discussed, from which to infer possession. There is no reasonable possibility that a different result would have been reached had the evidence been correctly recited, and defendant thus has not sustained his burden of showing prejudice. G.S. 15A-1443(a).

No error.

Judges VAUGHN and WELLS concur.

H. LEE WATERS, ALBERT LEE HUFF AND CLIFTON FREEDLE v. JOE E. BIESECKER, CHAIRMAN, AND PURCELL YARBROUGH AND EDWARD FOWLER, ALL MEMBERS OF THE CITY OF LEXINGTON ALCOHOLIC BEVERAGE CONTROL BOARD, AND THE CITY OF LEXINGTON ALCOHOLIC BEVERAGE CONTROL BOARD

No. 8222SC94

(Filed 4 January 1983)

1. **Municipal Corporations § 12— governmental immunity—operation of ABC store proprietary function**

   The operation of an ABC store by a city ABC Board is a proprietary function; therefore, the trial court correctly refused to dismiss on the ground of governmental immunity plaintiff's action in which he alleged a city ABC Board negligently excavated the lot next to plaintiff's building.

2. **Municipal Corporations § 12.2— notice of tort claim not required for ABC Board**

   Former G.S. 1-539.15 which required a claimant to give notice of his tort claim to a city within six months did not apply where defendant was a local ABC Board and not the city.

3. **Negligence § 50— negligent excavation—extent of liability**

   A city ABC Board's failure to give appropriate notice as to the nature and extent of the Board's plans for excavation of a lot next to plaintiff's building to enable plaintiff to take steps to protect his property constituted negligence.

APPEAL by defendant from *Mills, Judge.* Judgment entered 16 September 1981 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 16 November 1982.

At trial, plaintiff Albert Huff sought to prove that defendant, the City of Lexington Alcoholic Beverage Control Board (the

Board) negligently excavated the lot next to plaintiff's building, resulting in the loss of lateral support for plaintiff's building.[1] Plaintiff contends that the excavation was done without notice to him and that, as a result of the excavation, the plate glass at the front window cracked, a crack in the wall of the building widened, a waterline beneath the building pulled apart, and the pillars supporting the back corner of the building shifted. The jury found that plaintiff's building was damaged by the Board's negligence and that plaintiff was entitled to recover $7,000 from the Board. From a judgment in accordance with the jury's verdict, the Board appeals.

Barnes, Grimes and Bunce, by Jerry B. Grimes, for plaintiff Albert Lee Huff.

DeLapp, Hedrick and Harp, by Robert C. Hedrick, for defendant City of Lexington Alcoholic Beverage Control Board.

BECTON, Judge.

The issues on appeal are whether the trial court erred (1) in denying the Board's motion to dismiss based on (a) governmental immunity, and (b) plaintiff's failure to give notice to the City of Lexington of his claim within six months as required by N.C. Gen. Stat. § 1-539.15; and (2) in denying the Board's motions for directed verdict, to set aside the verdict, and for a new trial. Based on our review of the record and the applicable law, we find no error in the trial.

I

(a) *Governmental Immunity*

[1] In determining whether a governmental body will be held liable in tort for negligence, our courts have looked to the particular acts and functions of the governmental body to see whether those acts are governmental or proprietary in nature. *Sides v. Hospital*, 287 N.C. 14, 213 S.E. 2d 297 (1975); *Koontz v. City of*

1. Prior to trial, the trial court dismissed the action as to the individual defendants, leaving the Board as the only defendant. At trial, the Board's motion for directed verdict at the close of plaintiffs' evidence was granted against plaintiff H. Lee Waters, who owned the land on which Huff's building was located, and plaintiff Clifton Freedle, who operated a restaurant business in Huff's building.

Winston-Salem, 280 N.C. 513, 186 S.E. 2d 897 (1972), *pet. for reh. denied*, 281 N.C. 516 (1972); and *Casey v. Wake County*, 45 N.C. App. 522, 263 S.E. 2d 360 (1980), *pet. for discr. rev. denied*, 300 N.C. 371, 267 S.E. 2d 673 (1980). Although the term "proprietary" denotes a profit motive, profit motive is not essential to the determination that a function by a governmental body is proprietary. *Sides*, 287 N.C. at 23, 213 S.E. 2d at 303. Our courts have also looked to see whether the activities in question "are those historically performed by the government, and which are not ordinarily engaged in by private corporations." *Id.*

Considering (i) the trend to restrict the application of governmental immunity (our Supreme Court has recognized the "merit in the modern tendency to restrict rather than to extend the application of governmental immunity," *Koontz*, 280 N.C. at 529, 186 S.E. 2d at 908); (ii) the unquestionable profit motive underlying the operation of the ABC store by the Board (*see*, N.C. Gen. Stat. §§ 18B-804 and 805 (1981)); and (iii) the fact that the operation of an ABC store is not one of the traditional services historically rendered by a governmental body, we hold that the operation of an ABC store by the Board is a proprietary function and that the trial court, therefore, correctly refused to dismiss the case on the ground of governmental immunity.

(b) *Notice*

[2] N.C. Gen. Stat. § 1-539.15 (1969), effective at the time of the claim in this case, although later repealed in 1981,[2] required a claimant to give notice of his contract or tort claim to the City within six months. That statute does not apply in this case, however. The City of Lexington is not, and has never been, a party to this action. The Board can be, and was, sued in its own name. No notice to the Board was required in this case.

II

[3] Citing cases from New York, Iowa, and South Dakota, the Board contends that "[a]ny recovery of loss of lateral support accrues only for resulting damages to the soil itself as opposed to those damages resulting from injuries to a building." *Sanders v. Schiffer*, 46 A.D. 2d 536, 537, 363 N.Y. Supp. 2d 676, 678 (1975).

2. Repealed by 1981 N.C. Sess. Laws ch. 777 § 1, effective 2 July 1981.

That is too simplistic a statement and not the law in this State. In North Carolina, there is a duty upon an excavator, at the very least, to contact his neighbor and advise him or her as to the nature and extent of his proposed excavation so that the adjoining landowner might take appropriate steps to protect his or her property. The failure to do so is negligence. *Davis v. Summerfield*, 131 N.C. 352, 42 S.E. 818 (1902), *aff'd on rehearing*, 133 N.C. 325, 45 S.E. 654 (1903). Significantly, although the plaintiff in *Davis* knew that the defendant planned to excavate and build on his own property, the defendant nevertheless owed the plaintiff a duty to advise her of the nature and extent of his proposed excavation. The *Davis* Court itself, after considering the laws from other jurisdictions, said:

> The true rule deducible from the authorities seems to be that while the adjacent proprietor cannot impair the lateral support of the soil in its natural condition, but is not required to give support to the artificial burden of a wall or building superimposed upon the soil, yet he must not dig in a negligent manner to the injury of that wall or building, and it is negligence to excavate by the side of the neighbor's wall, and especially to excavate deeper than the foundation of that wall, without giving the owner of the wall notice of that intention that he may underpin or shore up his wall, or relieve it of any extra weight on the floors, and the excavating party should dig out the soil in sections at a time so as to give the owner of the building opportunity to protect it and not expose the whole wall to pressure at once. The defendants did not give any notice of the nature of their proposed excavation, and the evidence justified the jury in finding them guilty of negligence.

Davis at 354-55, 42 S.E. at 818.

In the case before us now, plaintiff was never advised as to the nature and extent of the Board's plans for excavation. Indeed, the only evidence of notice to plaintiff was a sign posted on the lot thirty days prior to a public hearing which stated that the lot had been purchased and the Board was considering the construction of a building. Even if this sign gave plaintiff notice of the Board's plan to construct a building on the lot, it did not, in any way, satisfy the requirements of *Davis*. The Board's failure to

give appropriate notice to enable plaintiff to take steps to protect his property constitutes negligence. Inasmuch as there was sufficient evidence of the Board's negligence and of the resulting damages to plaintiff's building to warrant the submission of the case to the jury and to support the jury's verdict, the defendant's motion for a directed verdict, for judgment notwithstanding the verdict, and for a new trial, were properly denied.

For the foregoing reasons, we find

No error.

Judges HEDRICK and WEBB concur.

EDWIN F. PINNER v. SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, A NEW YORK CORPORATION

No. 8228SC51

(Filed 4 January 1983)

1. Rules of Civil Procedure § 42; Trial § 14— severance of alternate claims—order of proof

In an action seeking damages for trees cut by defendant on plaintiff's property wherein defendant alleged that it had acquired a prescriptive easement to enter upon plaintiff's land to maintain its transmission lines thereon and, alternatively, requested that it be granted a permanent easement by eminent domain, the trial court did not abuse its discretion in severing the issue of prescriptive easement and proceeding on that issue alone. Furthermore, the trial court did not alter the defendant's burden of proving a prescriptive easement by having plaintiff proceed with his proof first. G.S. 1A-1, Rule 42(b).

2. Evidence § 29.2— business records—insufficient foundation—admission as harmless error

Testimony by defendant's witness did not qualify records regarding the placement and construction of defendant's telephone poles for admission as business records where the witness offered no evidence that the entries were based on the personal knowledge of the individual making them or that they were made at or near the time the poles were placed and constructed. However, the admission of such records was not prejudicial error where their only relevance was to show that defendant's poles had existed on plaintiff's property for at least 20 years, and that fact was testified to by other witnesses.

3. **Adverse Possession § 24— belief that entry was pursuant to easement—inadmissibility**

In an action involving defendant telephone company's alleged prescriptive easement to enter upon plaintiff's land to maintain its transmission lines thereon, testimony as to whether defendant's employees believed a written easement existed when they entered upon plaintiff's land to maintain the telephone lines was not admissible to show that defendant's entry was not under a "claim of right" where defendant did not rest its claim of prescriptive easement upon any written deed or agreement purporting to convey a right to enter upon plaintiff's land.

4. **Trial § 11.3— order of jury arguments**

The order of jury arguments is determined by the trial court, and its decision is final. Rule 10, General Rules of Practice for the Superior and District Courts.

5. **Adverse Possession § 25.3— cross-easements serving adjoining properties—instruction not required**

In an action involving whether defendant telephone company had acquired a prescriptive easement to enter upon plaintiff's land to maintain its transmission lines thereon, the evidence did not require the trial court to give plaintiff's requested instruction on the passage of cross-easements serving adjoining properties developed in relation to each other.

6. **Trial § 41— refusal to submit tendered issue**

The trial court did not err in refusing to submit an issue tendered by defendant where the issues submitted were sufficiently comprehensive to resolve all factual controversies and to enable the court to render judgment fully determining the cause.

APPEAL by plaintiff from *Allen, Judge.* Judgment entered 21 August 1981 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 9 November 1982.

Plaintiff brought this action seeking damages for trees cut by defendant on plaintiff's property. Defendant answered and defended on the ground, *inter alia*, that it had acquired a prescriptive easement to enter upon plaintiff's land to maintain its transmission lines thereon. Defendant further requested that, if no prescriptive easement was found, it be granted a permanent easement by eminent domain.

Plaintiff appeals from a judgment entered on a jury verdict finding that defendant had acquired a prescriptive easement.

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

Roberts, Cogburn & Williams, by Isaac N. Northup, Jr. and James W. Williams, for defendant appellee.

WHICHARD, Judge.

[1] Plaintiff contends the court erred in severing the issue of prescriptive easement and proceeding to trial on that issue alone. The court expressly based its decision on these factors: (1) an action for eminent domain involves the assessment of damages, whereas the primary issue regarding prescriptive easement is whether a right-of-way has been established; (2) only if the jury finds no prescriptive easement does an issue of damages for trespass arise, and (3) the jury could be "tainted" by evidence admissible as to one issue only.

The decision to sever issues is in the discretion of the trial judge. *Board of Transportation v. Royster*, 40 N.C. App. 1, 5, 251 S.E. 2d 921, 924 (1979); *Insurance Co. v. Transfer, Inc.*, 14 N.C. App. 481, 484, 188 S.E. 2d 612, 614 (1972); G.S. 1A-1, Rule 42(b). The court here set forth on the record sound reasons for its decision, and we find no abuse of discretion.

Plaintiff contends that the issue of prescriptive easement originated as an affirmative defense on which defendant had the burden of proof; and that by severing this issue and having plaintiff proceed with his proof first, "the court procedurally placed the burden on plaintiff," even though it instructed that defendant had the substantive burden of proving a prescriptive easement.

Plaintiff confuses the order of proof with the burden of proof. The order of presentation of proof is in the discretion of the court. *In re Westover Canal*, 230 N.C. 91, 95, 52 S.E. 2d 225, 228 (1949). The record here reflects no abuse of discretion, particularly considering that the ordinary practice is for the plaintiff to proceed first. *Id.* This procedural matter does not alter the burden of proof, which plaintiff concedes was clearly placed on defendant in the jury instructions.

[2] Plaintiff assigns error to the admission of photocopies of defendant's "pole records" regarding the placement and construction of telephone poles. He acknowledges that photocopies are admissible as originals pursuant to G.S. 8-45.1, but argues that the

foundation here for their introduction as business records was insufficient.

Business records are admissible as an exception to the hearsay rule when they (1) are made in the regular course of business, at or near the time of the events recorded; (2) are original entries; (3) are based on the personal knowledge of the individual making the entries; and (4) are authenticated by a witness familiar with the system by which they were made. *See Sims v. Insurance Co.*, 257 N.C. 32, 35, 125 S.E. 2d 326, 329 (1962); *Piedmont Plastics v. Mize Co.*, 58 N.C. App. 135, 137, 293 S.E. 2d 219, 221 (1982); *Wright v. American General Life Ins. Co.*, 59 N.C. App. 591, 596, 297 S.E. 2d 910, 914 (1982); 1 *Brandis on North Carolina Evidence* § 155 (2d rev. ed. 1982).

The pole records were introduced through the testimony of defendant's contract supervisor. His testimony in support of introduction of the records was as follows:

> [Defendant] maintains a record with regard to the placement and construction of telephone poles. . . . [T]hat record is maintained in Asheville in the Engineering Office. . . . I use pole records in my job. I use them continuously. . . . I am familiar with the pole records as they exist in the Asheville office and as they relate to [certain poles on plaintiff's land]. . . . I have made or had made a photographic reproduction of the pole record as it exists in the Asheville Office with regard to [the poles on plaintiff's land]. . . . [T]hat photostatic copy is identical to the record as it exists in the Asheville office, except three marks I have checked [on the copy] . . . .

The witness offered no evidence that the entries were based on the personal knowledge of the individual making them, or that they were made at or near the time the poles were placed and constructed. While he claimed familiarity with the location and content of the records, he demonstrated no knowledge of the system by which they were made.

The witness' testimony thus did not qualify the pole records for admission as business records. We perceive no prejudice in their admission, however, because the only relevance of these records to the prescriptive easement issue was to show that

defendant's poles had existed on plaintiff's property for at least twenty years; and that fact was testified to by several witnesses.

[3] Plaintiff assigns error to the exclusion of certain testimony elicited on cross-examination from two of defendant's employees who had entered upon plaintiff's land to maintain the telephone lines. One would have testified he entered the land in the belief that defendant had a written easement. The other would have stated that he "presumed right-of-way" when he entered.

Defendant's use of plaintiff's land is presumed permissive until proven adverse, and defendant has the burden of proving the elements of a prescriptive easement—*i.e.*, that the use was (1) adverse, hostile, or under a claim of right, (2) open and notorious, and (3) continuous and uninterrupted for twenty years; and (4) that there is substantial identity of the easement claimed. *Potts v. Burnette*, 301 N.C. 663, 666, 273 S.E. 2d 285, 287-88 (1981); *Dickinson v. Pake*, 284 N.C. 576, 580-81, 201 S.E. 2d 897, 900-01 (1974); *City of Statesville v. Credit and Loan Co.*, 58 N.C. App. 727, 729, 294 S.E. 2d 405, 406 (1982); *Taylor v. Brigman*, 52 N.C. App. 536, 539-40, 279 S.E. 2d 82, 84-85 (1981).

Plaintiff contends the excluded evidence was relevant to "[negate] the claim of adverse possession and shows that it was by a mistaken entry and not an intentional claim that would be open, adverse, hostile and under a claim of right." Possession of land under the mistaken belief that it belongs to the possessor is not adverse to the true owner, since there must be an intent to claim against the true owner. *Price v. Whisnant*, 236 N.C. 381, 72 S.E. 2d 851 (1952); *Gibson v. Dudley*, 233 N.C. 255, 63 S.E. 2d 630 (1951). The cases cited, however, both involved situations where the adverse claimant held a deed which he mistakenly thought described the property claimed.

> Although it has been stated that a use and enjoyment originating in mistake cannot be adverse, until the mistake is discovered, a more accurate statement of the rule is that where the party enjoying the easement does so under claim of right, independently of any deed or agreement, such enjoyment will be considered adverse even though it turns out that an existing agreement is based on mistake; but where the enjoyment has always been referred to a deed or agree-

ment which is finally shown to convey no right, another independent grant cannot be presumed.

28 C.J.S., Easements, § 14h, p. 658.

Defendant does not rest its claim of prescriptive easement upon any written deed or agreement purporting to convey a right to enter upon plaintiff's land. The excluded testimony thus does not negate that defendant's entry was under "claim of right," and whether defendant's employees believed a written easement existed was irrelevant to the issue being tried. It thus was not error to exclude the proffered testimony.

[4] Plaintiff assigns error to the refusal to allow him the final argument to the jury. The order of jury arguments is determined by the trial court, and its decision is final. Rule 10, General Rules of Practice for the Superior and District Courts; *Heilig v. Insurance Co.*, 222 N.C. 231, 233, 22 S.E. 2d 429, 431 (1942).

[5] Plaintiff contends the court erred in failing to give a requested instruction on open and visible uses. "[W]here adjoining properties of separate owners have been developed in relation to each other, so as to create cross easements . . . serving both properties, such easements, if open, apparent and visible, pass as an appurtenant to the respective properties, and are binding on grantees, although not referred to in the conveyance." *Packard v. Smart*, 224 N.C. 480, 485, 31 S.E. 2d 517, 519 (1944); *see Neamand v. Skinkle*, 225 N.C. 383, 35 S.E. 2d 176 (1945). The evidence here does not show the development of adjoining properties served by cross-easements. The requested instruction thus is not supported by the evidence, and the court properly declined to give it.

[6] Plaintiff contends the court erred in denying his request that the following issue be submitted to the jury: "Has the Defendant acquired a 30-foot easement over the land of the Plaintiff by open, notorious, adverse and continuous use for a period of twenty (20) years?" The court, after thoroughly charging on the factual elements of a prescriptive use, submitted the following issues: (1) "Has [defendant] acquired an easement over the land of the Plaintiff by prescriptive use for a period of twenty years before this action was commenced . . . ?"; and (2) "If so, what is the width of said prescriptive easement?"

The number, form, and phraseology of issues is in the court's discretion; and there is no abuse of discretion where the issues are "sufficiently comprehensive to resolve all factual controversies and to enable the court to render judgment fully determining the cause." *Chalmers v. Womack*, 269 N.C. 433, 435-36, 152 S.E. 2d 505, 507 (1967); *accord, Harvel's v. Eggleston*, 268 N.C. 388, 394, 150 S.E. 2d 786, 792 (1966). *See also Whitley v. Redden*, 276 N.C. 263, 267, 171 S.E. 2d 894, 897 (1970); *Johnson v. Lamb*, 273 N.C. 701, 706, 161 S.E. 2d 131, 136 (1968). The issues submitted adequately addressed the points in controversy and were clearly sufficient under the above standard.

Plaintiff assigns error to twelve portions of the jury charge. We have carefully examined the entire charge, and we find these assignments without merit.

Plaintiff finally assigns error to the court's failure to set aside the jury verdict. Having found no prejudicial error in the trial, we find no merit in this assignment.

No error.

Judges VAUGHN and WELLS concur.

WILLIAM E. FLEMING v. VANCE COUNTY BOARD OF EDUCATION, A PUBLIC BODY CORPORATE AND HILTON C. LEWIS, IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF THE VANCE COUNTY BOARD OF EDUCATION

No. 829SC96

(Filed 4 January 1983)

Schools § 13.2 — dismissal of probationary teacher — sufficiency of notice

A probationary teacher received 30 days notice as required by former G.S. 115-142(o) and G.S. 115-142(a)(4.1) when he received notice of defendant's decision not to renew his contract on 7 May 1981 and where the end of plaintiff's employment was 18 June 1981. Former G.S. 115-157(1), (6).

APPEAL by plaintiff from *Hobgood (Robert), Judge.* Order and judgment entered 4 November 1981 in Superior Court, VANCE County. Heard in the Court of Appeals 16 November 1982.

Plaintiff appeals from a judgment denying his claim for (1) a declaratory judgment that he did not receive requisite statutory notice of nonrenewal of his probationary teaching contract, and (2) an injunction ordering his reinstatement.

Pfefferkorn & Cooley, P.A., by Jim D. Cooley, for plaintiff appellant.

Perry, Kittrell, Blackburn & Blackburn, by George T. Blackburn, II, for defendant appellees.

WHICHARD, Judge.

G.S. 115-142(o) (1978) (now G.S. 115C-325(o) (Cum. Supp. 1981))[1] requires that "[a] probationary teacher whose contract will not be renewed for the next school year shall be notified of this fact not less than 30 days before the end of his employment period." G.S. 115-142(a)(4.1) (1978) (now G.S. 115C-325(a)(3) (Cum. Supp. 1981)) provides: " 'Day' means any day except Saturday, Sunday, or a legal holiday. In computing any period of time, the day in which notice is received is not counted, but the last day of the period so computed is to be counted."

Plaintiff actually received notice of defendant's decision not to renew his contract when he went to the post office on 7 May 1981, signed a return receipt, and took delivery of a certified letter from defendant. The period of computation thus began on the following day, 8 May 1981.

Plaintiff received compensation for his employment through 18 June 1981. Although he only reported for work through half of 15 June 1981, the other half of 15 June, as well as 16, 17 and 18 June, were designated "leave days," for which all teachers, including plaintiff, were compensated. A designated number of annual vacation leave days must be included within the employment period for which teachers are paid. G.S. 115-157(1) (1978) (current version at G.S. 115C-316(a)(1) (Cum. Supp. 1981)). Further, "[t]he provisions for annual vacation leave . . . apply only to such persons employed . . . during the days designated." G.S. 115-157(6) (1978) (*see* current version at G.S. 115C-316(a)(3) (Cum. Supp.

1. Chapter 115, Elementary and Secondary Education, effective at the relevant time here, was rewritten and recodified as Chapter 115C, effective 1 July 1981.

1981)). Thus the leave days on 15 through 18 June were part of plaintiff's period of employment for the purpose of establishing compensation under G.S. 115-157 (1978) (current version at G.S. 115C-316 (Cum. Supp. 1981)).

We believe the employment period for salary purposes is the appropriate period to use in computing the requisite thirty day notice period. We therefore hold that 18 June 1981, the last day of compensated employment, was the "end of [plaintiff's] employment period" within the meaning of G.S. 115-142(o) (1978) (now G.S. 115C-325(o) (Cum. Supp. 1981)). The total number of days between and including 8 May 1981, the next legal "day" after notice was received by plaintiff, and 18 June 1981, the end of plaintiff's employment, excluding Saturdays and Sundays, was thirty days. Nothing else appearing, then, defendant gave plaintiff the requisite statutory notice.

Whether any legal holidays must be excluded from this thirty day period remains to be determined. G.S. 115-157(1) (1978) (current version at G.S. 115C-316(a)(2) (Cum. Supp. 1981)) provides that "each county . . . board of education shall designate the same or an equivalent number of legal holidays occurring within the period of employment for academic teachers as those designated by the State Personnel Council for State employees." Pursuant to G.S. 115-157(1), defendant designated eleven legal holidays for the 1980-81 school year: 4 July; 1 September; 27, 28 November; 24, 25, 26 December; 1 January; 20, 21, 22 April. No designated legal holidays fell between 8 May and 18 June.

Plaintiff argues that the "legal public holidays" established by G.S. 103-4 should be excluded as "legal holidays" within the meaning of G.S. 115-142(a)(4.1) (1978) (now G.S. 115C-325(a)(3) (Cum. Supp. 1981)). We disagree. G.S. 115-157(1) is specific in its authorization to county boards of education to designate the required number of legal holidays. It thus controls over the general language of G.S. 103-4 in determining the issue presented. *See Utilities Comm. v. Electric Membership Corp.*, 275 N.C. 250, 260, 166 S.E. 2d 663, 670 (1969); *Bowling v. Combs, 60* N.C. App. 234, 238, 298 S.E. 2d 754, 757 (1983).

We therefore hold that plaintiff received thirty days notice of nonrenewal of his contract, in full compliance with G.S. 115-142(o) (1978) (now G.S. 115C-325(o) (Cum. Supp. 1981)). We thus need not

address his contention that he is entitled to an injunction reinstating him on the ground that he did not receive the requisite notice.

Affirmed.

Judges VAUGHN and WELLS concur.

ROBERT LEE BROCK AND WIFE, ETHEL B. BROCK v. BILL DAY AND WIFE, DORIS DAY

No. 8229SC165

(Filed 4 January 1983)

Contracts § 6.1 — action on note — unlicensed contractor — counterclaim on construction contract not permitted

An unlicensed building contractor may not maintain a counterclaim arising out of a construction contract in the owner's action against the contractor and his wife to recover the balance due on a promissory note which does not relate to the construction contract between the owner and the contractor.

APPEAL by defendants from *Howell, Judge.* Judgment entered 31 July 1981 in Superior Court, HENDERSON County. Heard in Court of Appeals 8 December 1982.

Plaintiffs instituted this action to recover the balance due on a promissory note allegedly executed and delivered to them by defendants. The defendants filed answer denying the material allegations of the complaint, and defendant Bill Day alleged a counterclaim against the plaintiffs to recover $35,000 allegedly due them by plaintiffs on a contract regarding the construction of a building. Plaintiffs filed a response to the counterclaim denying that they owed the defendants anything.

Plaintiffs moved for summary judgment as to their claim on the note, and as to defendant Bill Day's counterclaim regarding the contract for the construction of the building. In support of their motion for summary judgment as to the counterclaim, the plaintiffs offered evidence that they contracted with the defendant, Bill Day, to build for them a building on their property for

$169,000. The plaintiffs also offered evidence that the defendant was not a licensed contractor.

The trial court entered summary judgment for plaintiffs in the amount of $17,779.84 with respect to their claim against the defendants on the note, and summary judgment for plaintiffs dismissing the defendant's counterclaim. Defendants appealed.

D. Samuel Neill for the plaintiffs, appellees.

James H. Toms for the defendants, appellants.

HEDRICK, Judge.

In this case there are no genuine issues of material fact regarding defendant Bill Day's counterclaim. The one question presented on this appeal is whether an unlicensed contractor within the meaning of G.S. § 87-1 may maintain a counterclaim arising out of a construction contract in the owner's action against the contractor and his wife to recover the balance due on a promissory note which does not relate to the construction contract between the owners and the contractor.

Citing *Builders Supply v. Midyette*, 274 N.C. 264, 162 S.E. 2d 507 (1968), *Helms v. Dawkins*, 32 N.C. App. 453, 232 S.E. 2d 710 (1977) and *Furniture Mart v. Burns*, 31 N.C. App. 626, 230 S.E. 2d 609 (1976) the defendants assert: "An unlicensed contractor can enforce his contract defensively as a set-off, even though it exceeds the statutory maximum, against any claims by the other party to that contract."

The cited cases, among other things, stand for the proposition that an unlicensed contractor may off-set a counterclaim arising out of a construction contract in an owner's claim based on the same contract, but, in our opinion, he may not maintain a counterclaim in defense of the owner's claim on a promissory note totally unrelated to the construction contract. To allow an unlicensed contractor to maintain such a counterclaim would violate the public policy manifest in G.S. § 87-1 and articulated in *Builders Supply v. Midyette*, 274 N.C. 264, 162 S.E. 2d 507 (1968). The facts established by the record in the present case present an absolute and insurmountable legal bar to the defendant Bill Day's counterclaim. Hence, summary judgment for the plaintiffs on defendant's counterclaim will be affirmed.

Our decision articulated above makes it unnecessary for us to discuss the defendant's other contentions regarding the counterclaim.

We note the defendants do not challenge, except in the context of the counterclaim, summary judgment for the plaintiffs on their claim to collect the balance due on the promissory note. The burden is on the appellants to show error in the judgment on plaintiffs' claim. This they have failed to do; therefore, summary judgment for the plaintiffs against the defendants in the amount of $17,779.84 will be affirmed.

Affirmed.

Judges WEBB and BECTON concur.

WILLIAM A. WOOTEN v. NATIONWIDE MUTUAL INSURANCE CO.

No. 828SC136

(Filed 4 January 1983)

Insurance § 67.3— accident insurance—foot injury—issues submitted to jury confusing

In an action in which plaintiff sought to recover under an insurance policy for disability and medical benefits arising from injuries sustained when he stepped barefooted from a boat, the trial judge erred in submitting to the jury questions which confused the material issues which were raised by the evidence. G.S. 1A-1, Rule 49.

APPEAL by plaintiff from *Bruce, Judge.* Judgment entered 31 August 1981 in Superior Court, WAYNE County. Heard in the Court of Appeals 7 December 1982.

This is a civil action in which plaintiff seeks to recover under an insurance policy for disability and medical benefits arising from injuries sustained when plaintiff stepped barefooted from a boat. Defendant answered admitting the policy of insurance, but denying that the boating accident, directly and independently of all other causes, entitled plaintiff to medical and disability benefits.

Plaintiff offered evidence tending to show that he was a volunteer in the Fremont Rescue Squad. On 29 March 1976, he was engaged in a "dragging" operation on the Neuse River when he stepped barefooted from the boat and lodged a stick in his left foot. The stick, which caused bleeding, was removed, and the bleeding was stopped. The foot swelled and became bothersome to the plaintiff who went to a doctor a day or two later. The doctor drained and dressed the wound and prescribed antibiotics. Through the summer of 1976, plaintiff was in pain because of the foot, and he continued taking antibiotics. In September 1976, plaintiff entered the hospital for treatment of the foot. In October he reentered the hospital for phlebitis of the left leg. Eventually, in March 1979 and October 1979, plaintiff had to have two toes on the foot removed. As a consequence of the infections, he was disabled and out of work for substantial periods of time. On cross-examination, plaintiff testified that he had been diagnosed as a diabetic in July 1966. In 1975, he had received medical advice concerning a callus on the left foot, and, prior to the accident on 29 March 1976, plaintiff had been on antibiotics to treat an opening in his left foot.

One expert in general surgery testified for plaintiff that, in his opinion, the injury caused by plaintiff's stepping on a sharp object could have or might have, solely and independently of all other means, caused the condition of chronic osteomyelitis in the plaintiff's left foot. The depositions of two experts in orthopedic surgery reflected the same opinion. For the defendant, another medical expert testified that plaintiff's diabetes contributed to the complications that the plaintiff had in his foot.

After the evidence, the following issues were submitted to and answered by the jury as indicated:

1. Did the plaintiff William A. Wooten suffer bodily injury caused solely by accident on 29 March, 1976?

ANSWER: Yes

2. Did the plaintiff William A. Wooten incur medical expense arising out of injury caused by the accident, directly and independently of all other causes, and not caused or contributed to by any kind of disease?

ANSWER: No

3. What amount is plaintiff William A. Wooten entitled to recover for medical expense?

ANSWER: _____

4. Was the plaintiff William A. Wooten wholly disabled by injury caused by the accident directly and independently of all other causes, and not caused or contributed to by any kind of disease?

ANSWER: No

5. What amount is plaintiff entitled to recover for disability?

ANSWER: _____

From judgment entered on the verdict, plaintiff appealed.

David M. Rouse for the plaintiff-appellant.

Dees, Dees, Smith, Powell & Jarrett, by William W. Smith, for defendant-appellee.

HEDRICK, Judge.

The "Volunteer Group Accident Insurance Policy" provides, among other things, that the insurer will pay disability and medical benefits to the insured when he sustains damage resulting from injury by accident "directly and independently of all other causes."

It is the duty of the trial judge to submit to the jury issues which are raised by the evidence, and which, when answered, will resolve all material controversies between the parties. G.S. § 1A-1, Rule 49. In the present case, the questions submitted to the jury confused the material issues which were raised by the evidence. Read alone, issue one and its affirmative answer appear to establish defendant's liability. Read with issues two and four and their negative responses, however, issue one with its affirmative answer is contradictory and meaningless.

The evidence raises an issue as to whether plaintiff was disabled and incurred medical expenses as a result of the 29 March 1976 accident, directly and independently of all other causes. If the jury should answer this issue "yes," it would be

necessary to answer the issues as to what amount plaintiff is entitled to recover for medical expenses and disability. The burden of proof on all three issues is on the plaintiff. *Horn v. Insurance Co.*, 265 N.C. 157, 143 S.E. 2d 70 (1965).

For error in framing the issues, plaintiff is entitled to a new trial.

New trial.

Judges WEBB and BECTON concur.

STATE OF NORTH CAROLINA v. GILBERT BLANDIN

No. 822SC567

(Filed 4 January 1983)

Criminal Law § 149— order suppressing evidence—appeal by State—prosecutor's certificate not timely filed—dismissal of appeal

The State's appeal from a pretrial order allowing a motion to suppress seized evidence is dismissed where the prosecutor's certificate required by G.S. 15A-979(c) stating that the appeal is not taken for the purpose of delay and that the suppressed evidence is essential to the case was not filed by the State prior to the certification of the record on appeal to the appellate division.

APPEAL by the State from *Small, Judge.* Order entered 18 March 1982 in Superior Court, BEAUFORT County. Heard in Court of Appeals 7 December 1982.

Attorney General Rufus L. Edmisten, by Special Deputy Attorney General W. A. Raney, Jr. for the State, appellant.

Jeffrey S. Miller for the defendant, appellee.

HEDRICK, Judge.

The State purports to appeal an order of the Superior Court allowing the defendant's motion to suppress certain evidence seized pursuant to the search of the defendant's person. The record on appeal was docketed in this court on 7 June 1982. On 11 June 1982 the defendant filed in this court a motion to dismiss

the appeal for that the State had not filed the certificate mandated by G.S. § 15A-979(c) that the appeal was not taken for the purpose of delay and that the evidence suppressed is essential to the case.

On 18 June 1982 the State filed a motion in this court to add the certificate required by G.S. § 15A-979(c) to the record. On 21 June 1982 the State filed a response to the defendant's motion to dismiss arguing "that there are no specific time limitations on the prosecutor in filing a certificate under G.S. 15A-979(c) and that the certificate can be deemed to be timely as long as the Record on Appeal ultimately reflects the certification." In *State v. McDonald*, 55 N.C. App. 393, 285 S.E. 2d 282 (1982), filed 5 January 1982, this court held that the State had no right to appeal an order granting defendant's motion to suppress evidence where the record failed to show that the prosecutor certified to the judge who granted the motion that the appeal was not being taken for the purpose of delay and that the suppressed evidence was essential to the case as required by G.S. § 15A-979(c).

In *State v. Turner*, 305 N.C. 356, 359, 289 S.E. 2d 368, 370 (1982), filed 30 March 1982, Justice Britt speaking for our Supreme Court said: "We hold that the certificate envisioned by G.S. 15A-979(c) is timely filed if it is filed prior to the certification of the record on appeal to the appellate division. In the case at hand, since the certificate was served as a part of the record on appeal on 16 February 1981, and the record was certified by the clerk of superior court to the appellate division on 24 April 1981, the certificate was timely served."

In the present case, the certificate required by the statute has not yet been made a part of the record. Obviously, it was not filed before the record was certified by the Clerk of the Superior Court. Clearly the obvious purposes of the certificate discussed in *Turner* have not been satisfied.

In his brief the defendant argues: "To give the State the right to file the certificate after the case has already been docketed in the appellate court would be to reduce the requirement of the certificate to a nullity. If G.S. § 15A-979(c) means anything at all, it means that the Court is bound to dismiss this appeal."

We find the defendant's argument persuasive and the appeal is

Dismissed.

Judges WEBB and BECTON concur.

GILBERT T. CASEY v. RANSOME GRICE

No. 8111SC1404

(Filed 4 January 1983)

Appeal and Error § 6.2— order directing defendant to answer interrogatories and submit to oral deposition—interlocutory and non-appealable

An order requiring defendant to answer interrogatories and submit to oral deposition concerning his financial net worth was interlocutory and non-appealable. G.S. 1-277(a).

APPEAL by defendant from *Bowen, Judge.* Order filed 20 November 1981 in Superior Court, JOHNSTON County. Heard in the Court of Appeals 13 October 1982.

Plaintiff and his wife, Myde W. Casey, have been married since 25 October 1953 but separated in October 1981. Defendant Grice was acquainted with plaintiff and his wife and employed by plaintiff in October 1978 to make certain repairs to plaintiff's home.

On 28 September 1981, plaintiff filed suit against defendant, based on the torts of alienation of affections and criminal conversation, seeking actual damages of $250,000 and punitive damages of $250,000. Plaintiff filed both a notice to take the deposition of defendant and the first set of interrogatories seeking information concerning defendant's net worth.

Defendant objected to plaintiff's first set of interrogatories. Plaintiff responded by filing a motion for an order compelling discovery with regard to the interrogatories and deposition. In addition, plaintiff's attorney prepared an application for immunity and the court granted defendant full immunity from prosecution

relating to any criminal offense arising out of his relationship with plaintiff's wife, Myde W. Casey.

On 20 November 1981, Judge Bowen entered his order which concluded as a matter of law that the immunity granted defendant by the court was valid and that the privilege against self-incrimination was not available to defendant. Therefore, he ordered that defendant answer interrogatories and submit to oral deposition concerning his financial net worth. From this order, defendant appeals.

Narron, O'Hale, Whittington and Woodruff, by James W. Narron, for plaintiff appellee.

Mast, Tew and Armstrong, by George B. Mast and L. Lamar Armstrong, Jr., for defendant appellant.

MORRIS, Chief Judge.[1]

Although plaintiff and defendant raised no question of appealability, we believe the order appealed from is interlocutory and non-appealable. G.S. 1-277(a) provides in pertinent part:

> An appeal may be taken from every judicial order or determination of a judge of a superior or district court, upon or involving a matter of law or legal inference, whether made in or out of session, which affects a substantial right claimed in any action or proceeding; . . .

However, "it has been held that orders denying or allowing discovery are not appealable since they are interlocutory and do not affect a substantial right which would be lost if the ruling were not reviewed before the final judgment." *Dworsky v. Insurance Co.*, 49 N.C. App. 446, 447, 271 S.E. 2d 522, 523 (1980).

Where neither party raises the question of appealability and no right to appeal exists, an appellate court should dismiss the appeal on its own motion. *Pasour v. Pierce*, 46 N.C. App. 636, 265 S.E. 2d 652 (1980), *Metcalf v. Palmer*, 46 N.C. App. 622, 265 S.E. 2d 484 (1980).

1. The Court's decision in this case was made and written prior to Chief Judge Morris's retirement.

Because all assignments of error are based on Judge Bowen's order directing defendant to answer interrogatories and submit to oral deposition, we believe defendant's appeal is premature and must, therefore, be dismissed.

Appeal dismissed.

Judges BECTON and JOHNSON concur.

MALCOLM M. LOWDER, MARK T. LOWDER AND DEAN A. LOWDER, PLAINTIFFS v. ALL STAR MILLS, INC., LOWDER FARMS, INC., CAROLINA FEED MILLS, INC., ALL STAR FOODS INC., ALL STAR HATCHERIES, INC., ALL STAR INDUSTRIES, INC., TANGLEWOOD FARMS, INC., CONSOLIDATED INDUSTRIES, INC., AIRGLIDE, INC., AND W. HORACE LOWDER, DEFENDANTS AND CYNTHIA E. LOWDER PECK, MICHAEL W. LOWDER, DOUGLAS E. LOWDER, LOIS L. HUDSON, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR STEVE H. HUDSON, BRUCE E. HUDSON, BILLY J. HUDSON, ELLEN H. BALLARD, JENELL H. RATTERREE, DAVID P. LOWDER, JUDITH R. LOWDER HARRELL, EMILY P. LOWDER CORNELIUS AND MYRON E. LOWDER, INTERVENING DEFENDANTS

No. 8220SC14

(Filed 18 January 1983)

1. **Appeal and Error § 6.2— interlocutory orders affecting substantial rights—right of appeal**

Orders denying a motion to disqualify plaintiffs' attorneys and authorizing receivers to settle tax claims against the corporate defendants affect substantial rights which will work injury to the appellants if not corrected before an appeal from a final judgment and are, therefore, appealable.

2. **Attorneys at Law § 3— former representation of opposing party—discretion to disqualify attorney**

It is within the discretion of the trial court whether to disqualify an attorney for his former representation of an opposing party, and this discretion must be exercised within the parameters of Canons 4 and 9 of the Code of Professional Responsibility of the North Carolina State Bar.

3. **Attorneys at Law § 3— former representation of adverse party—disqualification of attorney**

If an attorney has formerly represented an adverse party in matters substantially related to the subject of the action, the attorney should be disqualified, nothing else appearing, and it is not necessary to show that the attorney received confidential information.

4. Attorneys at Law § 3— discretion to disqualify attorney—effect on expeditious disposal of case

In exercising its discretion in determining whether to disqualify an attorney, the trial court may consider the right of a party to have counsel of his or her choice and the effect a disqualification would have on the expeditious disposal of the case.

5. Attorneys at Law § 3— representation of defendant in criminal action—no disqualification to represent plaintiff

The trial court did not abuse its discretion in the denial of defendants' motion to disqualify plaintiffs' attorneys because they had represented the individual defendant in a criminal action involving matters related to this civil action where the trial court had before it a ruling of the Grievance Committee of the North Carolina State Bar dismissing a complaint against one attorney for plaintiffs based on the same ethical considerations as were before the court; defendant waited 22 months after the action was filed before making the motion to disqualify; and the action is a complicated derivative action for which it would take a substantial amount of time for new attorneys to become familiar.

6. Judgments § 2— order signed out of county—validity

An order permitting receivers appointed for the corporate defendants to employ certain counsel was not void because it was signed out of the county where the N.C. Supreme Court had held that the trial judge properly retained jurisdiction in himself after being rotated out of the district.

7. Notice § 1— order entered without notice to party—absence of prejudice

Defendants were not prejudiced by the court's entry of an order appointing accountants and attorneys for receivers for the corporate defendants without notice to the individual defendant where a full hearing was conducted on defendants' motion to remove the accountants and receivers.

8. Attorneys at Law § 3— appointment of plaintiffs' attorneys as counsel for receivers

The trial court erred in its appointment of plaintiffs' attorneys as counsel for the receivers for the corporate defendants since plaintiffs are attempting to have assets transferred from some corporate defendants to others, and their attorneys should not represent the receivers whose job it is to preserve the assets of all the corporations.

9. Receivers § 1— refusal to dissolve receivership

The evidence did not show that corporations in receivership have been so damaged by the receivership that the trial judge abused his discretion in refusing to dissolve the receivership.

10. Rules of Civil Procedure § 52— interlocutory, unappealable order—findings not required

The trial court was not required to make findings of fact as requested by defendants in an order denying a motion to vacate a receivership for the corporate defendants since the order was interlocutory and not appealable. Fur-

thermore, defendants were not prejudiced by failure of the trial court to find facts where the court in effect held that the evidence did not require it to change its previous findings of fact made in an order appointing the receivers, and the appellate court can review the evidence and determine whether the trial court was correct in this ruling. G.S. 1A-1, Rule 52(a)(2).

11. Receivers § 12.1— fees allowed for receivers and accountants and attorneys for receivers

Fees allowed by the trial court to the receivers and accountants and tax attorneys for the receivers of defendant corporations were reasonable in view of the amount of time involved, the complexity of the case, and the results obtained. Furthermore, the court did not err in allowing fees for work done by the attorneys and accountants before the receivers were formally appointed and while the corporations were in bankruptcy.

12. Receivers § 12.1— motions for fees—determination on basis of affidavits

The trial court could properly determine motions for fees for receivers and their attorneys and accountants on the basis of affidavits, and defendants did not have the right to cross-examine the applicants for fees. G.S. 1A-1, Rule 43(e).

13. Receivers § 12.2— settlement of tax claims by receivers—approval by court

It was reasonable for the trial court to approve the settlement of tax claims against the corporate defendants by receivers of the corporations, notwithstanding there may be defenses to some of the tax claims which the receivers propose to pay, where there were 14 docketed tax cases against the corporations totalling more than $5 million in interest and penalties; the proposed settlement for claims of the Internal Revenue Service was $540,080 and for claims of the N.C. Department of Revenue was $49,933; there were other claims which the Internal Revenue Service conceded under the settlement which it would not concede if there were no settlement; and substantial evidence was presented as to the possibility that the corporations would have to pay a much larger amount if the tax claims were not settled.

14. Receivers § 7— order permitting sale of land by receivers—premature appeal

The appellate court will not rule on the propriety of the trial court's order permitting receivers of a corporation to sell land owned by the corporation until the sale is confirmed or confirmation is denied. G.S. 1-505.

15. Judges § 5— motion for recusal—ruling on other motions before referral to another judge

In an action to recover damages allegedly caused by the individual defendant's mismanagement of various corporations, the trial judge acted properly in ruling on 19 motions before referring defendants' motion for recusal to another judge for a hearing where the trial judge had conducted hearings on the 19 motions for three weeks before defendants made the motion to recuse.

APPEAL by defendants and intervening defendants from *Seay, Judge*. Orders entered 2 October 1981 in Superior Court, STANLY County. Heard in the Court of Appeals 20 October 1982.

The plaintiffs filed this action on 11 January 1979 seeking damages on the ground that W. Horace Lowder had abused his duties as an officer of the corporate defendants. In an order filed 9 February 1979, Judge Seay appointed receivers for the corporations. In April 1979 the corporate defendants filed for protection under Chapter XI of the United States Bankruptcy Act. The proceedings in Superior Court were automatically stayed until February 1980 when the corporations were discharged from bankruptcy. Judge Seay entered orders retaining jurisdiction of all matters pending in the litigation notwithstanding his rotation from the district, authorizing the payment of fees to the attorneys and accountants, and holding W. Horace Lowder in contempt of court for violating orders of the court. Our Supreme Court in *Lowder v. Mills, Inc.*, 301 N.C. 561, 273 S.E. 2d 247 (1981) affirmed the orders appointing the receivers and retaining jurisdiction. It reversed the order authorizing the payment of attorney and accountant fees. It also reversed a decision of the Court of Appeals at 45 N.C. App. 348, 263 S.E. 2d 624 (1980) which had reversed the order holding W. Horace Lowder in contempt.

In 1980 other stockholders of the corporations intervened as defendants. On 2 October 1981 Judge Seay ruled on 19 motions that had been filed in the case. W. Horace Lowder and the intervening defendants appealed from the rulings on nine of the orders. Further facts will be set forth in the body of this opinion.

Moore and Van Allen, by John T. Allred and Randel E. Phillips, for plaintiff appellees.

DeLaney, Millette, DeArmon and McKnight, by Ernest S. DeLaney, for defendant appellants.

Hopkins, Hopkins and Tucker, by William C. Tucker, for intervening defendant appellants.

WEBB, Judge.

[1] We note at the outset that all the orders from which appeals are taken are interlocutory. We believe the order denying the motion to disqualify the plaintiffs' attorneys, which is the subject of the appellants' first assignment of error, and the order authorizing the receivers to settle the tax claims against the corporate defendants, which is the subject of the appellants' sixth assign-

ment of error, affect substantial rights which will work injury to the appellants if not corrected before an appeal from a final judgment. These orders are appealable. *See Industries, Inc. v. Insurance Co.*, 296 N.C. 486, 251 S.E. 2d 443 (1979). In our discretion, we shall consider some of the appellants' other assignments of error.

The appellants first contend it was error to deny their motion to disqualify the plaintiffs' attorneys. The defendants made a motion on 17 March 1981 to disqualify the plaintiffs' attorneys on the ground they had a conflict of interest. The record shows that prior to the filing of this action, W. Horace Lowder was convicted in federal court of income tax evasion. Mr. Lowder represented himself at trial and on appeal. He then retained the law firm of Brown, Brown and Brown. R. L. Brown, Jr. and R. L. Brown, III of that firm petitioned for a rehearing and, with the law firm of Arent, Fox, Kintner, Plotkin and Kahn of Washington, D.C., they petitioned the United States Supreme Court for a writ of certiorari. Both petitions were denied. R. L. Brown, III also represented Mr. Lowder in an attempt to have his sentence reduced and in an attempt to let Mr. Lowder serve the sentence in the Stanly County jail. The matters in which Mr. Brown represented Mr. Lowder in his criminal case are now involved in this civil action.

After the Brown firm had completed its representation of W. Horace Lowder, Malcolm Lowder conferred with R. L. Brown, III in regard to the problems of the corporations. Malcolm Lowder became dissatisfied with the manner in which the corporations had been managed and determined to bring this action. Malcolm Lowder retained R. L. Brown, III, who associated the law firm of Moore and Van Allen. Moore and Van Allen signed the complaint as plaintiffs' attorneys, but the Brown firm will receive a part of any contingent fee received by Moore and Van Allen.

On 24 March 1979, W. Horace Lowder filed a grievance with the North Carolina State Bar against R. L. Brown, III in which he stated that Mr. Brown had represented him on a petition for a writ of certiorari to the United States Supreme Court, that his brother, Malcolm M. Lowder, had stated that he was represented by Mr. Brown in an action to have W. Horace Lowder removed as manager of the corporation, that Mr. Brown had arranged for a

Charlotte law firm to represent his brother in a suit to have W. Horace Lowder removed from the management of the corporations, and that Mr. Brown had furnished the Charlotte law firm transcripts of the criminal trial. On 20 July 1979 the Grievance Committee of the North Carolina State Bar notified Mr. Brown "that after investigation and hearing, no probable cause was found" and the complaint was dismissed.

Judge Seay found as to the Brown firm that its representation of W. Horace Lowder "was extremely narrow in scope and necessarily based on matters of public record," that W. Horace Lowder's "exchanges of information with the Brown firm were confined to matters of public record or matters not substantially related to the present action," that the Grievance Committee of the North Carolina State Bar found no probable cause and dismissed the complaint after an investigation and hearing on essentially the same matters that were asserted in the motion, and that the "movant has failed to present this issue in a timely fashion." Judge Seay found as to Moore and Van Allen that since no confidences were shared between W. Horace Lowder and the Brown firm, none were passed to Moore and Van Allen, that the Brown firm and "Moore and Van Allen do not constitute a 'firm' for the purposes of imputing knowledge pursuant to Canon Four of the North Carolina Code of Professional Responsibility," and that plaintiffs would "suffer considerable prejudice in having their choice of counsel disqualified at this stage of the proceedings." The court denied the motion to disqualify the plaintiffs' counsel. The appellants assign error to this ruling.

The Code of Professional Responsibility of the North Carolina State Bar, Appendix VII, of the General Statutes, provides in pertinent part:

Canon 4

A Lawyer Should Preserve the Confidences and Secrets of a Client

* * *

EC4-4 The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source

of information or the fact that others share the knowledge. . . .

EC4-5 A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client and a lawyer should not use, except with the consent of his client after full disclosure, such information for his own purposes. . . . Care should be exercised by a lawyer to prevent the disclosure of the confidences and secrets of one client to another, and no employment should be accepted that might require such disclosure.

EC4-6 The obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment . . . .

* * *

Canon 9

A Lawyer Should Avoid Even the Appearance of Professional Impropriety

* * *

EC9-6 Every lawyer owes a solemn duty to uphold the integrity and honor of his profession . . . and to strive to avoid not only professional impropriety but also the appearance of impropriety.

We can find no precedent in this jurisdiction for the question raised by this assignment of error. In *Swenson v. Thibaut*, 39 N.C. App. 77, 250 S.E. 2d 279 (1978), *cert. denied*, 296 N.C. 740, 254 S.E. 2d 181 (1979), this Court held that the plaintiffs' attorneys should not be disqualified. In that case the plaintiffs' attorneys had appeared for a corporation which was a nominal defendant in the case then being litigated, but whose actual interests coincided with the interests of the plaintiffs.

[2-4] There have been cases from other jurisdictions dealing with this question. *See, e.g., State of Ark. v. Dean Food Products Co., Inc.*, 605 F. 2d 380 (1979); *Brennan's, Inc. v. Brennan's Restaurants, Inc.*, 590 F. 2d 168 (1979); *Akerly v. Red Barn System, Inc.*, 551 F. 2d 539 (1977); *NCK Org'n Ltd. v. Bregman*, 542 F. 2d 128 (1976), and Annot., 52 ALR 2d 1243 (1957). We

believe the rule as established in these cases is that it is within the discretion of the trial court as to disqualifying an attorney for his former representation of an opposing party. This discretion must be exercised within the parameters of Canons 4 and 9. Under these Canons, if an attorney has formerly represented an adverse party in matters substantially related to the subject of the action, the attorney should be disqualified, nothing else appearing. It is not necessary to show the attorney received confidential information. The ethical duty of an attorney under EC4-4 is broader than the attorney-client evidentiary privilege. An attorney should not use against a former client information he has received while representing that client although the information is not confidential and is available to others. A party can waive his right to have his former attorney disqualified. In exercising its discretion in determining whether to disqualify an attorney, the trial court may consider the right of a party to have counsel of his or her choice and the effect a disqualification would have on the expeditious disposal of the case.

[5] In the instant case, the Brown firm had represented the defendant in matters related to this case. We cannot hold, however, that Judge Seay abused his discretion in refusing to disqualify the Brown firm or the Moore and Van Allen firm. The court had before it a ruling from the Grievance Committee of the North Carolina State Bar in which it dismissed a complaint against R. L. Brown, III for the same ethical considerations as were before the court. The defendant waited 22 months from the time the action was filed before moving to disqualify the plaintiffs' attorneys. The case had twice been appealed and the corporations had been placed in bankruptcy and later discharged from bankruptcy before the motion to disqualify was made. This is a complicated derivative action and it would take a substantial amount of time for new attorneys to familiarize themselves with the case. We hold there was not an abuse of discretion by the court in refusing to disqualify plaintiffs' counsel. Since we have overruled this assignment of error, we do not discuss the different ethical positions of Brown, Brown and Brown and Moore and Van Allen.

In their second assignment of error, the appellants contend an order entered by Judge Seay on 15 February 1979 is void and should have been vacated. In February 1979 at the Richmond

County Courthouse, Judge Seay met with the receivers and with John Allred of the firm of Moore and Van Allen and R. L. Brown, III of the Brown firm. None of the appellants received notice of the meeting and none of them were present. As a result of the hearing at this meeting, Judge Seay entered an order in which he authorized the receivers to employ Moore and Van Allen as attorneys to render legal advice "concerning day-to-day activities, and the marshalling of assets, and pursuit of claims against third parties, and for the purpose of continuing the prosecution of this action to the end that any assets which should belong to All Star Mills or Lowder Farms are identified, and returned to them." Judge Seay also allowed the receivers to retain R. L. Brown, III, and Arent, Fox, Kintner, Plotkin and Kahn of Washington, D.C. as special tax counsel to defend the Tax Court litigation, and to employ Coopers and Lybrand as accountants.

Judge Seay recited that he had concluded that the burden was upon W. Horace Lowder "to defend All Star Foods, All Star Hatcheries, All Star Industries, Consolidated Industries, and Airglide, as well as himself, *in this action*, because if these defendants have any liability to the other corporated [sic] defendants, it is the direct result of actions taken by Horace Lowder . . . ." The court ordered that W. Horace Lowder could retain counsel on behalf of these companies notwithstanding the appointment of the receivers and that he would be personally responsible for any legal fees for such counsel.

Judge Seay recited further that the only potential conflict which he could see was that the receivers were acting on behalf of all the corporations except Carolina Feed Mills, Inc. even though two of them may have claims against the rest. He found as a fact that no current conflict existed and ordered that if an actual conflict appeared to arise in the course of the litigation, the parties should report it to the court.

The appellants argue that this order should be held void for several reasons. They say first that the findings of fact were not supported by the evidence. The record does not disclose what evidence was introduced at the hearing. There had been evidence offered at the January hearing on the appointment of the receivers which would fully support all findings of fact made by Judge Seay in his February order. We hold that he could rely on this evidence.

[6] The appellants also argue that this order should be held void because it was signed out of Stanly County. Our Supreme Court has held that Judge Seay properly retained jurisdiction in himself after being rotated out of the district. *Lowder v. Mills, Inc., supra*, at 579, 273 S.E. 2d at 258. We believe we would have to overrule our Supreme Court to say he could not sign an order in Richmond County. This we cannot do.

[7] The third reason the appellants advance for voiding this order is that it was entered without notice to the corporate defendants or individual defendants. The intervening defendants were not parties to the litigation at the time this order was signed. Notice to them was not required. The appointment of attorneys for the receivers, including the appointment of tax attorneys, affected a right of W. Horace Lowder. Notice should have been given to him. *See Hagins v. Redevelopment Comm.*, 275 N.C. 90, 165 S.E. 2d 490 (1969) and *Shepherd v. Shepherd*, 273 N.C. 71, 159 S.E. 2d 357 (1968). We do not believe the appellants were prejudiced by this error, however. Judge Seay conducted a full hearing on the appellants' motion to remove the accountants and attorneys for the receivers. The appellants had an opportunity to present any reasons they may have had to have them removed.

[8] The last reason the appellants advance for removal of the receivers' attorneys is that there is a conflict of interest. The appellants argue that one of the purposes of this action is to take assets from some of the corporations and give those assets to others. For that reason they say it is not proper for an attorney who is trying to accomplish this to serve as an attorney for the receivers of the corporations from whom he is trying to remove assets. We find no error in Judge Seay's authorizing the receivers to retain R. L. Brown, III and Arent, Fox, Kintner, Plotkin and Kahn to represent the receivers in the tax litigation. It was in the interests of all parties to minimize the taxes of the corporate group. There is no conflict in this regard. It may be that when a final judgment is entered, it will be found that some of the corporations have paid a disproportionate part of the taxes. Any adjustments which should be made may be done so in the final judgment.

We believe the court committed error in appointing Moore and Van Allen to represent the receivers. Among the things the attorneys for the receivers were directed to do is to render legal advice to the receivers "for the purpose of continuing the prosecution of this action to the end that any assets which should belong to All Star Mills or Lowder Farms are identified, and returned to them." The receivers were appointed to preserve the assets of all the corporations. If the plaintiffs are successful, the assets of some of the corporations may be transferred to other corporations in the group. We believe the receivers should be neutral in this contest. This case presents a different picture than most receiverships in which there is only one corporation with assets to be protected. Since the plaintiffs are attempting to transfer assets from some corporations to others, we do not believe their attorneys should represent the receivers whose job is to preserve the assets of all the corporations.

We sustain in part and overrule in part the appellants' second assignment of error.

In their third assignment of error, the appellants contend it was error for the Superior Court not to amend certain findings of fact and conclusions of law in the order appointing the receivers and in not declaring the order void as against public policy. The motion, the denial of which is the subject of this assignment of error, was filed on 19 February 1979. In this motion, W. Horace Lowder and the corporate defendants asked the court to amend the findings of fact, conclusions of law, the preliminary injunction, and the order appointing the receivers. The appellants argue it was error not to grant his motion and release certain of the corporations from the receivership. They argue further that the record shows that at the show cause hearing on the appointment of receivers, the corporations did not have an attorney but were represented by W. Horace Lowder, a layman. They contend it is a violation of public policy for a layman to act as an attorney, and the order appointing the receivers should be vacated for that reason. The intervening defendants argue that they hold a majority of the stock in All Star Mills, Inc. and Lowder Farms, Inc. and were not served with any notice before the receivers were appointed. They argue that their due process rights were violated when they were deprived of control of the corporations without an opportunity to be heard.

The subject of the appellants' third assignment of error has been before our Supreme Court in *Lowder v. Mills, supra.* Our Supreme Court has affirmed the appointment of receivers in this case. They discussed the adequacy of the findings of fact and the evidence to support them as well as the lack of notice to the stockholders. They did not discuss W. Horace Lowder's representation in court of the corporations, but that feature of the case was in the record. We believe we would have to overrule the Supreme Court to sustain the appellants' third assignment of error, which we cannot do. This assignment of error is overruled.

On 19 March 1980 DeLaney, Millette, DeArmon and McKnight, as attorneys for the seven corporate defendants, filed a motion to vacate the order placing them in receivership. On 13 March 1981 the same law firm filed motions on behalf of the corporate defendants other than All Star Mills, Inc. and Lowder Farms, Inc. to vacate the receivership. The denial of these motions is the subject of the appellants' fourth assignment of error. A good portion of the appellants' argument is directed at what they contend are erroneous findings of fact upon which the order placing the corporations in receivership was based. As we have pointed out, our Supreme Court has already passed on this part of the case. We cannot now overrule the Supreme Court.

[9] The appellants also contend the evidence adduced at the hearing to vacate the order shows the corporations have been so mismanaged since they were placed in receivership that they have greatly deteriorated in value. The appellants argue that for this reason, Judge Seay should have dissolved the order placing the corporations in receivership and returned the control of the corporations to the stockholders. There was conflicting evidence on this point. There was some evidence that the liquid assets of the corporations were depleted during the bankruptcy proceedings. The corporations have ceased some of their business operations pursuant to court order during the receivership. We cannot hold that the evidence shows that the corporations have been so damaged by the receivership that Judge Seay abused his discretion in refusing to dissolve the receivership.

[10] The appellants argue that it was error for Judge Seay not to find facts in this order since he had been requested to do so pursuant to G.S. 1A-1, Rule 52(a)(2). This was an interlocutory

order and is not appealable. For that reason, no findings of fact were necessary. *See O'Neill v. Bank*, 40 N.C. App. 227, 252 S.E. 2d 231 (1979). Even if the order was not interlocutory, we do not believe the appellants were prejudiced by Judge Seay's failure to find facts. The purpose of requiring a trial judge to find facts is to enable an appellate court to determine whether the trial judge based his legal conclusions on the proper facts. In the motion which we now review, the appellants had asked the court to vacate an order which had been entered. The question before Judge Seay was whether the evidence presented was such that he should change the facts found in his previous order or find new facts which would require him to change the order which had been entered. Judge Seay in effect held that the evidence was not such as to require him to change his previous findings of fact or to find new facts which would change the order. We are able to review the evidence and determine whether Judge Seay was correct in this ruling. For that reason, the appellants were not prejudiced by Judge Seay's failure to find facts.

The appellants' fourth assignment of error is overruled.

[11] The appellants' fifth assignment of error deals with the awarding of fees to the receivers, and to the attorneys and accountants for the receivers. The court in several orders approved the payment of fees to the receivers, and to Moore and Van Allen; Brown, Brown and Brown; and Arent, Fox, Kintner, Plotkin and Kahn as attorneys for the receivers. It also approved the payment of fees to Coopers and Lybrand as accountants for the receivers. We have held that it was error to appoint Moore and Van Allen as attorneys for the receivers so we reverse those portions of the orders which authorized the payment of fees to them. We note that if the plaintiffs are successful, they may be entitled to reasonable attorney fees pursuant to G.S. 55-55(d).

In support of the petition for fees, the receivers' attorneys and accountants submitted statements detailing the work they had done. The accountants' statements showed they had devoted 2,286.68 hours to the case. The court authorized the payment of fees and expenses to them in the amount of $90,421.45. R. L. Brown, III submitted a statement showing he had spent 297.75 hours on the case. The court authorized the payment to him of fees and expenses in the amount of $20,698.97. Arent, Fox, Kint-

ner, Plotkin and Kahn filed statements showing they had devoted 414.9 hours to the case. Fees and reimbursement for expenses were authorized for them in the amount of $49,048.22. John M. Bahner, Jr., one of the receivers, filed a statement in which he listed the various things he had done in the course of the receivership. This statement showed he had devoted 413 hours to his duties as a receiver. The receivers were authorized to pay Mr. Bahner $20,931.00 compensation for his work as a receiver. Henry C. Doby, Jr., one of the receivers, submitted a statement in which he set forth in detail the work he did as a receiver. He did not show the number of hours he devoted to this work but it is obvious from his statement that he spent a great deal of time on it. The receivers were authorized to pay him $9,137.00 in fees and as reimbursement for his expenses.

We believe that in view of the amount of time involved, the complexity of the case, and the results obtained, that the fees allowed by Judge Seay are reasonable.

The appellants argue that there was no evidence as to the necessity or value to each corporation of the services rendered, that the statements show the attorneys and accountants worked on the case for a few days before they were appointed, and that some of the work was done while the corporations were in bankruptcy and the receivers had no authority to act. We believe it is obvious that the services of the attorneys and accountants were necessary to settle the tax cases. Judge Seay was well able to determine the value of the services. We believe the work done before the receivers were formally appointed was proper. The corporations were involved in complicated tax litigation. The case was in recess at the time the receivers were appointed and the attorneys and accountants acted properly in starting work on the case a few days before they were authorized by court order to do so. The fees allowed for the time the corporations were in bankruptcy were also proper. It is true that at the time the bankruptcy order was entered, the receivers were divested of authority to act. They were responsible for delivering control of the corporations to the bankruptcy trustee. This required some work. When the tax claims were settled, the receivership received the benefit of all work done by the attorneys and accountants on the tax problems of the corporations while they were in bankruptcy.

The appellants next argue that the corporations were deprived of their property without due process of law when Judge Seay failed to determine the benefit to each corporation from the services of the receivers, attorneys and accountants and to apportion the costs accordingly. They contend that by Judge Seay's not doing so, some of the corporations had to pay for services they did not receive. Judge Seay held in his order appointing the receivers that all the corporations would be treated as one entity. We do not believe he was required to apportion the fees at the time he ordered them paid. When a final judgment is entered in this case, it can be determined what assets are owned by each corporation. At that time it can be determined what proportion of the total costs each corporation must bear.

[12] Finally, the appellants argue that it was improper to allow the fees without giving appellants a chance to cross-examine the receivers, attorneys and accountants as to the services rendered. We hold that the court under G.S. 1A-1, Rule 43(e) could hear the motions for fees on affidavits. *See Morgan, Attorney General v. Dare To Be Great,* 15 N.C. App. 275, 189 S.E. 2d 802 (1972). The appellants did not have the right to cross-examine the applicants for fees.

As to the fifth assignment of error, we reverse in part and affirm in part.

[13] In their sixth assignment of error the appellants argue that Judge Seay committed error in approving the receivers' request to settle tax claims against the corporations. At the time the receivers were appointed, some of the corporations had proposed assessments against them from the Internal Revenue Service. The North Carolina Department of Revenue also had claims against the corporations. A trial on the claims by the Internal Revenue Service had been commenced but was continued when the receivers were appointed. The tax counsel for the receivers negotiated settlements of the tax claims and the receivers petitioned Judge Seay for approval of these settlements.

The evidence at the hearing on this motion was that the Internal Revenue Service had asserted tax deficiencies and penalties against some of the corporations over a period of years from 1950 through 1972 totaling $5,015,519.00. The tax counsel recommended to the court that it approve a settlement of all

claims of the Internal Revenue Service for $540,080.34 and of the North Carolina Department of Revenue for $49,933.05. The court made findings of fact, including a finding of fact that "the negotiated settlement is fair and reasonable and probably represents the best result that can be obtained on behalf of the companies." The court ordered the receivers to execute the proposed settlement of the tax claims.

The appellants contend we should reverse this ruling of the Superior Court. They argue that there are valid defenses to the tax claims which the receiver proposes to settle. They go into some detail as to the validity of these defenses which they contend have not been presented. The appellees concede there may be some defenses to the claims which the receivers propose to pay. However, they say that in light of the fact that there were some fourteen docketed tax cases against the corporations, totaling more than $5,000,000.00 in interest and penalties, it is a good settlement to dispose of all of those cases and settle all claims for less than 11% of what the Internal Revenue Service has claimed. They argue that there are other claims which the Internal Revenue Service is conceding under the proposed settlement which they would not concede were there not a settlement, and which could cost the corporations substantially more than they will pay if the settlement is approved. There was a lengthy hearing on the proposed settlement. The receivers put on substantial evidence as to the complexities of the case and the possibility of having to pay a substantial amount more if the tax claims were not settled. The tax attorneys and the accountants recommended that the tax claims be settled as proposed.

The parties have not cited any North Carolina cases and we have found none which deal with the standard by which we review the trial court in approving settlements of litigation by receivers. The appellees cite *In re Ortiz's Estate*, 27 A. 2d 368 (Del. 1942) which says that the trial court "is only called upon to consider the nature of the claims and the nature of the possible defenses and the situation of the parties and exercise what may be called business judgment in determining whether the proposed compromise is reasonable in the circumstances." *Id.* at 374. We do not believe we can try the tax case in this Court. We believe it was reasonable for Judge Seay to approve the settlement of the tax claims taking into account the possibility of success in defend-

ing them as the evidence before him showed it to be. We hold this approval of the settlements was within Judge Seay's discretion.

The appellants' sixth assignment of error is overruled.

[14] The appellants by their seventh assignment of error contend Judge Seay should not have entered an order in regard to the sale of certain real estate owned by All Star Foods, Inc. in Hyde County. On 24 March 1981 the attorneys for the plaintiffs and the receivers petitioned the court to sell approximately 15,000 acres of land owned by All Star Foods, Inc. in Hyde County. They alleged that since the corporations had been in bankruptcy, there had been a shortage of working capital and that funds would be needed to pay the tax claims and fees which might be allowed. They alleged further that the Hyde County property is a non-income producing asset.

After hearing testimony, Judge Seay found facts and concluded it would be in the best interest of the corporations and a good prudent business decision to sell the Hyde County property. He ordered that permission to sell the land be given. He also ordered the receivers to investigate as to the value of the land and the tax consequences of a sale. He ordered that any sale of the property would be subject to the approval of the court.

We believe it would be premature for us to pass on this interlocutory order. A superior court judge has the power, pursuant to G.S. 1-505, to order the sale of real property held by a receiver. Until there is an order in this case confirming or not confirming the sale, we do not feel we should pass on its propriety. For this reason, we do not rule on the appellants' seventh assignment of error.

In the eighth assignment of error the appellants contend the court erred in not granting the defendants' motion for partial summary judgment. In the complaint the plaintiffs alleged that W. Horace Lowder had issued to himself stock in All Star Mills, Inc. and Lowder Farms, Inc. without adequate consideration and in violation of the plaintiffs' preemptive rights. The defendants in their pleadings asked that the sale of this stock be rescinded and the consideration paid by W. Horace Lowder for the stock be returned to him. At a hearing on a motion for partial summary judgment as to this pleading by the defendants, W. Horace

Lowder testified as to what he had paid for the stock. Judge Seay ruled that the sale be rescinded but deferred until after the trial a ruling on the question of what should be paid to W. Horace Lowder for the stock.

An appeal from Judge Seay's order on this motion for partial summary judgment is premature. We cannot say whether W. Horace Lowder was damaged by the order until a superior court judge has ruled as to what amount of money Mr. Lowder is entitled to receive. We do not pass on the appellants' eighth assignment of error.

[15] In their ninth assignment of error the appellants contend Judge Seay committed error in a ruling on a motion they had made that he recuse himself. On 29 May 1981 the appellants filed a motion in which they asked Judge Seay either to (1) vacate his order of 26 June 1979 retaining jurisdiction after he had rotated out of the district; (2) recuse himself from further proceedings in the action; or (3) refer the matter to another judge for a ruling on the motion to recuse.

The appellants alleged in their motion that Judge Seay had given the appearance of having prejudged the action and had exhibited extreme bias toward them. They listed eight specific instances of his bias. These were (1) permitting a layman, W. Horace Lowder, to represent the corporations at the hearing on the appointment of the receivers; (2) appointing the same receivers for the seven corporations although their interests were different; (3) holding a hearing without notice to the defendants at which the plaintiffs' attorneys were appointed as attorneys for the receivers; (4) on information and belief by the appellants undertaking to contact the bankruptcy judge in an effort to get him to "pursue a course of action" while the corporations were in bankruptcy; (5) expressing from the bench his bias against the corporate defendants for seeking the remedies afforded to them under the bankruptcy laws and the United States Constitution; (6) retaining jurisdiction after he had rotated out of the district under an act of the legislature allowing him to do so, which act had been introduced in the legislature at the instigation of R. L. Brown, III without the knowledge of Judge Seay; (7) making an erroneous ruling during the hearing so that the appellants had difficulty acquiring knowledge as to the terms of a contingent fee

contract between Brown, Brown and Brown and Moore and Van Allen; and (8) obtaining documents, orders and information other than in a judicial proceeding.

The motion was filed on the last day of a three-week hearing on 19 motions which had been filed in the case. Judge Seay made rulings and entered orders on these 19 motions. After doing so, he entered an order that the motion for recusal be referred to Judge F. Fetzer Mills for disposition.

The appellants, relying on *Ponder v. Davis*, 233 N.C. 699, 65 S.E. 2d 356 (1951); *State v. Hill*, 45 N.C. App. 136, 263 S.E. 2d 14, *cert. denied*, 300 N.C. 377, 267 S.E. 2d 680 (1980); and *McClendon v. Clinard*, 38 N.C. App. 353, 247 S.E. 2d 783 (1978), argue that it was error for Judge Seay to rule on the other motions before he had either ruled on the motion for recusal or had referred the matter to some other judge who had ruled on it. We believe this case is distinguishable from the cases relied on by the appellants. In none of those cases did the party making a motion for recusal wait until the presiding judge had virtually concluded the hearings. In this case, Judge Seay had conducted hearings for three weeks on 19 motions. We believe he acted properly in ruling on the motions before referring the matter to some other judge for a hearing on the motion for recusal.

The appellants argue that there was a timely filing of this motion because it had only recently been revealed to them that Judge Seay had held an *ex parte* hearing without notice to the defendants at which time the attorneys for the receivers were appointed. We have held in this opinion that the appellants suffered no prejudicial error from that hearing. If that had been the only matter alleged in the motion to recuse, we believe Judge Seay could have summarily denied the motion. We believe Judge Seay acted properly in ruling on the 19 motions before sending the motion for recusal to another judge for a hearing.

The appellants' ninth assignment of error is overruled.

Affirmed in part; reversed in part.

Judges HEDRICK and BECTON concur.

IN THE MATTER OF: THE APPEAL OF THE CHAPEL HILL RESIDENTIAL RETIREMENT CENTER, INC. FROM THE DENIAL OF ITS CLAIM FOR EXEMPTION BY THE ORANGE COUNTY BOARD OF EQUALIZATION AND REVIEW FOR 1979

No. 8110PTC1317

(Filed 18 January 1983)

1. **Taxation § 25.10— hearing before Property Tax Commission—sufficiency of evidence to support findings and conclusions**

In a hearing by the North Carolina Property Tax Commission, sitting as the State Board of Equalization and Review, concerning a residential retirement center as being exempt from *ad valorem* property taxes under G.S. 105-278.6, G.S. 105-278.7, and Article V, Section 2 of the North Carolina Constitution, the Commission erred in making certain findings and conclusions which were not supported by the evidence; however, the errors shown were not prejudicial since the Commission's essential findings and conclusions were amply supported in light of the whole record.

2. **Taxation § 22.1— residential retirement centers—ineligible for charitable purposes exemption from ad valorem property taxes**

The North Carolina Property Tax Commission, sitting as the State Board of Equalization and Review, properly found that a residential retirement center was not eligible for the charitable purposes exemption from *ad valorem* property taxes, under G.S. 105-278.6, G.S. 105-278.7, and Article V, Section 2 of the North Carolina Constitution. The center's screening procedures, admission guidelines and fee requirements resulted in its activities benefiting only a limited class of elderly persons rather than humanity in general or a significant segment of the community, and the center's obligation to, at sometime in the future, assume the obligations of some of its residents was too tentative and illusory to justify conclusion that the property is "held" for charitable purposes. G.S. 105-277.1.

APPEAL by petitioner from the North Carolina Property Tax Commission. Decision rendered 29 April 1981. Heard in the Court of Appeals 12 October 1982.

The Chapel Hill Residential Retirement Center, Inc. (hereinafter referred to as the Retirement Center, the Center, or petitioner) seeks a charitable purposes exemption from *ad valorem* property taxes, under G.S. 105-278.6, G.S. 105-278.7, and Article V, Section 2 of the North Carolina Constitution. On appeal from a ruling of the Orange County Board of Equalization and Review adverse to petitioner, the North Carolina Property Tax Commission, sitting as the State Board of Equalization and Review, conducted a full record hearing.

The evidence adduced at the hearing tended to show, in pertinent part, the following.

Petitioner is a non-profit North Carolina corporation that owns over 100 acres of land in Orange County. On its land, petitioner operates a complex which amounts to a self-contained community, known as Carol Woods, designed for elderly residents. The Center consists of 230 apartments, a 60 bed health center, service facilities, a dining hall, a social hall, a gift shop, lounge areas and recreational facilities. Still under construction in 1979, the Center was financed by a $12,700,000.00 loan. At the end of 1979, the corporation had assets approaching $16,000,000.00.

The first residents of the Retirement Center moved in during September of 1979. Within six months, all residential units were occupied. The average age of residents of the Center is 77 years.

Prospective residents of Carol Woods make application for residency to the Retirement Center, providing family and personal information, personal health history, and financial information. Applicants must be financially able to support themselves for a reasonable period of time after their admission and they must be physically able to care for themselves in order to be admitted. Applicants' health status, as verified by a medical doctor's report, is considered by the Center in the admission decision.

Once admitted, residents enter into a contract with the Retirement Center known as a Residence and Care Agreement. Under this contract, each resident must pay a "life-occupancy fee" of at least $21,500.00 upon admission and a monthly "service fee" of at least $444.00. A resident who desires more spacious apartment accommodations or who lives alone must pay a larger fee. In return, the Center agrees to furnish care and assistance to each resident in the form of housing, medical care and services, meals, laundry services, maintenance, utilities, housekeeping services, and recreation area access. The resident may terminate the agreement at any time for any reason and the Center may terminate it if, during the first 90 days, in its judgment the resident's physical or emotional condition prevents the resident from adapting to the life-style at the Retirement Center, or if, at any time, it is discovered that the resident made a material misrepresentation or omission in his application for admission, or if, prior to occupancy, a material change in health occurs. Upon

termination of residency or upon the resident's death, the occupancy fee is refunded, subject to a 2% per month deduction. The Center retains the right, "when necessary in its discretion," to adjust the monthly "service fee" to meet operation costs. Residents are required to carry medical insurance. The "service fees," in part, pay for the services rendered in the Carol Woods health center. Medical expenses related to eyeglasses, hearing aids, dental care, podiatry care, and mental health care must be paid by the individual residents.

The Retirement Center has a policy, expressed in its charter and by-laws, to not terminate any resident solely because he becomes financially unable to pay his "service fee," if such inability is due to circumstances beyond his control. In furtherance of this policy, the Residence and Care Agreement provides that "if the Resident presents to the Corporation facts which in the Corporation's opinion, justify special financial consideration, the Corporation will partially or wholly subsidize Resident's Monthly Rate *providing that such subsidy can be granted without impairing the ability of the Corporation to continue its objectives while operating on a sound financial basis.*" (Emphasis supplied.)

As of the date of the hearing, no resident had become unable to pay his monthly "service fee" and no exceptions to the admission requirements had been made. The Retirement Center received gifts and donations from persons who became members of the Board of Directors and from "other interested persons in the community" totaling $47,529.58, which money was used to conduct a feasibility study before forming the corporation. In 1978, the Center received no contributions; during 1979 and 1980, it received $357.00 in contributions.

After hearing all the evidence, the Commission made extensive "findings" and "conclusions" and, ultimately concluding that the Center's activities were not charitable, affirmed the denial of petitioner's claim for exemption. Petitioner appealed.

Jordan, Brown, Price & Wall, by John R. Jordan, Jr. and Robert H. Merritt, Jr.; and Bayliss & Hudson, by William H. Bayliss, for petitioner.

Coleman, Bernholz, Dickerson, Bernholz, Gledhill and Hargrave, by Geoffrey E. Gledhill, for respondent, Orange County.

WELLS, Judge.

The scope of appellate review of cases from the Property Tax Commission is set by G.S. 105-345.2. *See In re McElwee*, 304 N.C. 68, 283 S.E. 2d 115 (1981). Subsection (b) of that statute provides, in part, that the appellate court shall decide all relevant questions of law and interpret constitutional and statutory provisions. Subsection (b) further provides that the appellate court may grant relief if the taxpayer's substantial rights 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.

Subsection (c) provides that the appellate court must look to the whole record in reviewing the findings, inferences, conclusions and decisions of the Commission. Subsection (c) further provides that the rule of prejudicial error applies in appellate review of cases from the Property Tax Commission. While the weighing and evaluation of the evidence is in the exclusive province of the Commission, *In re Appeal of Amp, Inc.*, 287 N.C. 547, 215 S.E. 2d 752 (1975); *Clark Equipment Co. v. Johnson*, 261 N.C. 269, 134 S.E. 2d 327 (1964), where the evidence is conflicting, the appellate court must apply the "whole record" test to determine whether the administrative decision has a rational basis in the evidence, *In re McElwee, supra, quoting, In re Rogers*, 297 N.C. 48, 253 S.E. 2d 912 (1979). The "whole record" test does not permit the appellate court to substitute its judgment for that of the agency when two reasonable conflicting results could be reached, but it does require the court, in determining the substantiality of evidence supporting the agency's decision, to take into account evidence contradictory to the evidence on which the agency decision relies. Although the court does not make a *de novo* decision, the

evidence required to support an agency decision is greater than that required under the "any competent evidence" standard of review. *McElwee, citing Thompson v. Wake County Board of Education*, 292 N.C. 406, 233 S.E. 2d 538 (1977).

By its assignments of error in the present case, petitioner raises questions regarding the exclusion of evidence, questions as to the sufficiency of the evidence to support the Commission's findings of fact, and questions of law regarding what constitutes a "charity" for purposes of *ad valorem* tax exemption. The questions regarding exclusion of evidence are not properly before us: although defendant contends that the excluded evidence was relevant to its case, defendant failed to make any offers of proof and, therefore, has not preserved these exceptions for our review. *See Currence v. Hardin*, 296 N.C. 95, 249 S.E. 2d 387 (1978).

As to petitioner's assignments regarding sufficiency of the evidence to support the findings and conclusions of the Commission, we hold that, in certain instances detailed below the Commission erred, but that the errors shown are not prejudicial, the Commission's essential findings and conclusions being amply supported in light of the whole record.

As to the questions of law before us, we hold that petitioner is not entitled to *ad valorem* tax exemption as a charity under the statutes and Constitution of North Carolina and that, in light of the facts properly found and the evidence contained in the whole record, the Commission's decision refusing to grant petitioner such an exemption was correct.

I

[1] Petitioner contends that certain findings of fact are not supported by the evidence. The Commission found that "each resident of the Center is required to pay a one-time life occupancy fee ranging from $19,500.00 to $54,500.00 initially, and presently from $21,500.00 to $59,500.00, depending primarily on the size of the unit." Petitioner correctly asserts that the figures representing the upper values, $54,500.00 and $59,500.00, are the costs which two persons pay together when they share a unit. The Commission made a similar error with regard to the monthly occupancy fee rates in finding that the fee for each resident ranged from $565.00 to $975.00 initially and from $656.00 to $1,201.00 at the

time of the hearing. Again, the upper figures represented the fee required of two persons sharing a unit and, thus, they were incorrect. Nevertheless, in light of the facts in evidence, the minimum figures as to each charge were correctly found. These minimum figures clearly support the ultimate conclusion of the Commission. This error is harmless.

The Commission also found that "payment of the occupancy fee entitles the resident to a lifetime occupancy in an unfurnished apartment." While conceding that the Retirement Center does not furnish the apartments, petitioner contends that this finding was error because it overlooks the fact that each resident has numerous services, facilities, and other amenities available by virtue of his residence in the Center. This finding is supported by substantial, uncontroverted evidence and was properly made. Other findings of the Commission make clear the extent of services, facilities and amenities available to residents of the Center.

The Commission found that "the occupancy agreement may be terminated by the Center for a material adverse change in a resident's health or for failure to pay the monthly service charges." Petitioner contends that this finding was erroneous because these rights of termination are substantially qualified by the Residence and Care Agreement. While a change in health may not be the basis of a resident's termination after occupancy, this finding as made by the Commission apparently was taken directly from the language of the Center's standard form Residence and Care Agreement which was in evidence. Elsewhere in its decision, the Commission properly made express findings regarding the protections extended to residents who, after acceptance, become unable to pay. The Commission's failure to expressly find that *after occupancy* a resident cannot be terminated for an adverse change in health is not prejudicial error.

The Commission found that "each resident is entitled to 15 days per year at the Center's Health Care facility without extra charge." Petitioner contends that this finding was erroneously made because it shows that the Commission overlooked the fact that residents can carry over unused cost-free days to subsequent years. This contention is without merit. The finding is clearly supported by competent, uncontroverted evidence. Petitioner has suffered no prejudice due to the Commission's failure to find facts regarding the carry-over provisions.

The Commission concluded "that each applicant must demonstrate . . . that he can afford a monthly service charge greater than the income of many North Carolina residents," that "anyone who is accepted at the Center could live independently at practically any place he chose" and that "collectively, the residents are required to pay the total costs of all the services they receive." These "conclusions" actually constitute findings of fact. Petitioners contend that they are not supported by the evidence. The finding that the residents must, collectively, pay for everything they receive is supported by substantial evidence and was properly made. There was no evidence before the Commission regarding the income of the residents of North Carolina or the cost of living at places other than the Retirement Center; the findings as to those facts were erroneously made since they are not supported by any evidence. Nevertheless, in light of the whole record, these errors are harmless.

II

[2] Petitioner contends that the Tax Commission erred in concluding that its property is not used for charitable purposes and in denying it exemption from *ad valorem* taxation.

Article V, § 2(3) of the North Carolina Constitution provides that the General Assembly may exempt from taxation property held for charitable purposes. Acting pursuant to this grant of authority, the General Assembly enacted G.S. 105-278.6 and G.S. 105-278.7 which provide in pertinent part as follows:

> G.S. § 105-278.6. *Real and personal property used for charitable purposes.*
>
> (a) Real and personal property owned by:
>
> . . .
>
> (2) A home for the aged, sick, or infirm;
>
> . . .
>
> shall be exempted from taxation if: (i) As to real property, it is actually and exclusively occupied and used, and as to personal property, it is entirely and completely used, by the owner for charitable purposes; and (ii) the owner is not organized or operated for profit.

(b) A charitable purpose within the meaning of this section is one that has humane and philanthropic objectives; it is an activity that benefits humanity or a significant rather than limited segment of the community without expectation of pecuniary profit or reward. The humane treatment of animals is also a charitable purpose.

(c) The fact that a building or facility is incidentally available to and patronized by the general public, so long as there is no material amount of business or patronage with the general public, shall not defeat the exemption granted by this section.

(d) Notwithstanding the exclusive-use requirements of this section, if part of a property that otherwise meets the section's requirements is used for a purpose that would require exemption under subsection (a), above, if the entire property were so used, the valuation of the part so used shall be exempted from taxation.

G.S. § 105-278.7. *Real and personal property used for educational, scientific, literary, or charitable purposes.*

(a) Buildings, the land they actually occupy, and additional adjacent land necessary for the convenient use of any such building shall be exempted from taxation if wholly owned by an agency listed in subsection (c), below, and if:

(1) Wholly and exclusively used by its owner for nonprofit educational, scientific, literary, or charitable purposes as defined in subsection (e), below . . . .

. . .

(c) The following agencies, when the other requirements of this section are met, may obtain property tax exemption under this section:

(1) A charitable association or institution . . . .

. . .

(e) The fact that a building or facility is incidentally available to and patronized by the general public, so long as there is no material amount of business or patronage with the general

public, shall not defeat the exemption granted by this section.

(f) Within the meaning of this section:

. . .

(4) A charitable purpose is one that has humane and philanthropic objectives; it is an activity that benefits humanity or a significant rather than a limited segment of the community without expectation of pecuniary profit or reward. The humane treatment of animals is also a charitable purpose.[1]

Petitioner relies on *In re Taxable Status of Property,* 45 N.C. App. 632, 263 S.E. 2d 838, *disc. rev. denied,* 300 N.C. 374, 267 S.E. 2d 684 (1980) in its argument that its property is wholly exempt from *ad valorem* taxation as a charity. In that case, this court held that the Seventh Day Adventist Church had been properly granted exemption from *ad valorem* taxation because the property which was owned by the church was gratuitously donated for use by W. R. Winslow Memorial Home, Inc. and because the occupant, Winslow Home, was a charitable institution.

For purposes of our decision in this case, the relevant facts in the Winslow Home case were as follows.

> The W. R. Winslow Memorial Home, Inc. is a nursing home operated mainly for the aged and infirm located in Elizabeth City. . . . The home is run as a nonprofit corporation separate from the church . . . . There are no religious or other restrictions on entry, except that maternity, tubercular, alcoholic, mental, or drug addicted patients are forbidden.
>
> All patients must be able to pay the home's fee when they are admitted, but that rule is violated in practice. . . .

1. The exclusive use requirement in the above statutes is qualified by both statutory and decisional law. *See In re Forestry Foundation,* 296 N.C. 330, 250 S.E. 2d 236 (1979), *In re Wake Forest University,* 51 N.C. App. 516, 277 S.E. 2d 91, *disc. rev. denied,* 303 N.C. 544, 281 S.E. 2d 391 (1981). It is clear that property "held" for exempt purposes may fall under the definition of property "used" for exempt purposes. *See Cemetery, Inc. v. Rockingham County,* 273 N.C. 467, 160 S.E. 2d 293 (1968). For cases of similar import from other jurisdictions, *see* Annot. 54 A.L.R. 3d 9 (1974).

> Medicaid paid all or a portion of the home's fee for most of its patients, but Medicaid placed a ceiling on reimbursements. The home was not allowed to charge the patients or their families the difference between the Medicaid payment and the home's fee. Medicaid paid the home $28.00 per day for skilled care; the home's expenses for skilled care were $31.46 per day. Medicaid paid $23.30 per day for intermediate care; the home's expenses were $24.82. The difference was made up by donations, chiefly from the Winslow Foundation. No patient had ever been forced to leave the home because he or she could not pay the home's fee.
>
> Some patients had been admitted who did not qualify for Medicaid and who could not pay the fee; others were admitted before their Medicaid eligibility or other fee arrangements were determined. It was a policy of the home to try to determine the method of payment before admission. There had been a surplus in recent years, after donations, which the home had used to air condition the original building. The home had no stockholders and paid no dividends. Its assets would be distributed to the church if the corporation were dissolved. . . .

45 N.C. App. at 633-34; 263 S.E. 2d at 839-40.

In the Winslow Home case, this court found the following comment persuasive as to the meaning of the word "charity" as it is used in G.S. 105-278.7.

> "The concept of charity is not confined to the relief of the needy and destitute, for 'aged people require care and attention apart from financial assistance, and the supply of this care and attention is as much a charitable and benevolent purpose as the relief of their financial wants.' "

Central Board on Care of Jewish Aged, Inc. v. Henson, 120 Ga. App. 627, 171 S.E. 2d 747 (1969), *quoting Bozemon Deaconess Foundation v. Ford*, 151 Mont. 143, 439 P. 2d 915 (1968). While we affirm this statement as it applies to the Winslow Memorial Home, the facts of the present case demonstrate that merely supplying care and attention to elderly persons cannot, alone, constitute charity. Petitioner does not rely on outside funding in order to operate. The contributions it has received are not a

primary source of its financing. The Center is more in the nature of a cooperative operated for the mutual benefit of its residents who collectively pay for their care; it is not an institution providing for the special needs of individuals who are in need of charity, the aid of whom benefits society as a whole in addition to the residents. The present case is distinguishable from *In re Taxable Status of Property* and the Georgia case it relied upon because those cases, unlike this one, involved property owners who were receiving and relying upon donations from outside sources for the operation of their programs.

Petitioner's screening procedures, admissions guidelines and fee requirements result in its activities benefiting only a limited class of elderly persons rather than humanity in general or a significant segment of the community.

Petitioner next contends that it is charitable because it has a policy under which it will not, if possible, terminate any resident if, solely because of circumstances beyond his control, he becomes financially unable to pay his "service fee." Petitioner is contending, essentially, that its property is "held" for an exempted use. This argument cannot be sustained for two reasons. First, where property is being *used* for non-exempted purposes, it cannot classify as being *"held"* for exempted purposes. *See Cemetery, Inc. v. Rockingham County, supra.* The current use of the property prevents it from being "held" for some other use. Under the charter and bylaws of the Retirement Center and the provisions of the Residence and Care Agreement, petitioner is not bound to retain residents who become unable to pay their "service fee," the charter and bylaws merely reciting an espoused "policy" and the Residence and Care Agreement leaving in the unbridled discretion of the corporation the decisions as to whether the resident is in fact in need of financial aid and whether the extension of such aid to the indigent resident will be harmful to petitioner's objectives and financial well-being. The Center's obligation to, at some time in the future, assume the obligations of some of its residents is too tentative and illusory to justify a conclusion that the property is "held" for charitable purposes.

Our holding is supported by our consideration of the provisions of G.S. 105-277.1, which provided in pertinent part, as follows:

§ 105-277.1. *Property classified for taxation at reduced valuation.*

(a) The following class of property is hereby designated a special class under authority of Article V, Sec. 2(2), of the North Carolina Constitution and shall not be assessed for taxation: The first seven thousand five hundred dollars ($7,500) in assessed value of property owned by a North Carolina resident and, if real property or a mobile home, occupied by the owner as his or her permanent residence and, if household personal property, used by the owner in connection with his or her permanent residence, provided that, as of January 1 of the year for which the benefit of this section is claimed:

(1) The owner is either (i) 65 years of age or older or (ii) totally and permanently disabled, and

(2) The owner's disposable income for the immediately preceding calendar year did not exceed nine thousand dollars ($9,000) . . . .

. . .

For married applicants residing with their spouses, the disposable income of both spouses must be included, whether or not the property is in both names.

(b) Definitions.—When used in this section, the following definitions shall apply:

. . .

(3) "Permanent residence" means legal residence. It includes the dwelling, the dwelling site, not to exceed one acre, and related improvements. The dwelling may be a single family residence, a unit in a multi-family residential complex or a mobile home. . . .[2]

To allow petitioner's property to qualify for exemption because its residents are elderly would be to give such persons clearly preferential treatment over those persons over 65 years of age

2. By amendments to the statute, the dollar amounts of value and income are now $8,500.00 and $9,000.00, respectively.

who continue to live in their own discretely owned residences. While we recognize and applaud efforts similar to Carol Woods as being a progressive and desirable approach to the residential and health care and personal security of elderly persons, these laudable aspects of petitioner's operation do not suffice to bring it within the statutory classification of a charitable purpose.

In light of the whole record, petitioner is not entitled to exemption from *ad valorem* taxation under the provisions of G.S. 105-278.6 or G.S. 105-278.7 because no part of its property is being used for charitable purposes. *See and compare* cases discussed in *Annot.*, 37 A.L.R. 3d 565 (1971). The material findings and conclusions of the Property Tax Commission are supported by competent, material and substantial evidence in light of the whole record. The Order of the Property Tax Commission is

Affirmed.

Judges HEDRICK and ARNOLD concur.

STATE OF NORTH CAROLINA v. WILLIAM EDWARD HAMLETTE

No. 829SC102

(Filed 18 January 1983)

1. **Criminal Law § 73.4— victim's statements to police—admissibility as res gestae**

In a prosecution for second degree murder, the trial court correctly admitted into evidence as part of the *res gestae* certain statements made by the victim to police officers shortly after he was shot. The prosecution was a retrial of defendant's case, and the Supreme Court had found the victim's statements admissible in defendant's first trial. The only additional evidence defendant offered upon retrial was that the victim had visited the defendant and his accomplice or both on different occasions; however, that evidence did not indicate that the victim was untruthful when he stated he did not know where defendant and his accomplice lived.

2. **Homicide § 16.1— dying declaration—later statement indicating hope of recovery**

The fact that a victim indicated some hope of recovery on a date after having previously given a statement qualifying as his dying declaration, did not preclude the earlier statement from qualifying as a dying declaration.

3. Criminal Law § 69— telephone conversation—identity of person on other end of telephone inadmissible

In a prosecution for second degree murder where the victim was shot while speaking on the telephone in a telephone booth, and where an investigating officer testified that he picked up the receiver and discovered that someone was on the line, that he identified himself and the other person then identified herself, the trial court correctly sustained the State's objection as to the other person's identity since the officer admitted he had never talked to the other person on the telephone before, did not know or recognize her voice and did not know if in fact it was the person identified on the telephone.

4. Criminal Law § 35— offense committed by another—evidence corroborating defendant's version improperly excluded

The trial court improperly excluded the testimony of two officers which tended to show that the person who defendant contended committed the murder he was charged with found the gun and delivered the weapon to the officers after being instructed to do so. The excluded evidence corroborates defendant's version of the shooting that the other person was the guilty party and its exclusion was prejudicial to the defendant.

5. Criminal Law § 35— negative evidence that crime not committed by another—inadmissible

The trial court erred in allowing a detective and a lieutenant to testify that in the course of their investigations they were unable to establish that the person who defendant had said shot the victim had taken any part in the killing of the victim since the extent of their involvement in the case was insufficient to form an adequate basis for admission of their negative testimony. Neither the detective nor the lieutenant, without relying upon statements made by others, was in a position to know first hand that the person whom defendant accused of shooting the victim did or did not take part in the shooting or that the gun in evidence was or was not the weapon used in the shooting.

APPEAL by defendant from *Hobgood, Judge.* Judgment entered 4 September 1981 in Superior Court, PERSON County. Heard in the Court of Appeals 13 September 1982.

The present appeal is the second appeal of this case. In *State v. Hamlette*, 302 N.C. 490, 276 S.E. 2d 338 (1981) ("*Hamlette I*"), defendant was found guilty of murder in the first degree of Willard Lawrence Bailey. The Supreme Court reversed the conviction for erroneous exclusion of evidence offered by the defendant tending to show that it was not the defendant, but State's witness—Earl Torain—who shot Bailey. On retrial, defendant was found guilty of second degree murder. From the conviction and judgment, defendant appeals.

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

Ramsey, Hubbard & Galloway, by Mark Galloway, for defendant appellant.

JOHNSON, Judge.

On 21 February 1980, around 11:00 p.m., in Roxboro, North Carolina, Willard Lawrence Bailey was shot three times. Shortly after the shooting Bailey talked with three law enforcement officials and one lay witness. Bailey identified the defendant as the person who shot him to each of these witnesses. Bailey died 5 March 1980 as a result of the gunshot wounds.

Defendant presented evidence which tended to show that he did not shoot Bailey, but that Bailey was shot by Earl Torain. Defendant presents eleven assignments of error and argues that the trial court erred in its evidentiary rulings.

I

[1] Defendant contends that the trial court committed prejudicial error in permitting Officer Pricilla Betterton and Detective Steve Clayton to testify to statements Bailey made to them under the *res gestae* exception to the hearsay rule. Defendant argues that the statements were untrustworthy in that they contained a fabrication, to wit; when Bailey was asked if he knew where defendant and Torain lived, Bailey stated that he did not know and further, Bailey's statements were made only in response to specific inquiries and were not made contemporaneously with the events or with enough spontaneity to qualify as admissible *res gestae* statements.

Except for the additional argument that Bailey's utterances contained a fabrication, defendant raised this exact objection at his previous trial. As in *Hamlette I*, the evidence in this case showed that at 11:00 p.m. on 21 February 1980, in Roxboro, North Carolina, Pricilla Betterton, an off-duty policewoman, while sitting in her parked car in front of a Convenience Corner store, heard four to six gunshots. Approximately one minute after hearing the shots she saw Bailey run past her car into the Convenience Corner store. As Bailey emerged from the store Betterton approached him. She saw blood below his rib cage and in his mouth

and asked him what was wrong. He replied that he had been shot. She told him to sit down and asked him who shot him. Bailey replied, "William Hamlette." Bailey also stated that Hamlette left with Earl Torain in a 1965 Mercury. Betterton then went into the store, got a paper bag upon which to make notes, and returned to Bailey. She again asked him who shot him, and for the second time he replied, "William Hamlette." She asked if they had an argument and Bailey responded that he "was hurting" and wanted an ambulance. This conversation between Betterton and Bailey took place within three minutes of the shots.

Det. Clayton arrived at the scene and observed Bailey lying on the sidewalk with blood running from his mouth and blood stains on his shirt. Clayton talked to Officer Betterton for about two minutes and proceeded to talk with Bailey at approximately 11:10 p.m. In response to Clayton's questions, Bailey stated he had been shot by William Hamlette, Earl Torain was with Hamlette, Hamlette and Torain left in a 1965 Mercury headed north toward South Boston, the shooting had occurred at the telephone booth, and "he could see the people when the shooting occurred." Clayton asked Bailey if he knew where defendant and Torain lived. Bailey responded that he did not. Bailey was then transported by ambulance to Person County Hospital.

The trial court conducted *voir dire* to determine the admissibility of Bailey's statements to the officers. At the conclusion of the hearing, the court ruled that the statements were admissible under the *res gestae* exception to the hearsay rule.

The evidence regarding Bailey's statements to the officers and the circumstances surrounding the taking of the statements is identical to that presented in *Hamlette I*, with the exception of Bailey's statement that he didn't know where defendant and Torain lived and defendant's evidence that Bailey had visited Torain's and defendant's residences on prior occasions. On the basis of this additional evidence, defendant argues that the Supreme Court's ruling that the statements are admissible as spontaneous utterances in *Hamlette I* is not applicable in the case *sub judice*.

> Statements are admissible as spontaneous utterances when made by a participant or bystander in response to a startling or unusual incident whereby the declarant is without oppor-

> tunity to reflect or fabricate. *State v. Bowden*, 290 N.C. 702, 228 S.E. 2d 414 (1976); *see generally*, 1 Stansbury's N.C. Evidence § 164 (Brandis rev. 1973); McCormick on Evidence § 297 (1972). "[S]uch statements derive their reliability from their spontaneity when (1) there has been no sufficient opportunity to plan false or misleading statements, (2) they are impressions of immediate events and (3) they are uttered while the mind is under the influence of the activity of the surroundings." *State v. Deck*, 285 N.C. 209, 214, 203 S.E. 2d 830, 833-34 (1974); *see also State v. Johnson*, 294 N.C. 288, 239 S.E. 2d 829 (1978); *State v. Cot*, 271 N.C. 579, 157 S.E. 2d 142 (1967). It is this *spontaneity* and not being *part* of the incident which makes it relevant evidence. For example, where the utterance is made by an observer and not a participant, the statement may be admissible. *See*, e.g., *State v. Feaganes*, 272 N.C. 246, 158 S.E. 2d 89 (1967). Also, statements made after and therefore not part of the event are admissible if they are spontaneous utterances. *See*, e.g., *State v. Spivey*, 151 N.C. 676, 65 S.E. 995 (1909); Annot., 4 ALR 3d 149 (1965). (Emphasis original.)

Hamlette, 302 N.C. at 494-495, 276 S.E. 2d at 342. The Supreme Court ruled that the following facts and circumstances supported the trustworthiness of Bailey's statements:

> [O]nly three minutes passed between the witness Betterton's hearing of the shots and Bailey's statement that defendant shot him. Within thirteen minutes after the shooting, Bailey told Clayton that defendant had shot him. When he made these statements, he was suffering from three gunshot wounds, was bleeding from the mouth and chest, was at the crime scene and, at the time of the second statements, was being prepared by ambulance attendants for the trip to the hospital.

Id.

The Court stated that the statements do not in any way lose their spontaneous character because they were made in response to questions such as "What is wrong?", "Who shot you?", and "How did they leave?"

Defendant argues that certain evidence produced tends to show that Bailey fabricated his statements regarding his knowl-

edge of where Torain and defendant lived and that the trial court failed to consider this additional evidence in making its ruling.

The evidence defendant points to may indicate that Bailey had visited either Torain or defendant or both on different occasions. However, it does not indicate that Bailey was untruthful when he stated he did not know where defendant and Torain lived. Bailey's answers to Det. Clayton's questions were not obviously false; indeed it is possible that Bailey did not know their exact street addresses. The evidence defendant presented upon retrial contains no additional indication that Bailey had an opportunity to reflect upon or fabricate his statements at the time of the shooting.

It must be remembered that the slight possibility that Bailey may not have been accurate in all of his statements is to be viewed in light of the circumstances under which the statements were made. Bailey had just been shot three times, was in pain and bleeding. Nothing in the record suggests that Bailey had the opportunity or time to have planned to mislead or reflect upon and prepare false statements. Rather, the responses are more appropriately characterized as excited utterances produced by a startling event.

The trial court considered all of the evidence including that which indicated Bailey knew where Torain and defendant lived and had visited them on various occasions. The trial court correctly admitted the subject statements into evidence as part of the *res gestae* of the event under the rule announced in *Hamlette I.* Therefore, defendant's assignment is without merit.

II

[2] Defendant next argues that the trial court erred in admitting into evidence Bailey's statement to Lieutenant Ashley that defendant was the one who shot him.

This exact assignment of error was also raised in *Hamlette I,* where the Supreme Court held the statements admissible under the dying declaration exception to the hearsay rule. Defendant contends that the ruling in *Hamlette I* is not applicable because there was evidence presented upon retrial that Bailey, while

hospitalized, had indicated that he would "be okay," thus negating a belief in impending death.

The trial court conducted *voir dire*. The evidence showed that Lt. Ashley talked to Bailey in the emergency room at Person County Hospital. The conversation took place between thirty minutes and one hour after Bailey was shot. Bailey had gunshot wounds to his chest, had not yet undergone surgery, and was being administered blood transfusions. Bailey was in extreme pain and appeared to have difficulty breathing. Ashley asked Bailey who shot him. Bailey twice stated that "William Hamlette" shot him. The following morning before Bailey underwent surgery, Ashley returned to Person County Hospital and spoke to him in the Intensive Care Unit. Bailey again identified defendant as the person who shot him. At the time no one told Bailey he was dying and Bailey did not indicate he had such a belief.

Debbie Moss testified that she talked to Bailey at Person County Hospital the night of 21 February 1980, but that Bailey did not say anything about how he felt. Sometime after 21 February 1980, she again saw Bailey at Person County Hospital at which time Bailey stated that he would "be okay."

In *Hamlette I* the Supreme Court stated:

> The wounds, the time and the surroundings were such that a man could justifiably believe his death was imminent and believe he had no hope of recovery. The fact that Bailey lingered for several days does not render his statement inadmissible.

302 N.C. at 497, 276 S.E. 2d at 343.

In the case *sub judice* the trial court held that Bailey's statements to Ashley on the evening of 21 February 1980, were admissible as dying declarations and his later statements to Ashley on 22 February 1980 were admissible to corroborate the earlier dying declarations.

The evidence presented upon retrial is virtually identical to that presented in *Hamlette I*. The trial court's ruling is consistent with the Supreme Court's decision in *Hamlette I*. The fact that Bailey indicated some hope of recovery on a date after having previously given a statement qualifying as a dying declaration,

does not preclude the earlier statement from qualifying as a dying declaration. *State v. Hamlette, supra, citing State v. Harding,* 291 N.C. 223, 230, 230 S.E. 2d 397, 401 (1976). The defendant's assignment of error is without merit.

III

[3] Defendant next contends that the court erred in excluding testimony from Det. Clayton as to the identity of the person on the telephone line being used by Bailey at the time he was shot.

On direct examination Det. Clayton testified that after Bailey was removed from the scene he observed the damage to the telephone booth Bailey was using and noticed that the telephone receiver was hanging from the hook. On cross-examination Clayton testified that he picked up the receiver and discovered that someone was on the line, that he identified himself and the other person then identified herself. Defense counsel sought to have Clayton testify to the name the person identified herself by. The court sustained the State's objection. Defendant's motion to include Clayton's answer into record was allowed. In the jury's absence Clayton testified, "She said she was Debbie Moss." He admitted he had never talked to Debbie Moss on the telephone before, did not know or recognize her voice and did not know if in fact it was Debbie Moss on the telephone. Det. Clayton testified further that he never interviewed anyone named Debbie Moss.

At the conclusion of this hearing, the court again sustained the objection. The jury was returned to the courtroom and the defense was permitted to conclude its cross-examination of Det. Clayton. Lt. Melvin Ashley was called as the State's next witness. The State sought to introduce Bailey's statements to Ashley shortly after the shooting as dying declarations.

The court again conducted *voir dire* during which Debbie Moss testified for the defendant. She testified that she heard gunshots on the night in question while talking on the phone with Bailey. She stayed on the phone for a while. Someone spoke and identified himself as Det. Steve Clayton and she then identified herself. Det. Clayton told her to "come to town." Moss went to Person County Memorial Hospital and talked to Bailey. Defendant further examined Moss regarding statements Bailey purportedly made to her regarding how he felt.

Defendant's examination of Moss during Lt. Ashley's *voir dire* was to show that (1) she went to Person County Memorial Hospital shortly after the shooting, (2) she talked to Bailey and (3) at the time she talked to Bailey he had hopes of survival. The State was attempting to introduce Bailey's statements to Lt. Ashley as dying declarations, while defendant was seeking to have Bailey's statements to Ashley excluded.

Defendant argues that Moss' testimony given during Ashley's *voir dire* establishes the identity of the person Det. Clayton talked to on the telephone shortly after the shooting, and that the court therefore erred in excluding Clayton's testimony that the person identified herself as "Debbie Moss" as hearsay.

Before a witness may relate what he heard during a telephone conversation with another person, the identity of the person with whom the witness was speaking must be established. The identity of the person may be established by testimony that the witness recognized the other person's voice, or by circumstantial evidence. *State v. Williams*, 288 N.C. 680, 220 S.E. 2d 558 (1975).

Defendant is correct that Moss' testimony establishes the identity of the person with whom Det. Clayton spoke to by telephone shortly after the shooting. However, this evidence was presented during the *voir dire* hearing regarding Lt. Ashley's testimony and did not relate back to the examination of Det. Clayton. At the time defendant presented this evidence as to the identity of Debbie Moss, all examination of Det. Clayton had concluded, the court had reaffirmed its ruling and the State had called and was examining its next witness regarding other matters. At no time after the court's ruling and after Moss' testimony did defendant request the court to reconsider its earlier ruling. We hold that the court's ruling was correct. This assignment of error is without merit.

IV

[4] By assignments of error 6, 7, 8 and 11, defendant contends that the court erred in excluding certain testimony from the defendant and Lieutenant Donnell Clayton concerning statements made to them by Earl Torain.

Defendant testified it was not he, but Earl Torain who shot Bailey. Further, that while he was driving his car north on U.S. 501 Torain, who was in the passenger's seat, directed defendant to turn around and enter the Convenience Corner parking lot. Defendant did so without any knowledge of Torain's intention to shoot someone. Defendant testified Torain shot Bailey without warning.

Defendant argues that certain testimony excluded by the trial court would show that Torain possessed ill will toward Bailey and a motive to shoot him.

Defendant was allowed to testify that on the Monday night before the Thursday shooting, he drove Torain to Debbie Moss' house. Torain entered the house while defendant remained in the car. Approximately five minutes later Torain returned to the car, followed by Bailey who was holding a shotgun. Defendant and Torain drove away. The trial court excluded testimony that Torain stated as they left, "Let's go, but he won't always have the ups on me like this." The court also would not permit defendant to testify that on the night of the shooting, Earl Torain stated, "Willard Bailey thinks he's running things down at Debbie's house." Defendant was allowed to testify that he and Torain drove past the Convenience Corner. The trial court excluded testimony that Torain stated to defendant, "turn around and go back, that's the man I want to see." Defendant was allowed to testify that as they drove toward the Convenience Corner, they stopped at the Foodliner where Torain attempted to make a telephone call. The trial court excluded defendant's testimony that Torain stated, "the line was busy now, we'll try another booth before we get there, before we get to Debbie Moss' house." Defendant was allowed to testify that immediately after the shooting he stopped at Roy Paylor's place where Torain got out and left with the gun. Defendant went home and shortly after he arrived home Torain came to his apartment and made a statement to him. The trial court excluded defendant's testimony that Torain told him, "Be cool, don't say nothing, everything is under control."[1]

1. This statement is virtually the same as evidence excluded in the first trial which the Supreme Court held was prejudicial error to exclude. 302 N.C. at 500-02, 276 S.E. 2d at 345-46.

Lt. Ashley was allowed to testify that on 28 February 1980 he talked to Torain. Torain told him that on the night of the shooting Hamlette drove the car, turned it around, pulled up to the telephone booth and shot the victim. After the shooting, Torain got out of the car at Roy Paylor's place and ran.

Det. Steve Clayton and Lt. Donnell Clayton testified that Earl Torain was also arrested and charged with the shooting. Lt. Clayton testified further that he and Lt. Ashley talked to Torain on a Thursday shortly after the shooting. They asked him about the gun and told him they needed it. The trial court then excluded the following testimony of Lt. Clayton:

> A. I think after he finished giving the statement, I told him that we needed the gun and I asked him did he think that he could get the gun, and he said that he didn't—he didn't know, he'd try.
>
> Q. Did he tell you where he had found the gun?
>
> A. He told me that he found the gun in the ditch not far from an old place called the Chicken Shack on the Clay Road where he thought that the subject, where he thought Hamlette threw the gun out.
>
> Q. All right. Did he tell you how long the gun had been in his possession?
>
> A. He told me when he called me that he had just got back to the house after he had found the gun, so evidently he just found it then.

Lt. Donnell Clayton was then allowed to testify that on 6 March 1980 Torain called and informed him that he had the gun and on that same date Torain delivered the gun to him. The gun was wrapped in a towel. Both were in a brown paper bag.

Defendant contends this excluded evidence corroborates his version of the shooting that Torain is the guilty party and its exclusion was prejudicial to the defendant. We agree.

The applicable principles of law regarding the introduction of evidence tending to show that someone other than the defendant committed the crime charged are stated in *Hamlette I.*

> A defendant may introduce evidence tending to show that someone other than defendant committed the crime charged, but such evidence is inadmissible unless it points directly to the guilt of the third party. Evidence which does no more than create an inference or conjecture as to another's guilt is inadmissible . . . (Citations omitted.) "[T]he admissibility of another person's guilt now seems to be governed, as it should be, by the general principle of relevancy under which the evidence will be admitted unless in the particular case it appears to have no substantial probative value." 1 Stansbury's N.C. Evidence, § 93 at 302-03 (Brandis rev. 1973).

302 N.C. at 501, 276 S.E. 2d at 346.

The excluded evidence goes beyond inference or conjecture. It is all relevant as direct or corroborative evidence pointing directly to Torain as the guilty party and should have been admitted. Its exclusion was prejudicial error.

V

[5] Defendant next contends that the trial court committed error in the admission of negative testimony by Det. Clayton and Lt. Clayton.

Over defendant's objection, Det. Clayton testified that in the course of his investigation he was not able to establish that Earl Torain had taken any part in the killing of Willard Bailey; nor was he able to determine exclusively whether the gun in evidence had anything to do with the death of Willard Bailey.

Over defendant's objection, Lt. Clayton testified that in the course of his investigation he never found any evidence to establish that Earl Torain had shot Willard Bailey.

Defendant argues that the testimony was inadmissible as negative evidence and as an improper expression of opinion on the ultimate facts of the case. The State contends the witnesses were qualified to testify concerning information within their own knowledge resulting from their own investigations.

Our courts have defined negative evidence as testimony that an alleged fact does not exist. *Johnson & Sons, Inc. v. R.R. and Johnson v. R.R.*, 214 N.C. 484, 199 S.E. 704 (1938). *See also Black's Law Dictionary*, 4th Ed., Rev. 1968. In allowing negative

testimony that a deceased did not have large sums of money, this Court stated:

> Negative evidence is not inadmissible merely because it is negative . . . Upon a showing that a witness was in a position to know of the existence of a fact had it been true, negative testimony as to the nonexistence of the fact is not incompetent . . . There was testimony tending to show that both witnesses were familiar with decedent's financial condition and were in a position to know whether decedent possessed large sums of money on the days in question. The weight to be accorded this negative testimony was a question for the jury. (Citations omitted.)

Archer v. Norwood, 37 N.C. App. 432, 435, 246 S.E. 2d 37, 40 (1978). In *State v. Tedder*, 258 N.C. 64, 66, 127 S.E. 2d 786, 787 (1962) the court stated:

> [A] witness is not competent to testify as to the nonexistence of a fact when his situation with respect to the matter is such that the fact might well have existed without the witness being aware of it.

A similar principle is stated in *Vann v. Hayes*, 266 N.C. 713, 716, 147 S.E. 2d 186, 188 (1966). The question subject to negative testimony concerned whether headlights were burning on a car. The court stated:

> With respect to negative evidence, that is, that one did not see or one did not hear, it was meaningless if the non-seeing or non-hearing are equally consistent with the occurrence of the events themselves. The showing that a witness was in a position to hear or see or would have heard or would have seen is a prerequisite to the admissibility of negative evidence that the witness did not hear or see. In the absence of such preliminary showing negative testimony does not possess sufficient probative force to require its submission to a jury.

The testimony objected to here is negative testimony. The essential question therefore, is whether the officers' position with respect to the matter was such that they would have known of the existence of the fact had it been true.

The record shows that Det. Clayton's investigation and Lt. Clayton's involvement in the case were limited.[2] When Det. Clayton arrived at the scene of the shooting, Officer Betterton informed him as to matters Bailey stated to her. Det. Clayton then spoke with Bailey, who corroborated Betterton's report. Shortly after midnight he obtained arrest warrants for Hamlette and Torain on charges of assault with a deadly weapon inflicting serious injury with intent to kill. He arrested Hamlette during the early morning hours of 22 February 1980, but was unable to locate Torain. Torain was subsequently arrested, but Det. Clayton did not participate in his arrest. Det. Clayton searched Hamlette's car and apartment and found no evidence connected to the crime. On 6 March 1980 he received a bag containing a towel and a .32 caliber pistol from Lt. Clayton and sent this evidence to the SBI for analysis. The Roxboro Police Department failed to test the gun for fingerprints and no paraffin tests were performed on Hamlette. Det. Clayton did not know how Lt. Clayton obtained the gun.

In late February 1980 Torain approached Lt. Clayton to talk to him about the shooting. He directed Torain to Lt. Ashley who was the assigned investigating officer in the case. Lieutenants Clayton and Ashley interrogated Torain, who stated that Hamlette shot Bailey. On 6 March 1980 Torain gave Lt. Clayton a bag containing a towel and a .32 caliber pistol. Lt. Clayton delivered the bag and its contents to Det. Clayton. Lt. Clayton was unable to identify the pistol at the time of the retrial.

The extent of Det. Clayton's investigation and Lt. Clayton's involvement in this case was insufficient to form an adequate basis for admission of their negative testimony. Neither Det. Clayton nor Lt. Clayton, without relying upon statements made by others, was in a position to know first hand that Torain did or did not take part in the shooting or that the gun in evidence was or was not the weapon used in the shooting. This particular negative testimony was inadmissible hearsay evidence in that its value for truthfulness depended in part upon the veracity or com-

2. Lieutenant Clayton was not an investigator in the case. The question asked of him assumed that he was an investigator when in fact he was not. His only involvement was to direct Torain to Lt. Ashley, the assigned investigator, whom Lt. Clayton assisted in taking a statement from Torain and to deliver a bag and its contents to Detective Clayton.

petency of some other person. The negative testimony was also inadmissible because it was no more than conjecture and speculation. The admission of this evidence was prejudicial error.

In light of our holding that the evidence was improperly admitted, we do not find it necessary to address defendant's other assignments of error regarding this testimony.

Defendant is entitled to a new trial.

New trial.

Chief Judge MORRIS and Judge BECTON concur.

BETTYE HAIRSTON, ADMINISTRATRIX OF THE ESTATE OF JOHN O. HAIRSTON, PLAINTIFF v. ALEXANDER TANK AND EQUIPMENT CO. AND HAYGOOD LINCOLN MERCURY, INC., ORIGINAL DEFENDANTS

— AND —

ALEXANDER TANK AND EQUIPMENT CO., THIRD PARTY PLAINTIFF v. JAMES FULTON WHITBY AND TWO-WAY RADIO OF CHARLOTTE, INC., THIRD PARTY DEFENDANTS

No. 8226SC55

(Filed 18 January 1983)

1. **Automobiles and Other Vehicles § 87.4— negligence in failing to tighten wheel lugs—insulating negligence by truck driver**

In an action to recover for the wrongful death of plaintiff's intestate who was killed while standing behind his new car after the left rear wheel came off, the negligence of defendant car dealer in failing to tighten the lug bolts on the left rear wheel and in failing to check the car before delivery to the intestate was insulated by the negligence of defendant truck driver in failing to keep a proper lookout and in failing to keep his vehicle under proper control, and thus was not a proximate cause of the death of plaintiff's intestate, where the evidence tended to show that the intestate's car was stopped in the right northbound lane of a divided four-lane highway; a van with its emergency flashers on stopped some 20 feet behind the car; the left northbound lane remained free at all times; the right front of defendant driver's flatbed truck struck the van and knocked it into plaintiff's intestate; the van had been stopped in the highway for 90 seconds; defendant truck driver was driving at 45 miles per hour and had a clear and unobstructed view downgrade for at least a quarter of a mile from the van; when defendant driver was 300 feet from the van, a car 100 feet ahead signaled a left turn, moved to the left lane

and passed the van; and defendant driver was more than 250 feet from the van when he realized the van was not moving.

2. **Automobiles and Other Vehicles § 21.1— sudden emergency—negligence creating emergency**

Defendant was not entitled to invoke the doctrine of sudden emergency where the evidence showed that his negligence created in whole or in part the emergency he contends confronted him.

3. **Rules of Civil Procedure § 59; Trial § 52.1— judgment n.o.v. for one defendant—refusal to set aside verdict**

The trial court did not err in refusing to set aside the verdict for plaintiff as being excessive after the court had entered a judgment n.o.v. for one of the two defendants found by the jury to be negligent and thus liable to plaintiff for damages. G.S. 1A-1, Rule 59.

APPEAL by plaintiff and defendant Alexander Tank and Equipment Company from *Lewis, Judge.* Judgment entered 11 June 1981 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 8 November 1982.

This is an action for wrongful death in which plaintiff's intestate was killed while standing at the rear of his parked automobile on Interstate Highway 85 in Mecklenburg County. Defendant Alexander Tank and Equipment Company appeals, contending the trial court erred in failing to instruct the jury on the doctrine of sudden emergency; in denying its motion for a new trial on grounds that the damages were excessive; in allowing the defendant Haygood Lincoln Mercury's motion for judgment notwithstanding the verdict; and in denying defendant Alexander Tank and Equipment Company's motion that the court's ruling on its motions under Rule 15 of the North Carolina Rules of Civil Procedure be without prejudice as to any rights of contribution defendant may have had by Chapter 1B of the North Carolina General Statutes. Plaintiff appeals the ruling of the trial court granting the motion for judgment notwithstanding the verdict of defendant Haygood Lincoln Mercury. The claim by Alexander Tank and Equipment Company against James Fulton Whitby and Two-Way Radio of Charlotte and a counterclaim by Two-Way Radio of Charlotte have been disposed of and are not a part of this appeal. Other questions less significant will be discussed in the body of the opinion.

Tucker, Hicks, Sentelle, Moon & Hodge, by John E. Hodge Jr., Fred A. Hicks and David B. Sentelle, for plaintiff-appellant.

Golding, Crews, Meekins, Gordon & Gray, by Fred C. Meekins and Henry C. Byrum Jr.; and Hasty, Waggoner, Hasty, Kratt & McDonnell, by Robert D. McDonnell and William J. Waggoner, for defendant-appellant Alexander Tank and Equipment Company.

Hedrick, Feerick, Eatman, Gardner & Kincheloe, by J. A. Gardner III and Scott M. Stevenson, for defendant-appellee Haygood Lincoln Mercury, Inc.

HILL, Judge.

Plaintiff's intestate, John O. Hairston (hereinafter "Hairston"), contracted to purchase a new 1978 Lincoln Continental from defendant Haygood Lincoln Mercury, Inc. (hereinafter "Haygood") on Friday, 14 April 1978 and returned to consummate the purchase on Monday, 17 April 1978. Hairston lived in Charlotte, North Carolina; Haygood is in Lowell, North Carolina. Hairston waited at Haygood while the wheels on his Lincoln were changed to conform to the invoice of purchase. One of Haygood's employees changed the wheels but, in doing so, failed to tighten the lug nuts securing the left rear wheel. This went unnoticed, since Haygood neither inspected the job further nor test drove the new car as was customary. Hairston left Haygood at about 5:00 p.m., first traveling along Highway 7 some three miles to its intersection with Interstate 85 (hereinafter "I-85") and then took I-85.

I-85 is a four-lane, divided northbound-southbound highway with two lanes going in each direction. Each lane is 12 feet wide, making a total of 24 feet of travel area in each direction. At the point of its intersection with Highway 7, the northbound lane of I-85 veers gradually to the right and then runs straight to the South Fork River bridge that is some 1616 feet from the intersection. I-85 is slightly downgrade from the intersection to the bridge, but levels out a short distance before the bridge is crossed. There are no obstructions from the ramp intersection to the bridge.

On this day, 17 April 1978, the weather was clear; visibility was good. It was daylight. Traffic was moderate.

As Mr. Hairston drove in the right lane of northbound I-85 approaching the bridge, the left rear wheel of his automobile came off. Hairston, still in the right lane, stopped after traveling some 170 feet on the bridge, 208 feet from the place where the wheel fell. The left northbound lane of traffic remained clear at all times.

James Fulton Whitby, driving a 1970 Econoline van for his employer, Two-Way Radio of Charlotte, Inc., stopped in the right lane some 20 feet behind Hairston's car, activating his emergency flashers and called for help on the telephone in his van. The van, which was approximately seven feet tall, was higher than the normal passenger vehicle, red and rust colored, with a white top and bumper.

Robert G. Alexander was traveling north on I-85, driving a GMC cab on a flatbed truck owned by Alexander Tank and Equipment Company (hereinafter "Alexander Tank"). The flatbed was traveling 45 miles per hour in the right lane. Witnesses saw the flatbed traveling a quarter of a mile behind the van, far enough from the van for it to be fully visible to Mr. Alexander. The Alexander truck was larger and higher than the van, and Mr. Alexander's range of vision in the cab was farther than the range of vision in an ordinary car. The seat on which Alexander sat was nearly four feet off the ground. A car was traveling in the same lane approximately 100 feet in front of the flatbed. When this car was about 200 feet behind the stopped van, it moved to the left lane to pass the van. When the car changed lanes, Alexander was about 100 feet behind it. Alexander had seen the van as he approached, but testified he was about 120 feet from it when he realized the van was stopped. Alexander began a "gradual moving out" to the left lane. The right front of his truck, however, struck the van which was thrust forward, crushing Hairston, who had gotten out of his car and apparently was trying to open the trunk of his car. Hairston was killed. Whitby had told him earlier to get back in his car. Approximately 90 seconds had elapsed from the time Whitby had stopped the van until it was struck by the flatbed.

After the accident, the Hairston car was 350 feet north of the south end of the bridge. The Two-Way van was 310 feet, and the Alexander Tank truck was 400 feet from the same point.

At the conclusion of the evidence, the trial court denied a motion by Haygood for a directed verdict under N.C. Rules Civ. Pro. 50(a). The judge submitted separate issues of negligence to the jury, and the jury found both defendants liable. The jury awarded damages of $200,000. After the jury rendered its verdict, the trial court, upon Haygood's motion, awarded judgment n.o.v. to Haygood. Plaintiff Hairston and defendant Alexander Tank appealed.

Judgment n.o.v. is entered in accordance with a movant's earlier motion for a directed verdict, notwithstanding the contrary verdict actually returned by the jury. *Summey v. Cauthen*, 283 N.C. 640, 197 S.E. 2d 549 (1973).

> On a motion by defendant for a directed verdict in a jury case, the court must consider the evidence in the light most favorable to the plaintiff and may grant the motion only if, as a matter of law, the evidence is insufficient to justify a verdict for the plaintiff. All the evidence which tends to support plaintiff's claim must be taken as true and viewed in the light most favorable to the plaintiff, giving the plaintiff the benefit of every reasonable inference which may be legitimately drawn therefrom. [Citations omitted.] A trial court should deny a defendant's motion for a directed verdict under G.S. 1A-1, Rule 50(a) when viewing the evidence in the light most favorable to the plaintiff and giving plaintiff the benefit of all reasonable inferences, the court finds any evidence more than a scintilla to support plaintiff's *prima facie* case in all its constituent elements. [Citation omitted.]

Jones v. Allred, 52 N.C. App. 38, 41, 278 S.E. 2d 521, 523, *aff'd per curiam*, 304 N.C. 387, 283 S.E. 2d 517 (1981). The question before the Court is whether plaintiff has introduced sufficient evidence of actionable negligence to take her case to the jury. *See Norwood v. Sherman-Williams Co.*, 303 N.C. 462, 279 S.E. 2d 559 (1981).

[1] Defendant Haygood moved for a directed verdict on grounds that the evidence failed to show Haygood was negligent and that if any negligence was shown, it was insulated as a matter of law by the intervening negligence of defendant Alexander Tank. There was evidence from which the jury could find that Haygood negligently failed to install properly the left rear wheel on the

Hairston car and to inspect the car thereafter; that the wheel came off and the car was damaged as a result. The parties by stipulation have eliminated the question of property damage, however, and limited the case to an action for wrongful death. We address the question whether Haygood's negligence was a proximate cause of Hairston's death (it having been stipulated that Mr. Hairston's death resulted from the accident) and was properly submitted to the jury, or whether Haygood's negligence was insulated as a matter of law by the negligence of defendant Alexander Tank.

To recover damages for injury arising out of actionable negligence, the plaintiff must show: (1) failure of defendant to exercise proper care in the performance of some legal duty owed the plaintiff by the defendant under the circumstances, and (2) that such negligent breach of duty was the proximate cause of the injury, a cause that produced the result in continuous sequence, and without which it would not have occurred, and one from which a person of ordinary prudence could have foreseen that such result was probable under the facts as they existed. *McNair v. Boyette*, 282 N.C. 230, 192 S.E. 2d 457 (1972); *Moody v. Kersey*, 270 N.C. 614, 155 S.E. 2d 215 (1967); *Morris v. Transport Co.*, 235 N.C. 568, 70 S.E. 2d 845 (1952).

Associated with the doctrine of proximate cause is the doctrine of insulating negligence.

> This doctrine of insulating the negligence of one by the subsequent intervention of the active negligence of another really belongs to the definition of proximate cause. [Citation omitted.] . . . "While there may be more than one proximate cause, that which is new and entirely independent breaks the sequence of events and insulates the original or primary negligence." [Citation omitted.]

Butner v. Spease and Spease v. Butner, 217 N.C. 82, 87, 6 S.E. 2d 808, 810 (1940). The doctrine of insulating negligence was aptly quoted by Chief Justice Stacy in *Powers v. Sternberg*, 213 N.C. 41, 195 S.E. 88 (1938):

> "Where a second actor has become aware of the existence of the potential danger created by the negligence of an original tort-feasor, and thereafter, by an independent act of negli-

> gence, brings about an accident, the first tort-feasor is relieved of liability, because the condition created by him was merely a circumstance of the accident and not its proximate cause. Where, however, the second actor does not become apprised of such danger until his own negligence, added to that of the existing perilous condition, has made the accident inevitable, the negligent acts of the two tort-feasors are contributing causes and proximate factors in the happening of the accident and impose liability upon both of the guilty parties."

213 N.C. at 44, 195 S.E. at 90, *quoting Kline et al., aplnts. v. Moyer and Albert,* 325 Pa. 357, 364, 191 A. 43, 46 (1937).

Plaintiff argues that Haygood's negligence is one of two proximate causes and that Haygood and Alexander Tank are jointly liable. Plaintiff further contends that if the risk of some injurious consequence is reasonably foreseeable, proximate cause exists, and the negligence of an intervenor [Alexander Tank] does not insulate the primary tort-feasor [Haygood] from liability; it only adds a party with whom the liability can be shared.

As Chief Justice Stacy said:

> [T]he application of the doctrine of insulating the negligence of one by the subsequent intervention of the active negligence of another, as a matter of law, is usually fraught with some knottiness. [Citation omitted.] However, the principle is a wholesome one, and must be applied in proper instances. [Citations omitted.]

Butner v. Spease, supra at 85, 6 S.E. 2d at 810. The proper inquiry is:

> Was there an unbroken connection between the wrongful act and the injury—a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury?

Id. at 87, 6 S.E. 2d at 811.

> "[E]xcept in cases so clear that there can be no two opinions among men of fair minds, the question should be left to the

jury to determine whether the intervening act and the resultant injury were such that the author of the original wrong could reasonably have expected them to have occurred as a result of his own negligent act."

Davis v. Jessup and Carroll v. Jessup, 257 N.C. 215, 220, 125 S.E. 2d 440, 443 (1962).

The parties have cited cases supporting their respective theories of joint liability and insulating negligence. A careful reading of the cases reaffirms the adage: "Each tub rests on its own bottom." Each case must be decided on its facts. The record clearly shows sufficient evidence from which the jury could find Haygood was negligent in failing to tighten the lug bolts on the left rear wheel and in failing to check the new car before delivery. These acts of negligence, however, are not the proximate cause of the death of plaintiff's intestate, and such negligent acts of Haygood are insulated by the subsequent negligent acts of Alexander.

The record tends to show that the cab on the flatbed truck operated by Alexander was seven feet tall, and the seat was four feet from the ground—tall enough for Alexander to see over the cars ahead of him. In fact, he testified that it was his practice to "look over the particular car that is in front of one [sic] to see what's ahead." The cab was as tall as the Two-Way Radio van, which was taller than an ordinary passenger car. Alexander testified the car in front of his truck was lower than eye level.

As Alexander drove north on Interstate 85 that day, he had a clear and unobstructed view for at least a quarter of a mile downgrade to the South Fork River bridge. He was traveling with the flow of traffic at 45 miles per hour. An ordinary passenger car traveling at the same rate of speed was 100 feet in front of him. When the car in front was 200 feet south of the parked Two-Way Radio van, it signaled a left turn and moved to the left lane and passed the van. Alexander was 100 feet behind the car at the time it started to pull out—a total of 300 feet behind the van. Alexander's testimony indicates that *before* the car in front of him changed lanes he could see the top of the van, ". . . and I didn't realize it wasn't moving at that time." On another occasion, Alexander testified he was 250 feet *from the bridge* when he realized the van had stopped.

The van had been stopped on the bridge for 90 seconds. It was visible for a quarter of a mile. It could have been seen within the distance and framework of time by Alexander had he been keeping a proper lookout. We conclude that Alexander was negligent in failing to keep a proper lookout for vehicles stopped on the highway and in failing to keep his vehicle under proper control.

> [I]t is the duty of the driver of a motor vehicle not merely to *look*, but to *keep a lookout* in the direction of travel; and he is held to the duty of seeing what he ought to have seen.

Wall v. Bain, 222 N.C. 375, 379, 23 S.E. 2d 330, 333 (1942), *quoted in Ennis v. Dupree*, 258 N.C. 141, 145, 128 S.E. 2d 231, 234 (1962), *rev'd on other grounds*, 262 N.C. 224, 136 S.E. 2d 702 (1964).

We conclude there was no evidence whatsoever to justify Alexander's failure to see the van in time to take evasive action. If he saw the van, as he testified, he was negligent in failing to notice that it was not moving. If he failed to note that it was not moving until after the car in front of him had removed itself from the lane of traffic, then he failed to see what he should have seen. These negligent acts of Alexander—new and independent of any negligent acts of Haygood—constitute the proximate cause of injury and the death of plaintiff's intestate, and the negligence of Haygood was shielded by the subsequent acts of negligence by Alexander. This assignment is overruled.

[2] Defendant Alexander Tank argues that the trial court's failure to instruct the jury on the doctrine of sudden emergency was prejudicial and reversible error. Defendant had pleaded the doctrine in its answer; contends it had offered evidence to support the allegations; and requested before and after the trial court's charge to the jury that the court give a substantive charge to the jury on this defense.

The sudden emergency doctrine has recently been restated by this Court in the case of *Williams v. Jones*, 53 N.C. App. 171, 177-178, 280 S.E. 2d 474, 477 (1981):

> An automobile driver, who, by the negligence of another and not by his own negligence, is suddenly placed in an emergency and compelled to act instantly to avoid a collision or injury, is not guilty of negligence if he makes such a choice as a

> person of ordinary prudence placed in such a position might make, even though he made neither the wisest choice nor the one that would have been required in the exercise of ordinary care except for the emergency.

The Supreme Court in *Brunson v. Gainey*, 245 N.C. 152, 157, 95 S.E. 2d 514, 518 (1956), stated:

> It is not the conduct in the emergency that the law does not excuse. There is no culpability in such conduct. It is the negligent conduct which brought about the emergency which the law does not excuse. The act done in the emergency immediately causing the injury is a mere link in the causal chain connecting the negligent act, which brought about the emergency, with the injury. It is this negligent act, and not the non-negligent act done in the emergency, that liability springs from. [Citation omitted.]

A party is not entitled to invoke the doctrine of sudden emergency in exculpation of his negligence if his negligence brought about the sudden emergency or contributed to it in whole or in part. *Boykin v. Bissette*, 260 N.C. 295, 132 S.E. 2d 616 (1963); *Rodgers v. Thompson*, 256 N.C. 265, 123 S.E. 2d 785 (1962). The fact that a person is not negligent after an emergency has arisen does not preclude his liability for his negligent conduct that produced the emergency. When an emergency is created by the actor's own negligence or other tortious conduct, the fact that he then behaves in a manner entirely reasonable in light of the situation with which he is confronted does not insulate his liability for his prior conduct. *Foy v. Bremson*, 286 N.C. 108, 209 S.E. 2d 439 (1974). Based on the evidence before the Court, as outlined above, we conclude that, when viewed in the light most favorable to defendant, Alexander's negligence created in whole or in part the emergency he contends confronted him.

[3] Defendant Alexander Tank next asserts the trial court erred in denying its motion for a new trial under Rule 59, N.C. Rules Civ. Pro. on grounds that the jury verdict for damages was excessive and given under the influence of passion. We find no error.

Defendant's contention that the verdict was given under the influence of passion is not argued. In support of the argument

that the damage was excessive, Alexander Tank argues that the jury was led to believe there were two culpable, solvent defendants that it might hold accountable for plaintiff's intestate's death. Defendant contends that the trial court's entry of judgment n.o.v. left Alexander Tank saddled with a verdict that was inflated, excessive and prejudicial because it was returned by the jury as a verdict against two defendants, not defendant Alexander Tank alone.

We do not try to second-guess a jury. Rather, we note that our trial judges exercise their discretionary power in civil cases sparingly in proper deference to the finality and sanctity of a jury's findings. We place great faith and confidence in the ability of our trial judges to make the right decision without partiality regarding a motion for judgment n.o.v. Hence, we conclude that an appellate court should not disturb a trial judge's ruling on a judgment n.o.v. unless it is reasonably convinced by the total record that the trial judge's ruling probably amounted to a substantial miscarriage of justice. We hold such was not the case in this lawsuit. *See Worthington v. Bynum and Cogdell v. Bynum*, 305 N.C. 478, 290 S.E. 2d 599 (1982). The assignment is overruled.

We have examined the remaining assignments of error assigned by all parties and find them either moot in light of our holdings herein or meritless.

The parties herein received a fair trial, free of prejudicial error.

No error.

Judges ARNOLD and WHICHARD concur.

Blackwelder v. Dept. of Human Resources

LINDA L. BLACKWELDER, PRESIDENT AND MEMBER OF STEELE CREEK RESIDENTS ASSOCIATION FOR HERSELF AND ALL OTHER INTERESTED PERSONS AND WILLIAM B. YOUNG, MEMBER, ARROWOOD INDUSTRIAL PARK ASSOCIATION FOR HIMSELF AND ALL OTHER INTERESTED MEMBERS v. STATE OF NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, SARAH T. MORROW, M.D., M.P.H., SECRETARY AND HUGH H. TILSON, M.D., DIRECTOR AND SCA CHEMICAL SERVICES, INC., 60 STATE STREET, BOSTON, MASSACHUSETTS 02109

No. 8210SC6

(Filed 18 January 1983)

Administrative Law § 4; Appeal and Error § 6.2— appeal from order determining scope of review for administrative hearing—premature

An appeal from a superior court order determining the scope of review for an administrative hearing involving a contested hazardous waste treatment facility was premature as defendant failed to demonstrate that the order deprived it of a substantial right which it would lose if the order was not reviewed prior to the hearing. G.S. 1-277 and G.S. 7A-27.

APPEAL by respondent from *Brannon, Judge.* Order entered 28 August 1981 in Superior Court, WAKE County. Heard in the Court of Appeals 18 October 1982.

The petitioners, Linda R. Blackwelder, et al., were granted an administrative hearing before respondent, Department of Human Resources (DHR), to review DHR's issuance of a permit to respondent intervenor, SCA Chemical Services, Inc. (SCA) to operate a hazardous waste incineration facility in Mecklenburg County, N.C. A temporary restraining order and preliminary injunction were issued to stay operation of the permit and construction of the facility pending a final agency decision. SCA intervened.

Petitioners sought to have the issue of SCA's fitness to operate the facility, as evidenced by its past management and operating practices, determined at the administrative hearing. Petitioners were ordered to submit a complaint listing the contested factual and legal issues. A hearing was held to consider various motions and responses concerning the issues to be addressed in the permit review hearing. The hearing officer issued an order striking petitioner's allegations of SCA's ties to organized crime in other states, price fixing, and SCA's violation of environmental and health regulations in connection with its facilities in other states. The issue for hearing was designated as whether

the proposed facility satisfies the requirement for the issuance of the permit as set out in the applicable statutes and rules. Later the hearing officer, on his own motion, issued a clarification of the earlier order. The clarification states that the issues previously designated for hearing shall include the issues of whether the statutes and rules contain an express or implicit requirement that the owner of the proposed facility be a fit and proper person to exercise the privileges granted by that permit; and if so, whether SCA met that requirement.

SCA filed a motion in the cause in Superior Court seeking a determination of the proper issues for the hearing. Judge Brannon determined that the hearing officer's clarified issue of owner-fitness is relevant to the permitting process in this case. The court noted in passing that one of the statutes involved, G.S. 130-166.18(c), requires the promulgation and enforcement of rules concerning the management of hazardous waste including requirements for ownership. Judge Brannon entered an order holding that the issue of the owner's fitness is a germane issue and the hearing officer should allow testimony pursuant to that issue at the permit review hearing. From the entry of this order, respondent SCA appeals.

Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston, by William E. Poe and Irvin W. Hankins, III, for respondent appellant, SCA Chemical Services, Inc.

Attorney General Edmisten, by Assistant Attorneys General Robert R. Reilly and Thomas G. Meacham, Jr., for the State, respondent appellee.

Peter A. Foley, for the petitioner appellee.

JOHNSON, Judge.

This is an appeal from a Superior Court order determining the scope of review for an administrative hearing involving a contested hazardous waste treatment facility. Appellant SCA argues that the court erred by determining that the fitness of the applicant to operate the facility could be considered in the permitting process when there is no requirement of "fitness" set out in the applicable rules and regulations. The petitioners correctly contend that the threshold question presented by this appeal is

whether the appellant's appeal from an interlocutory order is allowable. For the reasons set forth below, we conclude that the attempted appeal is premature. The action must run its course in the administrative agency.

General Statutes 1-277 and 7A-27, taken together, provide that no appeal lies to an appellate court from an interlocutory order or ruling of the trial judge unless such ruling or order deprives the appellant of a substantial right which he would lose if the ruling or order is not reviewed before final judgment. *Consumers Power v. Power Co.*, 285 N.C. 434, 206 S.E. 2d 178 (1974); *accord, Funderburk v. Justice*, 25 N.C. App. 655, 214 S.E. 2d 310 (1975). A ruling is interlocutory in nature if it does not determine the issues but directs some further proceeding preliminary to final decree. *Greene v. Laboratories, Inc.*, 254 N.C. 680, 120 S.E. 2d 82 (1961); *Veazey v. City of Durham*, 231 N.C. 357, 57 S.E. 2d 377 (1950).

SCA concedes that Judge Brannon's ruling is interlocutory as it merely determines an issue to be addressed at the permit hearing, but contends that is immediately appealable because it affects a substantial right. SCA argues that introduction of the fitness issues into the administrative proceeding "drastically" changed its posture to the prejudice of SCA. In support of its argument, SCA makes the following assertions: (1) prior to entry of the order, the DHR's Division of Health Services had refused to take the owner's "fitness" into consideration in either the permitting or review process; (2) accordingly, the Division had defended SCA's permit against the third party challenge of the petitioners; and (3) as a result of the order, the Division has conducted a review of SCA's fitness and now refuses to defend the issuance of the permit, in a reversal of its earlier position. SCA contends that the order deprived SCA of "its right to have the State defend the issuance of the permit," altering the procedural posture of the administrative review process, and permitting the interjection of irrelevant material into that process, thus affecting a substantial right to SCA's prejudice. Therefore, an immediate appeal is needed to protect SCA's "right" to have the State defend its permit and to prevent the "unnecessary" course of procedure in a case where the question in need of appellate review is a strictly legal one, not requiring any factual analysis or support. SCA relies upon *Edwards v. Raleigh*, 240 N.C. 137, 81 S.E. 2d 273

(1954) and *Borden, Inc. v. FTC*, 495 F. 2d 785 (7th Cir. 1974) to establish an exception to the general rule against interlocutory appeals of agency decisions where the only issue needing resolution is a legal one.

The Department of Human Resources, appellee in this appeal, joins SCA in requesting immediate review of Judge Brannon's order due to the "time and cost an administrative hearing would involve" and in the interests of judicial economy and consistency.

As the Supreme Court recently noted, "the 'substantial right' test for appealability of interlocutory orders is more easily stated than applied." *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 208, 240 S.E. 2d 338, 343 (1978). "It is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered." *Id.* The case *sub judice* presents a somewhat unique factual situation and procedural context. Our research discloses no case directly on point. However, it is apparent that our courts have recently taken a restricted view of the "substantial right" exception to the general rule prohibiting immediate appeals from interlocutory orders. *Industries, Inc. v. Insurance Co.*, 296 N.C. 486, 251 S.E. 2d 443 (1979); *Waters v. Qualified Personnel, Inc., supra; Davis v. Mitchell*, 46 N.C. App. 272, 265 S.E. 2d 248 (1980). *See also Smart v. Smart*, 59 N.C. App. 533, 297 S.E. 2d 135 (1982); *Leasing Corp. v. Myers*, 46 N.C. App. 162, 265 S.E. 2d 240 (1980).

In *Waters* the defendant attempted to appeal from an order setting aside summary judgment in defendant's favor. The Supreme Court concluded that the defendant's rights are fully and adequately protected by an exception to the order which may then be assigned as error on appeal should final judgment go against it, and held that the appeal was premature. Regarding the defendant's claim that a substantial right had been affected, the Court stated:

> All defendant suffers by its inability to appeal Judge Long's order is the necessity of rehearing its motion. The avoidance of such a hearing is not a 'substantial right' entitling defendant to an immediate appeal. Neither, for that matter, is the avoidance of trial which defendant might have to undergo

should its motion and plaintiff's motion for summary judgment (which is still pending) both be denied.

Waters, 294 N.C. at 208, 240 S.E. 2d at 344. Similarly, in *Industries* the Supreme Court held that a partial summary judgment rendered on the issue of liability alone is not appealable on the theory that it affects a substantial right of defendant and will work injury to it if not corrected before an appeal from the final judgment. The Court again noted that if the ruling is in error, the defendant can preserve its right to complain of the error on appeal from the final judgment by a duly entered exception. "Even if defendant is correct on its legal position, the most it will suffer from being denied an immediate appeal is a trial on the issue of damages." *Industries*, 296 N.C. at 491, 251 S.E. 2d at 447.

"The reason for these rules is to prevent fragmentary, premature and unnecessary appeals by permitting the trial divisions to have done with a case fully and finally before it is presented to the appellate division." *Waters*, 294 N.C. at 207, 240 S.E. 2d at 343.

Taken together, *Waters* and *Industries* establish that avoidance of a rehearing or trial is not a "substantial right" entitling a party to an immediate appeal. *Accord, Davis v. Mitchell, supra.* The right must be one which will clearly be lost or irremediably adversely affected if the order is not reviewable before final judgment. In other words, the right to immediate appeal is reserved for those cases in which the normal course of procedure is inadequate to protect the substantial right affected by the order sought to be appealed.

Turning to the case under discussion, SCA argues that the order affected its "right" to have the State defend the issuance of the permit. No authority is cited in support of SCA's contention that it has a right to the State's defense. The record discloses that the permit was initially issued without DHR's observance of the proper administrative procedures designed to protect the petitioners' rights of due process. Accordingly, the petitioners were granted an administrative hearing to review issuance of the permit. Until the time of a final agency decision, the agency is free to reconsider its decision concerning the issuance of a permit. *In re Savings and Loan Assoc.*, 53 N.C. App. 326, 280 S.E. 2d 748 (1981). Therefore, DHR is under no "duty," as such, to defend is-

suance of the permit and SCA entitled to no "right" to have the State's defense. Accordingly, no "right" was lost by reason of Judge Brannon's order.

We note, in passing, two facts. First, the issue of owner or corporate "fitness" was initially recognized by the administrative hearing officer. Judge Brannon's order merely affirms that the issue as formulated by the hearing officer is a germane issue and that petitioners may present evidence on it. It is not entirely accurate to assert, as SCA does, that Judge Brannon's order *caused* DHR to reverse its position on "fitness." Second, the "no defense" letter issued by the Division of Health Services, which forms the basis of SCA's contention that the order changed the procedural posture of the case, states that the Division will not defend "on other than technical grounds" the issuance of the subject permit. It is this Court's understanding that SCA brings this appeal on the basis of its legal argument that the application for a permit is to be judged solely upon "technical grounds" and not upon SCA's past practices in managing similar facilities in other states. Accordingly, it is unclear exactly what "right" to a defense SCA has lost by virtue of Judge Brannon's order if DHR will defend the permit on "technical grounds."

The core of SCA's argument is that it is entitled *not* to have evidence presented at the administrative hearing regarding its past practices in managing other hazardous waste treatment facilities. SCA contends that its "fitness" as a plant owner is irrelevant to the permitting process, and the fitness issue ought not to be addressed to avoid an unnecessary course of procedure. SCA cites *Edwards v. City of Raleigh, supra*, as authority for a right to immediate appeal.

It is clear that a hearing must, in any event, be held in this case. Appellant SCA seeks to avoid a portion of that hearing. Under the rule announced in *Waters, supra*, and *Industries, supra*, avoidance of a rehearing or trial is not a "substantial right." Certainly then, avoidance of a *portion* of an administrative hearing is not a "substantial right." Even if SCA is correct in its legal position, the most it will suffer from being denied an immediate appeal is a portion of a hearing on the issue of fitness. As in *Industries* this does not give rise to a right of immediate appeal.

SCA's reliance upon *Edwards v. Raleigh* is misplaced. *Edwards* involved an appeal from the Superior Court's interlocutory order remanding the cause to the Industrial Commission for a hearing on the plaintiff's newly discovered evidence. The Supreme Court accepted the defendant's appeal under its supervisory power, N.C. Const. Art. IV, Sec. 8, to avoid a "wholly unnecessary and circuitous course of procedure." 240 N.C. at 139, 81 S.E. 2d at 275. Remand to the Industrial Commission was considered unnecessary in *Edwards* because the parties initially submitted the case upon an agreed statement of facts. As the plaintiff was thus unable to go outside the stipulated facts, a further hearing by the Industrial Commission was found to be "inconvenient, expensive and futile." *Id.*

Edwards is distinguishable in that the parties in the case under discussion have not yet had the opportunity to present their evidence, are not bound by an agreed statement of facts, and must, in any event, appear for a hearing before the Department of Human Resources. A hearing, yet to be held, cannot be considered unnecessary.

Nor does the order under discussion fall within the exception to the general rule prohibiting interlocutory appeals of agency decisions when the issue involved is a strictly legal one as set forth in *Borden, Inc. v. FTC, supra.* In the course of addressing the issue of exhaustion of administrative remedies prior to seeking judicial intervention, the Seventh Circuit stated the following rules:

> It is well settled that ordinarily courts will not interfere with an agency until it has completed its action and that administrative remedies may be bypassed only if (1) the agency has clearly violated a right secured by statute or agency regulation . . . (2) the issue involved is a strictly legal one not involving the agency's expertise or any factual determinations . . . or (3) the issue cannot be raised upon judicial review of a later order of the agency. (Citations omitted.)

495 F. 2d at 786-87. SCA correctly argues that the issue involved is a strictly legal one—the interpretation of a statute—however, this issue may be raised upon judicial review of the agency's final decision regarding SCA's permit to operate the facility. The Division of Health Services has as yet made only the decision to con-

sider whether a review of owner or corporate fitness is required by the applicable statutes and if so, whether SCA meets those requirements. The standard of review will not be altered if the question of whether SCA's past practices in managing similar facilities is germane is postponed until final appeal of the agency's determination of the permit issue. *See Jewel Companies, Inc. v. FTC*, 432 F. 2d 1155, 1159 (7th Cir. 1970). Allowing the DHR's Division of Health Services to proceed with the hearing, take evidence upon all the contested factual and legal issues, apply its expertise in the area of hazardous waste management, and render a fully informed final decision upon the issuance of SCA's permit can only serve to clarify the issues which may then be presented for judicial review pursuant to the normal course of procedure outlined in G.S., Chap. 150A, Art. 4.

SCA's attempted appeal of this agency action on the grounds of the vagueness, subjectivity, and irrelevancy of corporate fitness as a requirement for obtaining the permit in question is fragmentary, premature, and may ultimately prove to be unnecessary. SCA has not demonstrated that Judge Brannon's order deprives SCA of a substantial right which it will lose if the order is not reviewed at this time. Therefore, the appeal must be dismissed.

Dismissed.

Judges ARNOLD and HILL concur.

ROBERT A. DONNELL, EMPLOYEE v. CONE MILLS CORPORATION, EMPLOYER, SELF-INSURER

No. 8210IC152

(Filed 18 January 1983)

1. Master and Servant § 68— workers' compensation—reduced earning capacity from byssinosis

Plaintiff's earning capacity was reduced as a result of byssinosis contracted while working for defendant, and plaintiff was thus disabled from byssinosis, where the evidence showed that plaintiff could no longer work in a dusty environment and thus could not earn the same wages working for defendant after his disease as he earned before it; after the plant at which plain-

tiff worked was closed, he was not offered another job with defendant at a different plant because he could not pass the breathing test; plaintiff's earning capacity in other employment was reduced as a result of his disability; and he is earning less in his employment in a clean environment than he earned with defendant. G.S. 97-2(9).

2. Master and Servant § 99— workers' compensation—striking attorney's fee for plaintiff

The Industrial Commission did not err in striking an award of an attorney's fee for plaintiff under G.S. 97-88.1 since the claim was defended on a reasonable ground. Nor did the Commission err in the reduction of plaintiff's total attorney's fee. G.S. 97-90(a).

APPEAL by both parties from opinion and award of the North Carolina Industrial Commission filed 7 December 1981. Heard in the Court of Appeals 8 December 1982.

This case arose when plaintiff, a 54-year-old man, made a claim for byssinosis in 1980. Plaintiff worked for defendant from 13 July 1945 to 2 August 1976 in the carding department, except for approximately three years of military service from 1946 to 1949. He worked in the defendant's weaving department from 2 August 1976 until 15 June 1978 when the plant at which he worked closed.

During his employment with the defendant, plaintiff was exposed to cotton dust. He first began to have breathing problems in the 1950's. As time progressed, his symptoms got worse.

After his employment with the defendant ended, plaintiff did not get a job until 14 August 1978. He was promised another job with the defendant at a different plant but was rejected, apparently because he could not pass the breathing test. Plaintiff testified that he looked for other jobs during that time interval.

On 14 August 1978, plaintiff began work at Carolina Fabric Label Corporation where he operates a labeling machine. His job performance there has been good and he only missed three days of work during 1979 and the first six months of 1980. He was employed at Carolina Fabric when this case was heard before the deputy commissioner on 9 June 1980.

Plaintiff was examined by Dr. E. W. Stevens of Greensboro in 1978 after he stopped working for the defendant. Stevens' diagnosis was mild chronic obstructive pulmonary disease with a

history of byssinotic reaction. Dr. Stevens gave plaintiff a note suggesting that he return to work immediately but avoid undue dust.

Dr. Herbert O. Sieker of Duke University Medical Center examined plaintiff in March, 1979. His diagnosis was byssinosis with permanent impairment of the pulmonary functions. Lung capacity was seventy-five percent of normal. Dr. Sieker concluded that plaintiff should not work in the mill where there is any exposure to dust. According to Sieker, plaintiff is 100 percent limited for any heavy work or working in a dusty environment. But he added that plaintiff could work in a clean environment with moderate activity and suffer no disability.

Following a hearing on 9 June 1980, Deputy Commissioner Christine Y. Denson entered an opinion and award on 31 October 1980. She found that plaintiff was temporarily totally disabled from 15 June 1978 to 14 August 1978 and that he is permanently partially disabled as a result of byssinosis. The permanent partial disablement caused a loss of income of $54.19 per week from 14 August 1978 to 1 July 1979 and $40.19 per week from 1 July 1979 to the date of the award. The loss of income was a result of the fact that plaintiff's income at Carolina Fabric is less than it was when he worked for the defendant.

The award gave plaintiff $129.46 per week from 15 June 1978 to 14 August 1978, $36.13 per week from 14 August 1978 to 1 July 1979 and $26.80 per week from 1 July 1979 to the date of the award subject to a maximum of 300 weeks and to a change in condition. An attorney's fee of $1,200 for plaintiff's counsel was to be deducted from the award. Defendant also was ordered to pay plaintiff's counsel $1,226.96 under G.S. 97-88.1 because defendant did not stipulate as to liability. This amount was not to be deducted from the award. Defendant was to pay plaintiff's medical bills that resulted from his occupational disease and the costs of the action. Both parties appealed to the Full Commission.

On 7 December 1981, the Full Commission adopted all of the deputy commissioner's opinion and award except for the portion concerning attorney's fees. The Commission struck the fee paid pursuant to G.S. 97-88.1 and substituted a fee of $1,500 to be deducted from the award. Both parties appealed to this Court,

with plaintiff appealing only the portion that reduced his attorney's fees.

Chambers, Ferguson, Watt, Wallas, Adkins & Fuller, by J. Levonne Chambers, for plaintiff.

Smith, Moore, Smith, Schell & Hunter, by J. Donald Cowan, Jr. and Caroline Hudson, for defendant.

ARNOLD, Judge.

DEFENDANT'S APPEAL

[1] The substantive issue on this appeal is whether plaintiff's earning capacity was reduced as a result of byssinosis contracted while working for the defendant. If so, then he is disabled under G.S. 97-2(9) and our case law. *See, e.g., Wood v. Stevens & Co.*, 297 N.C. 636, 651, 256 S.E. 2d 692, 701 (1979). Because byssinosis is an occupational disease under G.S. 97-53(13), it is compensable under G.S. 97-52.

The burden of proof of showing a disability is on the plaintiff. *Hall v. Chevrolet Co.*, 263 N.C. 569, 139 S.E. 2d 857 (1965). To conclude that plaintiff is disabled because of a lack of earning capacity, the Industrial Commission must find

> (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that this individual's incapacity to earn was caused by plaintiff's injury.

Hilliard v. Apex Cabinet Co., 305 N.C. 593, 595, 290 S.E. 2d 682, 683 (1982). If the Commission makes these findings, and they are supported by competent evidence, they are conclusive on appeal even though there is evidence to support a contrary finding. *Walston v. Burlington Industries*, 304 N.C. 670, 677, 285 S.E. 2d 822, 827 (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). To decide this case, we must determine if plaintiff has met the three prongs of the *Hilliard* test.

Plaintiff met the first element of the test by showing that he could not earn the same wages working for defendant after his disease as he earned before it. Consistent with his conclusion that plaintiff has byssinosis, Dr. Sieker stated that plaintiff should not work in a dusty environment, that he "would not tolerate strenuous or sustained exercise in a work environment," and that he had evidence of permanent impairment of his pulmonary functions.

Finding of fact number eight that plaintiff could not take another job with defendant because he could not pass a breathing test is supported by competent evidence. Both plaintiff and Sieker testified that he was not given a new job with defendant because of his breathing problems.

Although plaintiff did begin work at another job two months after his job with defendant ended, he cleared the second hurdle of *Hilliard.* The findings of Deputy Commissioner Denson as adopted by the Full Commission show that plaintiff's earning capacity in any other employment was reduced as a result of his disability.

Stipulation number four in the 31 October 1980 award states that plaintiff's average weekly wage was $194.19 when he worked for defendant. Finding of fact number eight lists the highest salary at his new job as $3.85 an hour for a 40-hour week. Although the award did not calculate his highest salary in the new job, it did conclude that plaintiff was disabled and calculated what amounts were due to him as a result of his disability.

Simple multiplication reveals that plaintiff's maximum weekly wage at the new job was $154.00. This is considerably less than what plaintiff earned while working for the defendant. Although comparing before and after earnings is not the method to show diminished earning capacity, *Hill v. Dubose,* 234 N.C. 446, 447-48, 67 S.E. 2d 371, 372 (1951), we believe that it is a factor to be considered.

Given plaintiff's physical condition, the limits on his ability to work and his lack of training in any job except the textile industry, we hold that there was competent evidence before the Industrial Commission to find that plaintiff was disabled from byssinosis. This conclusion avoids the "needless and wasteful ap-

pellate review based upon allegations of inadequate and inappropriate findings and conclusions of law" that Justice Meyer decried in his separate opinion in *Hilliard. See* 305 N.C. at 599, 290 S.E. 2d at 686. We refuse to require magic words in an award of the Industrial Commission before it will be affirmed.

An examination of the record reveals that plaintiff's diminished earning capacity is linked to his disease. Based on evidence discussed above, this third and final prong of the *Hilliard* test is present here.

Defendant cites *Mills v. Stevens & Co.*, 53 N.C. App. 341, 280 S.E. 2d 802, *disc. rev. denied,* 304 N.C. 196, 285 S.E. 2d 100 (1981), in support of its position. The court in *Mills* affirmed the Industrial Commission's conclusion that the plaintiff was not disabled and did not have an occupational disease. The plaintiff in that case was unemployed for six months between his job with the defendant and a new job.

But *Mills* can be distinguished on its facts. The plaintiff there did not meet his burden of proof on the disability issue and the Commission held against him. The case *sub judice* is different because there is sufficient competent evidence in the record to support the Commission's findings for the plaintiff. For example, there was no finding of fact in *Mills* as to plaintiff's salary when he worked with the defendant, while that fact is stipulated here.

Our decision does not ignore that plaintiff's job with the defendant ended because the plant where he worked was closed. But we do not believe this to be dispositive on the disability issue. The crucial fact is that plaintiff's earning capacity was diminished because he developed the occupational disease of byssinosis during his employment with the defendant.

The Workers' Compensation statutes in North Carolina should be liberally construed to effect their purpose of compensating injured claimants and recovery should not be denied by a technical or narrow construction. *Stevenson v. Durham,* 281 N.C. 300, 188 S.E. 2d 281 (1972). We believe that this decision and its interpretation of "disability" under G.S. 97-2(9) is in accord with that general rule and does not enlarge the statute beyond its limits.

PLAINTIFF'S APPEAL

[2] Plaintiff appealed that part of the Commission's award which struck the attorney's fee awarded under G.S. 97-88.1 and reduced the total fee to $1,500, which is to be deducted from his award. The Deputy Commissioner had awarded plaintiff's attorneys $1,226.96 under G.S. 97-88.1 because she found that the hearing was defended without reasonable ground, and an additional $1,200 fee to be deducted from the award.

G.S. 97-88.1, which was added by 1979 N.C. Sess. Laws Ch. 268, § 1, states:

> 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.

Under the statute, "The test is not whether the defense prevails, but whether it is based in reason rather than in stubborn, unfounded litigiousness." *Sparks v. Restaurant*, 55 N.C. App. 663, 665, 286 S.E. 2d 575, 576 (1982).

Because the Commission struck the G.S. 97-88.1 award, it must have concluded that the defense was based on reasonable ground. Since our examination of the record leads us to a similar conclusion, we affirm the Commission's decision on this matter. *See Robinson v. Stevens & Co.*, 57 N.C. App. 619, 627, 292 S.E. 2d 144, 149 (1982).

We find no error in the Commission's reduction of plaintiff's total attorney's fees. This matter is subject to the approval of the Commission under G.S. 97-90(a) and will not be disturbed on appeal absent an abuse of that discretion.

The order of the Industrial Commission appealed from is

Affirmed.

Judges JOHNSON and BRASWELL concur.

West v. Slick

MARGARET M. WEST, CLIFFORD SCOTT, CALEB POYNER, ELWYN WALKER, JAMES O. DUNTON, DONALD ADAMS, SAMUEL H. LAMB, SAMUEL H. LAMB, II, PAMELA V. WEILAND, PETITIONERS-PLAINTIFFS v. EARL F. SLICK AND WIFE, JANE P. SLICK, PINE ISLAND DEVELOPMENT VENTURE, RDC, INC., RESPONDENTS-DEFENDANTS

No. 771SC147

(Filed 18 January 1983)

1. **Appeal and Error § 26— failure to make assignments of error or grouping of exceptions—appeal itself as exception to judgment**

Although the record on appeal disclosed that petitioners failed to make any assignment of error or grouping of exceptions in violation of App. R. 9(b)(1)(xi), 10(a) and (c), the appeal itself was an exception to the judgment, App. R. 10(a), and the court's underlying conclusion of law that the evidence presented by petitioners was insufficient as a matter of law to justify a jury verdict for them.

2. **Easements § 6.1; Highways and Cartways § 11.2— insufficient evidence to establish situs of roadways**

In an action to establish a neighborhood public road under G.S. 136-67 or in the alternative to establish a public road by prescription or dedication, petitioners' evidence was insufficient as a matter of law to establish the situs of either roadway, and it is a basic principle of law that in order to create an easement or public roadway, the evidence must disclose that travel was confined to a definite and specific line.

APPEAL by petitioners from *Ervin, Judge.* Judgment entered 30 September 1976 in Superior Court, PASQUOTANK County, transferred from CURRITUCK County. Heard in the Court of Appeals 6 December 1982.

In this special proceeding petitioners, owners of real property located on the Outer Banks in Currituck County, sought to establish a neighborhood public road under G.S. 136-67 and a public road by prescription or by dedication across land owned by respondents. Respondents are owners of a four-mile strip of land known as Pine Island, which is bounded on the south by the Currituck-Dare County line, on the north by private properties, on the east by the Atlantic Ocean and on the west by Currituck Sound. At issue is the way of motor vehicular travel on the Outer Banks from the county line north of Duck, North Carolina, to Corolla, a small fishing village near the North Carolina-Virginia line.

At jury trial petitioners' evidence tended to show that over the years since the early 1900's, two routes of travel had been

used to traverse the Pine Island property, now owned by respondents. One route, known as the "Inside Road" or "Soundside Road," was located on the inside of the bank along Currituck Sound. The other route, known as the "Pole Line Road," was located behind the primary sand dune line on the ocean side of the banks. The Pole Line Road was first used by Coast Guard personnel as they performed maintenance on telephone lines connecting Coast Guard Stations. These routes were primitive two-track sand trails that varied according to the ocean's patterns of wave, wind and sand. Travel was permitted along these routes until respondents became the owners of Pine Island and closed the routes to public use in June 1974.

For over fifteen years there was a sign near the Currituck-Dare County line which read "End State Road 500 feet." Although from 1939-1974 State highway maps showed a secondary road 1152 between the County line and Corolla, this road was never located on the ground by a survey. State records indicated that the State had never acquired an easement for the road and had never performed any construction or maintenance work on it.

At the close of petitioners' evidence, the court allowed respondents' motion for directed verdict. The court entered judgment dated 30 September 1976 dismissing the action and ordering that permission heretofore granted by respondents for petitioners to use the road remain in effect pending final determination on appeal of the case.

Although filed in apt time, the calendaring of petitioners' appeal was delayed for over five years, upon the parties' joint motion, pending completion by the Department of Transportation of a plan for public access to the Outer Banks of Currituck County.

Sanford, Cannon, Adams & McCullough, by Hugh Cannon, J. Allen Adams and Charles C. Meeker for petitioner appellants.

Womble, Carlyle, Sandridge & Rice by W. F. Womble and Allan R. Gitter; and Of Counsel, LeRoy, Wells, Shaw, Hornthal, Riley & Shearin, by Dewey W. Wells for respondent appellees.

BRASWELL, Judge.

[1] The record on appeal discloses that petitioners failed to make any assignment of error or grouping of exceptions, in viola-

tion of App. R. 9(b)(1)(xi), 10(a) and (c). For this reason respondents have moved to dismiss the appeal. We deny respondents' motion to dismiss on the ground that the appeal itself is an exception to the judgment, and in light of App. R. 10(a) which provides:

> "Except as otherwise provided in this Rule 10, the 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 on appeal in accordance with this Rule 10. No exception not so set out may be made the basis of an assignment of error; and no exception so set out which is not made the basis of an assignment of error may be considered on appeal. Provided, that upon any appeal duly taken from a final judgment any party to the appeal may present for review, by properly raising them in his brief, the questions whether the judgment is supported by the verdict or by the findings of fact and conclusions of law, whether the court had jurisdiction of the subject matter, and whether a criminal charge is sufficient in law, notwithstanding the absence of exceptions or assignments of error in the record on appeal."

The applicable clause in the rule above is "whether the judgment is supported by . . . the findings of fact and conclusions of law." Technically speaking, the judgment entered in this proceeding contains neither findings nor conclusions. When ruling on a motion for directed verdict in a jury trial, findings of fact and conclusions of law are "not required or appropriate and have no legal significance." *Kelly v. Harvester Co.*, 278 N.C. 153, 159, 179 S.E. 2d 396, 399 (1971). The court's underlying conclusion of law is that the evidence presented by petitioners was insufficient as a matter of law to justify a jury verdict for them.

Petitioners sought to establish a neighborhood public road over respondents' property under G.S. 136-67 or in the alternative to establish a public road by prescription or dedication.

G.S. 136-67 provides in pertinent part:

> "All those portions of the public road system of the State which have not been taken over and placed under maintenance or which have been abandoned by the Department of Transportation, but which remain open and in general use as a necessary means of ingress to and egress

> from the dwelling house of one or more families, and all those roads that have been laid out, constructed, or reconstructed with unemployment relief funds under the supervision of the Department of Human Resources, and all other roads or streets or portions of roads or streets whatsoever outside of the boundaries of any incorporated city or town in the State which serve a public use and as a means of ingress or egress for one or more families, regardless of whether the same have ever been a portion of any State or county road system, are hereby declared to be neighborhood public roads . . . ."

Petitioners argue that their evidence established a public road under the first portion of the statute concerning roads which were once a part of the public road system, and also under the third portion concerning roads located outside city limits which serve a public use. In the alternative, petitioners argue that their evidence was sufficient to show that the Inside Road and Pole Line Road were public roads through prescription based upon continuous and open public use of the roads for over twenty years. Petitioners also submit alternatively that the evidence showed an implicit and explicit dedication to the public of the roads from the county line to Corolla.

[2] We do not reach, however, the question of whether petitioners' evidence concerning these four theories was sufficient for submission to the jury. We hold that petitioners' evidence was insufficient as a matter of law to establish the situs of either roadway. It is a basic principle of law that in order to create an easement or public roadway, the evidence must disclose that travel was confined to a definite and specific line. *Speight v. Anderson*, 226 N.C. 492, 39 S.E. 2d 371 (1946); *Cahoon v. Roughton*, 215 N.C. 116, 1 S.E. 2d 362 (1939). While there may be slight deviations in the line of travel, there must be substantial identity of the easement claimed. *Speight v. Anderson, supra; Taylor v. Brigman*, 52 N.C. App. 536, 279 S.E. 2d 82 (1981).

Petitioners' evidence failed to set forth a description which would permit identification and location of the road on the ground with reasonable certainty. Most of the witnesses agreed that the route taken varied according to conditions of wind, rain and tides along the beach. Elwyn Walker, one of the petitioners, testified that at places the track varied between 200 and 300 feet. Peti-

tioners' evidence was disconnected and conflicting concerning the routes each witness followed. Pennell Tillett testified that the road he followed was halfway between the Pole Line and the Sound; Margaret Dowdy testified that at a point south of Pine Island Club she cut across the hard sand of the beach next to the surf. Tillett's testimony exemplifies the confusing nature of much of the testimony concerning location of the road:

> "When the water was low, I went south from Poyner's Hill Coast Guard station along the beach. I would go down as far as Caffey's Inlet, when the tide was low, right along the hard sand next to the surf. At Caffey's Inlet I would cut across at that point. The hard sand, that was pretty well on the back. The soft sand was up near the ocean, and there were pebbles there too. When you got on top of the hill, it was still soft and you had to go a little farther back where it was harder. The road was tracks through the sand and you had to sort of work your way through from the ocean side across to Caffey's Inlet when you got down there."

Although petitioners introduced a road map by the North Carolina State Highway Commission and county maps which showed a line for a road from Duck to Corolla, it is impossible to determine on the maps which road is the Pole Line Road and which is the Inside Road. In addition, the testimony of those who had traveled along the roadways cannot be reconciled with the physical evidence. D. W. Patrick, a survey engineer with the Department of Transportation had examined the exhibits and testified:

> "I have been pursuing the practice of engineering for some 30 years and I would have to say that there is no way you can determine where on the ground any 11.7 miles of roadway is located that is referred to in these exhibits. You couldn't tell whether it was on the surf or down the middle of the beach, or along each side of the pole line, or next to the sound side. All I can say is that it was on the land mass someplace between Currituck Sound and the Atlantic Ocean."

Petitioners' Exhibit No. 10 is an aerial map of Pine Island. David Lawrence, a survey engineer, stated that he could identify the two routes on the aerial map. The routes are clearly visible in some areas while impossible to discern in others, but generally

are pointed out. State records indicate that no survey of the ground for the purpose of locating or constructing a road was ever performed. We believe that identification of any road would rest in speculation and conjecture, which the law does not permit. *Adams v. Severt*, 40 N.C. App. 247, 252 S.E. 2d 276 (1979).

We hold, therefore, that petitioners' evidence failed as a matter of law to identify specific and definite lines or routes of use, and for this failure to locate the roadway on the ground, the court's judgment allowing respondents' motion for directed verdict must be affirmed.

Affirmed.

Judges ARNOLD and JOHNSON concur.

STATE OF NORTH CAROLINA v. CHARLES VERNERD NEAL

No. 8221SC595

(Filed 18 January 1983)

Criminal Law § 99— court's comment upon verdict in another trial—defendant not entitled to new trial

Defendant was not entitled to a new trial pursuant to his motion for appropriate relief because the trial judge commented upon a not guilty verdict in the trial of another defendant by telling the jurors, "I don't believe you were listening carefully to the evidence in this case and I caution you that if you're called on another jury, do listen to what the witnesses say because you are the triers of the facts," and three of those jurors were empaneled as jurors in defendant's trial, since (1) the right afforded by G.S. 1-180.1 and G.S. 15A-1239 when the trial judge comments upon a verdict is a continuance for the session, and defendant failed to move for a continuance; (2) a new trial has been excluded by G.S. 1-180.1 as a sanction for a trial judge's comments upon a verdict; and (3) there was no showing that the comments had any effect on the three jurors who served in both cases or that the comments prejudiced defendant's right to a fair trial. Sixth Amendment to the U.S. Constitution; Art. I, Sec. 24 of the N.C. Constitution.

APPEAL by defendant from *Wood, Judge*. Judgment entered 17 March 1982 in Superior Court, FORSYTH County. Heard in the Court of Appeals 8 December 1982.

A criminal jury session of Forsyth Superior Court began on 15 March 1982 and on 16 March 1982 defendant's trial began. On 17 March 1982, defendant was convicted by a jury of the misdemeanor of assault on a female. Judgment was entered on the same date, sentencing defendant to two years' imprisonment. On 24 March 1982, defendant filed a Motion for Appropriate Relief. On 29 March 1982 the motion was heard and denied. On 29 March 1982, defendant filed notice of appeal from the judgment entered 17 March 1982, and also gave notice of appeal from the denial of his Motion for Appropriate Relief. On 30 March 1982, formal order denying Motion was filed.

Attorney General Edmisten by Assistant Attorney General Daniel F. McLawhorn for the State.

Jenkins, Lucas, Babb & Rabil by S. Mark Rabil for the defendant appellant.

BRASWELL, Judge.

From ten assignments of error the defendant brings forth one argument. He contends that the trial court erred in denying defendant's motion for appropriate relief of a new trial for the sole reason that at the conclusion of a prior jury trial in the same week of court, the trial judge commented upon the verdict to the members of the jury, three of whom later became empanelled as jurors in the present case. Defendant contends that the judge's comments violated G.S. 15A-1239, the Sixth Amendment to the United States Constitution, and Article I, Section 24 of the North Carolina Constitution.

On the first day of the court week, at the conclusion of the first jury trial, and it being the day before the appellant's case began, the record shows the following transpired upon the coming in of the verdict:

> "CLERK: Your verdict will read as follows: 'We, the jury, unanimously find the defendant, Theodore M. Wilson, not guilty.' Members of the jury, is this your verdict so say you all?
>
> (affirmative response)
>
> COURT: All right, I'm going to let you folks go until tomorrow. Let me say this. In view of this question, I don't

believe you were listening carefully to the evidence in this case and I caution you that if you're called on another jury, do listen to what the witnesses say because you are the triers of the facts. I ask you to please do that. Because if you don't listen—these cases are right important cases.

Now, as I recall the evidence there which would have been improper for me to give you my recollection of it because I'm not the trier of the facts, but as I recall the evidence in this case, the officer said that when he came up there, the defendant put his hand in his pocket, that he told him—he put his hand on his shoulder, or arm, and said take your hands out and he took his hands out and the substance dropped to the ground underneath him. But it would have been improper for me to tell you that. That's the way that I heard the evidence.

I say this simply to you, you're going to be on the jury the rest of the week. Do listen carefully. It's important that you do.

(jury excused)"

In the Motion for Appropriate Relief, the attorney for appellant alleges that he did not discover that the presiding judge in the Wilson case, who was the same judge in the appellant's case, had made the comments listed above, until after verdict in the appellant's case. There is no evidence in the record that any juror ever did or said anything in response to the judge's comments, or that any juror was influenced in any manner by the judge's remarks. Defendant contends that his first opportunity to complain about the judge's comments was through the Motion for Appropriate Relief, made within 10 days after verdict. G.S. 15A-1414(b)(3).

No motion for a continuance was made before trial.

The relief sought in the Motion for Appropriate Relief is: "[F]or a new trial because the comments of the trial judge were made in contravention of N.C.G.S. 15A-1239, the VI Amendment of the Constitution of the United States, and Article I, Section 24 of the Constitution of North Carolina."

We hold that G.S. 1-180.1 is controlling and that defendant's argument that we should look only to G.S. 15A-1239 is misplaced.

Both statutes prohibit the trial judge from commenting on the verdict in criminal actions. The Legislature has provided the exclusive remedy for judicial praise, criticism or comment on the verdict by declaring in G.S. 1-180.1 that the prohibited remarks

> "shall constitute valid grounds as a matter of right, for the continuance for the session of any action remaining to be tried during that week at such session of court, upon motion of a defendant or upon motion of the State. The provisions of this section shall not be applicable upon the hearing of motions for a new trial, motions to set aside the verdict of a jury, or a motion made in arrest of judgment."

G.S. 15A-1239 is substantially similar in providing relief by a continuance of the case, but it does not contain any reference to nonapplicability to motions for a new trial, or to set aside the verdict, or arrest of judgment.

G.S. 15A-1239 was adopted in 1977 as part of the Trial Stage and Appellate Procedure Act, S.L. 1977, c. 711. A list of statutes repealed and replaced by the Act is set out in Section 33. G.S. 1-180.1, adopted in 1955, S.L. 1955, c. 200, is omitted from the list, and has not been repealed, and is still in effect. It has not been repealed by implication. *Commissioner of Insurance v. Automobile Rate Office,* 294 N.C. 60, 241 S.E. 2d 324 (1978).

When reconciled, the two statutes do not conflict. The right afforded by each statute is a motion for a continuance. Ignorance of a factual basis on which to move for a continuance affords no relief once the trial has begun.

Neither does the post-trial procedure of motion for appropriate relief rescue the appellant. Defendant in his brief places his reliance upon G.S. 15A-1414(a)(b)(3) as his basis for a new trial: "For any other cause the defendant did not receive a fair and impartial trial." This statute is designed for "relief for any error committed during or prior to trial," and must be made not more than 10 days after entry of judgment. While the motion was in apt time and concerns a matter prior to trial, the defendant has failed to show error. By the motion, and in the brief, the relief sought is a new trial. A new trial has been excluded from the sanctions available in G.S. 1-180.1 upon comment on the verdict by a judge, by saying that the right to a continuance "shall not be applicable upon the hearing of motions for a new trial."

Our civil procedure is consistent with the criminal procedure. G.S. 1A-1, Rule 51(c) of the Rules of Civil Procedure concludes with, "[t]he provisions of this section [judge not to comment on verdict] shall not be applicable upon the hearing of motions for a new trial . . . ." The sole civil remedy is a motion for a continuance.

In his overview comments upon the Trial Stage and Appellate Procedure Act, which became codified as G.S. 15A-1, *et seq.*, Allen A. Bailey, Chairman of the Criminal Code Commission pointed out that:

> "Unlike the Pretrial Criminal Procedure Act which effected numerous changes in prior procedure, the Trial Stage and Appellate Procedure Act is primarily a codification of the procedures developed by case law and an attempt to make them uniform. Bailey, 'Trial Stage and Appellate Procedure Act: An Overview', 14 Wake Forest L. Rev. 899 at 900 (1978)."

Although G.S. 15A-1239 covers the subject matter of judicial comment upon the verdict, nowhere does it prohibit or forbid comment. It only allows a relief valve of a continuance, if desired to be used. It does not command that any motion for a continuance be made. This view is expressed by James R. Van Camp, a member of the Code Commission, and Douglass R. Gill, a consultant to the Commission:

> "It is important to note that the right to a continuance in the event that the judge does comment on a verdict is not automatic; the defendant who wishes a continuance must make a motion for it. Van Camp and Gill, 'The Trial,' 14 Wake Forest L. Rev. 949 at 954 (1978)."

There is a waiver of the right to make a motion for a continuance by failing to make it prior to trial, and by asking for a new trial in a post-trial motion, based on alleged error under G.S. 15A-1239 and G.S. 1-180.1. *See, State v. Brown*, 300 N.C. 41, 46, 265 S.E. 2d 191, 195 (1980); *State v. Carriker*, 287 N.C. 530, 535, 215 S.E. 2d 134, 138 (1975).

In the trial judge's handling of the motion for appropriate relief, the record fails to show any abuse of discretion by the findings or denial of the motion. *State v. Batts*, 303 N.C. 155, 277 S.E.

2d 385 (1981); *State v. Watkins*, 45 N.C. App. 661, 263 S.E. 2d 846, *cert. denied*, 300 N.C. 561, 270 S.E. 2d 115 (1980). Appellant failed to provide the trial court with factual information that would reveal he was entitled to the relief of a new trial, or any other relief.

Concerning the constitutional question raised by the defendant under the motion for appropriate relief, the response in the State's brief, p. 12, points out:

> "Appellant did not cite, nor has the State's review of cases related to the issue presented located, any holding by the appellate courts declaring all remarks by the trial court to be so prejudicial to the administration of justice as to constitute reversible error *per se*."

In the *Carriker* case, *supra*, at 532, in discussing the question, the Supreme Court referred to the general rule as "stated in Annot., 89 A.L.R. 2d 197, 234, as follows: '. . . [T]he rule appears to be that the practice of addressing the prospective jurors does not of itself constitute reversible error . . .'."

After discussing the fair trial aspect of the question of judicial remarks, the Court in *Carriker, supra*, at 535, held that "[I]n order to obtain the benefit of the statute [G.S. 1-180.1] a defendant must, as defendant did in this case, move for a continuance."

The Supreme Court, in *State v. Perry*, 231 N.C. 467, 471, 57 S.E. 2d 774, 777 (1950), calls to our attention that the objectionable language must be viewed "in the light of all the facts and attendant circumstances disclosed by the record, and unless it is apparent that such infraction of the rules might reasonably have had a prejudicial effect on the result of the trial, the error will be considered harmless." The appellant sought, and was given, an evidentiary hearing post-trial, on the subject of whether he received a fair and impartial trial because of the alleged improper judicial comment to jurors. Other than the judge's pretrial words themselves, the record is devoid of any statement, impression, feeling, belief, reaction or conclusion of any of the three jurors who served in both cases, that the remarks had any effect on them. From the face of the comment itself, even if it be an ill-advised expression of instructions to the jury panel, there is no

showing that the remarks "had a prejudicial effect on the result of the trial." *Perry, supra,* at 471.

To constitute reversible error, upon a review of a motion for appropriate relief, the appellant has a duty to show "the language complained of might have so affected the prospective jury panel that it was likely defendant would be deprived of a fair and impartial trial." *Carriker, supra,* at 535. While impressed with the many principles of law argued in appellant's brief, we hold they do not fit the facts of this case.

In the appeal from the judgment on the jury verdict and from the denial of the motion for appropriate relief, we find no error.

Affirmed.

Judges ARNOLD and JOHNSON concur.

STATE OF NORTH CAROLINA v. LANCE KOBERLEIN

No. 821SC299

(Filed 18 January 1983)

1. **Criminal Law § 91— speedy trial—dismissal due to unavailability of prosecuting witness—time runs from new charges**

Where the charges against defendant were dismissed once due to the unavailability of a prosecuting witness at the probable cause hearing, the period for computation of the time within which defendant's trial must have been commenced under G.S. 15A-701(a1)(3) began to run from the last of certain listed events relating to the new charges rather than the original charges.

2. **Criminal Law § 91— speedy trial—last relevant event as return of indictment and not post-indictment arrest**

Where charges against defendant were dismissed once and then brought again, the last relevant event with regard to speedy trial purposes was when the new indictment was returned and not the post-indictment arrest. Since defendant was not brought to trial within 120 days following the new indictment, the case must be remanded for a determination pursuant to G.S. 15A-703, as to whether a dismissal with or without prejudice was warranted. G.S. 15A-701(a1)(1) and (3), G.S. 15A-612(b).

APPEAL by defendant from *Small, Judge.* Judgment entered 10 December 1981 in Superior Court, CURRITUCK County. Heard in the Court of Appeals 13 October 1982.

Defendant Lance Koberlein was convicted of common law robbery and assault with a deadly weapon with intent to kill resulting in serious bodily injury. From the verdict and judgment, defendant appeals.

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

Twiford, Derrick & Spence, by Russell E. Twiford, for defendant appellant.

JOHNSON, Judge.

Defendant assigns error to the trial court's denial of his motion to dismiss the charges with prejudice due to the State's failure to provide him a speedy trial in accordance with G.S. 15A-701.

The charges against defendant were dismissed once and then brought again. With regard to the commencement of trial, G.S. 15A-701(a1)(3) provides in pertinent part:

> 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 . . . 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.

On 9 September 1980 warrants were issued for the arrest of the defendant Lance Koberlein for common law robbery and assault with a deadly weapon with intent to kill. These warrants were executed on 24 February 1981 by the arrest of defendant. A first appearance was held the next day. On 25 March 1981 the charges were dismissed because of the failure of the prosecuting witness to appear at the probable cause hearing. On 30 March 1981 defendant was charged by indictment for the same offenses.

An order for arrest pursuant to G.S. 15A-305 was issued.[1] Defendant was then arrested upon the indictments on 23 September 1981. Defendant was brought to trial on 7 December 1981. In all, 285 days elapsed between defendant's initial arrest and trial, 250 days elapsed between indictment and trial, and 74 days elapsed between his post-indictment arrest and trial.

Defendant argues first that the relevant event to start the 120 day period is his initial arrest on 24 February 1981, and second, even if earlier periods are excluded, any reasonable interpretation of G.S. 15A-701 must result in the 120 day period beginning not later than 30 March 1981, the date of defendant's indictment. Defendant's position is that under either theory more than 120 days passed between the last relevant event listed in G.S. 15A-701(a1)(3). Therefore, he is entitled to a dismissal of the charges with prejudice. The State contends that the last event was the post-indictment arrest of defendant on 23 September 1981, which occurred only 74 days prior to his trial. Accordingly, the State argues that the trial was commenced well within the statutory 120 day limit.

I

[1] The first portion of defendant's argument raises an issue of first impression under G.S. 15A-701(a1)(3). The issue is whether the 120 day period begins to run from the last event relative to the original charges or the last event relative to the new charges, when charges are dismissed for reasons other than a finding of no probable cause pursuant to G.S. 15A-612 or dismissed pursuant to G.S. 15A-703. Defendant maintains that under G.S. 15A-701(a1)(3) when the charges were dismissed for the State's failure to proceed with the probable cause hearing and defendant was afterwards indicted for the same offenses, the applicable time period should have been 120 days from the date the defendant was arrested and served with criminal process on the original charges.

Defendant urges a very literal reading of G.S. 15A-701(a1)(3) upon this Court. A similar literal interpretation of the statute where charges for the same offense were reinstituted after a find-

1. G.S. 15A-305(b)(1) provides in part that an order for arrest may be issued when a grand jury has returned a true bill of indictment against a defendant who is not in custody, to answer to the charges in the bill of indictment.

ing of no probable cause was rejected in *State v. Boltinhouse*, 49 N.C. App. 665, 272 S.E. 2d 148 (1980). This Court noted that insertion of the phrase "or a finding of no probable cause pursuant to G.S. 15A-612," by amendment, rendered the statute ambiguous and subject to the literal interpretation for which the defendant contended, to wit, that the events relative to the original dismissed charges were the relevant measuring events. Such an interpretation would conflict with the clear intent of G.S. 15A-612(b) to permit subsequent prosecution for the same offense where a finding of no probable cause has been entered by imposing an impossibly short time limit upon the State in which to reinstitute the charges in many cases. Therefore, the defendant's interpretation was rejected in favor of the following interpretation:

> [W]hen a finding of no probable cause is entered pursuant to G.S. 15A-612, the computation of time for the purpose of applying the Speedy Trial Act commences with the last of the listed items ('arrested, served with criminal process, waived an indictment, or was indicted') *relating to the new charge rather than the original charge.* (Emphasis added.)

49 N.C. App. at 667, 272 S.E. 2d at 150.

We find no practical distinction between dismissal based upon the State's failure to proceed with a probable cause hearing because of the unavailability of the prosecuting witness and a finding of no probable cause for the purposes of computing the time limit under G.S. 15A-701(a1)(3). Therefore, we hold that the period for computation of the time within which trial must be commenced under G.S. 15A-701(a1)(3) began to run from the last of the listed events relating to the new charges rather than the original charges.

II

[2] The next issue presented is whether the last event in the relevant sequence is the indictment returned on 30 March 1981 as the defendant contends, or the post-indictment arrest on 23 September 1981 as the State contends. Again, this Court is presented with an issue of first impression. A number of cases have addressed the issue of whether the 120 day period under G.S. 15A-701(a1) begins with the *initial arrest* upon a warrant or with the indictment of the defendant.

In *State v. Young*, 302 N.C. 385, 275 S.E. 2d 429 (1981) the Supreme Court held that the lapse of more than 120 days between the defendant's arrest and the date of trial did not violate the statute where only 77 days elapsed between the date of defendant's subsequent indictment and trial.

In *State v. Rice*, 46 N.C. App. 118, 264 S.E. 2d 140 (1980) the time span from arrest to trial was 188 days, with 133 days between service of the warrant for arrest and date of indictment. Only forty-nine days elapsed from indictment to trial. The last of the items specified in G.S. 15A-701(a1)(1) to occur was found to be the indictment.[2] Therefore, the trial held forty-nine days later met the 120 day time frame of the statute.

In *State v. Boltinhouse, supra*, the defendant was arrested pursuant to a warrant issued 24 May 1979. On 5 September 1979 a finding of no probable cause was entered on the charge. On 24 September 1979 the defendant was indicted for the same offense. The trial commenced 7 January 1980, 105 days after the return of the indictment and 122 days after his initial arrest.

> Construing the ambiguous language of G.S. 15A-701(a1)(3) in light of the clear intent of G.S. 15A-612(b), we find that the period for computation of the time within which trial must be commenced under G.S. 15A-701(a1)(3) began to run from the date of defendant's indictment on the new charge rather than from the date of his arrest on the 'original charge,' as he contends. The 24 September 1979 indictment of defendant thus constituted the last in the relevant sequence of events.

49 N.C. App. at 668, 272 S.E. 2d at 150.

A similar sequence of events was presented in *State v. Charles*, 53 N.C. App. 567, 281 S.E. 2d 438 (1981). The defendant was arrested on or about 14 August 1979. After 120 days passed the defendant moved to dismiss because the State, without a valid reason, had failed to accord him a speedy trial. Subsequently, the defendant was indicted on 8 January 1980. The defendant's motion was not heard until 10 April 1980 and it was then denied.

2. G.S. 15A-701(a1)(1) provides that trial shall begin "[w]ithin 120 days from the date the defendant is arrested, served with criminal process, waives an indictment, or is indicted, whichever occurs last." Subdivision (1) applies to cases where the defendant is brought to trial upon the original, and not the new, set of charges.

The trial itself began on 10 April 1980, well within the 120 days of return of the indictment against the defendant. The denial of the defendant's speedy trial motion was affirmed. This Court reviewed the legislative history of G.S. 15A-701(a1)(1) and noted that the original Bill providing that the first of the enumerated events would start the 120 days, had been specifically amended to provide that the *last* of the occurring events would be used to measure the 120 days. In the course of its discussion this Court recognized that under the provisions of G.S. Chap. 15A, Art. 17, Criminal Process, while arrest may precede indictment in some cases, in others indictment may precede arrest and then concluded that in view of the legislative history the 120 days would run from whichever event occurred last ("arrested, served with criminal process, waived an indictment, or was indicted"). 53 N.C. App. at 571, 281 S.E. 2d at 44. In *Charles* the last occurring event in the criminal process chain leading from the initial arrest to the trial was found to be the return of the bill of indictment.

The observation made in *Charles* would appear at first glance to determine the issue presented in the case *sub judice*. However, upon closer scrutiny we do not believe that it is determinative. As the arrest preceded the indictment in *Charles*, the statement is not necessary to the outcome and is, therefore, *dicta*.

In each of the above cases when faced with the choice of initial arrest upon a warrant or return of a true bill of indictment, our courts have held the last relevant event in the enumerated chain of events to be the return of a true bill of indictment against the defendant. In addition, in each case the defendant's trial was commenced within 120 days after the indictment. In the case *sub judice*, the original arrest upon a warrant was executed relative to the original charges. In Part I of this decision we held that events relative to the original dismissed charges would no longer be considered "relevant" under G.S. 15A-701(a1)(3) where the State had failed to proceed with the probable cause hearing. Hence, we are confronted with the choice of either the date of indictment or the date of execution of the order of arrest upon the indictment as the starting event under the statute.

As we read the statute and the cases previously decided thereunder, the "arrest" referred to in subdivisions (1) and (3) of G.S. 15A-701(a1) must relate to the arrest upon a warrant prior to

indictment. A literal reading of the phrase "arrested, served with criminal process, waived an indictment, or was indicted, whichever occurs last" to include the arrest upon the indictment as urged by the State, would afford the State tremendous opportunity to defeat the express purpose of the Act in expediting the trial of cases by allowing it unfettered discretion in obtaining an order to arrest subsequent to indictment. The potential for undue delay is particularly present in cases governed by subdivision (3) of G.S. 15A-701(a1) in cases where the relevant events are those relating to the new charges rather than the original charges. Very often in such cases, as in the case under discussion, long periods of time will pass between the time of the offense, the initial arrest and the ultimate trial for that offense. Therefore, we hold that the return of a true bill of indictment on 30 March 1981 is the relevant last occurring event in the chain of criminal process in this case. The defendant was not responsible for any part of the subsequent delay and the State offers no justification for its failure to bring defendant to trial within the 120 days following the indictment. In view of the fact that defendant was not brought to trial within the statutory period, this case must be remanded for a determination pursuant to G.S. 15A-703, as to whether a dismissal with or without prejudice is warranted.

Reversed and remanded.

Chief Judge MORRIS and Judge BECTON concur.

STATE OF NORTH CAROLINA v. GARY LEE MYRICK AND JUANITA LANE PRESNELL

No. 8225SC635

(Filed 18 January 1983)

1. Searches and Seizures § 24— sufficiency of affidavit for warrant

An affidavit for a search warrant which alleged that the affiant, based upon personal knowledge and information from a confidential informant, had reason to believe that there was evidence of "a violation of the North Carolina Controlled Substances Act, Chapter 90-95(a)(1)" at a certain mobile home was sufficient to show probable cause for issuance of a warrant to search the mobile home although it failed to allege that controlled substances were seen or purchased at the mobile home by the informant.

2. Narcotics § 3.3— quantity of narcotics—speculative testimony—harmless error

Although a chemist's opinion testimony as to the number of talwin tablets which had been dissolved to form the residue in spoons found in defendants' residence may have been speculative, such testimony was not prejudicial error since the content of the residue, rather than the quantity, was the only part of the testimony relevant to the possession offense with which defendants were charged.

3. Narcotics § 3.1— tattoo on defendant's hand—evidence not prejudicial

The admission of a detective's testimony that defendant had a tattoo of the word "cancer" on her hand and a photograph of defendant's arm which showed the tattoo was not prejudicial to defendant where the detective properly testified about seeing needle marks on defendant's arm, and the tattoo was visible in photographs illustrating testimony about the needle marks.

4. Criminal Law § 128.2— injury to juror from exhibit—denial of mistrial

The trial court did not abuse its discretion in the denial of defendants' motion for a mistrial when one of the jurors pricked her finger on a hypodermic needle and began to bleed when exhibits were passed to the jury, and the injured juror was excused and replaced with an alternate before the jury began deliberations.

5. Criminal Law § 92.5— denial of motion to sever—no abuse of discretion

The trial court did not abuse its discretion in the denial of defendants' motion to sever their trials made on the ground that the consolidated trial prevented one defendant from having the second defendant testify in his behalf that a mobile home in which narcotics were found was not his residence.

6. Criminal Law § 111.1— denial of motion to instruct in language of indictments

The trial judge did not err in the denial of defendants' motions to instruct the jury in the precise language of the indictments rather than in the language of the statute under which defendants were charged where the trial judge sufficiently declared and explained the law arising on the evidence as required by G.S. 15A-1232.

7. Criminal Law § 117.3— interested witness—possibility of probation revocation—failure to instruct

The trial court did not err in refusing to instruct the jury that a State's witness was in danger of having her probation revoked if she failed to cooperate with the State in this case where the court gave an interested witness charge on the credibility of the witness in question.

8. Criminal Law § 163— failure to object to charge or request instructions

Defendants could not assign as error any portion of the charge or omission therefrom where the trial judge held a charge conference before he gave instructions to the jury and gave defendants an opportunity to object specifically to the instructions before the jury retired to deliberate, but defendants did not object or make any request for instructions. App. Rule 10(b)(2).

APPEAL by defendants from *Johnson, Judge.* Judgments entered 27 January 1982 in Superior Court, CATAWBA County. Heard in the Court of Appeals 11 January 1983.

This is a criminal action in which both defendants were charged in proper bills of indictment with: (1) knowingly maintaining a dwelling house which is resorted to by persons using controlled substances in violation of the Controlled Substances Act or for the sale of controlled substances, in violation of G.S. § 90-108(a)(7), and (2) felonious possession of pentazocine with intent to sell or deliver, in violation of G.S. § 90-95(a)(1).

Both defendants pleaded not guilty. The State offered evidence tending to show the following: On 1 October 1981, several Catawba County sheriff's deputies, armed with a search warrant, went to a mobile home located on Spencer Road in Catawba County. The deputies found in the home defendants Myrick and Presnell, Teresa Miller, Troy Long, and several other people. After the deputies entered the mobile home, Lori Bowman threw to the floor a hypodermic syringe containing a clear liquid. The liquid was subsequently tested by the SBI and proved to be liquified talwin, the trade name for the painkiller pentazocine. Another syringe containing liquified talwin was lying on the kitchen bar near defendant Myrick. Two vials, one of them containing peach-colored talwin tablets, were removed from defendant Myrick's person and seized by the deputies. The name of defendant Presnell was on the prescription label of the vial containing talwin. Several hypodermic needles and syringes were lying on a table where Troy Long was seated. Items seized from Long's possession included a plastic vial containing talwin tablets, a spoon, another needle and syringe, and shoestrings tied end to end. Numerous spoons containing a residue, which later proved to be dissolved talwin tablets, were found throughout the mobile home during the search, several of them in kitchen cabinets. Hypodermic needles also were found in a vase in the kitchen located near defendant Myrick. A roach clip was seized from the kitchen table, and two marijuana cigarettes were seized from the bedroom. The deputies saw red marks on the arms of both defendants and on the arms of the other people present. Teresa Miller testified that the mobile home was rented by defendant Presnell, who lived there with her two children and defendant Myrick. Mrs. Miller had been to the trailer approximately 200

times to purchase from defendants talwin, which she often injected into her veins while at the trailer. Mrs. Miller had seen defendants and the others present the day of the search injecting talwin into their veins while at the trailer.

Defendants put forth no evidence.

Both defendants were found guilty as charged.

From judgments imposing prison sentences of two years in each case, to run consecutively, defendants appealed.

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

Kirby Kepford for defendant appellant Juanita Lane Presnell.

Samuel H. Long, III and Daniel R. Green, Jr. for defendant appellant Gary Lee Myrick.

HEDRICK, Judge.

[1] Defendants first assign error to the denial of their motions to suppress the evidence seized after a search of the mobile home on Spencer Road. Defendants contend that the search warrant was fatally defective because the affidavit upon which it was based failed to identify the mobile home to be searched as the place where controlled substances were seen or purchased by the confidential informant. Thus, defendants argue, the affidavit furnishes insufficient information for showing probable cause in issuance of the warrant.

We do not agree. The affidavit, when considered contextually, alleges that the affiant, based upon personal knowledge and information from a confidential informant, has reason to believe there is evidence of

> . . . a crime, to wit: violation of the North Carolina Controlled Substances Act, Chapter 90-95(a)(1), and the property is located in the place described as follows: a Mobile Home, white in color with green trim and having a carport looking attachment to the mobile home. This Mobile Home being located on Spencer Road (RPR 1441) and being the second mobile home on the right traveling north past RPR 1544.

We hold the search warrant on its face, when considered together with the affidavit, is in all respects proper. Judge Johnson did not err in denying the defendants' motion to suppress.

Defendants' fifth, sixth, and seventh assignments of error relate to the admission and exclusion of evidence.

[2] Defendants first contend that the court erred in allowing an expert witness, the SBI chemist who tested the drugs seized, to testify about the number of talwin tablets he believed had been dissolved to form the residue in spoons found at the mobile home. In Assignment of Error No. 3, defendants argue that an improper foundation was laid for the admission of the expert's opinion. In Assignment of Error No. 6, the argument is that the expert was merely guessing and his opinion was inadmissible speculation.

We find no prejudicial error. The expert's testimony with respect to the number of tablets needed to form the residue might have been speculative, but the information to which he testified was immaterial. The content of the residue, rather than the quantity, was the only part of the testimony relevant to the possession offense with which defendants were charged.

[3] Defendants next contend, in Assignment of Error No. 7, that the court erred in allowing Detective James Morris to testify that defendant Presnell had a tattoo of the word "cancer" on her hand and in admitting State's Exhibit 11, a photograph of defendant Presnell's arm which showed the tattoo. Defendants argue that this evidence was irrelevant and served only to inflame the jury.

While the testimony about the tattoo and photographs depicting it might have been irrelevant, we fail to perceive how the admission of such evidence could have prejudiced the defendants. Detective Morris' testimony about seeing needle marks on defendants' arms clearly was relevant. When he viewed the needle marks, he obviously saw the tattoo, which also was visible in the photographs illustrating testimony about the needle marks. This contention is meritless.

[4] Defendants' eighth assignment of error is based upon the court's denial of their motion for mistrial. As the exhibits were being passed by the jury, one of the jurors pricked her finger on a hypodermic needle and began to bleed. Although the court refused to grant defendants' request for a mistrial, the injured

juror was excused and replaced with an alternate before the jury began deliberations, and the remaining jurors were questioned individually about whether the incident would affect their judgment in the case. A motion for mistrial must be granted if an incident occurs which would render a fair and impartial trial impossible under the law. *State v. McCraw*, 300 N.C. 610, 268 S.E. 2d 173 (1980). The question of mistrial lies within the discretion of the trial judge, whose decision will not be disturbed on appeal absent a showing of abuse of that discretion. *State v. Allen*, 50 N.C. App. 173, 272 S.E. 2d 785 (1980); *State v. Yancey*, 291 N.C. 656, 231 S.E. 2d 637 (1977). Nothing in this record indicates that any abuse of discretion occurred.

[5] The fifth assignment of error raised by defendants concerns the denial of their motion to sever. Defendants contend in their brief that the consolidated trial prevented defendant Myrick from having defendant Presnell testify in his behalf that the mobile home was not his residence. Because the trials were consolidated, defendant Presnell would have been proving the State's case against her if she had testified and admitted that she alone maintained the mobile home. We find this argument without merit. Whether defendants should be tried jointly or separately is within the sound discretion of the trial court. In the absence of a showing that a consolidated trial has deprived the movant of a fair trial, the exercise of the court's discretion will not be disturbed upon appeal. *State v. Slade*, 291 N.C. 275, 229 S.E. 2d 921 (1976). We find no abuse of discretion.

Defendants' Assignment of Error Nos. 9, 10, 11 and 12 relate to the court's instructions to the jury.

[6] Defendants first assign error to the denial of their motions to have the judge instruct the jury in the precise language of the bills of indictment. The bills of indictment charged that each defendant

> . . . unlawfully and wilfully did feloniously, knowingly and intentionally keep and maintain a dwelling house, which said dwelling house is and was resorted to be [sic] persons using controlled substances in violation of North Carolina General Statute chapter 90, article 5 for the purpose of using controlled substances, *and* which said dwelling house is and was

> used for the keeping and selling of controlled substances in violation of General Statute 90, article 5. (Emphasis added.)

G.S. § 90-108(a)(7), under which these defendants were charged, provides:

> It shall be unlawful for any person to knowingly keep or maintain any store, shop, warehouse, dwelling house, building, vehicle, boat, aircraft, or any place whatever, which is resorted to by persons using controlled substances in violation of this Article for the purpose of using such substances, *or* which is used for the keeping or selling of the same in violation of this Article. (Emphasis added.)

Defendants argue the trial court was obligated to instruct the jury in accordance with the bills of indictment rather than the statute. It is significant that the defendants made no motions with respect to the bills of indictment prior to trial. The duty of the trial judge is to declare and explain the law arising on the evidence. G.S. § 15A-1232. Judge Johnson did precisely as required by the statute. The defendants' assignments of error are not sustained.

[7] Defendants next assign error to the trial judge's refusal to instruct the jury as requested regarding witness Teresa Miller. Defendants argue the court erred in refusing to instruct the jury that witness Miller was in danger of having her probation revoked if she failed to cooperate with the State in this case. Defendants cite no authority in support of their argument. The trial judge gave an interested witness charge on the credibility of the witness in question. Nothing more was required. The defendants' contentions are meritless.

[8] By Assignment of Error Nos. 9 and 10, defendants contend the court erred in its instructions to the jury in placing the burden of proof upon defendants to establish that they lawfully possessed a controlled substance. By Assignment of Error No. 12, defendant Myrick contends the court erred in failing to instruct the jurors that if they found as a fact that both defendants shared the same household, then possession by defendant Myrick of the controlled substance prescribed to defendant Presnell would be presumed lawful. N.C. App. R. 10(b)(2) provides in part:

> No party may assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection; provided, that opportunity was given to the party to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

In the present case, Judge Johnson held a charge conference before he gave instructions to the jury and gave the defendants an opportunity to object specifically to the instructions before the jury retired to deliberate. Defendants had not objected and defendant Myrick had not made any request regarding the charge to which he now complains. The defendants have failed properly to preserve these exceptions for review.

We hold the defendants had a fair trial free from prejudicial error.

No error.

Judges WHICHARD and EAGLES concur.

STATE OF NORTH CAROLINA v. YORK BERNARD JOHNSON

No. 8223SC578

(Filed 18 January 1983)

1. Constitutional Law § 30— destruction of seized marijuana—no prior notification to defendant—harmless error under facts

In a prosecution for felonious trafficking in drugs through possession of 2,000 or more but less than 10,000 pounds of marijuana in violation of G.S. 90-95(h), the trial court did not err in denying defendant's motion to suppress evidence relating to 121 of the 123 bales of marijuana found in defendant's residence which were destroyed. Since photographs of the bales and barrels of marijuana were taken while the cache was still in defendant's basement; all of the items seized were placed in a van, transported to another site, and weighed; a sample was taken from the center of each bale and container, placed in a labeled plastic bag, initialed and dated; photographs were taken of these procedures; the samples were tested twice—once by the S.B.I. and once by an independent scientist; and both chemists concluded that the green vegetable matter was marijuana, the prosecution's actions did not constitute a

suppression of evidence even though the better practice would have been for the prosecution to have properly filed its destruction order and to have notified the defendant first.

2. **Constitutional Law § 34; Criminal Law § 26.8— declaration of mistrial—no findings of fact with respect to grounds—improper—not prejudicial—no double jeopardy**

In a prosecution for felonious trafficking in drugs, the trial court erred in failing to make findings of fact and entering them into the record before declaring a mistrial. However, such error was not prejudicial where the trial judge had suffered a heart attack the year before and had begun to experience familiar chest pains the night before and the morning of the day he declared the mistrial. The trial judge entered his findings of fact concerning the mistrial into the record prior to dismissing the jury the following day.

Judge HEDRICK concurs in the result.

APPEAL by defendant from *Rousseau, Judge.* Judgment entered 17 February 1982 in Superior Court, WILKES County. Heard in the Court of Appeals 7 December 1982.

During the late evening hours of 26 March 1981, a search of defendant's residence, pursuant to a valid search warrant, was made by officers of federal, state, and Wilkes County law enforcement agencies. The officers found and seized 123 forty-pound bales of what was alleged to be marijuana. Defendant was arrested and charged with felonious trafficking in drugs through possession of 2,000 or more but less than 10,000 pounds of marijuana, in violation of N.C. Gen. Stat. § 90-95(h) (1981).

Defendant appeared in Wilkes County District Court on 27 March 1981 for a first appearance; he was not represented by counsel at that time. That same morning, a signed, but unfiled, order issued, directing that the seized substance be destroyed. Less than 24 hours after defendant's arrest, 121 of the 123 bales were destroyed; 2 full bales and samples from each of the 121 destroyed bales were saved.

On 17 December 1981, three days into the State's presentation of its evidence, the judge, after an outburst from the District Attorney, took a ten-minute recess, withdrew a juror, and declared a mistrial without making findings of fact concerning his reasons for declaring a mistrial. The court then requested that the rest of the calendar, which consisted of guilty pleas, be called, and presided through the next day, a Friday. The judge entered

his findings of fact concerning the mistrial into the record prior to dismissing the jury on 18 December 1981.

A second trial was held before the Honorable Julius Rousseau, Jr. on 15 February 1982. The defendant renewed his motions to suppress evidence related to the destroyed bales and to dismiss the charges against him. The motions were denied, the case was tried, and the jury returned a verdict of guilty as charged. From a judgment imposing an active sentence of 10 to 15 years and a $100,000 fine, defendant appeals to this Court.

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

Vannoy, Moore & Colvard, by J. Gary Vannoy, for the defendant appellant.

BECTON, Judge.

I

[1] Defendant first appeals from the denial of his motion to suppress evidence relating to the destroyed portion of the seized materials. He cites numerous cases as support for the proposition that the destruction of the fruits of a search amounts to a suppression of evidence and a violation of due process. He argues that since the drug trafficking statute applies only to certain minimum quantities of contraband, he was denied procedural due process because he was not allowed to: (i) test all of the seized substance, and thus determine whether it was all, in fact, marijuana, and (ii) weigh the substance and determine, independently, whether he was properly charged with trafficking. We agree that the *Brady*[1] rule, that: "the suppression by the prosecutor of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith of the prosecution," properly applied, is a valid rule of law. However, the actions of the prosecutor did not amount to a *Brady* suppression of evidence.

Indubitably, the better practice would have been for the prosecution to have properly filed its destruction order and to

1. *Brady v. Maryland*, 373 U.S. 83, 87, 10 L.Ed. 2d 215, 218, 83 S.Ct. 1194, 1196-97 (1963).

have notified the defendant, in a timely fashion, of its intention to destroy the marijuana. We will be hard-pressed, in the future as we are now, to see the need for such hasty action. Nevertheless, we find no error harmful to the defendant here for the following reasons.

Photographs of the bales and barrels of marijuana were taken while the cache was still in defendant's basement. All of the items seized were placed in a van, transported to another site, and weighed.[2] A sample was taken from the center of each bale and container, placed in a labeled plastic bag, initialed and dated. Photographs were taken of this procedure. The samples were tested twice—once at the S.B.I. laboratory and again, at defendant's request, by an independent scientist at North Carolina State University. Both chemists concluded that the green vegetable material was marijuana.

This stage of the investigation was conducted with great care. Competent evidence as to the weight of the marijuana was introduced. Consequently, we find that under the circumstances of this case, the prosecution's actions did not constitute a suppression of evidence; neither do any of the facts *sub judice* permit us to infer that the course of conduct urged by the defendant would have resulted in the preservation of evidence favorable to his cause.

II

[2] Defendant next complains that the first trial court committed error by improperly declaring a mistrial, and that the second trial court erred by denying defendant's motion to dismiss based on defendant's claim that he was subjected to double jeopardy. We will discuss these contentions together.

The trial court, *before* granting a mistrial, "must make finding of facts with respect to the grounds for the mistrial and insert the findings in the record of the case." N.C. Gen. Stat. § 15A-1064 (1978). The original trial court did make findings of fact relating to its declaration of mistrial. Our statute specifically requires, and we strongly urge adherence thereto, that findings be made and entered into the record *before* a declaration of mistrial. Even the

2. The State's evidence was that the weight was 4,920 pounds.

most exigent of circumstances do not justify circumvention of this rule. *See, e.g., State v. Boykin*, 255 N.C. 432, 121 S.E. 2d 863 (1961) (Judge suffered heart attack and made findings from his hospital bed before declaring mistrial). We note that this defendant did not acquiesce in the mistrial. Consequently, we hold that the original trial court erred in failing to make factual findings before it declared the mistrial. Nevertheless, on the facts of this case, we find no prejudice to the defendant, and thus, no merit to his argument that he was twice placed in jeopardy for the same offense.

"It is a fundamental principle of the common law, guaranteed by our Federal and State Constitutions, that no person may be twice put in jeopardy of life or limb for the same offense." *State v. Shuler*, 293 N.C. 34, 42, 235 S.E. 2d 226, 231 (1977), *citing* U.S. Const. Amend. V, N.C. Const. Art. I § 19 [other citations omitted]. Equally clear is the proposition that a defendant may be subsequently tried following the termination of an earlier proceeding by order of mistrial when the mistrial was granted due to, *inter alia*, a physical necessity. This is true even when the mistrial is granted over defendant's objections. *Id.*

The Official Commentary to G.S. § 15A-1064 provides:

> This provision will be important when the rule against prior jeopardy prohibits retrial *unless the mistrial is upon certain recognized grounds or unless the defendant requests or acquiesces in the mistrial.* If the defendant requests or acquiesces in the mistrial, that finding alone should suffice. [Emphasis added.]

Physical necessity is such a recognized ground. The judge in the first trial had suffered a heart attack the year before and had begun to experience the familiar chest pains the night before and the morning of the day he declared the mistrial. Clearly such danger signals amount to "physical necessity." The trial of a heated drug trafficking case is decidedly different from the taking of guilty pleas. The facts found by the trial judge on 18 December were sufficient to warrant a mistrial.

Assured as we are of the quality of our trial bench, we point out that the *raison d'etre* of G.S. § 15A-1064 is sound and valued highly by this Court. It is only because of the peculiar facts of

this case that we find the declaration of a mistrial, before facts warranting the mistrial were found, to be harmless.

III

Defendant's third argument concerns the voluntariness of his statements regarding the ownership and weight of the marijuana in his basement. He contends that, although he took responsibility for the marijuana's presence, he did not make a statement concerning its weight, and that admission of a purported utterance that the substance weighed five to six thousand pounds was error. Because competent evidence of the weight of the marijuana was later admitted without objection, we find no prejudice to defendant here. *State v. Melvin*, 32 N.C. App. 772, 774, 233 S.E. 2d 636, 638 (1977).

IV

We have examined defendant's arguments four and five and find them to be without merit.

We find defendant's trial to have been free from prejudicial error.

No prejudicial error.

Judge HEDRICK concurs in the result.

Judge WEBB concurs.

RDC, Inc. v. Brookleigh Builders

RDC, INC., A DELAWARE CORPORATION DOING BUSINESS IN NORTH CAROLINA v. BROOKLEIGH BUILDERS, INC., BY W. JOSEPH BURNS, TRUSTEE IN BANKRUPTCY; STAFFORD R. PEEBLES, JR., TRUSTEE FOR CARLISLE B. MCKENZIE AND WIFE, LOUISE J. MCKENZIE; CARLISLE B. MCKENZIE AND WIFE, LOUISE J. MCKENZIE; STAFFORD R. PEEBLES, JR., TRUSTEE FOR MARTIN SEPTIC TANK SERVICE; MARTIN SEPTIC TANK SERVICE; WAYNE C. SHUGART, TRUSTEE FOR SMITH-PHILLIPS LUMBER COMPANY; SMITH-PHILLIPS LUMBER COMPANY; FOSTER & HAILEY, INC.; PFAFF'S, INC.; NEW WORLD, INC.; AND OLDTOWN CARPET CENTER

No. 8221SC168

(Filed 18 January 1983)

Laborers' and Materialmen's Liens § 8— enforcement of lien—filing in bankruptcy court not sufficient

The filing of a proof of claim of lien for labor and materials in a federal bankruptcy court did not constitute the commencement of an action to enforce the lien within the meaning of G.S. 44A-13(a); rather, an action to enforce a lien for labor and materials may properly be commenced only by the filing of a civil action in the appropriate State court. G.S. 44A-12; G.S. 1A-1, Rules 2 and 3.

APPEAL by respondents from *Freeman, Judge.* Judgment entered 17 December 1981 in Superior Court, FORSYTH County. Heard in the Court of Appeals 9 December 1982.

RDC, Inc. instituted this special proceeding before the Clerk of Superior Court to recover monies due it, as holder of a deed of trust, from surplus foreclosure sale proceeds held by the Clerk, following the bankruptcy and dissolution of Brookleigh Builders, Inc. and the satisfaction of the obligation owed to the holders of deeds of trust. Before the Clerk, respondents stipulated and agreed that RDC was entitled to priority in the remaining proceeds. The Assistant Clerk presiding, upon finding that the remaining respondents were in disagreement as to who, among themselves, was entitled to follow RDC in priority, transferred the proceeding to the Superior Court for trial.

The case was tried without a jury. The following facts are not in dispute and are pertinent to an understanding of the question presented concerning the relative priority of the two respondents who are parties to this appeal, a statutory lienor and the holders of a note secured by a deed of trust.

Prior to 6 November 1979, two deeds of trust were recorded (by parties not presently involved), encumbering the subject property of Brookleigh Builders.

On 6 November 1979, respondent Foster & Hailey, Inc. first furnished materials or labor to the subject property.

On 3 January 1980, respondents Carlisle B. and Louise J. McKenzie recorded a $5000.00 deed of trust, encumbering the subject property.

On 15 July 1980, Foster & Hailey last furnished materials or labor to the subject property.

On 22 September 1980, Foster & Hailey properly filed a $6,217.65 claim of lien on the subject property, pursuant to Article 2 of Chapter 44A of the General Statutes.

On 27 October 1980, Brookleigh filed a voluntary petition in bankruptcy in federal court.

On 26 November 1980, Foster & Hailey filed a proof of claim in federal bankruptcy court, asserting its $6,217.65 lien. (While this filing was within 180 days of the "last furnishing," Foster & Hailey never instituted any action in state court to enforce its lien.)

11 January 1981 was the 180th day after Foster & Hailey's "last furnishing" to Brookleigh.

On 18 February 1981, the trustee in bankruptcy "abandoned" the subject property pursuant to an order of the bankruptcy court. The trustee had held the property for 84 days.

On 3 July 1981, the present special proceeding was instituted in state court, wherein creditors with priority over both Foster & Hailey and the McKenzies received satisfaction. A balance of $6,942.18 remained, which is now the subject of dispute. The superior court ruled that Foster & Hailey had, by filing its proof of claim in federal bankruptcy court, properly "commenced" an action (within the meaning of G.S. 44A-13(a)) to enforce its lien and that, therefore, Foster & Hailey was entitled to priority in the remaining funds.

The McKenzies and Stafford R. Peebles, Jr., as trustee for the McKenzies, appealed.

Peebles, Hedgpeth & Schramm, by John J. Schramm, Jr. and Joseph C. Hedgpeth, for Stafford R. Peebles, Jr., Trustee, Carlisle B. McKenzie and Louise J. McKenzie, respondent-appellants.

House, Blanco & Osborn, P.A., by Reginald F. Combs, for Foster & Hailey, Inc., respondent-appellee.

WELLS, Judge.

Article 2 of Chapter 44A of the General Statutes pertains to statutory liens on real property. For priority purposes, liens duly perfected under Chapter 44A relate back to the time of first furnishing of labor or materials. As between a statutory lien and the lien created by a deed of trust, the general rule (which applies to the present case) is that the lien which is first in time has priority. *See Assurance Society v. Basnight*, 234 N.C. 347, 67 S.E. 2d 390 (1951). G.S. 44A-12 provides that, to be effective, claims of lien must be filed not later than 120 days after the "last furnishing" of labor or materials. G.S. 44A-13(a) permits the bankruptcy court to order enforcement of a perfected statutory lien. In the instant case, the bankruptcy court did not order such enforcement, but instead ordered that the trustee release the subject property to the claims of creditors. Foster & Hailey now contends that it should be excused from instituting an enforcement action since it filed a proof of claim in bankruptcy. We do not agree.

G.S. 44A-13(a) and (c) provide as follows:

§ 44A-13. *Action to enforce lien.*

(a) Where and When Action Instituted.

> An action to enforce the lien created by this Article may be instituted in any county in which the lien is filed. No such action may be commenced later than 180 days after the last furnishing of labor or materials at the site of the improvement by the person claiming the lien. If the title to the real property against which the lien is asserted is by law vested in a receiver or trustee in bankruptcy, the lien shall be enforced in accordance with the orders of the court having jurisdiction over said real property.

. . .

(c) Notice of Action.

Unless the action enforcing the lien created by this Article is instituted in the county in which the lien is filed, in order for the sale under the provisions of G.S. 44A-14(a) to pass all title and interest of the owner to the purchaser good against all claims or interests recorded, filed or arising after the first furnishing of labor or materials at the site of the improvement by the person claiming the lien, a notice of lis pendens shall be filed in each county in which the real property subject to the lien is located within 180 days after the last furnishing of labor or materials at the site of the improvement by the person claiming the lien. It shall not be necessary to file a notice of lis pendens in the county in which the action enforcing the lien is commenced in order for the judgment entered therein and the sale declared thereby to carry with it the priorities set forth in G.S. 44A-14(a). If neither an action nor a notice of lis pendens is filed in each county in which the real property subject to the lien is located within 180 days after the last furnishing of labor or materials at the site of the improvement by the person claiming the lien, as to real property claimed to be subject to the lien in such counties where the action was neither commenced nor a notice of lis pendens filed, the judgment entered in the action enforcing the lien shall not direct a sale of the real property subject to the lien enforced thereby nor be entitled to any priority under the provisions of G.S. 44A-14(a), but shall be entitled only to those priorities accorded by law to money judgments.

G.S. 1A-1, Rules 2 and (in pertinent part) 3 of the Rules of Civil Procedures provides as follows:

Rule 2. One form of action.

There shall be in this State but one form of action for the enforcement or protection of private rights or the redress of private wrongs, which shall be denominated a civil action.

> Rule 3. Commencement of action.
>
> A civil action is commenced by filing a complaint with the court. The clerk shall enter the date of filing on the original complaint, and such entry shall be prima facie evidence of the date of filing.

When the provisions of G.S. 44A-13(a) and G.S. 1A-1, Rules 2 and 3 are construed *in pari materia*, it is clear that lien holders may not commence an action to enforce their lien by any type of filing in a bankruptcy court, but only by filing a civil action in the appropriate state court.

Although both appellant and appellee have argued bankruptcy law at considerable length, we carefully point out that we do not address in any sense questions of the respective rights of the parties to this action under the bankruptcy laws of the United States, as at the time the present action was filed, the subject property was no longer subject to those laws. Our holding in this case is on the sole ground that appellee's filing of a claim with the trustee in bankruptcy did not constitute the filing of an action to enforce the lien so as to give appellee the benefit of the lien enforcement procedures established under the statutes of North Carolina.[1]

Appellee not having filed an action to enforce its lien, its lien expired prior to the time the present proceedings were instituted, and the trial court erroneously concluded that appellee is entitled to first priority in the balance of the funds in the hands of the Clerk. Under the facts stipulated to us in this matter, the appellant Stafford R. Peebles, Jr., Trustee for Carlisle B. McKenzie and wife Louise J. McKenzie, is entitled to first priority in such remaining funds. Accordingly, the judgment of the trial court must be reversed and this matter remanded to the Superior Court of Forsyth County for entry of judgment consistent with our opinion.

1. We note that the provisions of G.S. 44A-13(a) might have the effect of tolling the 180 day period for filing an action while the lien property is in the hands of the trustee. Under such an interpretation, appellee would have had 77 days after the subject property was released in which to commence an action to enforce. Legislative attention is perhaps appropriate to resolve any doubt as to the question.

Reversed and remanded.

Judges VAUGHN and WHICHARD concur.

RONDA JOY WILLIAMS KING v. SANDRA HUDSON ALLRED, LLOYD G. HARZE AND NU-CAR CARRIERS, INC.

No. 8218SC106

(Filed 18 January 1983)

Automobiles and Other Vehicles § 87.5— truck improperly parked on highway— automobile driver intoxicated—summary judgment for truck driver proper

In an action brought by plaintiff, a passenger in an automobile which collided with a truck which was parked on a traveled portion of the highway and not marked by lights or flares, the trial court properly entered summary judgment for defendants truck driver and truck owner since the negligence in parking the truck on a traveled portion of the highway and in failing to mark the parked truck with lights or flares was insulated by the negligence of the driver of the automobile in driving while intoxicated. G.S. 20-161(a) and G.S. 20-134.

Judge ARNOLD dissenting.

APPEAL by plaintiff from *Kivett, Judge.* Order entered 5 October 1981 in Superior Court, GUILFORD County. Heard in the Court of Appeals 17 November 1982.

Plaintiff was injured as a passenger in an automobile driven by the defendant Allred when it collided on a public highway with a tractor-trailer truck owned by the defendant Nu-Car Carriers, Inc., and driven by the defendant Lloyd G. Harze. All defendants filed motions for summary judgment. The defendants Harze and Nu-Car Carriers, Inc., contended the negligence of Allred intervened and insulated their negligence, if any, as a matter of law. The trial court allowed the motion of the defendants Nu-Car Carriers, Inc. and Harze, dismissing with prejudice plaintiff's action against these defendants. Plaintiff appeals.

Tate & Bretzmann, by Raymond A. Bretzmann, for plaintiff-appellant.

Nichols, Caffrey, Hill, Evans & Murrelle, by G. Marlin Evans and Harold W. Beavers, for defendant-appellees Lloyd G. Harze and Nu-Car Carriers, Inc.

HILL, Judge.

Plaintiff King and defendant Allred had been drinking beer in a bar in Greensboro. Defendant Allred testified in response to plaintiff's interrogatories that "[w]e were both intoxicated." They left the bar at 2:00 a.m. in a car owned and operated by defendant with plaintiff as passenger. The parties' destination was Allred's home, which was to be reached by driving along Highway I-85 to High Point, then along U.S. 311 to Flynt Hill Road and then to defendant's home.

Defendant was driving at about 45 miles per hour along the service road to I-85. This road was paved, 36 feet wide and at a slight downgrade, for 500 feet before the point of collision. A second or two before the collision, Allred saw the truck belonging to Nu-Car Carriers which was parked in Allred's lane. There were no flares or other lights on or around the parked truck. Allred applied her brakes, but collided with the Nu-Car Carriers truck. Allred testified bright lights from an oncoming vehicle obstructed her vision; that at all times she was looking ahead and at the oncoming vehicle. In her affidavit, Allred testified she was under the influence of intoxicants and did not see the truck in time to avoid colliding with it; that just before the accident she was intoxicated to the extent that she was unable to operate a car in a careful and prudent manner or keep it under proper control. Plaintiff suffered injuries arising out of the accident.

All defendants moved for summary judgment. The court denied the motion by Allred and allowed the motion of Nu-Car Carriers and Harze, dismissing with prejudice plaintiff's action against them.

One question is presented to this Court: Whether the trial court erred in granting the motion for summary judgment of defendants Lloyd G. Harze and Nu-Car Carriers. We find no error.

North Carolina law provides: "No person shall park or leave standing any vehicle . . . upon the paved or main-traveled portion of any highway . . . outside municipal corporate limits unless the vehicle is disabled to the extent that it is impossible to avoid stopping and temporarily leaving the vehicle upon the paved or main-traveled portion of the highway . . . ." G.S. 20-161(a). A violation of this law is negligence *per se. Hughes v. Vestal,* 264 N.C. 500, 142 S.E. 2d 361 (1965). Furthermore, it is unlawful to fail to display proper lights on a vehicle parked on the highway after dark. *See* G.S. 20-134. Violation of this statute is negligence *per se. Barrier v. Thomas and Howard Co.,* 205 N.C. 425, 171 S.E. 626 (1933).

By parking the truck on the traveled portion of the highway and failing to mark the parked truck with lights or flares, Lloyd G. Harze was negligent, and his negligence is imputed to Harze's employer, Nu-Car Carriers, Inc. A breach of duty to exercise reasonable care to warn other motorists of their peril may constitute negligence that is the proximate cause of injury resulting from a collision with a stationary vehicle on the highway. 3 Blashfield, Automobile Law and Practice 3d, § 116.

Allred acknowledges that she was intoxicated to the extent that she was unable to operate her automobile in a careful and prudent manner or keep it under proper control. This act constituted negligence *per se. Walters v. Parrish,* 252 N.C. 787, 115 S.E. 2d 1 (1960).

Where two motorists, or a motorist and a non-driver, are involved in an automobile accident, the negligence of one of the tort-feasors will intervene between the negligence of the other and the resulting accident only if it is such as to exclude the negligence of the other as a proximate cause of the accident. 2 Strong's N.C. Index 3d, Automobiles and Other Vehicles, § 87.4. We are confronted with the question whether parking of the truck by defendant Nu-Car Carriers, Inc. without posted warnings is a proximate cause of the accident or is merely a remote cause that has been insulated by the acts of defendant Allred in negligently operating the car while intoxicated.

The rule was quoted by Chief Justice Stacy in *Powers v. Sternberg,* 213 N.C. 41, 195 S.E. 88 (1938):

> "Where a second actor has become aware of the existence of the potential danger created by the negligence of an original tort-feasor, and thereafter, by an independent act of negligence, brings about an accident, the first tort-feasor is relieved of liability, because the condition created by him was merely a circumstance of the accident and not its proximate cause. Where, however, the second actor does not become apprised of such danger until his own negligence, added to that of the existing perilous condition, has made the accident inevitable, the negligent acts of the two tort-feasors are contributing causes and proximate factors in the happening of the accident and impose liability upon both of the guilty parties."

Id. at 44, 195 S.E. at 90, *quoting Kline et al., Aplnts., v. Moyer and Albert*, 325 Pa. 357, 364, 191 A. 43, 46 (1937).

Plaintiff contends that since Allred (the second actor) did not become apprised of the danger created by Harze and imputed to Nu-Car Carriers, Inc., until the negligence of both Allred and Harze made the accident inevitable, the negligent acts of two tort-feasors are contributing and proximate causes of the accident and impose liability upon both parties.

In the final analysis, the question becomes one of proximate cause, and each case must be judged on its facts. The Nu-Car Carriers vehicle was negligently parked in Allred's lane of traffic and without flares or lights to warn of its presence. Defendant Allred admitted she was intoxicated when she left the bar. Nevertheless, she operated the vehicle and received the plaintiff as a guest passenger. She was so intoxicated that she was unable to operate an automobile carefully, prudently and under proper control and did not see the truck in time to avoid a collision. She said bright lights from an oncoming car obstructed her vision at the point of collision. Allred had been traveling a straight, paved road 500 feet at 45 miles per hour and saw the parked vehicle only one or two seconds before the collision. Had she not been so intoxicated, she would not have been blinded by the headlights so that she failed to see the parked vehicle.

The duty to drive a car in a careful and prudent manner and keep it under proper control is on the driver when he or she starts the vehicle and remains on the driver throughout the trip.

The driver must anticipate emergencies that might arise under existing circumstances and operate the vehicle accordingly. This defendant Allred failed to do. Her negligence began when she operated her car while under the influence of an intoxicant. A collision was reasonably foreseeable throughout the drive. Her admitted inability to operate the car carefully at the time of collision resulted in plaintiff's injury and was its proximate cause. The ruling of the trial court that the negligence of Allred insulated the negligence of Harze and Nu-Car Carriers, Inc. is

Affirmed.

Judge JOHNSON concurs.

Judge ARNOLD dissents.

Judge ARNOLD dissenting.

I dissent. I cannot say that no genuine issue of material facts exists so as to conclude that the defendant Allred's negligence was the proximate cause of plaintiff's injury as a matter of law.

IN THE MATTER OF THE PURPORTED LAST WILL AND TESTAMENT OF JAMES BETHUNE

No. 8120SC1369

(Filed 18 January 1983)

1. **Wills § 23— caveat proceeding—refusal to give peremptory instruction for propounders**

The trial court in a caveat proceeding properly refused to give the jury a peremptory instruction that it should find that the will in question was the will of the purported testator if the jurors believed the witnesses as to the execution of the will where the caveators presented sufficient evidence for the jury to find that the paper writing in question was not duly executed by the purported testator.

2. **Evidence § 11.5— transaction with deceased—testimony by beneficiary of will**

The trial court in a caveat proceeding properly ruled that a beneficiary of the purported will was precluded by G.S. 8-51 from testifying as to her transactions with deceased.

In re Bethune

APPEAL by propounders from *Lane, Judge.* Judgment entered 4 September 1981 in Superior Court, MOORE County. Heard in the Court of Appeals 24 September 1982.

This is a caveat proceeding filed by the three natural children of James Bethune who died in Moore County on 26 July 1979. The caveators alleged that Bethune's purported will, which was presented for probate on 17 August 1979, was not his last will and testament because Bethune was mentally ill and physically weak on the date the will was executed. They further alleged that the purported will was not signed by Bethune, or in the alternative, that his signature was obtained by undue influence. The propounders of the will, Juanita Mason and Patricia Lyon, are the illegitimate daughters of Bethune and the sole beneficiaries of the purported will.

The caveat proceeding was subsequently transferred to the Superior Court for trial on the issue of *devisavit vel non.* Caveators stipulated that they were no longer alleging insufficient mental capacity of Bethune.

The propounders' evidence tends to show that on 14 October 1978, Bethune came to Doris Mungo's house in Durham. Bethune asked Ms. Mungo, the mother of propounders, if she would accompany him to Grover Burthey's Funeral Home for the purpose of witnessing his will. When Bethune and Ms. Mungo arrived at Burthey's office, Bethune handed him a typed document and asked Burthey to witness his will. After reading the document labeled "LAST WILL AND TESTAMENT OF JAMES BETHUNE TO JUANITA MASON AND PATRICIA LYON," Burthey read the document to Bethune. At Bethune's request, Burthey signed Bethune's name to the document while Bethune held the pen. Burthey and Ms. Mungo then signed the document in the presence of Bethune. Bethune told a neighbor that he had willed everything to his daughters "Pat and Juanita."

The caveators' evidence tends to show that on 4 June 1981 Burthey told a private investigator that he did not read the purported will to Bethune. Attorney George Bumpass testified that his firm had done extensive legal work for Bethune including the drafting of a will in the 1950's, but that he did not draft the will in question. During 1978 and 1979, Bumpass saw Bethune approximately twice a month. In April 1979 Bethune asked Bumpass

about clearing up property matters in Moore County but never mentioned making a will. Bumpass further testified that Bethune would not go near Burthey's Funeral Home and did not want Burthey near his house. Other evidence tends to show that Bethune's health had been poor since 1977; that he could not read nor write and that he had told a neighbor that he did not want any of his possessions to go to his daughters in Durham.

At the close of the evidence the jury found that the paper writing, dated 14 October 1978, was not executed by James Bethune according to the requirements of the law for a valid last will and testament.

From a judgment entered on the verdict, the propounders appeal.

Boyette and Boyette, by M. G. Boyette, Sr., for propounder appellants.

Van Camp, Gill & Crumpler, by James R. Van Camp, for caveator appellees.

MARTIN, Judge.[1]

[1] At the close of the evidence, the propounders moved for a directed verdict, or, in the alternative, for a peremptory instruction to the jury "that if they believe the witnesses as to the execution of the Will that they should find the Will should be probated in solemn form and is the will of the late James Bethune." The propounders have assigned error to the trial court's denial of this motion on the basis that they had met their burden of showing a properly executed will and that the caveators had failed to present any evidence to the contrary. We disagree.

In a case such as this the trial court must consider all of the evidence in the light most favorable to the caveators, deem their evidence to be true, resolve all conflicts in their favor and give them the benefit of all reasonable inferences arising from the evidence. *In re Coley,* 53 N.C. App. 318, 280 S.E. 2d 770 (1981). Furthermore, a peremptory instruction in favor of the party hav-

1. The Court's decision in this case was made and written prior to Judge Martin's retirement.

ing the burden of proof is proper only "when there is no conflict in the evidence and but one inference is permissible from it." *Cutts v. Casey*, 278 N.C. 390, 418-419, 180 S.E. 2d 297, 312 (1971). In the case *sub judice* caveators presented evidence that attorney George Bumpass' firm had prepared a will for Bethune in the 1950's; that Bumpass had no knowledge of the will at issue; that Bumpass had known Bethune for a long time and knew that he did not get along with Burthey and that Bethune had stated that he did not want to leave any of his property to his daughters in Durham. We believe the caveators presented sufficient evidence for the jury to find that the paper writing was not the duly executed will of James Bethune. It is obvious that the jurors did not believe the propounders' witnesses. This assignment of error is overruled.

[2] The propounders have also assigned error to the refusal of the trial court to allow Juanita Mason to testify as to her transactions with Bethune. The record on appeal shows that, at the close of the evidence and after the trial court had ruled on propounders' motion for a directed verdict and peremptory instruction, propounders attempted to offer the testimony of Juanita Mason. The court ruled that this witness could not testify as to her transactions with Bethune. We are unable to say if the exclusion of this testimony was prejudicial, since the record does not disclose what Ms. Mason's testimony would have been. *In re Worrell*, 35 N.C. App. 278, 241 S.E. 2d 343, *disc. review denied*, 295 N.C. 90, 244 S.E. 2d 263 (1978). Furthermore, the trial court has discretionary power to allow or disallow a party to introduce further evidence after they have rested. *Maness v. Bullins*, 33 N.C. App. 208, 234 S.E. 2d 465, *disc. review denied*, 293 N.C. 160, 236 S.E. 2d 704 (1977). We find no abuse of the trial court's discretion. We finally note that, pursuant to the language in G.S. 8-51 (the dead man's statute), it appears that the trial court was correct in disallowing Ms. Mason's testimony. This statute, in pertinent part provides: "[A] party shall not be examined as a witness in his own behalf or interest . . . against the executor, administrator or survivor of a deceased person . . . or a person deriving his title or interest from, through or under a deceased person . . . , concerning a personal transaction or communication between the witness

and the deceased person . . . ."[2] Ms. Mason, as a beneficiary of the purported will, comes within the ambit of this statute. *In re Will of Edgerton*, 29 N.C. App. 60, 223 S.E. 2d 524, *disc. review denied*, 290 N.C. 308, 225 S.E. 2d 832 (1976).

In their final argument propounders contend that the trial court erred in denying their motions to set aside the verdict and for a new trial, for reasons given in their prior assignments of error. Having found no merit to these assignments of error, we shall not disturb the verdict or the judgment.

Affirmed.

Judges ARNOLD and WHICHARD concur.

IN THE MATTER OF: THE FORECLOSURE OF LAND COVERED BY THOSE CERTAIN DEEDS OF TRUST GIVEN BY: RONALD S. WEST AND MARGIE H. WEST

No. 829SC156

(Filed 18 January 1983)

Evidence § 29.2— computerized records—sufficient foundation for admission in evidence

The testimony of a local FHA employee who was familiar with respondents' FHA loan accounts and the methods by which the FHA finance office in St. Louis, Missouri obtains the loan account data to put on its computers provided a sufficient foundation for the admission of the computerized records of respondents' FHA loan accounts under the business records exception to the hearsay rule.

APPEAL by respondents from *Hobgood, Judge.* Order entered 3 November 1981 in Superior Court, FRANKLIN County. Heard in the Court of Appeals 8 December 1982.

On 20 April 1979 the petitioner, Farmer's Home Administration (FHA) filed and served a notice of hearing regarding the right of foreclosure under several deeds of trust from respond-

2. An exception to G.S. 8-51 is noted in actions to set aside a purported will on grounds which include the lack of mental capacity. *In re Will of Ricks*, 292 N.C. 28, 231 S.E. 2d 856 (1977). In the matter presently before this Court, mental capacity was not an issue for jury determination.

ents, Ronald S. West and wife, Margie H. West on farmland located in Franklin County, N.C. The Franklin County Clerk of Court entered an order on 17 June 1980 finding that the respondents were in default and ordering that foreclosure be completed and a public sale be conducted on the subject premises. The respondents appealed from this order to the Superior Court.

The matter was heard before Judge Hobgood on 2 November 1981. Edith Shearin, secretary and office assistant in the Franklin County Farmers Home Administration office testified primarily from computerized records centrally maintained in a FHA office in St. Louis, Mo. Ms. Shearin testified, over objections by counsel for the respondents, that Ronald S. West and Margie H. West were in default and delinquent under the terms of their various loan accounts.

At the conclusion of the testimony and final arguments, Judge Hobgood made findings of fact and ordered the foreclosure to be completed. From the entry of this order, respondents appeal.

East and Norman, by Thomas F. East and Larry E. Norman, for respondent appellants.

Samuel T. Currin, United States Attorney, by Lawrence B. Lee, Senior Attorney, Office of the General Counsel, U.S. Department of Agriculture, and Patricia L. Holland, Assistant United States Attorney, for petitioner appellee.

JOHNSON, Judge.

The respondents present two related arguments on appeal: (1) the trial court erred in admitting the computerized records of the FHA and testimony of Edith H. Shearin into evidence without proper authentication and foundation; and (2) the trial court erred in ordering the completion of foreclosure upon the computerized records erroneously admitted into evidence.

The trial court found that a valid debt existed, that respondents were in default, that there was a right to foreclosure under the instruments and that proper notice had been given to all parties. The respondents do not contest the central fact that the account was in default under the terms of the notes and deeds of trust held by the petitioner. Rather, they take issue with the

introduction into evidence of Ms. Shearin's testimony that respondents were in default and the documents and computerized statements of account under the business records exception to the rule excluding hearsay evidence. We find no error in the admission of this evidence.

In the case of *State v. Springer*, 283 N.C. 627, 197 S.E. 2d 530 (1973) the Supreme Court set forth the requirements for authentication of business records stored in electronic computing equipment as a prerequisite for their admission into evidence.

> We therefore hold that printout cards or sheets of business records stored on electronic computing equipment are admissible in evidence, if otherwise relevant and material, if: (1) the computerized entries were made in the regular course of business, (2) at or near the time of the transaction involved, and (3) a proper foundation for such evidence is laid by testimony of a witness who is familiar with the computerized records and the methods under which they were made so as to satisfy the court that the methods, the sources of information, and the time of preparation render such evidence trustworthy.

Id. at 636, 197 S.E. 2d at 536.

The respondents cite *State v. Springer* and rely on that case in support of their contention that the proper foundation for Ms. Shearin's testimony was not provided because she did not testify that she was familiar with the computerized records and methods under which they were made. However, *Springer* is distinguishable in that the Supreme Court held that the testimony of a special investigator was inadmissible because the witness was testifying from computer records without attempting to offer the records themselves into evidence. Further, a proper foundation for his testimony had not been laid.

The record discloses that the computer records were properly authenticated and a proper foundation laid through the testimony of Ms. Shearin. Ms. Shearin testified to the effect that the computer center in St. Louis contained all the business records of the FHA and was the only source of such records. Thus, the first requirement set forth in *Springer*, that the computerized entries be made in the regular course of business was met.

The second requirement of the business records exception requires that computer entries be made at or near the time of the transactions involved. Ms. Shearin testified that the FHA in Franklin County provides information during the course of a loan to the finance office. In turn, the finance office puts that information into the computer terminals. In order to allow the county office to follow the course of the loan, the finance office prepares a transaction record which is sent back to the county office for inclusion in the borrower's file as a management systems card. An overall review of Ms. Shearin's testimony shows that information, payment or other data concerning the loan transaction is systematically forwarded by the Franklin County office to the St. Louis finance office without significant delay. Thus, the requirement that data be computerized at or near the time of the transaction involved is satisfied.

The requirement for laying a proper foundation is the third element of admissibility. A proper foundation must be laid by a witness who is familiar with the computerized records and the methods under which they were made. With regard to witness familiarity, the Court in *State v. Springer, supra,* stated:

> "The impossibility of producing in court all the persons who observed, reported and recorded each individual transaction gave rise to the modification which permits the introduction of recorded entries, made in the regular course of business, at or near the time of the transaction involved, and authenticated by a witness who is familiar with them and the method under which they are made. *This rule applies to original entries made in books of account in regular course by those engaged in business, when properly identified, though the witness may not have made the entries* and may have no personal knowledge of the transactions." (Emphasis added.)

283 N.C. at 634, 197 S.E. 2d at 535, *quoting, Supply Co. v. Ice Cream Co.,* 232 N.C. 684, 61 S.E. 2d 895 (1950). Ms. Shearin has been an employee of the FHA in Franklin County for sixteen years. She identified the records as FHA loan transaction records. Further, Ms. Shearin is familiar with the respondents' loan accounts and testified about the method by which the finance office in St. Louis obtains the loan account data to put on their computer.

As to the records upon which her testimony is based, Ms. Shearin testified:

> This information that I have today is verified with the finance office in St. Louis, Missouri, by the computer terminal in the Finance Office on each loan account.

After stating that the finance center in St. Louis contains all the Farmers Home records in the United States, Ms. Shearin added:

> Farmers Home Administration of Franklin County provides information to the Finance Office in St. Louis, Missouri, to put on a computer and in turn they set up their computer records in Finance and provide us with a transaction record, which we have today with us in Mr. West's management system card. We have a transaction record for every loan account of Mr. West and this information is a summary of those transaction records as given me by the Finance Office in St. Louis, Missouri.

The testimony of Ms. Shearin demonstrated her knowledge both of the subject records and the method by which the data is gathered and the records made. A sufficient foundation was laid to establish the trustworthiness of the loan records. Respondents have not demonstrated that the records indicating their default under the terms of the loan were not trustworthy or that the computer records were otherwise unreliable on the issue of their default. The fact that Ms. Shearin did not personally enter the information furnished the finance office on their computer bank, nor update and compute the interest on a particular loan herself does not in any way diminish her ability to authenticate the records and testify to the default under the rule announced in *State v. Springer*, 283 N.C. at 634, 197 S.E. 2d at 535. The "business records" exception contemplates exactly the situation presented by this case—the "impossibility of producing in court all the persons who observed, reported and recorded each individual transaction." *Id.* Therefore, to lay a proper foundation for admission of centrally maintained computerized records, it is wholly unnecessary to produce in court the computer terminal operator who actually entered the data onto the computer terminal.

The trial court properly admitted the FHA computer records and testimony of Ms. Shearin into evidence and properly ordered foreclosure to proceed based upon the evidence received at trial.

Affirmed.

Judges ARNOLD and BRASWELL concur.

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION, AND THE NEW TELEPHONE COMPANY v. CENTRAL TELEPHONE COMPANY

No. 8210UC372

(Filed 18 January 1983)

Utilities Commission § 20— general rate case—inclusion of expenses and revenues associated with yellow page advertising

The Utilities Commission did not err in including the expenses and revenues associated with and derived from yellow page directory advertising in the revenues and expenses of a telephone company before determining what rate increase should be granted the telephone company since (1) the furnishing of classified advertising by a telephone company, more commonly known as the yellow pages, is an essential part of the service it provides, (2) there was no substantial competition posing a threat to the telephone company's advertising market in North Carolina, and (3) the Court was unwilling to substitute its judgment for that of the Utilities Commission.

APPEAL by Central Telephone Company from an order of the North Carolina Utilities Commission. Order entered 21 September 1981. Heard in the Court of Appeals 10 November 1982.

Central Telephone Company filed an application to increase its rates and charges for telephone service in North Carolina on 16 January 1981. The Utilities Commission declared this to be a general rate case and ordered public hearings on 18 February. The Public Staff and the New Telephone Company were allowed to intervene on 3 June.

Following public hearings on the matter, the Commission issued an order granting an annual increase of $3,119,990 in gross revenues. In this order, the Commission included the expenses and revenues associated with and derived from yellow page directory advertising in the revenues and expenses of Central Telephone. In its application and presentation, Central had not included yellow page directory advertising revenues and expenses on the ground that they were not essential to providing telephone service to the public.

The net amount of revenue attributable to the yellow page advertising was $1,784,208 for the test year. Inclusion of this amount by the Commission increased the revenues available to Central to $56,659,619 and as a result, decreased the rate increase that was granted.

After a rehearing and amendment of its order by the Commission, the case was appealed to this Court solely on the yellow page issue. New Telephone is not a party to this appeal.

Paul L. Lassiter and Antoinette R. Wike, for the North Carolina Utilities Commission-Public Staff, intervenor-appellee.

Kimzey, Smith & McMillan, by James M. Kimzey, for defendant-appellant.

ARNOLD, Judge.

Before deciding the issue in this case, we note that the Utilities Commission has broad authority over regulated utilities in North Carolina under G.S. 62-30 and -32. The burden of proof is upon the utility seeking a rate increase to show that the proposed rates are just and reasonable. G.S. 62-75. *State ex rel. Utilities Comm'n v. S. Bell Tel. & Tel. Co.*, 24 N.C. App. 327, 210 S.E. 2d 543 (1975), *appeal dismissed*, 289 N.C. 286, 221 S.E. 2d 322 (1976). On appeals like the one before us, the rates fixed by the Commission "shall be prima facie just and reasonable." G.S. 62-94(e). 12 Strong's N.C. Index 3d *Telecommunications* § 1.9 (1978).

We find the recent case of *State ex rel. Utilities Comm'n v. S. Bell Tel. & Tel. Co.*, 57 N.C. App. 489, 291 S.E. 2d 789 (1982), to be persuasive. In that case, Southern Bell sought a general rate increase. The Commission granted only a partial increase. Bell appealed on the ground that the Commission improperly included its yellow page revenues and expenses in computing Bell's gross revenues and expenses.

In affirming the Commission's order, the Court reviewed the evidence as presented in the record and found that it was sufficient to support the order. Although that case differs from the one before us in that Southern Bell had included yellow page revenues for over 50 years prior to the application that was the subject of the case, we find the rationale of *Southern Bell* to be convincing.

Our decision rests on three grounds. First, we hold that the furnishing of classified advertising by a telephone company, more commonly known as the yellow pages, is an essential part of the service it provides. As a result, yellow page revenue and expenses should be included in the revenues and expenses of the company when it applies for a rate increase. This is clearly the majority rule. *See* 127 Cong. Rec. S11139-40 (daily ed. Oct. 6, 1981) (The District of Columbia and thirty of the thirty-five states that have decided the question consider directory advertising revenue in ratemaking cases.); 74 Am. Jur. 2d *Telecommunications* § 32 (1974).

In making our decision, we have not ignored our Supreme Court's statement in *Gas House, Inc. v. S. Bell Tel. & Tel. Co.*, 289 N.C. 175, 221 S.E. 2d 499 (1976), that yellow page advertisements are not a part of a telephone company's public utility business. But the holding in that case did not turn on the same issue that is before us. Instead, *Gas House* simply held that a limitation of liability clause in a contract between an advertiser in the yellow pages and Southern Bell was reasonable. Because that case was not decided on the issue that is central to the case *sub judice* and because the court's statement about the yellow pages was *obiter dictum*, we are not bound by it. *Muncie v. Insurance Co.*, 253 N.C. 74, 116 S.E. 2d 474 (1960). 1 Strong's N.C. Index 3d *Appeal and Error* § 69 (1976).

A recent decision by the Nebraska Public Service Commission on the issue before us listed reasons that yellow page revenues and expenses should be included. In *In re United Tel. Co. of the West*, 12 Pub. Util. Rep. 4th 462 (1975), the Commission stated:

> There can be no doubt that this is a service performed by the company. Telephone equipment and personnel are involved in this area. The directory is supplied by the company to its subscribers. The directory is a piece of telephone property. The equipment and personnel used in relation to yellow pages advertising are also used in providing telephone service. Directory advertising revenues come from telephone subscribers.

12 Pub. Util. Rep. 4th at 465. The case pointed out that "only telephone subscribers are advertisers in the yellow pages and

. . . directory advertising generates telephone calling" and concluded that "no one except the telephone company can adequately carry on the venture." *Id.* at 466. The reasoning of the Nebraska case is valid in the case *sub judice.*

Central points to recent increases in competition for advertising revenue as support for the argument that the yellow page revenue and expenses should not be considered. We cannot find a sufficient demonstration of such competition from the evidence in the record before us.

In testimony by its employee Thomas F. Moncho, Central sought to show competition from other sources. Of the eight exhibits that Moncho offered, seven were city directories published by private companies. He acknowledged that the publishers of those directories charged for them, unlike Central's yellow pages which are distributed free to its customers. Exhibit eight was a yellow page directory for the Raleigh-Durham-Chapel Hill area that was distributed free by a private publisher and paid for by the advertising of the merchants therein.

Elizabeth C. Porter, a staff accountant with the Utilities Commission Public Staff, testified on this issue. She argued that yellow pages are an integral part of telephone service.

> The origination of, the use, and the market for yellow pages are directly related to the telephone itself. To separate the two operations would create an inequitable situation for the ratepayer. The market would continue to be generated by the ratepayer and yet he would receive no benefit from the directory yellow page operations.

Record at 37.

Based on the record and the testimony of Moncho and Porter, we agree with the Commission's conclusion that "there is presently no substantial competition posing a threat to Central's advertising market in North Carolina." Seven city directories that subscribers had to pay for, and a yellow page directory from an area that Central does not service, are not sufficient competition to exclude consideration of Central's yellow page revenue.

Our third basis for upholding the Commission's order is that we are unwilling to substitute our judgment for that of the

Utilities Commission. "[I]f the order of the Commission is supported by any reasonable construction of the evidence it is not to be disturbed because a different interpretation could have been placed upon it." *State ex rel. Utilities Comm'n v. S. Railway Co.*, 267 N.C. 317, 326, 148 S.E. 2d 210, 217, *modified*, 268 N.C. 204, 150 S.E. 2d 337 (1966). This standard of review was followed in the recent *Southern Bell* case. *See* 57 N.C. App. at 496, 291 S.E. 2d at 793.

For the reasons stated herein, the order of the Utilities Commission is

Affirmed.

Judges HILL and JOHNSON concur.

MARION DOZIER PUGH v. THOMAS DAVENPORT AND WIFE, EDITH DAVENPORT; THELMA DAVENPORT HASSELL AND HUSBAND, FENTRESS HASSELL; IDA D. MAITLAND AND HUSBAND, WILL MAITLAND; WILMA DAVENPORT SPENCER AND HUSBAND, JESSIE L. SPENCER; DALLAS DAVENPORT AND WIFE, MARGARET D. DAVENPORT; CLARA MAY DAVENPORT RHODES AND HUSBAND, T. EARL RHODES

No. 812SC1308

(Filed 18 January 1983)

Wills § 33.1 — applicability of Rule in Shelley's Case

The Rule in Shelley's Case applied to a devise of land to "Percy Davenport for the period of his lifetime. . . . At the death of Percy Davenport I devise said land to the lawful issue of his body in fee simple forever," where it appears from an examination of the four corners of the will that the testator intended to use "lawful issue of his body" in the sense of heirs generally; therefore, the devisee received a fee simple estate in the devised land. G.S. 41-1.

APPEAL by defendants from *Smith (Donald L.), Judge.* Judgment entered 11 August 1981 in Superior Court, TYRRELL County. Heard in the Court of Appeals 17 September 1982.

Plaintiff brought this action to determine the ownership of a tract of land in Columbia Township, Tyrrell County. She claims to be owner of a marketable fee simple interest as that term is

defined in G.S. 47B-1 through 47B-9, the North Carolina Real Property Marketable Title Act. The defendants contest plaintiff's ownership.

The claims of both parties are based on a record chain of title dating from the will of W. L. Pritchett, which was probated on 8 May 1923. That will devised the land to "Percy Davenport for the period of his lifetime. . . . At the death of said Percy Davenport I devise said land to the lawful issue of his body in fee simple forever."

On 1 October 1927, Davenport and his wife mortgaged the property to H. L. Swain. Swain foreclosed on the property and conveyed it on 13 January 1931 to E. P. Cahoon. The 1931 deed stated "[f]or a more complete and minute description reference is had to the Will of Willis Pritchett. . . ." Cahoon is also listed as purchaser of the land in a 4 April 1935 special proceeding by Tyrrell County for failure to pay drainage district assessments.

On 13 December 1947, Cahoon conveyed the land to James A. Pinner and wife. This deed mentioned Pritchett's will and the two conveyances of the land to Cahoon. The Pinners then conveyed the tract to Henry G. Dozier on 10 April 1954. Their conveyance referred to the deed to them from Cahoon.

Dozier conveyed to the plaintiff on 4 June 1965. His deed referred to the conveyance to him from the Pinners.

The defendants are the surviving lawful issue of the body of Percy Davenport, the life tenant under Pritchett's 1923 will. Davenport died on 29 February 1980. As a result, the defendants base their claim on their status as remaindermen.

In the judgment, the court ruled in favor of the plaintiff primarily on the authority of G.S. 47B-2(c). Even though the court found that both parties had an estate of real property for at least 30 years as required by the statute to be marketable, it held that the plaintiff had superior title because the defendants' interest was not protected under the G.S. 47B-3 exceptions to the statute, and had not been preserved by registration under G.S. 47B-4. The defendants appealed.

Earnhardt & Busby, by Charles T. Busby, for plaintiff-appellee.

Charles W. Ogletree for defendant-appellants.

ARNOLD, Judge.

This case was argued by both parties on the basis of the Marketable Title Act, G.S. 47B-1 through 47B-9. The effect of the language in the 1923 Pritchett will, however, decides the outcome without any reference to the Act.

Although neither party discussed it in their briefs or oral arguments, the Rule in *Shelley's Case* apparently applies to the devise by W. L. Pritchett. That common law doctrine was born in *Wolfe v. Shelley*, 1 Coke 93b, 76 Eng. Rep. 206 (C.B. 1581), and states:

> When an ancestor, by any gift or conveyance, taketh an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs in fee or in tail, the word heirs is a word of limitation of the estate, and not a word of purchase.

Crisp v. Biggs, 176 N.C. 1, 2, 96 S.E. 662, 662 (1918). The Rule in *Shelley's Case* is a rule of law and not a rule of construction. *Hampton v. Griggs*, 184 N.C. 13, 113 S.E. 501 (1922).

In the case *sub judice*, the 1923 devise was to "Percy Davenport for the period of his lifetime. . . . At the death of said Percy Davenport I devise said land to the lawful issue of his body in fee simple forever."

For the Rule to apply, all of the following factors must be present:

> (1) there must be an estate of freehold in the ancestor; (2) the ancestor must acquire that estate in the same instrument containing the limitation to the heirs; (3) the words 'heirs' or 'heirs of the body' must be used in the technical sense meaning an indefinite succession of persons, from generation to generation; (4) the two interests must be either both legal or both equitable; and (5) the limitation to the heirs must be a remainder in fee or in tail.

Jones v. Stone, 52 N.C. App. 502, 507, 279 S.E. 2d 13, *disc. rev. denied*, 304 N.C. 195, 285 S.E. 2d 99 (1981). *See also White v. Lackey*, 40 N.C. App. 353, 356, 253 S.E. 2d 13, 15-16, *disc. rev. denied*, 297 N.C. 457, 256 S.E. 2d 810 (1979); *Benton v. Baucom*, 192 N.C. 630, 633-34, 135 S.E. 629, 631 (1926); *Hampton*, 184 N.C. 13, 113 S.E. 501.

Four of these five factors are clearly present here. First, there is "an estate of freehold in the ancestor. . ." since Percy Davenport had a life estate. Second, Percy acquired his estate in the same instrument containing the remainder [Pritchett's 1923 will].

Third, the interests of Percy and the remaindermen are both legal interests. Fourth, the remainder here is in tail because it is limited to Percy's lawful bodily issue.

The fifth requirement for the application of the Rule in *Shelley's Case* is not met so easily, however. It requires "that the words 'heirs' or 'heirs of the body,' *or some equivalent expression* . . . be used in a technical sense as importing a class of persons to take indefinitely in a succession, from generation to generation, in the course marked out by the canons of descent." *Benton*, 192 N.C. at 633, 135 S.E. at 631 (emphasis added).

If "lawful issue of his body" is equivalent to "heirs" or "heirs of the body," the Rule applies. This decision turns on whether "it manifestly appears that such words are used in the sense of heirs generally." *Faison v. Odom*, 144 N.C. 107, 109, 56 S.E. 793, 794 (1907). *Accord, Wright v. Vaden*, 266 N.C. 299, 146 S.E. 2d 31 (1966). *See also* Restatement of Property § 312 comment g (1940).

After an examination of the four corners of the will, which is the appropriate method for determining how "issue" is used here, *Jones*, 52 N.C. App. at 509, 279 S.E. 2d at 17, we find that "issue" was used in the technical sense and that the Rule applies. The remainder was in "fee simple forever." This indicates that an indefinite line of succession, not specific takers, was contemplated at the time of the devise. This interpretation is strengthened by the fact that there is no devise over in case of failure of the remainder because of a lack of takers.

The phrase "at his death" at the beginning of the remainder does not indicate a specific group of takers so as to remove

"issue" from meeting the technical use of "heirs." Limit of the class to "lawful" bodily issue is also not enough to prevent application of the Rule. *Wool v. Fleetwood*, 136 N.C. 460, 48 S.E. 785 (1904).

Thus, the status of the title before application of the Rule was a life estate in Percy Davenport and a remainder in fee tail in his lawful bodily issue forever. After the Rule in *Shelley's Case* operated, Percy had the life estate and the remainder in fee tail. G.S. 41-1 converted the fee tail into a fee simple. Because there is no intervening estate between Percy's two estates, they merged. *See Elmore v. Austin*, 232 N.C. 13, 59 S.E. 2d 205 (1950); *Citizens Bank and Trust Co. v. Watkins*, 215 N.C. 292, 1 S.E. 2d 853 (1939). He was vested with the fee simple interest in 1923. *See generally* Webster, *A Relic North Carolina Can Do Without—The Rule in Shelley's Case*, 45 N.C.L. Rev. 3 (1966); Block, *The Rule in Shelley's Case in North Carolina*, 20 N.C.L. Rev. 49 (1941) (These articles discuss the Rule's history and its application in North Carolina).

We conclude that since Percy Davenport became vested in fee simple in 1923, the defendants have no claim as remaindermen to the land that is the subject of this case. Plaintiff can trace her title back to the 1923 will. She prevails without application or discussion of the Marketable Title Act.

Affirmed.

Judges MARTIN and WHICHARD concur.

TONUJA MARIE PARKER BY HER GUARDIAN AD LITEM LINA BELL PARKER v. NATHANIEL JUNIOR McCALL

No. 828SC79

(Filed 18 January 1983)

Automobiles and Other Vehicles § 41.1— child darting in front of vehicle—directed verdict for defendant proper

In an action instituted by minor plaintiff to recover for personal injuries which she, as a pedestrian, sustained when struck by an automobile operated by defendant, the trial court properly granted a directed verdict for defendant

where the evidence showed that defendant had slowed to allow an oncoming car to pass; his vehicle was being operated at a speed between 15 and 20 miles per hour in a 25 mile per hour zone during the time he observed the child; as soon as she started into the street he blew the horn and applied the brakes, turning to the right; and there was no evidence that defendant could have avoided the accident by the exercise of reasonable care under the circumstances.

APPEAL by plaintiff from *Barefoot, Judge.* Judgment entered 29 September 1981 in Superior Court, LENOIR County. Heard in the Court of Appeals 10 November 1982.

The plaintiff, Tonuja Marie Parker, a minor, instituted this action to recover for personal injuries which she, as a pedestrian, sustained when struck by an automobile operated by defendant, Nathaniel Junior McCall. At trial both plaintiff and defendant presented evidence. At the close of all the evidence, the defendant moved for directed verdict. The motion was granted and the action dismissed with prejudice. Plaintiff appeals from the directed verdict granted in favor of defendant.

Jones and Wooten, by Everett L. Wooten, Jr., for plaintiff appellant.

Morris, Rochelle & Duke, P.A., by Thomas H. Morris, for defendant appellee.

JOHNSON, Judge.

The sole question presented for review is whether the court erred in granting the defendant appellee's motion for a directed verdict at the close of all the evidence. For the reasons stated below, we conclude that no evidence of negligence on the part of the defendant was presented at trial. Therefore, the directed verdict in defendant's favor was properly granted.

On motion for directed verdict all evidence which supports plaintiff's claim should be taken as true and considered in the light most favorable to the plaintiff, giving plaintiff the benefit of every inference which may be drawn therefrom and with all contradictions, conflicts and inconsistencies resolved in plaintiff's favor. *Capps v. Dillard,* 11 N.C. App. 570, 181 S.E. 2d 739 (1971); *Moore v. Powell,* 205 N.C. 636, 172 S.E. 327 (1934). Therefore, the question before us is whether the evidence considered in the light

most favorable to plaintiff is sufficient to justify a verdict in her favor.

The parties stipulated that the defendant was driving his automobile in an eastwardly direction on Lincoln Street in Kinston, N.C. at about 6:42 p.m. on 2 February 1980 when he struck the plaintiff. Plaintiff was six years old at the time and was struck while she was attempting to cross Lincoln Street. The accident occurred in a residential area. Lincoln Street is an east-west street paved with smooth asphalt. It was dry that evening, the weather was clear, and it was dark with the street lighted. The stated speed limit was 25 miles per hour.

The plaintiff's evidence was to the effect that she lived in a house at 1116 Lincoln Street, which was on the north side of the street, and that there were street lights on the south side of the street, one of which was across from 1116 Lincoln Street. Plaintiff testified that she had been to the grocery store for her mother and was across the street from her house when she saw an automobile coming and waited for it to pass before attempting to cross the street. Plaintiff further testified she did not see the automobile with which she collided.

M. M. Hatcher, a Kinston police officer, investigated the accident. He testified that the plaintiff told him there was an automobile traveling west down Lincoln Street which she waited for, that she did not see any automobile traveling east, and attempted to cross the street. The defendant told Hatcher that he had seen the child on the curb before the accident occurred, he then saw a car approaching him traveling west and he did not see the child again until she was running into the street ahead of him. Officer Hatcher testified that defendant told him the plaintiff collided with his automobile on the side toward the left front tire. Hatcher found defendant's automobile on the right hand side of the street with 40 feet of skid marks leading from it.

The evidence of the defendant was to the effect that he was driving eastwardly on Lincoln with the lights on when the accident occurred. As he was traveling along the 1100 block of Lincoln Street there were cars coming from the opposite direction. A vehicle was parked on each side of the street. Since only one car could pass between the parked vehicles defendant slowed to allow the oncoming car to pass. Defendant testified that the vehicle go-

ing west was still to the east of the minor plaintiff when he first saw her standing in the middle of the sidewalk on the north side of the street. After the oncoming vehicle passed he accelerated to 15 or 20 miles per hour and observed the plaintiff still standing on the sidewalk. Suddenly she started running across the street. Defendant further testified that he blew his horn, applied his brakes and turned to the right, and that the child struck his automobile right at or behind the left front wheel.

The trial court correctly granted defendant's motion for directed verdict, renewed at the close of all the evidence. Notwithstanding the fact that the court must consider the evidence in the light most favorable to the plaintiff, *Capps v. Dillard, supra; Moore v. Powell, supra,* no presumption of negligence arises from the mere fact that a motorist strikes and injures a child who darts into the street or highway in the path of the approaching vehicle. *Brewer v. Green,* 254 N.C. 615, 119 S.E. 2d 610 (1961). The Supreme Court in *Winters v. Burch,* 284 N.C. 205, 210, 200 S.E. 2d 55, 58 (1973) quoted the following rule from 4 Blashfield, Automobile Law and Practice (3rd Ed. 1965) § 151.11 as being well established in this jurisdiction:

> A motorist is not, however, an insurer of the safety of children in the street or highway; nor is he bound to anticipate the sudden appearance of children in his pathway under ordinary circumstances. Accordingly, the mere occurrence of a collision between a motor vehicle and a minor on the street does not of itself establish the driver's negligence; and some evidence justifying men of ordinary reason and fairness in saying that the driver could have avoided the accident in the exercise of reasonable care must be shown. In the absence of such a situation, until an automobile driver has notice of presence or likelihood of children near line of travel, the rule as to the degree of care to be exercised as to children is the same as it is with respect to adults.

Accordingly, there must be some evidence that the defendant motorist could have avoided the accident by the exercise of reasonable care under the circumstances. The standard of care applicable in cases like this one has frequently been addressed by our courts.

In *Brinson v. Mabry*, 251 N.C. 435, 111 S.E. 2d 540 (1959) the seven year old plaintiff and her sister were standing alongside the traveled portion of the highway. They were apparently waiting for vehicular traffic to pass before crossing. The defendant was traveling north. Two cars traveling south passed the two girls. After the second vehicle passed, the plaintiff broke away from her older sister and ran into the middle of the highway. The defendant was familiar with the scene of the accident and knew that children crossed there. In affirming the trial court's grant of a directed verdict in favor of the defendant, the court stated:

> True, the presence of children on or near the traveled portion of a highway whom a driver sees, or should see, places him under the duty to use due care to control the speed and movement of his vehicle and to keep a vigilant lookout to avoid injury. (Citations omitted.)
>
> Nevertheless, when a child, without warning, darts from behind another vehicle into the path of a motorist who is observing the rules of the road with respect to speed, control, and traffic lanes, and who is maintaining a proper lookout, the resulting injury is not actionable . . . In such event the cause should not be submitted to the jury. (Citations omitted.)

251 N.C. at 438-439, 111 S.E. 2d at 543. The defendant driver in *Brinson* was not required to stop completely so long as the girls remained off the traveled portion of the road and apparently attentive to traffic conditions; but only to slow down and proceed with caution.

In the case *sub judice* the defendant was operating his vehicle after dark with the lights on, proceeding at 15 to 20 miles per hour, well within the stated speed limit of 25 miles per hour. He had seen the child standing alone on the sidewalk before the westbound automobile passed, and saw her still standing on the sidewalk after it passed. When the minor plaintiff darted out into the street, the defendant was too close to stop.

> A motorist operating his vehicle at a lawful speed is not liable for injuries to a child who runs into the street so suddenly that the motorist could not avoid striking him. And this is the rule even where the motorist was aware at the

time of the presence of children on the sidewalk along the street.

Wilson v. Gardner, 18 N.C. App. 650, 652, 197 S.E. 2d 807, 809 (1973); *accord Westbrook v. Robinson*, 11 N.C. App. 315, 181 S.E. 2d 231 (1971).

There was no evidence before the trial court to support a finding that the defendant failed to use proper care with respect to (1) the speed and control of his vehicle, (2) the maintenance of a vigilant lookout and (3) the giving of a timely warning to avoid injury. Defendant had slowed to allow an oncoming car to pass. His vehicle was being operated at a speed between 15 and 20 miles per hour in a 25 miles per hour zone during the time he observed the child. As soon as she started into the street he blew his horn and applied the brakes, turning to the right. There is no evidence that defendant could have avoided the accident by the exercise of reasonable care under these circumstances. Defendant is not required to come to a complete stop so long as the child remains on the sidewalk especially after observing that the child has already waited for one car to pass without attempting to cross.

Defendant's motion for a directed verdict was properly allowed.

Affirmed.

Judges ARNOLD and HILL concur.

STATE OF NORTH CAROLINA v. JAMES BERNARD SAMUEL

No. 8221SC503

(Filed 18 January 1983)

1. Criminal Law § 87.1— allowance of leading questions

The trial court did not abuse its discretion in allowing the district attorney to lead a State's witness in eliciting testimony concerning the legal significance of an insurance release form.

2. Criminal Law § 50.2— opinion testimony as to what witness would have done

In a prosecution for obtaining property from an insurance company by false pretenses, an insurance company employee was properly permitted to testify as to whether he would have paid defendant's claim had he known of the discrepancies in the information submitted to his company.

3. Criminal Law § 42.6— chain of custody of car

The State established a sufficient chain of custody of a car to permit the admission of documents found in the trunk of the car 15 days after the car was seized where the evidence showed that the car, its trunk and the fenced-in area in which the car was kept had been locked for the entire 15 days.

APPEAL by defendant from *Albright, Judge.* Judgment entered 28 January 1982 in Superior Court, FORSYTH County. Heard in the Court of Appeals 16 November 1982.

At trial, the State introduced evidence tending to show that defendant had in his possession a 1977 Mercedes Benz automobile that he knew, or had reason to know, was stolen, and that defendant had exchanged the stolen Mercedes' identification numbers for the numbers on a 1973 Mercedes he had purchased. Evidence was also adduced tending to show that defendant had falsified a claim to an insurance company to obtain a settlement for an accident that never occurred.

Defendant's evidence tended to show that he was not guilty of the crimes alleged. From verdicts of guilty of obtaining property by false pretenses and possession of a stolen vehicle, and judgments imposing consecutive sentences of 4 to 5 and 3 to 5 years in each conviction respectively, defendant appeals to this Court.

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

Liner & Bynum, by David V. Liner and Zachary T. Bynum, III, for defendant appellant.

BECTON, Judge.

I

[1] Defendant first contends that the trial court erred when it allowed the district attorney to lead Wardell Williams, a witness for the State, and elicit testimony concerning the legal

significance of an insurance release form. It is so well-known as to be axiomatic that the trial court has discretionary authority to permit leading questions in proper instances. *State v. Smith*, 291 N.C. 505, 231 S.E. 2d 663 (1977). When the testimony is competent, the defendant's exception will not be sustained unless he can show an abuse of discretion or that he was prejudiced by the court's action. *Id.* Defendant does not deny that the testimony objected to was competent. He could not have been prejudiced thereby since the same evidence was later admitted without objection. Thus, this exception has merit only if the trial court abused its discretion. No such showing has been made, and we find no error in the ruling of the trial court.

II

[2] Defendant next assigns error to the admission of a colloquy, a representative portion of which follows:

> Q. Would you have paid this claim had you known that the person who presented himself to you as Wardell E. Williams was in truth and fact not Wardell Williams but James Bernard Samuel?
>
> MR. LINER: OBJECTION to what he would have done.
>
> COURT: OVERRULED. You may answer.
>
> A. We would have paid the individual either listed on the registration or the title irrespective of what the individual that was presenting himself said his name was.
>
> Q. Would you have paid that claim had you known that the person who presented himself to you as Wardell E. Williams was in truth and fact not Wardell E. Williams but was James Bernard Samuel?
>
> MR. LINER: Same OBJECTION.
>
> COURT: OVERRULED.
>
> Q. Would you have paid that claim under those circumstances?
>
> A. That—if an individual misrepresents himself that would lead me to questions and I doubt if I'd pay it at that particular time.

Q. Would you have paid that claim had you known in truth and fact that the car did not belong to either—let me rephrase it. Would you have paid that claim that day on August 13th had you known that car had been taken from Bob Neill Pontiac in 1977?

A. Negative.

He argues that the questions and testimony elicited thereby allowed the State's witness, Malcolm Turner, to give an opinion based on hypothetical facts. We disagree for the following reasons.

First, the facts used in the "hypothetical" questions—(i) that the person who applied for and got the insurance company draft was not the named payee, Wardell Williams; (ii) that the registration certificate for the 1973 Mercedes Benz had been altered; and (iii) that the 1977 automobile had been stolen—were all in evidence prior to the examination of Malcolm Turner. Second, a lay witness may testify concerning what he or she would or could have done under certain conditions, or with the knowledge of certain facts. *Brandis on North Carolina Evidence*, § 131 (2d revised ed. 1982); *cf. Kivett v. Telegraph Co.*, 156 N.C. 296, 72 S.E. 388 (1911). Malcolm Turner was asked, essentially, whether he would have paid the claim had he known of the discrepancies in the information submitted to his company. This was proper. We find no error in the admission of this testimony.

III

[3] By his third assignment of error, defendant challenges the admission of incriminating documents found in the trunk of the stolen 1977 automobile, on the ground that the State failed to establish a proper chain of custody of the automobile. The automobile was seized by the North Carolina Department of Motor Vehicles (DMV) on 6 April 1981. The DMV inspectors entered the passenger compartment of the locked car through use of an unlocking device; they did not open the glove box or the trunk because "they were locked and we did not have a key to get in them and did not want to damage the vehicle to open them up." After searching the car's interior, the inspectors re-locked the car, towed it to, and stored it in, a locked, fenced-in area at Crews Wrecker Service in Kernersville. The car was left there

until 21 April 1981, some fifteen (15) days later, when the inspector returned with a key and searched the vehicle, its glove compartment and trunk. The admitted items—sales documents from a local jeweler made out to defendant—were found in a cardboard box among a potpourri of other items. The purpose of the requirement that a chain of custody be established is to insure, as much as possible, that evidence sought to be used has not been interfered with by third parties during the period between seizure and trial. *See, State v. Fulton*, 299 N.C. 491, 263 S.E. 2d 608 (1980). Here, there was ample competent evidence that the trunk, the car itself, and the fence surrounding the area had, for the entire fifteen days, been locked. Access to the trunk, without a key, could have been obtained only by damaging the trunk lock. No such damage was observed. Thus, we find no reason to infer that interference with this evidence actually or even probably occurred.

IV

We have examined defendant's assignment of error number four and the record relating thereto and find it to be without merit.

We find defendant's trial to have contained no error.

No error.

Judges HEDRICK and WEBB concur.

IN THE MATTER OF: MARK WEBB, A MINOR; SANDRA WEBB, RESPONDENT

No. 8114DC1313

(Filed 18 January 1983)

Parent and Child § 6.3— allowing DSS to retain custody of child

The trial judge did not err in allowing the Department of Social Services to retain custody of a minor child where the evidence tended to show that respondent had had no contact with her son between 1973 and 1979; several visits took place between 1979 and 1980, to which the son responded negatively; the son did not feel secure or comfortable in visiting his natural parent at her home; he would return scared and crying to the foster household; and

there was testimony that frequent visitation by respondent with her son was very detrimental to her son's mental health.

APPEAL by respondent from *LaBarre, Judge.* Judgment entered 3 July 1981 in Juvenile Division of District Court, DURHAM County. Heard in the Court of Appeals 20 September 1982.

On 26 April 1972, respondent Sandra Webb was 12 years old and gave birth to Mark Webb. She lived with her mother, Wilhelmina Webb, in a housing unit of four rooms in Durham County, which was subsequently found to be overcrowded, infested with bugs, improperly screened, poorly kept, and not conducive to maintaining proper hygiene standards. These conditions resulted in reports by school authorities that several children of the Webb household were infected with the contagious disease, impetigo.

Based on the above findings, the District Court of Durham County found all children in the Webb household to be neglected children under G.S. 7A-278. Thus, the court granted full custody and control of all children including Mark and Sandra Webb to the Department of Social Services (DSS). However, none of the children were immediately removed from the Webb household until 9 November 1973 when the DSS took physical custody of Mark Webb and Margaret Webb, daughter of Wilhelmina Webb. Both children were 18 months old at that time, were placed in the foster home of Dorothy Cameron and have remained there while respondent continues living with her mother.

Although respondent had no contact with her son Mark between 1973 and 1979, several visits took place between 1979 and 1980, to which Mark responded negatively. Because neither Mark nor Sandra felt secure or comfortable in visiting their natural parents at the Webb home and both would return scared and crying to the Cameron household, visits were thereafter held at DSS.

Fearing these visits were causing psychological and emotional trauma to the children, the DSS terminated the visits and on 18 March 1981, filed a motion to have the status of this case revised. At the hearings on this motion, a clinical psychologist, qualified and accepted by the court as an expert in the field of clinical psychology, testified that she evaluated Mark Webb on 21

October 1980 and found him intellectually bright and that he appeared to have pent-up anger towards his natural mother. She believed that Mark could not handle re-establishing contact with his mother without counseling; that Mark's attachment is to his foster home; and that he, therefore, should stay there.

A DSS social worker testified that she would recommend any future visits take place at the Cameron home where Mark and Margaret had received excellent care, had opportunities for extra recreational and educational activities and where the foster parents are committed to continue caring for them. Respondent informed her that if Mark could not be returned to her, she would agree to his continuing to live in his foster home. She referred respondent to a parenting group, which she attended. DSS took no action when respondent turned eighteen to try to return Mark to her care and custody except to begin visits in 1979.

Respondent testified at the hearing that after Mark was removed from her custody, she saw him twice during the first year, although she asked as often as once a week to see him; that no social worker discussed with her a plan for reuniting her with her child; and that no social worker advised her what actions she could take to get Mark back.

On cross-examination she testified that she loves Mark but that she failed to send him a gift or card for Christmas since 1973 or for his birthday. She also stated that the Webb household consists of seven people occupying a five-bedroom apartment and that she believes it to be in Mark's best interest to live with her there, although she could provide no reason supporting this belief.

Another DSS social worker stated that some professionals believe frequent visitation was "very detrimental" to Mark's mental health and that perhaps visitation should never occur. She felt that to attempt to promote psychological bonding between respondent and Mark would not be in Mark's best interest. She recommended respondent have custody of her younger child, Terry, but not Mark.

Supervisor of the Permanency Planning Unit testified that respondent did not call each week requesting to see Mark and that she found visits between respondent and Mark to be detrimental.

The court concluded that leaving Mark in the custody of DSS at the Cameron foster home would serve Mark's best interest; that respondent had forfeited her right to visit Mark by her conduct and further visits would be psychologically detrimental to him and not in his best interest. Thus, respondent was ordered to pay $15.00 per week for Mark's support. The court, however, granted respondent custody of her younger child, Terry. From this judgment, respondent appeals.

James W. Swindell for petitioner appellee.

Shirley Dean for respondent appellant.

MORRIS, Chief Judge.[1]

We note at the outset that respondent violated Rule 28(b)(5), Rules of Appellate Procedure, by failing to note the assignments of error and exceptions to which each question is addressed immediately after each question in the argument portion of her brief.

Despite this violation, we have carefully reviewed the record and believe that the findings of fact are clearly supported by the evidence. In custody cases, "it is mandatory . . . that the trial judge be given a wide discretion in making his determination and it is clear that his decision ought not to be upset on appeal absent a clear showing of abuse of discretion." *Greer v. Greer*, 5 N.C. App. 160, 163, 167 S.E. 2d 782, 784. We find no showing of an abuse of the judge's discretion in this case. The judgment is therefore,

Affirmed.

Judges BECTON and JOHNSON concur.

1. The Court's decision in this case was made and written prior to Chief Judge Morris's retirement.

STATE OF NORTH CAROLINA v. WILLIAM MILLER CASEY

No. 828SC557

(Filed 18 January 1983)

1. **Criminal Law § 50— opinion testimony as to value—repeated questions**

In a prosecution for willful injury to personal property (a truck), the trial court did not err in permitting the owner of the truck to testify that the post-impact value of the truck was $400 after the prosecutor asked him four times about the value of the truck after the impact.

2. **Property § 4.2— willful injury to personal property—sufficiency of evidence**

The evidence was sufficient to support conviction of defendant for willful and wanton injury to personal property in violation of G.S. 14-160 where defendant admitted that he intentionally ran into the victim's truck with his car, and the evidence tended to show that this intentional act was done in disregard of the victim's property rights in his truck, it not being necessary to prove that defendant was acting with malice toward the owner of the truck.

APPEAL by defendant from *Bruce, Judge.* Judgment entered 29 January 1982 in Superior Court, WAYNE County. Heard in the Court of Appeals 6 December 1982.

Defendant was charged with unlawful, willful and wanton injury to personal property in violation of G.S. 14-160 and driving while under the influence of intoxicating liquor in violation of G.S. 20-138. He pled not guilty to both charges.

The State's evidence tended to show that on 1 August 1981, the defendant struck a 1962 Chevrolet truck owned and operated by James Wheeler in the driveway of Ellen Lane's residence in Wayne County. The defendant was operating a 1968 Cadillac when he hit Wheeler's truck.

Wheeler testified that the defendant turned off of the highway and hit the truck. He then backed up and hit it again. Wheeler stated that there was damage to the left headlight, the bumper, the grill and the right fender. His testimony was that there was a $400 diminution in the truck's value after the incident.

Trooper Willie B. Young of the Highway Patrol corroborated Wheeler's description of the damage. He also described the defendant as having "a very strong odor of alcoholic beverage about him, his speech was slurred, mush-mouthed . . ." and added that

the defendant's face was "red, or flushed." Young observed the defendant driving a few minutes after leaving the scene of the incident and arrested him for driving under the influence.

Trooper K. R. Gales of the Highway Patrol testified that the defendant refused to take a breathalyzer test at the Goldsboro Police Department. He stated that in his opinion the defendant was under the influence of intoxicating liquor when he was at the Police Department.

Defendant's motion to dismiss both charges at the end of the State's evidence was denied.

The defendant testified that during the morning of 1 August 1981, he drank a can of beer and took a dose of ammonia to settle his nerves. About dinner time, defendant took Susie Mae Grady to Ellen Lane's house. When he arrived there, he saw a truck that he thought belonged to his nephew. Defendant hit the truck with his car while traveling one or two miles per hour and with his foot on the brake. When he realized that it was Wheeler's truck, defendant stopped and backed up. He denied hitting the truck a second time.

The defendant, Grady and Lane all testified that they observed no damage to the Wheeler truck after the accident.

Defendant's motion at the close of all the evidence to dismiss both charges was denied. He was found guilty of damage to personal property with a value of less than $200 and given a suspended sentence upon payment of a fine, court costs and restitution. Defendant was also convicted of driving under the influence and given a maximum sentence of 123 days. From these convictions and sentences, the defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Roy A. Giles, Jr., for the State.

Barnes, Braswell & Haithcock, by Tom Barwick, for defendant-appellant.

ARNOLD, Judge.

[1] Defendant raises two arguments on this appeal. He first contends that the trial court should have sustained his objections to

the prosecutor's repeated questioning of Wheeler about the value of his truck after the impact with the defendant's car.

The transcript shows that Wheeler stated that his truck was worth $800 before the impact. After the prosecutor asked him four times about the value of the truck after the impact, Wheeler said $400.

We first note that as owner of the truck, Wheeler was a competent witness to give an opinion on its value before and after the impact. *See generally,* 1 Brandis, N.C. Evidence § 128 (2nd rev. ed. 1982); *State v. Avery,* 302 N.C. 517, 276 S.E. 2d 699 (1981); *State v. Cotten,* 2 N.C. App. 305, 163 S.E. 2d 100 (1968). There was competent evidence to support his opinion since he had obtained two estimates of the damage at garage repair shops.

Although the prosecutor may have asked some leading questions on the valuation issue, we find no error on this point. The control of leading questions is within the trial judge's discretion, *State v. Greene,* 285 N.C. 482, 206 S.E. 2d 229 (1974), and we find no abuse of that discretion here.

Even if the leading questions were improperly admitted, defendant was not prejudiced thereby. By asking the questions on value, the State was attempting to establish damage greater than $200. Although Wheeler testified that the diminution in value was $400, the jury only convicted defendant of damage to personal property with a value of less than $200.

[2] Defendant's second contention is that the damage to personal property charge should have been dismissed because the State did not prove that the damage was wanton and willful as required by G.S. 14-160. The defendant does not dispute that he hit Wheeler's truck but instead, he contends that he did not intend to damage it.

G.S. 14-160 does not define willful or wanton. But in *State v. Williams,* 284 N.C. 67, 199 S.E. 2d 409 (1973), our Supreme Court stated the meaning of these terms.

> In our view, the words "wilful" and "wanton" refer to elements of a single crime. Ordinarily, "[w]ilful as used in criminal statutes means the wrongful doing of an act without justification or excuse, or the commission of an act purposely

> and deliberately in violation of the law." *State v. Arnold*, 264 N.C. 348, 141 S.E. 2d 473 (1965). "Wantonness . . . connotes intentional wrongdoing. . . . Conduct is wanton when in conscious and intentional disregard of and indifference to the rights and safety of others." *Hinson v. Dawson*, 244 N.C. 23, 28, 92 S.E. 2d 393, 396-97 (1956).

Williams, 284 N.C. at 72-73, 199 S.E. 2d at 412.

By admitting that he hit Wheeler's truck intentionally, defendant showed that he acted willfully. This intentional act was also wanton since it was done in disregard of Wheeler's property rights in his truck. It is not necessary to prove that defendant was acting with malice toward Wheeler when he hit his truck to convict him under G.S. 14-160. *State v. Sneed*, 121 N.C. 614, 28 S.E. 365 (1897).

We also note that defendant did not object to the jury instructions on wanton and willful conduct. Those instructions were consistent with the definitions stated in *Williams* and we find them to be correct.

No error.

Judges JOHNSON and BRASWELL concur.

P. K. ANDRESEN AND WIFE, CHRISTINE ANDRESEN; J. N. BRYAN AND WIFE, MARTHA BRYAN; JEAN BROWN; F. D. DUNCAN AND WIFE, ELIZABETH C. DUNCAN; ROSA LEE L. HARRELL; C. F. IRONS AND WIFE, MALENE G. IRONS; BILLY E. JONES AND WIFE, HANNAH JONES; H. T. PATTERSON AND WIFE, LOIS PATTERSON; HELEN S. PARKENSON; CARL P. PIERCE AND WIFE, LUCY N. PIERCE; J. J. PERKINS AND WIFE, MAMIE L. PERKINS; NICHOLAS REDKA AND WIFE, BARBARA REDKA; JOHN O. REYNOLDS AND WIFE, ELLA REYNOLDS; HELEN W. STASAVICH; SAM B. UNDERWOOD, JR. AND WIFE, ALMA W. UNDERWOOD; D. C. WADE, JR. AND WIFE, ANN WADE; AND EDNA S. WHICHARD v. EASTERN REALTY COMPANY, MARVIN K. BLOUNT, THE CITY OF GREENVILLE AND ALTON E. WARREN

No. 823SC130

(Filed 18 January 1983)

Deeds § 20.7— restrictive covenants—allowance of motion to dismiss error

Where plaintiffs brought an action to prevent issuance of a building permit to defendant Eastern Realty Company for the construction of twenty-six townhouse units within the subdivision in which they lived claiming that such construction would violate restrictive covenants applicable to the entire subdivision, the trial court erred in granting defendants' motion to dismiss on the ground that plaintiffs had failed to state a claim for relief.

APPEAL by plaintiffs from *Brown, Judge.* Judgment entered 7 October 1981 in Superior Court, PITT County. Heard in the Court of Appeals 6 December 1982.

Plaintiffs, as owners of real property in the Rock Spring Park Subdivision in Greenville, brought this action on 15 August 1980 to prevent issuance of a building permit to defendant Eastern Realty Company [hereinafter Eastern] for the construction of twenty-six townhouse units within the subdivision. Plaintiffs claim that such construction would violate restrictive covenants applicable to the entire subdivision, which were recorded on 26 August 1940 in the Pitt County Register of Deeds office. The eight persons who recorded the restrictive covenants were predecessors in title to the defendant Eastern.

Relevant portions of the covenants stated:

> all the lots or parcels of land shown upon the map of Rock Spring Park Subdivision . . . are hereby subjected to the following covenants and restrictions as to the use thereof, running with the said land by whomsoever owned, to-wit:

(1) All the lots in the tract above described as shown on said map shall be known and described as residential lots. No structure shall be erected, altered, placed or permitted to remain on any residential lot other than one detached single family dwelling, not to exceed three and one-half (3 1/2) stories in height, together with the private garage for not more than three cars, and other buildings incidental and necessary to the proper use of said property for residential purposes. . . .

(8) These covenants and restrictions shall run with the land and shall be binding on all the parties holding any of the said property under any deed subsequent to the filing of this instrument, and shall be in full force and effect until January 1, 1965, at which time they shall be automatically extended for successive periods of 10 years unless they shall be declared inoperative for good cause shown before a court of competent jurisdiction under proper legal proceedings.

(9) If the parties hereto, or any owner of any of the property herein described, or their heirs or assigns, shall violate or attempt to violate any of the covenants and restrictions herein set off, it shall be lawful for any person or persons owning real property situated in said development as shown by said map to prosecute any proceedings at law or in equity against the person or persons violating any such covenants, and to prevent him or them from so doing, and recover liquidated damages for such violations.

These covenants made specific reference to a map of the subdivision recorded in map book 3, page 141, of the Pitt County registry. Eastern's land is in an area on the map that is not divided into lots.

Plaintiffs alleged that many of them bought lots in the subdivision based on representations by Marvin K. Blount, one of the original developers, and that the entire development was subject to the restrictive covenants. In an amendment to their complaint on 9 October 1980, plaintiffs demanded a jury trial.

On 20 October 1980, defendants Eastern and Blount filed a motion to dismiss plaintiffs' action for failure to state a claim for relief. They moved to strike plaintiffs' demand for a jury trial and

set forth two affirmative defenses. First, they alleged that plaintiffs had waived their right to enforce the restrictive covenants by acquiescence for thirty years in use of the land for stables and grazing. Second, they contended that there had been a substantial change in the character of the use of the land so as to make the covenants unenforceable, assuming they were applicable.

Plaintiffs moved to strike defendants' affirmative defenses and for judgment on the pleadings on 30 July 1981. On 7 October 1981, the trial court denied plaintiffs' motion and dismissed their complaint. From this judgment, plaintiffs appealed. Defendants Alton E. Warren, chief building inspector for the City of Greenville, and the City of Greenville are not parties to this appeal.

Underwood & Leech, by David A. Leech, for plaintiff-appellants.

Blount, Crisp & Savage, by John M. Savage, for defendant-appellees Eastern Realty Company and Marvin K. Blount.

ARNOLD, Judge.

Plaintiffs lost this case under a G.S. 1A-1, Rule 12(b)(6) motion since the trial judge believed that they had failed to state a claim upon which relief could be granted. Although neither the defendants' answer nor the court's judgment mention the rule specifically, defendants' answer and the judgment both speak in terms of dismissing the plaintiffs' complaint. A G.S. 1A-1, Rule 12(b)(6) motion is a proper vehicle for dismissing a complaint when it fails to state a claim upon which relief can be granted.

We hold that it was error to dismiss plaintiffs' complaint in this case. "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*, 298 N.C. 715, 719, 260 S.E. 2d 611, 613 (1979). When making a ruling under this rule, "the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted." *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E. 2d 611, 615 (1979); *see also*, W. Shuford, N.C. Civil Practice and Procedure § 12-10 (2d ed. 1981).

Although there is a general rule of strict construction against limitations on the free use of land in North Carolina, *Stegall v. Housing Authority,* 278 N.C. 95, 100, 178 S.E. 2d 824, 828 (1971) and cases cited therein, we cannot say as a matter of law that plaintiff could not prevail in this action. Our examination of the record, exhibits and the briefs before us supports this conclusion.

The map of Rock Spring Park includes the defendants' land. Moreover, the land is specifically referred to in the restrictive covenants. The restrictions state that "all the lots or parcels of land shown upon the map" are subject to the covenants. On the map, defendants' land is labelled "future extension," which indicates that it might have been meant to be part of the subdivision. Finally, it would have been simple for the original developers to leave defendants' land off the subdivision map if they had intended for it not to be subject to the restrictions.

Thus, the trial judge was incorrect in dismissing the complaint since it may state some claim for relief. As a result, we reverse the judgment and remand this case for proceedings consistent with this opinion.

Reversed and remanded.

Judges WHICHARD and JOHNSON concur.

IN THE MATTER OF: JESSIE PENNY FARMER, RESPONDENT

No. 827SC146

(Filed 18 January 1983)

1. Insane Persons § 2— competency hearing—right to trial de novo—improper remarks by counsel—harmless error

In a proceeding to determine whether respondent was incompetent to manage her own affairs, respondent was not denied her right to a trial *de novo* in superior court by the trial court's denial of her motion for a mistrial because counsel for petitioner made improper remarks in his opening statement that the case had been tried before the clerk and a jury, that respondent was found to be incompetent, and that the matter was being heard on appeal from that finding where the trial court promptly gave the jury corrective instructions, and where the issue of respondent's competency was the subject of extensive

expert and lay testimony in the trial in the superior court. G.S. 1A-1, Rule 61; G.S. 35-2.

2. Insane Persons § 2— competency hearing—testimony by guardian ad litem

The trial court did not err in permitting respondent's guardian *ad litem* to testify for petitioner in a proceeding to determine whether respondent was competent to manage her own affairs.

APPEAL by respondent from *Reid, Judge.* Judgment entered 16 September 1981 in NASH County Superior Court. Heard in the Court of Appeals 9 December 1982.

A petition was filed before the clerk of Superior Court in Nash County, seeking an adjudication of the competency of respondent Jessie Penny Farmer to manage her own affairs. Attorney Henry M. Fisher was duly appointed guardian *ad litem* for respondent. A hearing on the issue of respondent's competency was held before the clerk and a jury, resulting in a verdict and judgment of incompetency from which respondent appealed to the Superior Court. Pending such appeal, an order of the Superior Court was issued appointing Henry M. Fisher as Temporary Receiver for respondent, giving Fisher the power and authority to manage and preserve respondent's property.

Following a trial in Superior Court before Judge Reid and a jury, a verdict was returned finding that respondent was incompetent from want of understanding to manage her own affairs. Judgment on the verdict was entered, appointing Fisher as guardian and trustee for respondent, from which judgment respondent has appealed to this Court.

Harris, Cheshire, Leager & Southern, by Samuel R. Leager, for petitioner-appellee.

Farris, Thomas & Farris, P.A., by Robert A. Farris, for respondent-appellant.

WELLS, Judge.

Respondent first contends that the trial judge erred in denying respondent's motion for a mistrial after counsel for petitioner, in his opening statement to the jury, stated that the case had been tried by a jury, that respondent had been found to be incompetent, and that the matter was being heard on appeal from

that finding. Respondent contends that she was entitled to a trial *de novo* in the Superior Court[1] and that a *de novo* trial by its very terms requires the exclusion of any reference to or evidence of a result reached in a previous trial. Upon respondent's objection to the statement made by counsel for petitioner and motion for mistrial, the trial court heard arguments in the absence of the jury, then recalled the jury and gave the following instruction to the jury:

> Members of the jury, it was mentioned by Mr. Leager that there was another hearing before the clerk and the jury, from which an appeal had been taken. I instruct you that the law contemplates in the Superior Court when a jury in the Superior Court tries a case, it is contemplated and it is deemed that the jury should try the case *de novo*, that means from the beginning or in the same manner and in the same way as if the case had never been tried before. The fact that another jury has heard issues similar to the issue that you will hear shall not be considered by you in any way in making up your deliberations in this case. You should be completely open minded about this case and make your determination solely and exclusively upon the evidence that you hear in this case and in no way shall you be governed or guided by anything which may have been preceded today or the hearing which is taking place in the Superior Court.

The pertinent provisions of G.S. 35-2, entitling respondent to a trial *de novo* on appeal from the clerk to the Superior Court, require that the matter be heard and tried on its merits in the Superior Court from beginning to end as if no trial had been held before the clerk and without any presumption in favor of the clerk's jury verdict or the clerk's judgment. *See In re Hayes*, 261 N.C. 616, 135 S.E. 2d 645 (1964). In the trial *de novo*, therefore, the burden on petitioner was to show by evidence *adduced at that trial* that petitioner was entitled to a verdict and judgment of incompetency, and petitioner was not entitled to rely on any aspects of the former trial in seeking to carry his burden of proof at the *de novo* trial. Thus, it was improper for counsel for peti-

1. G.S. 35-2 provides that the ward may appeal from the Clerk's jury findings to the Superior Court, where the matters at issue shall be tried *de novo* before a jury.

tioner to refer in his opening statement to the results of the previous trial. In a civil trial, however, such an impropriety may not necessarily require an order of mistrial. G.S. 1A-1, Rule 61 of the Rules of Civil Procedures provides:

> Rule 61. *Harmless error.*
>
> No error in either the admission or exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action amounts to the denial of a substantial right.

As we noted earlier, Judge Reid responded to respondent's objections and motion for mistrial with a prompt corrective instruction to the jury. *See Hamilton v. Henry,* 239 N.C. 664, 80 S.E. 2d 485 (1954). The trial record shows that the issue of respondent's competency was the subject of extensive expert and lay testimony from witnesses who were competent to give such evidence. Under these circumstances, we are persuaded that Judge Reid's refusal to order a mistrial did not result in the denial of respondent's right to a trial *de novo.* This assignment is overruled.

[2] Respondent next contends that the trial court erred in allowing respondent's guardian *ad litem,* Henry Fisher, to testify for petitioner over respondent's objection. The essence of respondent's argument seems to be that allowing the guardian to testify as to the ward's incompetency is tantamount to compelling respondent to testify against herself. Respondent cites no authority to support this argument, but contends that "sound policy" should exclude such testimony. We are not aware of any restrictions on the competency of guardians *ad litem* as witnesses in trials involving their wards. *See* G.S. 8-49; G.S. 8-50; and 1 Brandis on North Carolina Evidence, §§ 53 and 54. This assignment is overruled.

Finally, respondent contends that the trial judge erred in his instruction to the jury by reminding them that the present trial was a trial *de novo* and that they should be guided in this decision only by evidence presented at the present trial. We find no merit in this argument, and this assignment is overruled.

No error.

Judges VAUGHN and WHICHARD concur.

STATE OF NORTH CAROLINA v. JAMES FRANK RUDD

No. 8218SC588

(Filed 18 January 1983)

Criminal Law § 99.5— court's threatening counsel for requesting record of proceedings—prejudicial error

The trial court erred in refusing to make a record of numerous parts of defendant's trial and by threatening to incarcerate defendant's counsel for requesting the trial court to do so. G.S. 15A-1446(a) and G.S. 1A-1, Rule 43(c).

APPEAL by defendant from *Lane, Judge.* Judgment entered 7 December 1981 in the GUILFORD County Superior Court. Heard in the Court of Appeals 7 December 1982.

Defendant was charged with and convicted of assault with a deadly weapon with intent to kill inflicting serious injury. The State's evidence tended to show defendant, an auxiliary deputy sheriff in Guilford County, was driving his pickup truck along a small road near the residence of defendant's brother, Harold. As defendant was driving along the road, Harold approached defendant's truck to inquire about defendant's presence. Thereupon, without provocation, defendant shot Harold in the forehead, knocking Harold to the ground. Harold did not lose consciousness, and the bullet wound to his head caused no permanent injury.

Defendant's evidence tended to show that there had been bad feelings between defendant and Harold for years, that Harold had a violent temper, and that defendant was afraid of Harold. On the day of the shooting incident, as defendant was driving along the roadway, Harold approached defendant's truck, ran alongside it, banged on the hood, and threatened defendant with a gun. Defendant stopped in an effort to avoid running over Harold, retreated in the truck as far as he could, and then fired his gun at Harold.

On 18 December 1981, after the verdict was returned, Judge Lane sentenced defendant to a term of not less than five nor more than seven years, suspended all but 90 days of the sentence, and ordered defendant to deliver himself to the Sheriff of Guilford County on 4 January 1982 for incarceration at the Guilford County Farm for a period of 90 days. Defendant gave notice of appeal. Judge Lane then reconsidered the terms of defendant's sentence and ordered defendant into immediate custody. Defendant requested that his existing bond be continued pending his appeal. This request was denied. Following further dialogue with Judge Lane concerning defendant's choice between withdrawing his appeal or accepting immediate in-custody status, defendant withdrew his appeal and was allowed to continue his existing bond. Defendant subsequently, and in apt time, entered a post-trial motion for appropriate relief, which motion was denied. From denial of that motion, defendant appealed.

Attorney General Rufus L. Edmisten, by Associate Attorney John W. Lassiter, for the State.

Smith, Moore, Smith, Schell & Hunter, by Jack W. Floyd and Robert H. Slater, for defendant.

WELLS, Judge.

Defendant has brought forward twelve assignments of error, but we deem appropriate to deal with only one.

In his third assignment of error, defendant contends that the trial court erred in refusing to make a record of the proceedings and by threatening to incarcerate defendant's counsel for requesting the trial court to do so. In support of this argument, defendant refers to both the trial transcripts and to an affidavit of defendant's counsel, attached to and incorporated into defendant's motion for appropriate relief, included in the record on appeal. The trial transcript shows that upon the trial court's sustaining the State's objection to several questions put to witnesses by defendant's counsel, bench conferences were held. Counsel's affidavit states that at several of these conferences, the trial judge refused to allow him to put the witness's answers in the record and that the trial judge "advised defense counsel that he had come close to going to jail and could still go if he persisted in attempting to get matters and rulings into the record." The af-

fidavit further states that when defendant's counsel attempted to object to portions of the trial court's jury instructions, the trial judge declined to make a record of those objections, "reminding defense counsel that he could still go to jail for what the trial judge construed as disrespect for the Court."

First, we note the procedural problems implicit in the presentation of defendant's contentions as to the threats made to counsel by the trial judge. While the trial transcript does show that counsel were called to the bench frequently during the course of the trial, it does not record the threats defendant's counsel attributes to the trial judge. Defense counsel's affidavit, however, was accepted by the Assistant District Attorney who tried the case for the State, without objection. In its brief, the State apparently concedes that the events described by defendant's counsel did occur at trial. Under these circumstances, we deem it appropriate to accept defense counsel's affidavit as a legitimate representation of these trial events and circumstances.

While it is fundamental that trial counsel be allowed to make a trial record sufficient for appellate review, *see* G.S. 15A-1446(a), G.S. 1A-1, Rule 43(c) of the Rules of Civil Procedure and Shuford's North Carolina Civil Practice and Procedure (2nd Ed.), § 43-5, not every failure by the trial court to comply with the Rule will be deemed prejudicial error. *See State v. Chapman*, 294 N.C. 407, 241 S.E. 2d 667 (1978). When such efforts by trial counsel are met by not mere failure or refusal of the trial court to make such a record, but are met also by overt hostility of the trial judge to such efforts, the risks that a good trial record will not be made are significantly increased. While recognizing that the balancing of the needs of judicial efficiency against lawyer exuberance will often be difficult for the trial judge, we are constrained to say that the risk of regretable judicial mistakes, *see State v. Chapman, supra*, will be less likely if trial judges avoid overt hostile reactions to such efforts by trial counsel. It is also appropriate to note that such efforts by trial counsel should rarely occasion threats by the trial judge to incarcerate counsel, lest not only should a good trial record fail to be made, but also that such actions by the trial court may amount to such manifest abuse of the trial court's discretion in the conduct of the trial as to prejudice the outcome. *See State v. Goode*, 300 N.C. 726, 268 S.E. 2d 82 (1980).

Under the circumstances presented by the record in this case, we are persuaded that the risk that defendant's defense was substantially inhibited by the actions of the trial judge and that a complete trial record was not made to the prejudice of defendant's rights are sufficient to require a new trial.

As the other errors asserted by defendant are not likely to recur, we deem it unnecessary to discuss them.

New trial.

Judges VAUGHN and WHICHARD concur.

STATE OF NORTH CAROLINA v. JOE JUNIOR LOCKLEAR

No. 8216SC600

(Filed 18 January 1983)

1. **Criminal Law § 87.4— redirect examination—matters which could have been presented on direct**

The trial court has discretion to permit counsel to introduce on redirect examination relevant evidence which could have been, but was not, brought out on direct examination, and the court did not abuse its discretion in this case in permitting the redirect examination of a State's witness about identification of defendant in the neighborhood of the alleged crime after it occurred.

2. **Larceny § 8— instructions on taking**

The trial court in a larceny prosecution did not err in instructing the jury that "[c]utting the speaker wires and moving parts of the stereo system from one room to another would be a taking."

APPEAL by defendant from *Morgan, Judge.* Judgment entered 27 January 1982 in Superior Court, ROBESON County. Heard in the Court of Appeals 8 December 1982.

Defendant was charged with breaking or entering under G.S. 14-54(a) and felonious larceny under G.S. 14-72. He pled not guilty to both offenses.

The State presented its evidence through four witnesses. Earl Strickland testified that he returned home about 10:30 a.m.

on 24 July 1981 and noticed that the back French doors had been broken. His stereo receiver and speakers had been moved from the bedroom into the den. He estimated the fair market value of the stereo to be $125.

James E. Strickland testified that he went to Earl Strickland's house on the morning of 24 July 1981 after he heard Earl's dog barking. He noticed that the two back French doors had been smashed in.

From his vantage point on the screened porch, James saw the defendant in the house. The defendant was wearing blue jeans, no shirt, a hat turned around on his head and socks on his hands. He had seen the defendant on several occasions prior to 24 July 1981 and knew his name. James went to his house, where he called his father who contacted the police.

Opel Oxendine, who lives about one quarter of a mile from Earl's house, testified that she saw the defendant on the morning of 24 July 1981. He did not have a shirt on at that time. Soon after the defendant left her house, Oxendine discovered that Earl's house had been broken into.

Katie Oxendine, who lives about 400 yards from Earl's house, stated that she saw the defendant on the morning of 24 July 1981 heading away from Earl's house. He did not have on a shirt at that time.

The defendant offered no evidence. He was found guilty of felonious breaking or entering and felonious larceny. The trial judge gave the defendant a sentence of ten years on both convictions. The larceny sentence was suspended and the defendant was placed on five years of supervised probation which would begin at the end of the breaking or entering sentence.

From the verdicts and sentences, the defendant appealed.

Attorney General Edmisten, by Special Deputy Attorney General John R. B. Matthis and Assistant Attorney General Alan S. Hirsch, for the State.

Smith and Jobe, by Bruce F. Jobe, for defendant appellant.

ARNOLD, Judge.

[1] Defendant first argues that the redirect examination of James Strickland by the prosecutor was erroneous and prejudicial because it did not clarify direct examination and was not related to anything brought out on cross-examination. The testimony objected to involved the identification of the defendant in the neighborhood of the alleged crime after it occurred.

The redirect examination here was not erroneous. Although the rule is that redirect examination cannot be used to repeat direct testimony or to introduce an entirely new matter, the trial judge has discretion to permit counsel to introduce relevant evidence which could have been, but was not brought out on direct. *State v. Branch*, 288 N.C. 514, 526, 220 S.E. 2d 495, 504 (1975), *cert. denied*, 433 U.S. 907 (1977); 1 Brandis, N.C. Evidence § 36 (2d rev. ed. 1982) and cases cited therein. We find no abuse of that discretion here where the subject of the redirect examination was the identification of the defendant by James Strickland, which was discussed on both direct and cross-examination. Even if some new matter were the subject of redirect, any error here would not be prejudicial given the heavy weight of the evidence against the defendant.

[2] Defendant's other assignment of error attacks the jury instruction on what constitutes a taking and carrying away as an element of felonious larceny. He objects to the judge's instruction that

> Cutting the speaker wires and moving parts of the stereo system from one room to another would be a taking.

This statement followed the trial judge's verbatim recitation of the jury instruction submitted by the defendant on the taking and carrying away element of larceny. We find no error on this point.

As defendant states in his brief, G.S. 15A-1232 makes it the duty of the trial judge in instructing the jury to declare and explain the law arising on the evidence in the case. It is sufficient if a trial judge gives a requested instruction in substance, and not the exact words requested by the defendant, when the instruction is proper based on the evidence. *State v. Sledge*, 297 N.C. 227, 254 S.E. 2d 579 (1979). The defendant's requested instruction was given even though the trial judge added a statement. His applica-

tion of the law to the facts was correct. When viewing the instructions contextually as a whole, as we must on appeal, *State v. Rogers*, 299 N.C. 597, 264 S.E. 2d 89 (1980), we find no error.

No error.

Judges JOHNSON and BRASWELL concur.

TERRY GREGORY AND WIFE, PENNIE GREGORY, EDWARD WOMBLE AND WIFE, WALLY WOMBLE, W. M. BOOTH AND WIFE, RUBY BOOTH, J. W. WYNN AND WIFE, GLORIA WYNN, HARRY WARD AND WIFE, MITTIE WARD, GEORGE SMITH AND WIFE, PAT SMITH, LARRY WATSON AND WIFE, NILE WATSON, AND TOMMY WOOLARD AND WIFE, JEAN WOOLARD v. TOWN OF PLYMOUTH

No. 822SC65

(Filed 18 January 1983)

1. **Municipal Corporations § 2.1— amended annexation proposal—no requirement for second public hearing**

There is no requirement that a second public hearing be held on an amended annexation proposal, when that amendment is adopted to achieve compliance with G.S. 160A-35, pursuant to the authority granted in G.S. 160A-37(e). Therefore, where an amendment to an original annexation ordinance only provided additional information clarifying services to be extended to the annexed area and delineated how those services would be financed, there was not a substantial change to the ordinance necessitating notice to those affected thereby.

2. **Municipal Corporations § 2.6— annexation—sufficiency of fire protection services**

The amended proposal to an annexation ordinance provided for fire protection services on substantially the same basis and in the same manner as such services were provided within the rest of the municipality prior to annexation, as required by G.S. 160A-35(3)(a).

APPEAL by petitioners from *Peel, Judge.* Judgment entered 20 October 1981 in Superior Court, WASHINGTON County. Heard in the Court of Appeals 10 November 1982.

The Town of Plymouth, North Carolina, adopted an ordinance for the annexation of Liverman Heights, the area where plaintiffs live, on 8 September 1980. A hearing pursuant to a petition for

review filed by the petitioners was held before the Honorable Donald L. Smith, Superior Court Judge, on 2 March 1981. The judgment was entered without exception by any of the parties. It provided, in pertinent part:

> NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the Court, pursuant to the provisions of G.S. § 160A-38(G)(3) remand the report to the Municipal Governing Board of the Town of Plymouth, North Carolina, for amendment of the plan providing for the services to the end that the provisions of G.S. § 160A-35 are satisfied, and that if the municipality shall fail to take action in accordance with the Court's instructions upon remand within three (3) months of receipt of said instructions, the annexation proceeding shall be deemed null and void.

In accord with the judgment, the Town Council, without public hearing, adopted an amendment to its original proposal on 1 June 1981. Thereafter, petitioners filed a second petition, asking the Court to declare the annexation proceeding null and void for failure to comply with the mandate of the relevant statutes. Judgment was entered in favor of the Town. Petitioners excepted and appealed to this Court.

Wilkinson & Vosburgh, by John A. Wilkinson, for petitioner appellants.

Hutchins, Romanet, Thompson, Hillard & Harrell, by Andrew L. Romanet, Jr., for respondent appellees.

BECTON, Judge.

Petitioners bring forth fourteen (14) assignments of error and raise five (5) arguments on appeal. Petitioners' first argument is that the Town of Plymouth was required to hold a public hearing on the amended proposal. We hold that it was not.

[1] The Legislature has empowered municipal governing boards to "amend the report required by G.S. 160A-35 to make changes in the plans for serving the area proposed to be annexed so long as such changes meet the requirements of G.S. 160A-35." N.C. Gen. Stat. § 160A-37(e) (1982). There is no requirement that a second public hearing be held on an amended annexation proposal, when that amendment is adopted to achieve compliance with G.S.

160A-35, pursuant to the authority granted in G.S. 160A-37(e). *Conover v. Newton*, 297 N.C. 506, 256 S.E. 2d 216 (1979); *Williams v. Town of Grifton*, 22 N.C. App. 611, 207 S.E. 2d 275 (1974). The Plymouth City Council was directed, by order entered 2 March 1981, to more clearly set forth its proposals for the provision of certain municipal services to residents in the Liverman Heights area, in accordance with G.S. 160A-35. The petitioners have stipulated that the original annexation ordinance was adopted in accord with all statutory procedures, and that they were accorded proper notice and an opportunity to be heard. Thus, the relevant inquiry is whether the amendment effected a substantial change to the ordinance, necessitating notice to those affected thereby. The stated purpose of the 29 May 1981 amendment, is "to provide additional information clarifying those services to be extended to the annexation area and delineating how those services shall be financed." Our review of the record reveals that it does no more than that. Because this amendment was adopted by the Town of Plymouth pursuant to the authority conferred upon it by G.S. 160A-37(e), to achieve compliance with G.S. 160A-35, no public hearing was required prior to its adoption. *Williams v. Town of Grifton*, 22 N.C. App. at 613, 207 S.E. 2d at 277 (1974). A second public hearing is not required on remand unless substantial changes are made in the amended plan that are not a part of the original notice of public hearing and are not provided for in the plans for service. *Rexham v. Town of Pineville*, 26 N.C. App. 349, 216 S.E. 2d 445 (1975).

Because we find that no public hearing was required on remand, petitioners' arguments two, three and four, all concerning alleged procedural irregularities surrounding the 29 May 1981 meeting, need not be discussed.

[2] Petitioners finally contend that the amended proposal does not provide for fire protection services on substantially the same basis and in the same manner as such services are provided within the rest of the municipality prior to annexation, as required by G.S. 160A-35(3)(a). They argue that because Liverman Heights is located south of the railroad that completely transverses the town and that because the fire station is north of these tracks, it is both possible and likely that fire personnel would be blocked from the annexed area by a train. While the juxtaposition of Liverman Heights, the railroad, and the fire sta-

tion may foster this type of situation, we note from the record that at least 25% of the present corporate area of Plymouth lies south of the rail lines, and is thus served by and subject to the town's geography. Further, the Plymouth Volunteer Fire Department has and continues to serve as both the town's and Liverman Heights' sole fire department; the protection afforded the annexed area is the same as that given other areas in Plymouth. The new plan also provides for the enhancement of fire protection on the south side through the installation of new water mains and hydrants. Finally, should the Town fail to install promised improvements, petitioners have recourse pursuant to N.C. Gen. Stat. § 160A-37(h) (1982).

For the foregoing reasons, the judgment of the trial court is affirmed.

Affirmed.

Judges WEBB and HILL concur.

STATE OF NORTH CAROLINA v. ERIC W. OWENS

No. 8226SC563

(Filed 18 January 1983)

Homicide § 30.2— error in failing to submit voluntary manslaughter

The trial court in a murder prosecution erred in failing to submit the lesser offense of voluntary manslaughter to the jury where there was evidence tending to show that defendant shot decedent with a pistol while decedent was beating defendant with his fists and a belt, since the jury could have concluded that defendant intentionally fired the pistol in self-defense but used excessive force.

APPEAL by defendant from *Howell, Judge.* Judgment entered 15 January 1982 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 6 December 1982.

Defendant was indicted for first degree murder, convicted of second degree murder, and sentenced to 25 years imprisonment for the shooting death of Willie Hayes.

Attorney General Edmisten, by Assistant Attorney General Grayson G. Kelley, for the State.

Paul J. Williams for defendant appellant.

ARNOLD, Judge.

Defendant contends that the trial court erred in refusing his request for an instruction on voluntary manslaughter. We agree.

Voluntary manslaughter is defined as the "unlawful killing of a human being without malice and without premeditation and deliberation." *State v. Benge*, 272 N.C. 261, 158 S.E. 2d 70 (1967). A defendant may be guilty of voluntary manslaughter if he kills in self-defense, but uses excessive force. *State v. Woods*, 278 N.C. 210, 179 S.E. 2d 358 (1971). Under a bill of indictment for first degree murder, if there is evidence to support the submission of the lesser offense of voluntary manslaughter, the defendant is entitled to an instruction on it. *State v. Wrenn*, 279 N.C. 676, 185 S.E. 2d 129 (1971).

We have reviewed the transcript and find that there is evidence to require the submission of voluntary manslaughter to the jury.

State's evidence tends to show that the deceased, Willie Hayes, had returned home drunk. When Hayes was drunk, he was violent and ill-tempered, and often got into fights. Hayes was a tenacious fighter who battled until he emerged victorious. Hayes was arguing with his common law wife and stepdaughter when defendant rang the doorbell. Hayes, with a leather belt wrapped around his hand, answered the door, said, "I'll show you who the boss is here," and ordered defendant to get off his porch. The wife overheard defendant ask Hayes what was wrong, that he had not done anything. The wife then heard several gunshots. A neighbor who witnessed the shooting testified that he saw defendant coming off the steps "as if he was dodging something." Defendant raised his left arm to protect his face and forehead, withdrew a revolver from his waist area with his right hand, and fired several shots toward the house. Defendant told his niece that "the man was beating me so he killed him." Hayes died of two gunshot wounds.

Defendant testified that he rang the doorbell and asked to see his girl friend, the stepdaughter. Hayes answered the door, cursing and threatening to kill defendant. As defendant turned to leave, Hayes beat defendant on the side of his face with his fists and the belt and pushed defendant off the porch. As defendant fell backwards, he pulled out the pistol, and out of fear of Hayes, shot into the air, not intending to shoot Hayes, but rather to scare Hayes. Defendant knew that Hayes had a reputation for violence.

On the basis of this evidence, the jury could have concluded that defendant intentionally fired the gun in self-defense but used excessive force. Voluntary manslaughter, therefore, should have been submitted.

Since we are ordering a new trial, we need not discuss defendant's remaining assignments of error.

New trial.

Judges JOHNSON and BRASWELL concur.

STATE OF NORTH CAROLINA v. MICHAEL ANTHONY SIMPSON

No. 8226SC348

(Filed 18 January 1983)

Criminal Law § 91— Speedy Trial Act—finding of State's failure to comply error

Where defendant was arrested on certain charges and, on the day set for a probable cause hearing, the State took a voluntary dismissal, and where the defendant was later indicted for the same offenses, for purposes of the Speedy Trial Act, the time should have been measured from the date the defendant was indicted. G.S. 15A-701(a1)(3), G.S. 15A-931, and G.S. 15A-612.

APPEAL by the State from *Snepp, Judge.* Order entered 5 January 1982 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 19 October 1982.

The defendant was arrested on 12 July 1981 on charges of breaking or entering and first degree rape. The case was set for a probable cause hearing on 29 July 1981. There was not a probable

cause hearing but the State took a voluntary dismissal on 29 July 1981. The defendant was released from custody at that time. On 21 September 1981 defendant was indicted for the same offenses. On 4 January 1982 the defendant filed a motion to dismiss for the State's failure to comply with the Speedy Trial Act.

The court filed an order on 5 January 1982 granting the defendant's motion to dismiss. The State appealed.

Attorney General Edmisten, by Assistant Attorney General Evelyn M. Coman, for the State.

Dozier, Millard, Pollard and Murphy, by W. Joseph Dozier, Jr., for defendant appellee.

WEBB, Judge.

The State contends it was error to dismiss this case under G.S. 15A-701(a1) which 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 disposition of this case depends upon when the 120-day period commences during which time the defendant must have been brought to trial. As we read G.S. 15A-701(a1)(3), the time should have been measured from the date the defendant was indicted. The original charges against the defendant were dismissed

pursuant to G.S. 15A-931, not G.S. 15A-703 or a finding of no probable cause pursuant to G.S. 15A-612. The first portion of the statutory provision is satisfied. The defendant was then charged with the same offenses and was indicted on 21 September 1981. These were the only indictments issued against the defendant for these charges and their issuance was the last of those events relevant under the statute, to wit: arrest, service of criminal process, waiver of indictment, or indictment. The 120-day period began to run from 21 September 1981. It was error to dismiss the indictments on 5 January 1982, which was 106 days after the indictments were returned. Defendant's contention that the time should have been calculated from the date of his arrest ignores the statute's plain wording.

The State also assigns error to the court's amending its order *nunc pro tunc* and in dismissing the charges with prejudice. Since we have held it was error to enter the order, we do not discuss these assignments of error.

Reversed and remanded.

Judges HEDRICK and BECTON concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 4 JANUARY 1983

C.B.H., INC. v. WALKER No. 8214SC357	Durham (80CVS3058)	No Abuse of Discretion
FANCY FOODS OF VA. v. PORT O'CALL No. 821DC644	Dare (81CVD369)	No Error
HARRELL v. HARRELL No. 829DC693	Vance (79CVD460)	Dismissed
IN RE MILLER No. 8222SC338	Davidson (81SP376)	Affirmed
IN RE MILLER No. 8222SC343	Davidson (81SP377)	Affirmed
PILOT HOUSE 446, LTD. v. HEGG No. 823SC779	Carteret (82CVS114)	Affirmed
STATE v. COOPER No. 827SC216	Wilson (81CRS4020)	Affirmed
STATE v. FISHER No. 8221SC579	Forsyth (81CRS48120)	No Error
STATE v. HORNE No. 823SC382	Craven (80CRS14833) (80CRS14834)	No Error
STATE v. LONG No. 8229SC313	McDowell (81CRS5526)	No Error
STATE v. MATHIS No. 824SC420	Duplin (81CRS1002)	No Error
STATE v. MELVIN No. 824SC297	Sampson (81CRS1681) (81CRS1682) (81CRS1683)	No Error
STATE v. STALLINGS No. 8223SC300	Wilkes (81CRS6842)	No Error
STATE v. THOMPSON No. 822SC612	Beaufort (81CRS6035)	No Error
STATE v. WHARTON No. 8218SC405	Guilford (81CRS46943)	No Error
STEVENS v. CONCRETE CURB CORP. No. 8126SC1354	Mecklenburg (81CVS3999)	Appeal Dismissed
VANLANDINGHAM v. PETERS No. 8212SC629	Cumberland (81CVS4941)	No Error

FILED 18 JANUARY 1983

BARROW v. THOMAS No. 8217SC714	Rockingham (80CVS388)	No Error
CP&L v. CENTRAL TELEPHONE CO. No. 8210SC159	Wake (81CVS5348)	Affirmed
LEVAN v. BOB DUNN FORD, INC. No. 8218DC140	Guilford (80CVD6151)	Reversed & Remanded
MAU v. PAINTING SERVICES, INC. No. 8210IC149	Industrial Commission (H-2870)	Affirmed
MOYE v. VAUSE No. 828SC364	Greene (80CVS186)	Affirmed
NCNB v. WEAVER No. 8225SC725	Catawba (81CVS1550)	Affirmed
STATE v. ALLEN No. 8219SC574	Rowan (81CRS3160) (81CRS3161)	No Error
STATE v. ALLMAN No. 8218SC406	Guilford (81CRS16284)	No Error
STATE v. HARPER No. 8225SC309	Caldwell (81CRS4570)	No Error
STATE v. HUMPHREY No. 8221SC697	Forsyth (81CR44417)	No Error
STATE v. JULIAN No. 8219SC330	Rowan (81CRS7652)	No Error
STATE v. KERSEY No. 8220SC439	Richmond (81CRS3395)	No Error
STATE v. LUCAS No. 824SC264	Sampson (81CRS317) (81CRS318)	No Error
STATE v. NIVENS No. 8222SC351	Davidson (81CRS3474) (81CRS3475)	No Error
STATE v. POWELL No. 821SC683	Dare (81CRS4734)	No Error
STATE v. SIMMONS No. 8221SC628	Forsyth (81CRS45865)	No Error
STATE v. VAUGHT No. 8213SC678	Brunswick (81CRS4749)	No Error

IN THE MATTER OF: BRADFORD P. DAILEY, D.D.S., JUDICIAL REVIEW OF THE DECISION OF THE NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS v. NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS

No. 8110SC1267

(Filed 1 February 1983)

1. **Physicians, Surgeons and Allied Professions § 5— standard of care among dentists—same or similar communities**

The State Board of Dental Examiners erred in phrasing findings and conclusions in terms of a standard of practice observed in "North Carolina" since G.S. 90-21.12 states that the standard of health care provided must be in accordance with the standard of practice among members of the same health care profession with similar training and experience situated in the *same or similar communities.*

2. **Physicians, Surgeons and Allied Professions § 5— findings and conclusions of Board of Dental Examiners—sufficiency of evidence to support**

Certain findings and conclusions of the North Carolina Board of Dental Examiners, made pursuant to a hearing conducted to determine whether disciplinary sanctions should be imposed upon plaintiff, were supported by competent substantial evidence even though the evidence was conflicting. However, the evidence did not support certain findings concerning whether plaintiff should have taken an x-ray of an extraction site, should have removed a broken root tip upon a patient's second post-operative visit and whether plaintiff should have filled the canal of a root upon which a root canal was performed with filling material.

APPEAL by plaintiff from *Brannon, Judge.* Judgment entered 24 August 1981. Heard in the Court of Appeals 15 September 1982.

Sumrell, Sugg & Carmichael, by Rudolph A. Ashton, III, and Tharrington, Smith & Hargrove, by Steven L. Evans, for plaintiff appellant.

Bailey, Dixon, Wooten, McDonald & Fountain, by Ralph McDonald and Carson Carmichael, III, for defendant appellee.

JOHNSON, Judge.

On 19 January 1980 the North Carolina State Board of Dental Examiners (Board) conducted a hearing to determine whether disciplinary sanctions should be imposed upon appellant, Bradford P. Dailey, for negligence and malpractice in the practice of dentistry. Based upon its findings of fact and conclusions of law, the

Board pursuant to G.S. 90-41(a)(3) and (4), imposed disciplinary sanctions upon appellant.

On 28 August 1980 appellant petitioned for judicial review of the administrative decision. Judge Smith affirmed the Board's decision in part and reversed in part. The pertinent part of Judge Smith's decision states:

> [T]hat while there is substantial evidence in the record to support the Board's findings and conclusions as to the standard of practice among members of the health care profession of general dentistry, the record before the Court does not contain substantial evidence to support the Board's Findings of Fact 20, 21, 22 and 39 and Conclusions of Law 1, 2, 3, 4, 7 and 8 to the extent that those Findings and Conclusions state the standard of practice among dentists with similar training and experience as the Petitioner and situated in the New Bern, North Carolina community or similar communities.

The court reversed and remanded the case to the Board for further findings of fact and conclusions of law not inconsistent with the judgment of the court.

Upon remand, and without receiving further evidence, the Board entered an amended decision containing what the Board designated as "further" findings of fact and "further" conclusions of law 20(A), 21(A), 22(A), 39(A), 1(A), 2(A), 3(A) and 4(A). These further findings and conclusions did little more than restate the initial set of findings and conclusions in terms of a statewide rather than local community standard for the practice of general dentistry. Again, disciplinary sanctions were imposed. Appellant then petitioned for judicial review of the second agency decision. On 24 August 1981 Judge Brannon affirmed the Board's second decision.

In this appeal appellant contends that the second agency decision was erroneously affirmed for the following reasons: (1) the Board erred in making its further findings and conclusions as to a statewide standard without taking further evidence and (2) there was insufficient evidence to support various findings of fact and conclusions of law concerning appellant's treatment of Ms. Barbara Lanzer in 1977 and Ms. Mayona Baldree in 1978.

I

[1] G.S. 90-21.12 states that the standard of health care provided must be in accordance with the standard of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act giving rise to the cause of action. It is clear from the wording of the statute that the test is not that of a statewide standard of health care, but rather a standard of practice among members of the same health care profession situated in the *same or similar communities.*

In appellant's case, that is the standard of practice in the New Bern community or communities similar to it, not the standard of practice in North Carolina generally. The Board's further findings and further conclusions are phrased in terms of a standard of practice observed in "North Carolina." This is error requiring reversal of further Findings of Fact 20(A), 21(A), 22(A), and 39(A) and further Conclusions of Law 1(A), 2(A), 3(A) and 4(A).[1]

II

Appellant's contention that the Board's findings and conclusions are not supported by the evidence raises the question of the scope of review defined by G.S. 150A-51(5), which provides in part:

> The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if . . . the agency findings, inferences, conclusions, or decisions are unsupported by substantial evidence admissible under G.S. 150A-29(a) or G.S. 150A-30 in view of the entire record as submitted.

The standard of judicial review set forth in G.S. 150A-51(5) is known as the "whole record" test. *Thompson v. Board of Education,* 292 N.C. 406, 233 S.E. 2d 538 (1977). The whole record test does not allow the reviewing court to replace the Board's judgment as between two reasonably conflicting views, even though

1. In view of our decision to reverse the "further" findings and conclusions on the basis of utilization of an erroneous standard of practice we do not reach the issue of whether the Board erred in making its further findings without taking additional evidence.

the court could justifiably have reached a different result had the matter been heard before it *de novo*. *Id.* In *Savings & Loan Association v. Savings & Loan Commission*, 43 N.C. App. 493, 259 S.E. 2d 373 (1979) this Court addressed the whole record test and stated,

> "The reviewing court, while obligated to consider evidence of record that detracts from the administrative ruling, is not free to weigh all of the evidence and reach its own conclusions on the merits. If, after all, of the record has been reviewed, substantial competent evidence is found which would support the agency ruling, the ruling must stand."

Id. at 497-98, 259 S.E. 2d at 376.

Substantial evidence in this context has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Thompson v. Board of Education*, 292 N.C. 414, 233 S.E. 2d at 544.

The law of this State is clear regarding the respective roles of the administrative agency and the reviewing court concerning conflicting evidence. In the case of *In re Wilkins*, 294 N.C. 528, 242 S.E. 2d 829 (1978), Wilkins appealed the decision of the Board of Medical Examiners revoking his license. The testimony of the doctor—Wilkins—and his patient was in direct conflict as to the circumstances and purposes for certain prescriptions. In addressing the proper scope of the Board in viewing the conflicting evidence and the proper scope of a judicial review, our Supreme Court stated,

> "The credibility of the witnesses and the resolution of conflicts in their testimony is for the Board, not a reviewing court, and the findings of the Board supported, as these findings are, by competent evidence, are conclusive upon judicial review of the Board's order."

Id. at 549, 242 S.E. 2d at 841.

[2] Therefore, we now consider whether the evidence of record is sufficient to support the Board's Findings of Fact 9, 20, 21, 22 and Conclusions of Law 1, 2 and 3 which pertain to appellant's treatment of Ms. Baldree, and finding of fact 39 and conclusions of law 7 and 8 which pertain to treatment rendered Ms. Lanzer.

All evidence of the standard of care relative to the treatment administered Ms. Baldree was received through the testimony of Drs. Hand and Secosky who were both in the same health care profession as appellant and situated in the same community—New Bern—as appellant during the time in question. Their testimony was elicited in response to questions aimed at defining the local standards in New Bern, North Carolina or similar communities.

Drs. Hand and Secosky testified that it is an accepted practice in the New Bern community to advise a patient if a root tip was left in an extraction site. This evidence is undisputed and clearly supports the Board's Finding of Fact 20 that the standard of practice on or about June and July 1978 among members of the health care profession of general dentistry situated in the New Bern, North Carolina community or similar communities was that a dental patient should be told when a root tip had been left in the extraction site.

Appellant next argues that the evidence was insufficient to support the Board's Finding of Fact 9 that appellant did not advise Ms. Baldree that he was not able to remove the broken root tip. The testimony regarding this question is conflicting. Ms. Baldree testified she thought appellant removed the broken root tip on 22 June 1978 and that appellant did not tell her he was not able to remove it. Appellant testified that he told her he was not able to remove the root tip; gave her the option of having him to attempt to remove it surgically, refer her or to leave the root tip in. According to plaintiff, Ms. Baldree chose to leave the root tip in.

The mere existence of conflicting evidence does not permit the reviewing court to weigh the evidence and substitute its determination for that of the Board. The credibility of the witnesses and the resolution of conflicts in their testimony is a matter for the Board, not a reviewing Court. *In re Wilkins, supra.* The question presented is an issue of fact and the Board properly exercised its authority and weighed the conflicting testimony of the witnesses. The Board's Finding of Fact 9 is supported by competent substantial evidence.

Appellant next contends that there was insufficient evidence to support the Board's Findings of Fact 21, 22 and Conclusions of Law 2 and 3 that the standard of practice on or about June and

July 1978 among general dentists in the New Bern community or similar communities was (1) that a dentist should have an x-ray taken of an extraction site if during the process of an extraction a root is broken and, in any event, if an x-ray is not taken at that time, then an x-ray should be taken when the patient later returns complaining of pain; (2) that a dentist who fails to remove a broken root tip and thereafter learns on the patient's second post-operative visit that the patient has a dry socket, should then remove the broken root tip or refer the patient to an oral surgeon.

Dr. Hand testified that the practice in the New Bern community is that when an extraction is done and the dentist knows that there is a broken root tip, an x-ray is taken to determine if it's feasible to leave it. That if an x-ray was not taken at the time the broken root tip was left in and the patient returned complaining of pain, it would be in accordance with good and accepted practice and procedure to take an x-ray at that time. Dr. Hand further testified that anytime a patient is in discomfort a procedure is indicated to relieve that discomfort. A general dentist can perform such procedures or the patient can be referred to an oral surgeon. It would not be unusual to expect Ms. Baldree to have pain for a week or ten days and not unusual to treat her for a dry socket.

Dr. Secosky testified that it is not necessarily a deviation from local standards in the New Bern community not to x-ray before and after an extraction. If the dentist can see the broken root tip there would be no need to x-ray, but if the root tip was not visible, then the standard of practice would be to take an x-ray. If a dry socket developed in the area of the root tip the standard of practice is to leave the root tip in until after the dry socket is treated and cleared and then the dentist can make a determination about the removal of the root tip. A general dentist can do this or refer the patient.

Appellant testified that in his judgment there was no need to do a post-operative x-ray because he had the broken tooth and could see the root tip. Ms. Baldree returned and complained of pain in the site. He examined her and saw the exposed bone but did not see the normal clotting. He diagnosed it at the time as a dry socket by the lack of normal healing and with full knowledge

there was a root tip remaining. He was attempting to solve the immediate problem of the dry socket and then, if so indicated later, he would either attempt to remove the root tip or refer her. The dry socket normally takes a couple of weeks to heal.

The evidence here is conflicting as to whether a dentist who performs an extraction and is aware that a broken root tip remains, should then take an x-ray of the extraction site to determine the feasibility of leaving the root tip. Dr. Hand testified that the local standard of practice requires an x-ray. Dr. Secosky testified that if the dentist can see the root tip then the standard does not require an x-ray. Appellant's testimony that he knew the root tip was there and that it was visible is uncontradicted. Here again, the question presented was one of fact and properly for the Board to decide by exercise of its authority in weighing the conflicting testimony and the credibility of the witnesses. *In re Wilkins, supra.*

We therefore hold that the Board's Finding of Fact 21 and Conclusion of Law 2 that the local standard of practice required appellant to have taken an x-ray of the extraction site to determine whether it was feasible to leave the broken root tip is supported by competent substantial evidence. The Board's Finding of Fact 22 and its Conclusion of Law 3 that the local standard of practice required appellant, on Ms. Baldree's second post-operative visit, to remove the broken root tip himself or refer her to an oral surgeon are not supported by competent substantial evidence. All evidence of record shows that upon Ms. Baldree's post-operative visits complaining of pain, the local standard of practice required appellant to take steps to relieve her of the discomfort; and if a dry socket has developed in the area of the root tip, to treat and clear the dry socket before making a determination about removing the root tip himself or to refer her.

The evidence is uncontradicted that upon Ms. Baldree's second post-operative visit appellant diagnosed a dry socket in the extraction area and took steps to relieve her of the discomfort by treating the dry socket before making a determination about removal of the root tip. All of the evidence here supports appellant's contention that upon Ms. Baldree's post-operative visits, he treated her in accordance with required local standards.

Based upon the evidence supporting the Board's Findings of Fact 9, 20, 21 and Conclusions of Law 1 and 2, we hold that there is substantial competent evidence of record to support the Board's Conclusion of Law 4 which states,

> "The acts and omissions on the part of the respondent in his treatment of Mayona Morris Baldree on or about June and July, 1978, do not comply with the standard of practice among members of the health care profession of general dentistry with similar training and experience as a respondent and situated in New Bern, North Carolina or similar communities, and such acts and omissions on the part of the respondent constitute negligence and malpractice in the practice of dentistry within the meaning of N.C.G.S. Sec. 90-41(a)(12) and N.C.G.S. Sec. 90-41(a)(19)."

Appellant next contends that there was insufficient evidence to support the Board's Finding of Fact 39 and Conclusions of Law 7 and 8.

Finding 39 and Conclusion 7 are virtually identical and state:

> "The standard of practice on or about October 1977, among members of the health care profession of general dentistry with similar training and experience as the respondent and situated in the New Bern, North Carolina community or similar communities was that when a root canal is performed, the canal of the root is filled with filling material."

Conclusion of Law 8 states:

> "The acts and omissions on the part of the respondent in his treatment of Barbara Elaine Lanzer on or about October 1977, do not comply with the standard of practice among members of the health care profession of general dentistry with similar training and experience as a respondent and situated in New Bern, North Carolina or similar communities, and such acts and omissions on the part of the respondent constitute negligence and malpractice in the practice of dentistry within the meaning of N.C.G.S. Sec. 90-41(a)(12) and N.C.G.S. Sec. 90-41(a)(19)."

Based upon sufficient and competent evidence the Board found and concluded on 5 October 1977, appellant performed a root

canal on Ms. Lanzer's first left molar and that appellant did not fill the root canal with any kind of filling material. The question raised is whether appellant's failure to fill the canal with a filling material violated a required standard of care among members of the health care profession of general dentistry. All of the evidence relative to this question was received through the testimony of Drs. Kenneth Gibbs and D. J. Kolzet.

Dr. Gibbs testified that while he personally did not approve of the practice of not filling root canals, it was accepted practice in some communities. He stated he did not know whether it was accepted practice in the New Bern community. Dr. Kolzet testified that in his opinion it was not good and accepted practice to leave a root canal unfilled and close the tooth. It is in the best interest of the healing process to fill the root canal system. Dr. Kolzet was never asked about a standard of practice within North Carolina or any community within this state or any other state. It is clear from his testimony that his opinion on this point is based not on his knowledge of the general standard of practice prevailing in North Carolina or any community within North Carolina or any similar communities, but on his experience in the city of Chicago, Illinois.

We hold that the evidence is insufficient to support the Board's finding and conclusion that "[t]he standard of practice on or about October 1977, among members of the health care profession of general dentistry with similar training and experience as the respondent and situated in the New Bern, North Carolina community or similar communities was that when a root canal is performed, the canal of the root is filled with filling material." Likewise, we hold that the evidence of record is insufficient to support the Board's Conclusion of Law 8. In light of our decision regarding this assignment of error, we do not find it necessary to address appellant's remaining assignments of error relating to the Board's findings and conclusions regarding treatment rendered Ms. Lanzer.

In conclusion, we affirm the Board's Findings of Fact 9, 20, and 21 and Conclusions of Law 1, 2, and 4. We reverse Findings of Fact 22 and 39 and Conclusions of Law 3, 7 and 8 and reverse further Findings of Fact 20(A), 21(A), 22(A) and 39(A) and further Conclusions of Law 1(A), 2(A), 3(A) and 4(A). This case is to be

remanded to the Superior Court, and the Superior Court is directed to remand the case to the North Carolina State Board of Dental Examiners directing the Board to enter findings of fact and conclusions of law not inconsistent with the opinion of this Court.

Affirmed in part, reversed in part and remanded.

Chief Judge MORRIS and Judge BECTON concur.

STATE OF NORTH CAROLINA v. STEPHEN KEITH HALL

No. 824SC479

(Filed 1 February 1983)

1. **Homicide § 21.9— involuntary manslaughter—shooting of another hunter**

The evidence was sufficient for the jury to find that defendant's accidental shooting of another deer hunter constituted culpable negligence so as to support his conviction of involuntary manslaughter where it would permit the jury to find that defendant did not know at what he was shooting when he turned and fired his rifle upon hearing a rustle in the brush.

2. **Homicide § 27.2— involuntary manslaughter—instructions—proximate cause—foreseeability**

In a prosecution for involuntary manslaughter arising out of defendant's accidental shooting of another deer hunter, the trial court committed prejudicial error in failing to define proximate cause in the instructions or to state that foreseeability was a requisite of proximate cause.

3. **Criminal Law § 102.6— jury argument—civil and criminal negligence**

In this prosecution for involuntary manslaughter, the trial court erred in refusing to permit defense counsel to explain the difference between civil and criminal negligence in his closing argument to the jury. G.S. 84-14.

4. **Criminal Law § 33.4— reaction of victim's wife—defendant's failure to contact victim's wife—irrelevancy—harmless error**

Testimony in an involuntary manslaughter case relating to the reaction of the victim's wife when she was told of the victim's death and defendant's failure to contact the victim's wife after the death was irrelevant, but the admission of such testimony was not prejudicial error.

5. **Criminal Law § 33.3; Homicide § 15— shooting of another hunter—no hunting license—shooting deer at night—irrelevancy**

In a prosecution for involuntary manslaughter arising out of defendant's accidental shooting of another deer hunter, the trial court erred in the admis-

sion of testimony (1) that defendant did not have a hunting license at the time he shot the victim and (2) that defendant shot a deer at night several weeks after the victim's death.

Judge HEDRICK dissenting.

APPEAL by defendant from *Lane, Judge.* Judgment entered 20 January 1982 in Superior Court, JONES County. Heard in the Court of Appeals 10 November 1982.

Defendant, Stephen Keith Hall, age 21, was convicted of involuntary manslaughter and given a three-year active prison sentence, the presumptive term under the Fair Sentencing Act. Following the entry of judgment, defendant gave notice of appeal.

Attorney General Edmisten, by Assistant Attorney General Robert R. Reilly, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender James H. Gold, for defendant appellant.

BECTON, Judge.

I

The charge against the defendant arises out of the shooting death of Freddie Futreal on the morning of 12 October 1981. Both the defendant and Futreal were hunting deer at the time. They were members of different hunting parties, however. The State contends that, although defendant did not intentionally shoot Futreal, defendant's actions nevertheless constituted criminal negligence. The defendant contends the shooting was an accident. Defendant testified that he had been following a deer, that he had not seen any other hunters in the area, that he accidentally shot Futreal when he heard a rustle in the brush, and that he fired at what he thought was the white and brown coloring of a deer.

The issues on appeal are (i) whether the State's evidence supported a finding of defendant's culpable negligence; (ii) whether the trial court erred in refusing to allow defense counsel to explain the difference between civil and criminal negligence in his closing argument; (iii) whether the trial court erred in admitting evidence about how Futreal's wife responded when she was told that he had been shot; (iv) whether the court erred in admitting evidence that defendant "firelighted" deer one month subsequent

to the shooting of Futreal, which, arguably, tended to show defendant's culpably negligent disposition; (v) whether the court erred in allowing the State to cross-examine a witness about the proper handling of a firearm; (vi) whether the trial court properly charged the jury on defendant's not having a hunting license; and (vii) whether the trial court erred in failing to charge the jury on foreseeability and the definition of proximate cause.

Although we grant a new trial because the trial court failed to define proximate cause and to give instructions on foreseeability, it is necessary to discuss some of the other issues raised since those issues are likely to arise on retrial.

II

[1] The defendant contends that the evidence was insufficient to support his conviction for involuntary manslaughter because his accidental shooting of another deer hunter did not constitute culpable negligence.

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

State v. Everhart, 291 N.C. 700, 702, 231 S.E. 2d 604, 606 (1977). Finding no North Carolina cases involving manslaughter convictions arising from hunting accidents, the defendant relies on a New York case, *New York v. Joyce*, 192 Misc. 107, 84 N.Y. Supp. 2d 238 (1948) in which the court found no culpable negligence. Although the facts in *Joyce* are similar to the facts in this case, we are not persuaded by the reasoning in the *Joyce* case.

The North Carolina case closest on point, which defendant cites, is *State v. Everhart.*[1] In *Everhart,* "the defendant was a young girl with an I.Q. of 72. She gave birth to a baby while lying on the floor and dropped the newborn infant while attempting to place him upon the bed. Thinking the baby was dead, [he did not cry nor move] she wrapped him in a blanket." 291 N.C. at 704, 231 S.E. 2d at 607. The baby died. The defendant in *Everhart* had a basis for believing the child to be dead. As the Supreme Court said:

> [T]he defendant had just delivered a baby without any assistance; was ill; and was scared. The doctor found no evidence of trauma or a purposeful act upon the body of the baby. He concluded that the child was accidentally smothered or died of neonatal respiratory failure—the failure to have proper stimulation to cause continued breathing. Under these facts there was not sufficient evidence to show that defendant acted in such a manner as to import a thoughtless disregard of the consequences of her act or heedless indifference to the rights and safety of the baby.

Everhart, at 704-05, 231 S.E. 2d at 607.

Although *Everhart* suggests that a tragic result, standing alone, is not enough to establish criminal negligence, *Everhart* will not allow one to shoot and kill another when the shooter does not know at whom or what he is shooting.

From the evidence presented in this case the jury could find that defendant did not know what he was shooting at when he turned and fired his Winchester 30-5 rifle. There were no eyewitnesses to the shooting, but defendant made several statements to State witnesses which, while not necessarily inconsistent, would allow the jury to conclude that he was culpably negligent. David Barrow, after hearing a shot and while going to

1. We note that *State v. Horton,* 139 N.C. 588, 51 S.E. 945 (1905) involves a manslaughter conviction arising out of a hunting accident, but the jury returned a special verdict finding that, although the hunting engaged in by defendant was prohibited by a statute requiring defendant to get the written consent of the owner of the land on which defendant hunted, the hunting was not itself dangerous to human life or done in a negligent manner. In spite of the jury's special finding, the trial court adjudged defendant to be guilty of manslaughter, and our Supreme Court reversed the conviction.

the place where he left Futreal, heard defendant hollering that "he thought there was a bear up the tree." When Barrow saw defendant and asked him what happened, defendant said: "I think I shot a man." Barrow continued:

> I asked him what did he mean he thought he shot a man and he said he saw a bush shake and he shot. . . . I asked him what did he mean he thought he shot a man and he said he didn't know. I asked him had he been over there and he said no, so I left there and went over there [where Futreal was] . . . . Before I got to where [Futreal] was, . . . he pointed out where he thought the man was at.

It is true that defendant's subsequent statements to Sam Griffin and Deputy R. E. Provost suggest that defendant had been chasing a deer and shot only after he saw a brown and white spot on what he thought was a deer. It is also true that Futreal was found in a brier thicket that had "bushes and vines overhanging" and "sage grass probably five feet deep." These, however, are factors that the jury was to consider in determining if defendant was culpably negligent; they are not, as a matter of law, insufficient to carry the case to the jury.

III

[2] Having determined that defendant's nonsuit motion was properly denied, we turn to the dispositive issue in this case: whether the trial court's failure, generally, to define "proximate cause," and, specifically, to instruct that foreseeability is a requisite of proximate cause, constitutes prejudicial error.

To hold a defendant criminally responsible for a homicide, the defendant's act must have been a proximate cause of the death. *State v. Satterfield*, 198 N.C. 682, 153 S.E. 155 (1930); *State v. Mizelle*, 13 N.C. App. 206, 185 S.E. 2d 317 (1971). "Proof of culpable negligence does not establish proximate cause," *State v. DeWitt*, 252 N.C. 457, 458, 114 S.E. 2d 100, 101 (1960), because mere proof of a negligent act does not establish its causal relation to the injury. Further, evidence of causal relation is not necessarily proof of proximate cause.

So familiar is the definition of proximate cause that it can be stated, without citation, as a cause: (1) which, in a natural and continuous sequence and unbroken by any new and independent

cause, produces an injury; (2) without which the injury would not have occurred; and (3) from which a person of ordinary prudence could have reasonably foreseen that such a result, or some similar injurious result, was probable under the facts as they existed. Thus:

> [F]oreseeability is a requisite of proximate cause. We have previously pointed this out and ordered a new trial where a proper definition of proximate cause was not given in a civil action. [Citation omitted.] *It is all the more imperative that all of the necessary elements including a correct definition of proximate cause . . . be given in a criminal case.* [Emphasis added.]

Mizelle, 13 N.C. App. at 208, 185 S.E. 2d at 318-19.

In this case the defendant, evidently relying on the pattern jury instruction on involuntary manslaughter, N.C.P.I.—Crim. 206.50, which defines proximate cause and specifically refers to foreseeability, requested that the following instruction be given: "To hold a person criminally responsible for manslaughter his act must have been a proximate cause of [the] death. Foreseeability is a requisite of proximate cause." The trial court, however, merely instructed the jury that "the State must prove that this unlawful or criminally negligent [sic] on the part of the defendant in shooting the said Mr. Futreal proximately caused the death of Mr. Futreal." No definition of proximate cause was included in the trial court's charge, and no specific reference to "foreseeability" was made when the trial court mentioned the words "proximately caused."

The trial court did mention the words "reasonable foresight" in defining criminal negligence, and the State, relying on *State v. Gainey*, 292 N.C. 627, 234 S.E. 2d 610 (1977), contends that the instructions, considered contextually, were adequate. We disagree. *Gainey* is distinguishable because the trial court therein adequately defined proximate cause and gave specific instructions on foreseeability.[2]

2. Relevant portions of the trial court's instructions in *Gainey* follow:

> [T]he State must prove that the defendant's intentional or reckless violation of the law proximately caused Carrie Freeze's death. Proximate cause is a real cause, a cause without which Carrie Freeze's death would not have oc-

A reference to "reasonable foresight" as an element of criminal negligence is not sufficient when no instruction of foreseeability is given with reference to proximate cause. As we stated earlier, evidence of causal relation and proof of culpable negligence are not necessarily proof of proximate cause. *State v. Satterfield.*

In *State v. Mizelle,* the defendant was convicted of involuntary manslaughter based on evidence that his car hit a man who was pushing a pickup truck off the road. Evidence that Mizelle was intoxicated and was driving his car at a speed fifteen (15) miles per hour above the posted limit was admitted. The trial court instructed the jury that it must find that the victim's death "was the natural and probable result of the defendant's act." However, because the trial court did not define proximate cause or state that foreseeability was a requisite of proximate cause, we granted Mizelle a new trial. We do the same here.

IV

Defendant assigned error to other portions of the trial court's charge, but it is not necessary to discuss the issues raised in those assignments of error since they are not likely to occur at re-trial. Certain evidentiary matters will likely be raised at re-trial, however, and we now summarily discuss them.

[3] Defendant assigned error to the trial court's refusal to permit defendant's counsel to explain the difference between civil and criminal negligence in his closing argument to the jury. Under N.C. Gen. Stat. § 84-14 (1981), counsel, in his argument to the jury, is entitled to read or state to the jury a relevant statute

curred. In order to find that the defendant's violation proximately caused Carrie Freeze's death, you must find first that the violation proximately caused the automobiles to collide at the intersection of this road on this occasion.

Second, that the accident proximately caused Carrie Freeze's death.

Third, that both the accident and the death occurred in a manner which was *reasonably foreseeable* from the defendant's intentional or reckless violation of the law. The defendant's violation need not have been the only cause or the last or nearest cause. It is sufficient if it occurred with some other cause acting at the same time which in combination with it proximately caused the death of Carrie Freeze. [Emphasis added.]

Gainey record, pp. 38-39.

or other rule of law so as to present his side of the case. *State v. McMorris*, 290 N.C. 286, 225 S.E. 2d 553 (1976); and *Wiles v. Mullinax*, 270 N.C. 661, 155 S.E. 2d 246 (1967). For example, in *Wiles*, our Supreme Court, citing G.S. § 84-14, ordered a new trial because of the trial court's improper refusal to allow defendant's counsel to read to the jury a statute and recent Supreme Court decision in support of his contention that defendants did obtain for the plaintiff the desired insurance coverage. In the case *sub judice*, defendant should have been allowed to inform the jury that the standard of negligence in civil cases is different from the standard applicable when criminal negligence is charged. Defendant should have been allowed, for example, pursuant to G.S. § 84-14, to read the following passage from *State v. Everhart* which we quoted earlier:

> Culpable negligence in the criminal law requires more than the negligence necessary to sustain a recovery in tort. Rather, for negligence to constitute the basis for the imposition of criminal sanctions, it must be such reckless or careless behavior that the act imports a thoughtless disregard of the consequences of the act or the act shows a heedless indifference to the rights and safety of others. . . .

Everhart, at 702, 231 S.E. 2d at 606.

[4] Defendant also assigned error to the trial court's admission of testimony relating to Mrs. Futreal's reaction when told of her husband's death and testimony relating to defendant's failure to contact Mrs. Futreal after her husband's death. We agree with defendant that this testimony was irrelevant, but we cannot say, on the record before us, that it was prejudicial. As the State argues, "a widow's tears are many and not unexpected. In fact, it appears that everyone was affected by the death. Barrow cried when he found the body. The defendant cried." Nevertheless, we repeat the general rule: Testimony which is offered solely for the purpose of creating sympathy for an alleged victim or for the purpose of improperly exciting prejudice against the defendant should not be admitted into evidence. *State v. Braxton*, 294 N.C. 446, 462, 242 S.E. 2d 769, 779 (1978); *State v. Page*, 215 N.C. 333, 1 S.E. 2d 887 (1939). *See also, State v. Johnson*, 298 N.C. 355, 377, 259 S.E. 2d 752, 766 (1979).

[5] Finally, defendant assigned error to the trial court's admission of evidence (i) that defendant did not have a hunting license at the time he shot Futreal, and (ii) that defendant shot a deer at night several weeks after Futreal's death. Whether the defendant had a hunting license on the day in question was irrelevant to the question whether his conduct was criminally negligent. The violation of a statute is pertinent when, and only when, that statute is designed for the protection of human life or limb and there is evidence tending to show that a violation thereof proximately caused the death. *State v. Duncan*, 264 N.C. 123, 141 S.E. 2d 23 (1965). *See also, State v. Horton*, 139 N.C. 588, 51 S.E. 945 (1905), wherein the Supreme Court held that the defendant's manslaughter conviction, arising out of a hunting accident in which the defendant shot the deceased while under the mistaken impression that he was shooting at a turkey, could not be based on the defendant's violation of a statute requiring written permission from a landowner to hunt on his land.

With regard to the testimony that defendant shot a deer at night, we note first that this occurred several weeks *after* Futreal's death. Further, the shooting of a deer at night has minimal probative value on the question of whether defendant would be a truthful witness. Simply put, evidence tending to show that the defendant has a disposition towards culpable negligence is inadmissible. *State v. McAdams*, 51 N.C. App. 140, 275 S.E. 2d 500 (1981).

For the reasons set forth in Part III of this opinion, defendant is entitled to a

New trial.

Judge WEBB concurs.

Judge HEDRICK dissents.

Judge HEDRICK dissenting.

I respectfully dissent from the majority opinion and vote to reverse. The evidence discloses the defendant was where he had a right to be, doing what he had a right to do with a weapon he had a right to use. The most that can be said in this case is that

the defendant used bad judgment, which in my opinion, is not culpable negligence.

PATRICIA T. BAILEY AND EBERT L. BAILEY, JR. v. MARVIN C. GOODING, SEASHORE TRANSPORTATION COMPANY, AND CAROLINA COACH COMPANY

No. 818SC1266

(Filed 1 February 1983)

1. **Courts § 9; Rules of Civil Procedure § 55— entry of default—error for one superior court judge to review ruling of another**

Where defendants failed to answer within the time allowed by G.S. 1A-1, Rule 12(a)(1) and an entry of default was entered against defendant pursuant to G.S. 1A-1, Rule 55, it was error for one superior court judge to set aside the "judgment" of another superior court judge which had denied defendants' motion to set aside the clerk's entry of default. The second judge's order was void for two reasons: (1) The judge set aside the entry of default pursuant to G.S. 1A-1, Rule 60(b) and an entry of default may be set aside only by motion pursuant to G.S. 1A-1, Rule 55(d) and a showing of good cause. (2) Even had the second judge made a necessary finding of good cause to set aside the entry of default, the order would have been void because a ruling on the question of good cause had already been made by the first judge.

2. **Rules of Civil Procedure §§ 55.1, 60— entry of default—use of wrong rule not prejudicial error**

Where a trial judge refused to set aside an entry of default and used the standards pursuant to G.S. 1A-1, Rule 60(b) instead of the standards pursuant to G.S. 1A-1, Rule 55(d), the error was harmless since the trial judge also clearly applied the "good cause" standard of Rule 55(d).

3. **Rules of Civil Procedure § 55— failure to set aside entry of default—no error**

The trial judge did not abuse his discretion in failing to find good cause to set aside the clerk's entry of default where the evidence tended to show that defendants' answer was filed four months after expiration of the time allowed for filing answer and more than one month after default was entered and where there was nothing in the record to indicate what actions defendants took during this time to defend the case other than to deliver the suit papers to the insurance carrier.

APPEAL by plaintiffs from order of *Stevens, Judge*, entered 9 May 1979 in Superior Court, WAYNE County, and from judgment of *Tillery, Judge*, entered 27 May 1981 in Superior Court, WAYNE County. Heard in the Court of Appeals 17 September 1982.

This negligence action arises out of a collision on 6 February 1977 between a car driven by plaintiff Patricia T. Bailey and owned by plaintiff Ebert L. Bailey, Jr., and a bus driven by defendant Marvin C. Gooding, an employee of defendant Seashore Transportation Company, who leased the bus from defendant Carolina Coach Company.

Complaint was filed by plaintiffs on 16 June 1977. Defendants were properly served, but, for reasons to be discussed later in this opinion, failed to answer within the time allowed by G.S. 1A-1, Rule 12(a)(1). Upon motion by plaintiffs, default was entered by the clerk of superior court on 17 October 1977. Plaintiffs filed motion for default judgment on 20 October 1977, and on 28 October 1977 defendants filed a motion to set aside the entry of default and a response to the motion for default judgment. Defendants filed an unverified answer to the suit on 22 November 1977.

On 6 February 1978, Judge David I. Smith entered an order denying defendants' motion to set aside the clerk's entry of default. Judge Smith also entered a "judgment" determining the issue of liability against defendants and ordering that the case be placed on the trial calendar on the issue of damages.

On 2 June 1978, before trial on the damage issue was held, defendants moved pursuant to Rule 60(b) to set aside the "judgment" of Judge Smith on grounds of mistake, inadvertence, surprise and excusable neglect. Defendants also alleged a meritorious defense. This motion was allowed on 9 May 1979 by Judge Henry Stevens. Plaintiffs attempted an immediate appeal of the order of Judge Stevens, but the appeal was dismissed as premature. *Bailey v. Gooding,* 301 N.C. 205, 270 S.E. 2d 431 (1980).

Following a jury trial on the merits, judgment was entered finding defendants negligent and plaintiff Patricia Bailey contributorily negligent and awarding no damages to plaintiffs. Plaintiffs appeal from both the final judgment and the interlocutory order of Judge Stevens setting aside the default previously entered in their behalf.

Freeman, Edwards & Vincent, by George K. Freeman, and Narron, Holdford, Babb, Harrison & Rhodes, by William H. Holdford, for plaintiff-appellants.

Young, Moore, Henderson & Alvis, by Walter Brock, Jr., and B. T. Henderson, II, for defendant-appellees.

MARTIN, Judge.[1]

[1] We first consider the interlocutory order of Judge Stevens. This order is void and must be vacated for two reasons. First, the "judgment" which it purports to set aside pursuant to Rule 60(b) was an entry of default, not a final judgment by default. *Pendley v. Ayers*, 45 N.C. App. 692, 263 S.E. 2d 833 (1980). Rule 60(b), by its express terms, applies only to final judgments. An entry of default may be set aside, not by motion pursuant to Rule 60(b), but by motion pursuant to Rule 55(d) and a showing of good cause. *Pendley v. Ayers, supra.* Second, even had defendants proceeded properly under Rule 55(d) and were we to construe the order of Judge Stevens to contain the necessary finding of good cause to set aside the entry of default, the order would be void because a ruling on the question of good cause had already been made by Judge Smith. Generally, one superior court judge cannot overrule another. *In re Burton*, 257 N.C. 534, 126 S.E. 2d 581 (1962). This rule is applicable even in a case involving an interlocutory order where there is no showing of changed circumstances since the entry of the interlocutory order. In making his determination that defendants' default was caused by excusable neglect, which necessarily encompasses a finding of good cause, Judge Stevens considered nothing more than the matters previously considered by Judge Smith. Although Judge Smith was considering a motion to set aside entry of default by the clerk, whereas the question before Judge Stevens was the propriety of the entry of default by Judge Smith, resolution of both matters required a determination of the same issue, i.e., whether good cause existed to set aside entry of default against defendants. Judge Smith found that it did not. No showing of changed circumstances having been made by defendants, Judge Stevens

1. This opinion was written in accordance with the Court's decision made prior to Judge Martin's retirement and was adopted by the Court and ordered filed after he retired.

was not at liberty to overrule Judge Smith's finding on the issue of good cause.

By vacating the order of Judge Stevens, we have reinstated Judge Smith's orders wherein he refused to set aside the clerk's entry of default and ordered the matter calendared for trial on the issue of damages. Defendants have cross-assigned error to these orders on two grounds: (1) that Judge Smith erroneously applied the stricter standards of Rule 60(b), applicable to motions to set aside default judgments, rather than the "good cause" standard of Rule 55(d), applicable to motions to set aside entry of default; and (2) that Judge Smith abused his discretion in failing to find good cause to set aside the clerk's entry of default.

[2] As to (1), we have previously stated that a motion to set aside entry of default is governed by the first clause of Rule 55(d) that, "[f]or good cause shown, the court may set aside an entry of default." This standard is more lax than that required for setting aside a default judgment pursuant to Rule 60(b), which requires the presence of "mistake, inadvertence, or excusable neglect." In denying defendants' motion to set aside entry of default, Judge Smith stated as follows:

> [I]t appearing to the Court . . . that the failure of the defendants to file answer or otherwise plead or appear in this action was not due to any of the reasons justifying relief set out in Rule 60(b) and good cause has not been shown for the setting aside of said entry.

Although Judge Smith apparently applied the stricter standards of Rule 60(b), this error was harmless since he also clearly applied the correct "good cause" standard of Rule 55(d). Had Judge Smith failed to make this additional finding of good cause, the erroneous application of Rule 60(b) would have been reversible error. *Realty, Inc. v. Hastings*, 45 N.C. App. 307, 262 S.E. 2d 858 (1980). Because he also applied the correct test of "good cause," however, the reference to Rule 60(b) was surplusage and does not require reversal of the order denying defendants' motion to set aside entry of default. *See Hubbard v. Lumley*, 17 N.C. App. 649, 195 S.E. 2d 330 (1973); *Whaley v. Rhodes*, 10 N.C. App. 109, 177 S.E. 2d 735 (1970). Defendants argue that the cited cases are inapplicable because in each of those cases the trial court allowed the motion to set aside entry of default upon finding both good cause and the

requisites of Rule 60(b). We believe the principle espoused in those cases applies to cases involving the denial of motions to set aside entry of default as well. There is a presumption in favor of the validity of judgments in the lower courts, and the burden is on appellant to show prejudicial error. When an order recites two bases as its support, one of which is correct and the other incorrect, the order will be referred to that basis which is sufficient to support it. *See London v. London*, 271 N.C. 568, 157 S.E. 2d 90 (1967).

[3] As to (2), that Judge Smith abused his discretion in failing to find good cause to set aside the clerk's entry of default, the determination of whether good cause has been shown rests within the discretion of the trial judge and will not be disturbed absent an abuse of discretion. *Britt v. Georgia-Pacific Corp.*, 46 N.C. App. 107, 264 S.E. 2d 395 (1980); *Frye v. Wiles*, 33 N.C. App. 581, 235 S.E. 2d 889 (1977). "A judge is subject to reversal for abuse of discretion only upon a showing by a litigant that the challenged actions are manifestly unsupported by reason." *Clark v. Clark*, 301 N.C. 123, 129, 271 S.E. 2d 58, 63 (1980). The facts and circumstances of the particular case govern the determination of whether "good cause" has been shown by the movant, who bears the burden of proof. *Whaley v. Rhodes, supra.*

In their motion to set aside the clerk's entry of default, defendants alleged that their failure to file a timely answer was the result of mistake by defendant Seashore Transportation's insurance carrier. The affidavits and exhibits filed in support of and in opposition to the motion disclose the following sequence of events: On 11 May 1977 plaintiffs' attorney wrote a letter to defendant Seashore Transportation and requested that Seashore Transportation forward the letter to its insurance carrier and have the carrier contact plaintiffs' attorney concerning the collision. Plaintiffs received no further communication, and on 16 June 1977 they filed suit against defendants. All defendants had been served by 22 June 1977. On 7 July 1977, W. S. Pearce, Jr., an insurance adjuster for defendant Seashore Transportation's insurance carrier, received copies of the suit papers and proceeded to the office of plaintiffs' attorney to discuss the claim. The following day, plaintiffs' attorney wrote Pearce:

> In line with our agreement this date I write to confirm that I will not take an entry of default in this case until our

> negotiations break down. As I understand it you will be back in touch with me around the first of August and at that time we will either give you a further continuance or decide to procede (sic) with the suit. At that time if the negotiations break down we will give you additional time within which to secure counsel and file answer.

Plaintiffs' attorney did not hear from Pearce by 1 August, and on 10 August wrote Pearce:

> As I recall from our conversation of July 7th, you were to let me hear from you on or about August 1st. I would appreciate it if you would advise me as soon as possible as to your Company's position regarding liability.
>
> I am still unable to furnish you complete medicals in this case since Mrs. Bailey is still having to go to the doctor and still having considerable trouble.
>
> In any event I would appreciate it if you would let me hear from you at your earliest convenience.

Pearce wrote plaintiffs' attorney in reply on 22 August:

> I am sorry that I was not able to get back to you at the planned time. I attempted on numerous occasions to get in touch with the witness without success. I have now been able to talk to her by telephone. I have an appointment on 9-1-77 to obtain her statement and I hope that I will be able to be in touch with you in the very near future after that date.

Pearce was not able to interview the witness as planned. He states in his affidavit that he called plaintiffs' attorney on 15 September 1977 and, upon being informed that the attorney was out, left word that he was still investigating the matter and would get back to the attorney. Plaintiffs' attorney denies ever receiving such a message.

Having heard nothing further from anyone for defendants, plaintiffs' attorney caused a default to be entered before the clerk on 17 October 1977. The next day he received a letter from attorney B. T. Henderson informing him that Henderson's firm had been retained by the insurance carrier and requesting an extension of time to file answer. Plaintiffs' attorney advised Henderson by phone that default had been entered the previous day.

The facts recited above "do not compel a conclusion that appellant[s] demonstrated good cause to have the entry of default set aside." *Howell v. Haliburton*, 22 N.C. App. 40, 42, 205 S.E. 2d 617, 618 (1974). We thus cannot say that the action of Judge Smith in failing to find good cause was "manifestly unsupported by reason" constituting an abuse of discretion. *Clark v. Clark, supra.*

Defendants' answer was filed four months after expiration of the time allowed for filing answer and more than one month after default was entered. There is nothing in the record to indicate what actions defendants took during this time to defend the case other than to deliver the suit papers to the insurance carrier. Continued inattention by a defendant in a lawsuit does not constitute good cause to set aside an entry of default. *Howell v. Haliburton, supra; cf. Hubbard v. Lumley, supra* (no abuse in finding of good cause where defendant was incorrectly informed by insurer that it was not responsible for defendant's defense and where answer was filed promptly upon learning of mistake); *Whaley v. Rhodes, supra* (no abuse in finding of good cause where defendant was assured by his insurance agent three weeks after delivering suit papers to him that everything was being taken care of and where default was entered four days after expiration of the time to file answer).

Further, the actions of the insurance carrier do not compel a finding of good cause. Pearce states in his affidavit that at the time default was entered, he did not think that negotiations had broken down such that his agreement with plaintiffs' attorney not to enter default had terminated. The facts reveal, however, that Pearce had not contacted plaintiffs' attorney for more than one month prior to the entry of default and had retained counsel to defend in the case during that time. At no other time prior to entry of default had contact between Pearce and plaintiffs' attorney ceased for such a lengthy period of time. These facts belie Pearce's assertion that he was continuing to negotiate with plaintiffs' attorney at the time of entry of default. The agreement by plaintiffs' attorney not to seek entry of default until negotiations broke down had expired and did not constitute good cause to set aside the default entered on 17 October 1977. *Cf. Webb v. James*, 46 N.C. App. 551, 265 S.E. 2d 642 (1980) (an agreement by the plaintiff to continue the cause until the next term of court did not

constitute good cause from the expiration of that agreement until the entry of default).

This Court seldom has found an abuse of discretion by the trial court in failing to set aside a default judgment. In *Peebles v. Moore*, 48 N.C. App. 497, 269 S.E. 2d 694 (1980), *modified and aff'd*, 302 N.C. 351, 275 S.E. 2d 833 (1981), the determinative factors in setting aside the default were that the defendant's failure timely to file answer was not due to any fault of the defendant but due to an inadvertence on the part of the defendant's insurer and that defense counsel promptly filed an answer upon discovering that a mistake had been made. Neither of those factors are present in this case. *See also Byrd v. Mortenson*, 60 N.C. App. 85, --- S.E. 2d --- (1982).

Our holding renders unnecessary review of the judgment entered following trial on the merits in this case. That judgment is vacated, and the case is remanded to the trial court for trial on the issue of damages.

Judgment and order vacated and remanded.

Judges ARNOLD and WHICHARD concur.

STATE OF NORTH CAROLINA v. LAWRENCE LEE HEFLER

No. 8226SC433

(Filed 1 February 1983)

1. Automobiles and Other Vehicles § 113.1 — involuntary manslaughter — culpable negligence — sufficiency of evidence

The evidence was sufficient for the jury to find that defendant was culpably negligent in striking a pedestrian with his automobile so as to support his conviction of involuntary manslaughter where it tended to show that, as he was leaving an apartment complex, defendant struck the victim while he was jogging in a parking lot extending from the left side of the road; the area was well lighted and the victim was wearing fluorescent gloves; defendant had been drinking beer and taking drugs earlier in the evening; and defendant struck a Volkswagen and barely missed a trash dumpster seconds before striking the victim and then collided with an automobile on the left-hand side of the road immediately after the victim was injured.

2. Homicide § 1.1— year and a day rule—inapplicability to manslaughter

The "year and a day rule" applies only to murder cases and does not apply to the crime of manslaughter. Therefore, defendant could properly be convicted of involuntary manslaughter where the victim died 14 months after being struck by defendant's automobile.

3. Automobiles and Other Vehicles § 114— involuntary manslaughter—instructions—reckless driving—driving on wrong side of highway

The evidence in an involuntary manslaughter case was sufficient to support the trial court's instructions on reckless driving in violation of G.S. 20-140(b) and driving on the wrong side of the highway in violation of G.S. 20-146 where it tended to show that defendant struck the victim with an automobile while the victim was jogging in a parking lot extending from the left side of the road; the area was well lighted and the victim was wearing fluorescent gloves; defendant had been drinking beer and taking drugs earlier in the evening; defendant struck a Volkswagen and barely missed a trash dumpster seconds before striking the victim; and defendant collided with an automobile on the left-hand side of the road immediately after the victim was injured. Assuming that there was insufficient evidence to support the court's instructions on driving at a speed greater than was reasonable and prudent under the existing conditions in violation of G.S. 20-141(a) and failing to decrease speed to avoid a collision in violation of G.S. 20-141(n), such instructions could not have affected the result and did not constitute prejudicial error.

4. Constitutional Law § 31— denial of motion for expert witness at State's expense

In a prosecution of defendant for involuntary manslaughter by striking the victim with an automobile, the trial court did not abuse its discretion in the denial of defendant's motion that the State provide him with funds to employ a medical expert to determine whether medical personnel at the hospital in which the victim died were guilty of gross negligence where there was plenary evidence that the victim's head injury resulting from defendant's wrongdoing was a contributing cause of death, since neither negligent treatment nor neglect of an injury will excuse a wrongdoer unless the treatment or neglect was the sole cause of death.

APPEAL by defendant from *Snepp, Judge.* Judgment entered 25 September 1981 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 9 November 1982.

From a jury verdict finding the defendant, whose automobile struck and killed a pedestrian, guilty of involuntary manslaughter and a judgment committing defendant to five years imprisonment, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Fred R. Gamin, for the State.

Assistant Public Defender Eben Rawls, for defendant appellant.

BECTON, Judge.

The defendant raises the following issues on appeal: (1) whether the trial court should have allowed defendant's motion to dismiss because there was no evidence of culpable negligence; (2) whether the trial court should have allowed defendant's motion to dismiss because the victim died over a year and one day after sustaining injuries incurred when defendant's car collided with him; (3) whether the trial court erred in instructing the jury on involuntary manslaughter and death by vehicle; and (4) whether the trial court abused its discretion in denying the defendant's motion for an expert witness. After careful consideration, we conclude that defendant received a fair trial free of prejudicial error.

CULPABLE NEGLIGENCE

[1] At the close of the State's case, defendant chose to present no evidence and then moved to dismiss on the ground that there was insufficient evidence of culpable negligence to submit the charge of involuntary manslaughter to the jury. Involuntary manslaughter has been defined as "the unlawful killing of a human being unintentionally and without malice but proximately resulting from the commission of an unlawful act not amounting to a felony, or some act done in an unlawful or culpably negligent manner. . . . " *State v. Williams*, 231 N.C. 214, 215-16, 56 S.E. 2d 574, 574-75 (1949). The trial court instructed the jury on four possible unlawful acts: driving without due caution and circumspection and at a speed or in a manner so as to be likely to endanger any person in violation of N.C. Gen. Stat. § 20-140(b) (1981); driving at a speed greater than is reasonable and prudent under the conditions then existing in violation of N.C. Gen. Stat. § 20-141(a); failing to decrease speed to avoid colliding with any person in violation of N.C. Gen. Stat. § 20-141(m) (1978); and failing to drive on the right side of the highway in violation of N.C. Gen. Stat. § 20-146 (1978). The court then instructed the jury that there was no evidence of an intentional violation of any of these

statutes, but that the jury could find culpable negligence if the inadvertent or unintentional violation of a statute was "accompanied by recklessness [or] probable consequences of a dangerous nature, when tested by the rule of reasonable foresight, amounting altogether to a thoughtless disregard of the consequences or a heedless indifference to the safety of others." Considered in the light most favorable to the State, the evidence was sufficient to go to the jury. The trial court, therefore, correctly denied defendant's motion to dismiss the manslaughter charge. The facts which support our conclusion follow.

On the evening of 18 January 1980, defendant and Herbert Gerald Horton, Jr., were at Horton's apartment drinking beer and taking Quaaludes. Herbert testified that he drank at least two six-packs of beer, and that defendant "was drinking right along with" him. The two left the apartment between 8:30 and 9:00 p.m. and drove to Sun Valley Apartments located off Arrowood Road in Charlotte.

They visited a friend there for approximately one-half hour, and drugs were used during the visit. Upon leaving the apartment, defendant, who was driving, hit a Volkswagen and then barely missed a trash dumpster. Defendant then swerved to the left and struck James Stevens as he was jogging in a parking lot which was on the left side of the road. Stevens was tossed to the left, and defendant then collided with a car driven by James Sledge, as it was entering the apartment complex on Lodge South Circle. Sledge testified that he observed a jogger coming toward him "well right" of the path of his car. The jogger was wearing dark shorts, a light jersey, and large fluorescent gloves. Sledge then saw a car swerve directly behind the jogger. He assumed "that it was just somebody playing games." The car hit the jogger and then collided with Sledge's car in Sledge's lane of travel. A resident of the apartment complex heard the collision and ran to investigate. He observed defendant getting out of his wrecked vehicle and heard defendant say that he was going "to blow this place." Defendant then ran from the scene. He was arrested three days later and charged with "hit and run."

A Charlotte policeman, who arrived at the scene of the accident around 9:50 p.m., testified that he observed two cars on the righthand side of Lodge South Circle. The fronts of both cars

were wrecked. He testified that Lodge South Circle appeared to be the width of a normal two-lane road where the two vehicles were situated, but that there was no center line on the road. Further testimony revealed that there were three streetlights located on the right side of Lodge South Circle; that the complex was well-lighted on the night of the collision; that there were two speed bumps in the road leaving the complex before one reaches the dumpster and one after the dumpster, and that defendant left the complex "quick" driving at a speed of 30 to 35 miles per hour.

Notwithstanding these facts, the defendant cites numerous cases in support of his contention that there was insufficient evidence of culpable negligence. A close examination of the cases cited reveals factual distinctions. In *State v. Tingen*, 247 N.C. 384, 100 S.E. 2d 874 (1957), and *State v. Becker*, 241 N.C. 321, 85 S.E. 2d 327 (1955), the victims were walking across the street at night and were struck by defendants as they were driving in their proper lane of travel. In *State v. Roop*, 255 N.C. 607, 122 S.E. 2d 363 (1961), the evidence showed that defendant's car was only two feet in the left lane when the accident occurred. In *State v. Hancock*, 248 N.C. 432, 103 S.E. 2d 491 (1958), the physical evidence showed that the collision occurred in defendant's proper lane of travel. Finally, in *State v. Massey*, 271 N.C. 555, 157 S.E. 2d 150 (1967), there was conflicting evidence as to which side of the street defendant was driving on at the time of the collision.

In *State v. Freeman*, 31 N.C. App. 93, 228 S.E. 2d 516, *disc. review denied*, 291 N.C. 449, 230 S.E. 2d 766 (1976), we held that the trial court properly ruled that there was sufficient evidence of culpable negligence to take the case to the jury on the charge of manslaughter. There the State's evidence showed that defendant's wrecked automobile was found against a bridge abutment on the left-hand side of the roadway; that a passenger in defendant's car was killed in the accident; that an odor of alcohol was detected about the defendant's person; and that defendant testified that he had taken some Valium tablets and had drunk a few beers before the accident. In light of our decision in *Freeman* and the evidence in this case, we find no error in the denial of defendant's motion for dismissal in the matter now before us. The evidence clearly supports a finding that the defendant violated one or more safety statutes and that the violation(s) constituted culpable negligence.

THE "YEAR AND A DAY" RULE

[2] The victim was taken to the hospital after the collision where he remained unconscious until his death on 16 March 1971. An autopsy revealed evidence of a severe head injury. The medical examiner who performed the autopsy testified that in his opinion, "the immediate cause of death was broncho-pneumonia as a complication of severe head injury, which was the underlying, or remote, cause of death." The attending neurosurgeon testified that the victim "died as a result of his head injury, unequivocally."

At the close of the evidence defendant also moved for dismissal because the victim died approximately 14 months after having been struck by defendant's automobile. Defendant contends that under the common law "year and a day" rule, he could not be charged with manslaughter. In an early North Carolina case applying this rule, our Supreme Court reasoned that "if death did not take place within a year and a day of the time of receiving the wound, the law draws the conclusion that it was not the cause of death; and neither the court nor jury can draw a contrary one." *State v. Orrell*, 12 N.C. 139, 141 (1826). The defendant in *Orrell* was found guilty of murder. In fact, in all the North Carolina cases discussing this rule, the defendants were convicted of murder. *See, State v. Pate*, 121 N.C. 659, 28 S.E. 354 (1897); *State v. Haney*, 67 N.C. 467 (1872); *State v. Baker*, 46 N.C. 267 (1854); *State v. Shepherd*, 30 N.C. 195 (1847). This Court is not predisposed to extend the application of this rule to the crime of manslaughter, particularly in light of growing authority that the rule has outlived its usefulness. *See*, Annot., 60 A.L.R. 3d 1323 (1974), and cases cited therein. Since the era in which the doctrine originated, the advance of medical science and improvement of diagnostic skills relative to the prolongation of human life obviate the need for this rule. *See*, Note, *Criminal Law—Homicide—Death Resulting More Than a Year and a Day After Assault*, 40 N.C.L. Rev. 327 (1962). Consequently, defendant's motion to dismiss the manslaughter charge based on the common law "year and a day" rule was properly denied.

JURY CHARGE

[3] Defendant assigns error to the trial court's instructions to the jury on the charges of involuntary manslaughter and death by

vehicle. He first argues that the trial court committed reversible error in charging the jury on the following four statutory violations: driving without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property in violation of G.S. § 20-140(b); driving at a speed greater than is reasonable and prudent under the conditions then existing in violation of G.S. § 20-141(a); failing to decrease speed to avoid colliding with any person in violation of G.S. § 20-141(m); and failing to drive on the right side of the highway in violation of G.S. § 20-146. Defendant argues that there was insufficient evidence to support any of the statutory violations.

The evidence was uncontradicted that on the evening of 18 January 1980 defendant struck the victim while he was jogging in a parking lot extending from the left side of the road; that the area was well lighted and the victim was wearing fluorescent gloves; that defendant had been drinking beer and taking drugs earlier in the evening; that he struck a Volkswagen and barely missed a trash dumpster seconds before striking the victim and that he collided with an automobile on the left-hand side of the road immediately after the victim was injured. This evidence clearly supports a violation of driving on the wrong side of the road and reckless driving.

Assuming, *'rguendo,* that there was insufficient evidence to charge the jury on the two speeding violations, we find no prejudicial error. Their submission could not have affected the result. *See, State v. Atkins,* 58 N.C. App. 146, 292 S.E. 2d 744, *disc. rev. denied and appeal dismissed,* --- N.C. ---, --- 295 S.E. 2d 480 (1982).

Defendant further argues that the trial court did not adequately explain culpable negligence or the difference between involuntary manslaughter and death by vehicle. We hold that the court fully explained culpable negligence and gave instructions on both charges consistent with the Pattern Instructions, N.C.P.I.—Criminal 206.55.

MOTION FOR EXPERT WITNESS

[4] At the beginning of the trial, defendant filed a motion requesting that the case be continued to allow him time to consult a

medical expert in order "to determine whether the acts and omissions of the medical personnel at Charlotte Memorial Hospital amounted to gross negligence." Defendant further requested that the State provide him with funds to pay this expert. The trial court denied the motion, and defendant has assigned error.

N.C. Gen. Stat. §§ 7A-450(b) and 7A-454 (1981) require that expert assistance be provided "only upon a showing by defendant that there is a reasonable likelihood that it will materially assist the defendant in the preparation of his defense or that without such help it is probable that defendant will not receive a fair trial." *State v. Gray*, 292 N.C. 270, 278, 233 S.E. 2d 905, 911 (1977). The appointment of such an expert "depends really upon the facts and circumstances of each case and lies, finally, within the discretion of the trial judge." *Id.* at 277, 233 S.E. 2d at 910-911. *See, State v. Tatum*, 291 N.C. 73, 229 S.E. 2d 562 (1976).

The trial court here did not abuse its discretion in denying defendant's motion for expert assistance. Expert testimony about the alleged negligence of medical personnel at Charlotte Memorial Hospital would not excuse defendant's wrongdoing in light of evidence clearly showing that the head injury directly contributed to the victim's death. "[O]ne can be guilty of involuntary manslaughter whenever his culpable negligence is *a* proximate cause of the victim's death." (Citations omitted.) *State v. Ellis*, 25 N.C. App. 319, 320, 212 S.E. 2d 909, 910 (1975). "There may be more than one proximate cause and criminal responsibility arises when the act complained of caused or directly contributed to the death." *State v. Cummings*, 301 N.C. 374, 377, 271 S.E. 2d 277, 279 (1980). Further, improper or unskilled treatment by attending physicians is no defense for one who has inflicted injury necessitating treatment. *State v. Jones*, 290 N.C. 292, 225 S.E. 2d 549 (1976). "Neither negligent treatment nor neglect of an injury will excuse a wrongdoer unless the treatment or neglect was *the sole cause of death.*" *Id.* at 299, 225 S.E. 2d at 552.

These rules apply to the situation *sub judice.* There was plenary evidence that the head injury resulting from defendant's wrongdoing was a contributing cause of death.

We find no error in the court's rulings and instructions.

No error.

Judges HEDRICK and WEBB concur.

ROY LEE HARRELL v. WILLIAM A. DAVENPORT, JR. AND NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY

No. 828SC176

(Filed 1 February 1983)

1. **Insurance § 2.2— *negligent failure to procure fire insurance policy*—genuine issue as to promise to procure**

In an action brought by plaintiff for negligent failure to procure a fire insurance policy, the forecast of evidence raised a material question of fact as to whether defendant insurance agent undertook to procure a policy of insurance on plaintiff's tractors.

2. **Insurance § 2.2— negligent failure to procure policy—summary judgment improper**

In an action to recover damages for the negligent failure to procure a fire insurance policy, the trial court erred in entering summary judgment for defendant insurance company in that the allegations in plaintiff's complaint were sufficient to state a claim for relief against defendant insurance company under generally accepted principles of agency law as applied to the relationship of insurance agents and companies they represent or are employed by.

APPEAL by plaintiff from *Barefoot, Judge.* Judgment entered 19 October 1981 in GREENE County Superior Court. Heard in the Court of Appeals 9 December 1982.

Plaintiff brought this action to recover damages for the negligent failure to procure a fire insurance policy. In his verified complaint, plaintiff alleged the following essential facts and circumstances. Defendant Davenport was an agent of defendant insurance company and had the authority to issue fire insurance policies and binders as the agent for defendant insurance company. On 16 November 1979, plaintiff requested Davenport to write an insurance policy insuring plaintiff against loss by fire of two tractors, in the amount of $4,000.00 respectively. Davenport advised plaintiff that the tractors would be insured by defendant insurance company and that the binder would be issued immediately. Plaintiff offered to pay Davenport the premium for the

policy, but Davenport refused, stating he would have to consult the manual to determine the amount of premium due. On 7 March 1980, the tractors were destroyed by fire. When plaintiff notified Davenport of the loss, Davenport informed plaintiff that the policy had not been written and that the tractors were not covered by insurance. Defendant insurance company denied coverage of the tractors. Defendant Davenport, an agent for defendant insurance company, undertook to procure for plaintiff a policy to insure the tractors against loss by fire, but negligently failed to do so. His negligence was the proximate cause of plaintiff's loss.

Defendant insurance company answered, admitting that defendant Davenport was its Agency Manager in Greene County, admitting that no policy was issued to insure plaintiff's tractors, and denying plaintiff's other essential allegations. Defendant insurance company further alleged that it was never requested to issue such a policy for plaintiff.

Defendant Davenport answered, admitting that on 16 November 1979 he was an agent for defendant insurance company, admitting plaintiff's fire loss, admitting that he did not write a policy to cover plaintiff's tractors, and denying plaintiff's other essential allegations.

After the pleadings were joined, defendants moved for summary judgment. At the hearing on the motion, the materials before the trial court consisted of plaintiff's verified complaint, plaintiff's deposition, the deposition of plaintiff's son, Roy Stevens Harrell, the affidavit of plaintiff's wife, the deposition and affidavit of defendant Davenport, the affidavit of Judy McMillen, Hilda Harper and Joyce Noble, office employees of defendant insurance company, and the affidavit of Allen Hardison, a Greene County agent for defendant insurance company.

Defendant Davenport testified substantially as follows. On 16 November 1979, he met with plaintiff at plaintiff's home, at the time he was the exclusive agent for defendant insurance company in Greene County. While at plaintiff's residence on 16 November 1979, he "wrote" an insurance policy to cover the contents of plaintiff's home. He discussed coverage for the tractors with plaintiff, but told plaintiff he would not have time to take care of that policy that day. While there, he was given the serial

numbers from the tractors and their value. He told plaintiff he would be away for a week or ten days to attend his daughter's wedding, he would be very busy when he returned, and if he did not call plaintiff, for plaintiff to call him. He never called, nor did plaintiff. He just forgot. He never issued a binder or caused a policy to issue covering the tractors.

Noble stated that she, Hilda Harper, Judy McMillen, and Davenport were the only persons working in defendant insurance company's Greene County office between 16 November 1979 and 7 March 1980. She did not see plaintiff or Stevens Harrell in the office between 16 November 1979 and 7 March 1980, and no one from the Harrell family ever called to give the serial numbers or other information on the tractors. Harper and McMillen made similar statements.

In his deposition, plaintiff testified that in November 1979, plaintiff's wife called defendant Davenport about insuring the contents of plaintiff's home, as they (the Harrells) wanted to change companies. Davenport came to the Harrell home on 16 November 1979, plaintiff, his wife, and his son Steve were present. Plaintiff discussed coverage for the tractors with Davenport, who stated he would require serial numbers and values. Plaintiff's son then called Eastern Tractor and Equipment Company in Greenville, obtained values for the tractors, wrote them down and handed them to Davenport. Plaintiff's son then went to the yard, got the serial numbers on the tractors, wrote them down and gave them to Davenport. Plaintiff offered to pay Davenport, but Davenport said he did not have his rate book with him. Davenport stated he would write the policy and send a bill. The following week, Davenport called plaintiff's wife to say that he had lost the information on the tractors. Plaintiff's son took the information to Davenport's office. Three weeks or a month later, plaintiff's wife called Davenport to remind him. Davenport stated that he was busy, had not written the coverage, but would get right on it. Plaintiff never paid a premium nor received a policy on the tractors. In their affidavits, plaintiff's wife and son supported plaintiff's testimony in its essential elements.

From summary judgment entered for defendants, plaintiff has appealed.

Wilton R. Duke, Jr. for plaintiff-appellant.

Fred W. Harrison for defendant-appellee Davenport.

Speight, Watson and Brewer, by Susan Parrott Carlton and William C. Brewer, Jr., for defendant-appellee North Carolina Farm Mutual Insurance Company.

WELLS, Judge.

The threshold substantive question before us is whether, under the forecast of evidence before the trial court, the statements and conduct of defendant Davenport might be construed as an undertaking to procure a policy of insurance on plaintiff's tractors. In *Wiles v. Mullinax* (first appeal), 267 N.C. 392, 148 S.E. 2d 229 (1966), our Supreme Court recited the rule applicable to the forecast of evidence in this case, as follows:

> "It is very generally held that where an insurance agent or broker undertakes to procure a policy of insurance for another, affording protection against a designated risk, the law imposes upon him the duty, in the exercise of reasonable care, to perform the duty he has assumed and within the amount of the proposed policy he may be held liable for the loss properly attributable to his negligent default."

[1] We hold that the forecast of evidence in this case raises a genuine, material question of fact as to whether defendant Davenport entered into such an undertaking. Defendants contend that the undertaking was not consummated because plaintiff and Davenport failed to agree on all the elements of the policy. The forecast of evidence shows that plaintiff and Davenport discussed the identity of the property to be insured and the value of the property. The forecast of evidence does not indicate that plaintiff and Davenport discussed the policy period, or that they agreed on the amount of the premium. *Mayo v. Casualty Co.*, 282 N.C. 346, 192 S.E. 2d 828 (1972) involved the negligent failure of an insurance agent to issue a binder for a fire insurance policy. The Court held that no specific form or provision is necessary to constitute an oral communication intended as a binder, that it is not required that the communication leading to a binder set forth all the terms of the contemplated insurance policy, and that the provisions of the statutory standard insurance policy are read into a

binder. *See also Sloan v. Wells*, 296 N.C. 570, 251 S.E. 2d 449 (1979). Applying the foregoing *Mayo* and *Sloan* principles to the present case, we hold that the communications between plaintiff and defendant Davenport were sufficient to allow but not require a jury to find that Davenport entered into an undertaking to obtain a standard policy on plaintiff's tractors to insure them for $4,000.00 each against loss by fire. The fact that plaintiff and Davenport did not agree on the amount of the premium to be paid is not fatal to plaintiff's claim, as the jury might find an implied promise by plaintiff to pay the premium as calculated by Davenport.

We are also persuaded that from the forecast of evidence before the trial court, there was a genuine material issue of fact as to whether Davenport used reasonable diligence to procure the policy of insurance plaintiff desired for his tractors.

[2] The next substantive issue we address is whether defendant insurance company was entitled to summary judgment under principles of agency law. Defendant insurance company contends that the record is barren of facts or evidence from which it could be inferred that defendant Davenport was an employee of defendant insurance company, and thus, there was no showing that defendant insurance company was responsible or answerable for Davenport's alleged negligent acts. In his complaint, plaintiff alleged that Davenport was an agent of defendant insurance company, had authority to issue policies and binders for defendant insurance company, that in response to plaintiff's request, Davenport advised plaintiff that the requested policy would be issued by defendant insurance company, and that while acting as defendant insurance company's agent, Davenport negligently failed to procure or issue the policy. These allegations were sufficient to state a claim for relief against defendant insurance company under generally accepted principles of agency law as applied to the relationship of insurance agents and companies they represent or are employed by. *See Mayo v. Casualty Co., supra; Little v. Poole*, 11 N.C. App. 597, 182 S.E. 2d 206 (1971). Under these circumstances, on a motion for summary judgment, defendant insurance company had the burden of showing that plaintiff's claim was fatally defective in this respect. *See Lowe v. Bradford*, 305 N.C. 366, 289 S.E. 2d 363 (1982). This, defendant company failed to do. On the contrary, defendant Davenport, in his deposition,

testified that he was defendant insurance company's exclusive agent in Greene County and stated in his affidavit that he was "employed as an agent" by defendant insurance company from December of 1957 through July of 1980.

For the reasons stated, we hold that summary judgment was improvidently entered for the defendants. The judgment below is reversed and the case is remanded for trial.

Reversed and remanded.

Judges VAUGHN and WHICHARD concur.

STATE OF NORTH CAROLINA v. ELMER LEROY PEOPLES, SR.

No. 8212SC488

(Filed 1 February 1983)

1. **Criminal Law § 66.17— one-on-one confrontation—independent origin of in-court identification**

A robbery victim's in-court identification of defendant was not rendered incompetent by a prior one-on-one confrontation when police officers inadvertently allowed the victim to view defendant in a hall while waiting for an elevator at the law enforcement center where the victim testified that he was in a lighted room with defendant and was able to observe his uncovered face in close proximity for a total of six to eight minutes, the victim unequivocably stated that he based his identification of defendant upon his observation of him at the time of the robbery, and the trial judge found that the witness had ample opportunity to view the defendant at the time of the crime and that the confrontation at the law enforcement center was unintentional.

2. **Criminal Law § 87; Witnesses § 7.1— witness previously hypnotized—competency of testimony**

The trial court did not err in the admission of testimony by a witness who had previously been hypnotized by a police officer where defendant failed to show that the witness was rendered untrustworthy as a result of being hypnotized, the fact that the witness was hypnotized prior to trial being a matter bearing upon the credibility rather than the competency of the witness.

3. **Criminal Law § 45; Witnesses § 1— inadmissibility of videotape of hypnosis session**

The trial court erred in admitting into evidence and permitting the jury to view a videotape of a hypnosis session of a State's witness where the State failed to demonstrate to the court the scientific acceptance of the reliability

and accuracy of hypnosis. However, the admission of such evidence did not constitute prejudicial error in light of the overwhelming competent evidence of defendant's guilt of the crime charged. G.S. 8-97.

4. Robbery § 4.1— ownership of property taken in robbery—no fatal variance

There was no fatal variance between an armed robbery indictment alleging a corporate ownership of silver taken in the robbery and evidence which failed to establish such corporate ownership where the evidence negated the idea that defendant was taking his own property.

APPEAL by defendant from *Farmer, Judge.* Judgment dated 17 December 1981 entered in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 15 November 1982.

Defendant was charged in bills of indictment with armed robbery and conspiracy to commit armed robbery.

State's evidence tended to show that in April or May of 1980 defendant telephoned Bruce Miller inquiring if he wanted to make some "easy money." Defendant later discussed with Miller the robbery of Borden Chemical Plant, which kept on hand quantities of silver used in its manufacture of formaldehyde. On 4 May 1980 defendant set up a meeting between himself, Miller and Bob Peele to discuss further the robbery but he never showed up. Defendant later contacted Miller and arranged another meeting at his house on 25 May. The two men met and defendant discussed in great detail the robbery of silver from the plant. That night defendant, Miller and Peele arrived at Borden Chemical Plant shortly before the change of the midnight shift. Miller entered the office of Steven Reams, shift supervisor, and forced him at gunpoint to lead the men to the door of a room containing granulated silver stored in 10-inch high black buckets. They broke open the door with crowbars, setting off an alarm, and began loading up defendant's car with buckets of silver. The next day the men sold three of the black buckets of silver to a gold and silver dealer in Fayetteville for approximately $16,000.00.

Defendant presented no evidence. He was found guilty as charged and received a prison term of seven to ten years. Defendant appeals.

Attorney General Edmisten, by Special Deputy Attorney General H. A. Cole, Jr. and Assistant Attorney General Fred R. Gamin, for the State.

Assistant Public Defender James R. Parish for defendant-appellant.

ARNOLD, Judge.

[1] Defendant first assigns error to the denial of his motion to suppress the in-court identification of him by Borden's nightshift supervisor, Mr. Steven Reams. He contends that the identification was tainted by a prior one-on-one confrontation between the witness and the defendant. Confrontation occurred on the day Miller was brought to the police station for a photographic line-up. After identifying the defendant from a set of six photographs, Reams again pointed him out as the robber when police officers inadvertently allowed the witness to view the defendant in a hall while waiting for an elevator. Reams had not been told that defendant would be present at the Law Enforcement Center. Although such a single confrontation for identification purposes is widely condemned, we do not find that this unplanned exhibition was violative of due process standards when viewed under the totality of the circumstances. *See, State v. Dawson*, 302 N.C. 581, 276 S.E. 2d 348 (1981); *State v. Thomas*, 292 N.C. 527, 234 S.E. 2d 615 (1977). On *voir dire* Reams testified that on the night of the robbery he was in a lighted room with the defendant and was able to observe his uncovered face in close proximity for a total of six to eight minutes. He unequivocably stated that he based his identification of the defendant upon his observation of him made upon the night of the robbery. The trial judge found that the witness had ample opportunity to view the defendant at the time of the crime and that the confrontation at the Law Enforcement Center was unintentional. Since these facts are supported by the evidence, the court's holding that the in-court identification was competent will not be disturbed upon appeal. *State v. Thomas, supra.* This assignment of error is without merit.

[2] In his next assignment of error defendant argues that the trial judge erred in allowing into evidence (1) testimony of Bruce Miller, who had been previously hypnotized by police officers, and (2) a videotape of the hypnosis session.

The trial judge entered the following order denying defendant's motion to suppress Miller's testimony:

FINDINGS OF FACT

(1) Bruce C. Miller was hypnotized on October 8, 1981 by S. C. Sessoms, Jr., a Detective with the Fayetteville Police Department, in the Law Enforcement Center in Fayetteville, North Carolina, with Officer Pulliam, Detective Bruce Daws and Captain Hart in the room.

(2) Prior to Bruce C. Miller being hypnotized, Detective Sessoms stated that the purpose of the hypnotic session was to enhance the memory of Bruce C. Miller.

(3) The hypnotic session was video-taped.

(4) Prior to this trial, the attorneys for the defendants were informed of the hypnotic session and given access to the video-tape by the State.

(5) Prior to October 8, 1981, Bruce C. Miller had been arrested and made a statement concerning the crimes for which the defendants are being tried.

(6) On December 9, 1981, the court along with the attorneys for the State and the defendants, viewed the video-tape; and the hypnotist inquired of Bruce C. Miller what he did on May 25 and 26, 1980, who he was with and a few other questions.

(7) No evidence was offered by the State or the defendants in this hearing.

CONCLUSIONS OF LAW

(1) Bruce C. Miller gave answers under hypnosis as a result of his voluntary thought process and not as a result of any suggestion by the hypnotist.

(2) The hypnotist was not suggestive to Bruce C. Miller.

(3) The hypnotic session was not improperly conducted such as to render the testimony of Bruce C. Miller inadmissable.

(4) The totality of circumstances reveals that the hypnotic session was not unnecessarily suggestive as to offend fundamental standards of decency, fairness and justice.

(5) Permitting Bruce C. Miller to testify after being hypnotized would not violate the defendants constitutional rights.

(6) The motion by the defendants should be denied.

IT IS ORDERED that the motion by the defendants be and it is hereby denied.

Prior to trial defendant's attorney was allowed to view the videotape of the hypnosis session. At trial he was given ample opportunity to cross-examine both the witness Miller and the detective who conducted the hypnosis. The jury was fully advised that this witness had been previously hypnotized. Defendant does not contend on appeal that the hypnotist in any way suggested ideas to Miller or influenced his memory of the events relating to the crime.

Inasmuch as defendant has failed to show in any respect that the witness was rendered untrustworthy as a result of his being hypnotized, we find no error in the trial judge's denial of defendant's motion to suppress Miller's testimony on this ground. The fact that the witness was hypnotized prior to trial is a matter bearing upon the credibility of his testimony and not its competency. *State v. McQueen*, 295 N.C. 96, 244 S.E. 2d 414 (1978). The weight to be given evidence presented by a witness, whose memory was considered to be in need of refreshing by an outside source, was a matter for the jury's consideration.

[3] However, we do not approve the admission into evidence and jury view of the videotape of the hypnosis session. Under G.S. 8-97 videotapes now may be introduced as substantive evidence upon laying a proper foundation. However, the particular nature of the video portrayal on this tape also placed upon the State the burden to meet other "applicable evidentiary requirements." G.S. 8-97. Inasmuch as no North Carolina decision has resolved the legal issues surrounding videotapes of hypnotic sessions, it was incumbent upon the prosecution to present the trial judge with a sufficient basis to constitute this tape as competent evidence in the courtrooms of this state. *Compare, Wood v. Stevens & Co.*,

297 N.C. 636, 256 S.E. 2d 692 (1979). We find the State failed to meet its burden.

The standard for the admission of new kinds of scientific evidence and procedures was set out in *State v. Temple*, 302 N.C. 1, 273 S.E. 2d 273 (1981) as follows:

> "This court is of the opinion, that we should favor the adoption of scientific methods of crime detection, where the demonstrated accuracy and reliability has become established and recognized. Justice is truth in action, and any instrumentality, which aids justice in the ascertainment of truth, should be embraced without delay."

Id. at 12, 273 S.E. 2d at 280, quoting from *State v. Powell*, 264 N.C. 73, 74, 140 S.E. 2d 705, 706 (1965); *see also, State v. Steele*, 27 N.C. App. 496, 219 S.E. 2d 540 (1975) [applying the test set forth in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) for admissibility of polygraph evidence].

Since the record before us in devoid of any effort to demonstrate to the court the scientific acceptance of the reliability and accuracy of hypnosis, the State did not establish the competency of the videotape and we need not decide whether the prosecution met the above test for the admission of this type of evidence. However, we note that the issue of the admissibility of hypnotically induced testimony in a criminal trial has engendered significant controversy in the legal community and the overwhelming majority of courts have excluded out-of-court statements and tape-recorded testimony from hypnosis sessions when offered as substantive evidence. *See e.g., Greenfield v. Robinson*, 413 F. Supp. 1113 (W.D. Va. 1976); *Jones v. State*, 542 P. 2d 1316 (Okla. Crim. App. 1975); *State v. Jorgensen*, 8 Or. App. 1, 492 P. 2d 312 (1971); *State v. Harris*, 241 Or. 224, 405 P. 2d 492 (1965); *State v. White*, 60 Wash. 2d 551, 374 P. 2d 942 (1962), *cert. denied*, 375 U.S. 883, 84 S.Ct. 154, 11 L.Ed. 2d 113 (1963); Note, *Hypnotically-Induced Testimony Held Inadmissible in Criminal Proceeding*, 7 Wm. Mitchell L. Rev. 264 (1981); Pelanda, 14 Akron Law Review 609 (1981); Annot., 92 A.L.R. 3d 442 (1979). As pointed out in *State v. McQueen*, 295 N.C. 96, 244 S.E. 2d 414 (1978), the admission of a videotape containing the extrajudicial statements of a person under hypnosis is entirely different from testimony of a previously hypnotized witness about his present

in-court recollection of past events. Nor do we consider a tape recording of a hypnosis session in any way admissible as corroboration of the testimony of a witness stating his present recall of prior incidents. *Cf., State v. Fowler*, 29 N.C. App. 529, 225 S.E. 2d 110 (1976) (results of polygraph not admissible for corroborative purposes).

Although we do find the admission of the videotape to be error, we do not hold the error to be prejudicial in light of the overwhelming presence of competent evidence centering on defendant's guilt of the crime with which he was convicted. *See, State v. Knight*, 282 N.C. 220, 192 S.E. 2d 283 (1972). Bruce Miller testified as to defendant's planning and commission of the crime. The plant supervisor positively identified the defendant as one of the men that he witnessed robbing the plant of buckets of silver. Defendant was also identified as a seller of three buckets of granulated silver shortly after the robbery. Under the facts of this case we find it to be clear that the improper admission into evidence of the videotape was harmless error.

[4] In his final assignment of error defendant contends that the trial judge erred in failing to dismiss the charge of armed robbery at the close of the evidence. He argues there existed a fatal variance between the indictment which alleged ownership of the silver in a corporation known as Borden Chemical and the proof at trial which failed to establish this corporate ownership. We do not agree. "An indictment for robbery will not fail if the description of the property is sufficient to show it to be the subject of the robbery and negates the idea that the accused was taking his own property." *State v. Spillars*, 280 N.C. 341, 345, 185 S.E. 2d 881, 884 (1972). Steve Reams, the shift supervisor at Borden Chemical, testified that defendant took buckets of silver at gunpoint from a locked room located on the premises of the plant and that the substance taken was an integral ingredient used by the plant in its manufacturing process. We find this evidence sufficient to overcome defendant's motion to dismiss.

We hold that defendant received a fair trial without prejudicial error.

No error.

Judges HILL and JOHNSON concur.

RANDALL DOUGLAS WRIGHT v. FIBER INDUSTRIES, INC., MELVIN J. DOBBINS, REX L. BELL, RAY A. KILMINISTER, THOMAS A. KOENTOP, WILLIAM MAYROSE, JAMES S. BUTNER, JOHN SULLIVAN, AND CARL M. SPANGLER, JR.

No. 8227SC45

(Filed 1 February 1983)

1. **Master and Servant § 10.2— claim for damages due to retaliatory discharge—dismissal of claim error**

The trial court erred in dismissing plaintiff's claim for damages due to retaliatory discharge from his employment where his complaint alleged sufficient information to give the court and the parties notice of the transactions and occurrences which he intended to prove to entitle him to relief under G.S. 97-6.1.

2. **Master and Servant § 12— claim for blacklisting—dismissal of claim error**

The trial court erred in dismissing plaintiff's claim in which he alleged that defendants blacklisted him since plaintiff's allegation could support a cause of action under the blacklisting statute, G.S. 14-355.

3. **Appeal and Error § 6.2— denial of a motion to dismiss—not appealable**

Denial of a motion to dismiss for failure to state a claim is not appealable because it is neither a final judgment within G.S. 1-277(a) nor does it affect a substantial right.

APPEAL by plaintiff from *Friday, Judge.* Judgment entered 12 October 1981 in Superior Court, CLEVELAND County. Heard in the Court of Appeals 9 November 1982.

Plaintiff, who was injured at work, brought this action against his employer, Fiber Industries. In his complaint, he alleged the following. On 8 February 1980, he was employed by Fiber Industries as a production operator. While he was working on his regular job assignment he was asked to assist other employees in removing several packs of pumps which had been stacked on a machine. As he was pulling on the pumps, he experienced a sharp pain in his lower back. He reported the accident to his shift foreman. He was taken to Cleveland Memorial Hospital where his ailment was diagnosed as back strain. After he returned to work on 12 February 1980, he performed light duty functions until 22 February 1980. Then plaintiff had a five-day break. When he returned to work, he was informed that he should go back to his regular duties, which he attempted to perform until he eventually collapsed. He was hospitalized from 5

March 1980 to 13 March 1980. He continued to see various orthopedic surgeons after he left the hospital. He remained out of work until 2 September 1980. When he returned to work, he was not permitted to perform light duty work, instead, he was required to perform his regular work assignments. On 22 September 1980, he injured his back while doffing a machine. He was injured again on 16 October 1980 and was admitted to Cleveland Memorial Hospital.

According to plaintiff, when he was in the hospital, defendants Dobbins, Bell, and Koentop, visited him and told him that they were considering firing him because of his inability to perform his regular work assignments. They also said that Fiber Industries had filed a Workers' Compensation claim for him which had been denied.

Plaintiff was fired on 24 October 1980. On 28 October 1980, some employees of Fiber Industries met with plaintiff and told him that he was not entitled to receive any benefits except under Fiber Industries' private insurance policy. They asked plaintiff to sign a document which provided that he had fully recovered from his injury on 2 September 1980, and resumed work on 3 September 1980. Plaintiff refused to sign the document.

Plaintiff eventually discovered that a Workers' Compensation claim had not been filed. He filed a claim on 2 February 1981. On oral argument, counsel stipulated that he had received benefits under an award entered in that proceeding.

On 5 May 1981, plaintiff filed a seventy-seven paragraph complaint consisting of eleven claims for relief. Defendant moved to dismiss the claims pursuant to G.S. 1A-1, Rule 12(b)(6). The trial judge granted defendant's motion with respect to nine of the claims. Plaintiff abandoned four of his claims and appealed the dismissal of the remaining five claims.

O. Max Gardner III, for plaintiff appellant.

Weinstein, Sturges, Odom, Groves, Bigger, Jonas and Campbell, by John J. Doyle, Jr., and L. Holmes Eleazer, Jr., for defendant appellee.

VAUGHN, Chief Judge.

For the most part, we agree with the trial judge's dismissal of plaintiff's claims, so we shall only address the two claims which should not have been dismissed: retaliatory discharge and blacklisting.

Since this is an appeal from a dismissal pursuant to G.S. 1A-1, Rule 12(b)(6), the only question before us is whether plaintiff's complaint sets forth a "short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief. . . ." G.S. 1A-1, Rule 8(a)(1).

In *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970), Justice Sharp (later Chief Justice) explained Rules 12(b)(6) and 8(a)(1). After noting that our Rule 8(a)(1) differs from the Federal Rule of Civil Procedure 8(a)(2), in that the federal rule requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," she quoted with approval from Mr. Justice Black's opinion in *Conley v. Gibson*, 355 U.S. 41, 2 L.Ed. 2d 80, 78 S.Ct. 99 (1957):

> "[T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. The illustrative forms appended to the Rules plainly demonstrate this. Such simplified 'notice pleading' is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues."

Sutton v. Duke, 277 N.C. at 102, 176 S.E. 2d at 165. Justice Sharp summarized various federal decisions and 2A Moore's Federal Practice § 12.08 (1968) as follows:

> [A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief . . . [or] except in those instances where the

face of the complaint discloses some insurmountable bar to recovery. . . . [In short, it] 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.* (Emphasis in original.)

Sutton v. Duke, 277 N.C. at 102-103, 176 S.E. 2d at 165-166. *See also Morrow v. Kings Department Stores, Inc.*, 57 N.C. App. 13, 290 S.E. 2d 732, *review denied*, 306 N.C. 385, 294 S.E. 2d 210 (1982).

[1] Plaintiff's third claim, for damages due to retaliatory discharge, was as follows:

45. The plaintiff avers that he was discharged by the defendants, as hereinbefore alleged, in part because he threatened to institute or cause to be instituted, in good faith, a proceeding before the North Carolina Industrial Commission with respect to certain injuries that the plaintiff suffered by way of an accident that arose out of and occurred during the course of his employment with the corporate defendant.

46. The plaintiff avers that pursuant to N.C. Gen. Stat. Sec. 97-6.1 that he is entitled to recover damages from the defendants herein resulting from his termination for the reasons heretofore set forth. The plaintiff avers that he has suffered substantial damages because of such actions and therefore avers that he is entitled to recover such damages from the defendants.

47. The plaintiff . . . alleges that the individual defendants named herein acted in conspiracy, collusion, and illegal combination with the corporate defendant for the purpose of seeking to discharge the plaintiff for his threats to institute for cause to be instituted a claim under the North Carolina Workers' Compensation Act. As a result thereof, the plaintiff respectfully avers that he is entitled to recover any and all of the damages complained of herein from the individual defendants, both jointly and severally.

G.S. 97-6.1 is the statute which makes it unlawful for an employer to discharge or demote an employee in retaliation for filing a Workers' Compensation claim:

(a) No employer may discharge or demote any employee because the employee has instituted or caused to be instituted, in good faith, any proceeding under the North Carolina Workers' Compensation Act, or has testified or is about to testify in any such proceeding.

(b) Any employer who violates any provision of this section shall be liable in a civil action for reasonable damages suffered by an employee as a result of the violation, and an employee discharged or demoted in violation of this section shall be entitled to be reinstated to his former position. The burden of proof shall be upon the employee.

Clearly, plaintiff's complaint alleges sufficient information to give the court and the parties notice of the transactions and occurrences which he intends to prove to entitle him to relief under G.S. 97-6.1.

Despite the liberal nature of notice pleadings, a claim for relief must satisfy the requirements of the substantive laws which support the pleadings. *United Leasing Corp. v. Miller*, 45 N.C. App. 400, 263 S.E. 2d 313, *review denied*, 300 N.C. 374, 267 S.E. 2d 685 (1980). Defendant contends that plaintiff has no cause of action under the statute because his workers' compensation claim was filed more than three months after he was fired, and the statute only covers those who are fired after they file their claim. We do not agree.

G.S. 97-6.1 was enacted in response to *Dockery v. Lampart Table Co.*, 36 N.C. App. 293, 244 S.E. 2d 272, *review denied*, 295 N.C. 465, 246 S.E. 2d 215 (1978). In *Dockery*, the plaintiff was injured when a load of tables fell on him while he was working in defendant's factory. He received temporary workers' compensation benefits. When he returned to work after two weeks, he was fired. The plaintiff alleged that he was fired in retaliation for pursuit of his remedies under the Workers' Compensation Act. In affirming the trial court's grant of the defendant's motion to dismiss, this Court held "If the General Assembly . . . had intended a cause of action [for retaliatory discharge] . . . in a workmen's compensation statute as comprehensive as ours, it would have specifically addressed the problem." *Dockery v. Lampart Table Co.*, 36 N.C. App. at 297, 244 S.E. 2d at 275.

Clearly, G.S. 97-6.1 was intended to prevent employers from firing or demoting employees in retaliation for pursuing their remedies under the Workers' Compensation Act. If G.S. 97-6.1 were limited only to retaliatory acts which occurred after the employee filed his claim, an employer could easily avoid the statute by firing the injured employee before he filed. We do not think the legislature intended the statute to be so easily circumvented.

The courts of this State have recognized that the Workers' Compensation Act should be liberally construed so that benefits will not be denied by technical, narrow, or strict interpretation. *Stevenson v. City of Durham*, 281 N.C. 300, 188 S.E. 2d 281 (1972); *Johnson v. Asheville Hosiery Co.*, 199 N.C. 38, 153 S.E. 591 (1930). Liberally construed, the statute encompasses acts by employers intending to prevent employees from exercising their rights under the Workers' Compensation Act. Whether the employee is fired before or after he files his claim should make no difference.

[2] In plaintiff's eighth claim for relief, he alleges that defendants blacklisted him: "After having been discharged from his employment . . . the plaintiff . . . alleges that the defendants herein prevented or attempted to prevent the plaintiff by word or by writing from obtaining employment from any other person, company, or corporation within Cleveland County, North Carolina."

The blacklisting statute, G.S. 14-355, reads, in part, as follows:

> If any person, agent, company or corporation, after having discharged any employee from his or its service, shall prevent or attempt to prevent, by word or writing of any kind, such discharged employee from obtaining employment with any other person, company or corporation, such person, agent or corporation shall be guilty of a misdemeanor and shall be punished by a fine not exceeding five hundred dollars ($500.00); and such person, agent, company or corporation shall be liable in penal damages to such discharged person, to be recovered by civil action.

Defendants contend that plaintiff's claim was properly dismissed because it is too vague and imprecise to put defendants

on notice. The test to apply, which was mentioned above, is that plaintiff's claim should not be dismissed unless it appears that he is not entitled to any relief under any set of facts which could be proved in support of his claim. Clearly, plaintiff's allegation, with appropriate facts, would support a cause of action under the blacklisting statute. Any vagueness could easily be resolved by discovery pursuant to Article 5 of the North Carolina Rules of Civil Procedure.

[3] Defendants attempt to cross-appeal, by means of a cross-assignment of error, the trial court's denial of their motion to dismiss plaintiff's tenth claim. Denial of a motion to dismiss for failure to state a claim is not appealable because it is neither a final judgment within G.S. 1-277(a) nor does it affect a substantial right. *O'Neill v. Southern National Bank*, 40 N.C. App. 227, 252 S.E. 2d 231 (1979); *Hankins v. Somers*, 39 N.C. App. 617, 251 S.E. 2d 640, *cert. denied*, 297 N.C. 300, 254 S.E. 2d 920 (1979). Moreover, a cross-assignment of error is "any action or omission of the trial court to which an exception was duly taken . . . and which deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken." Rule 10(d) Rules of Appellate Procedure.

For the reasons stated, we reverse the dismissal of plaintiff's third and eighth claims. We affirm the dismissal of the other claims.

Defendants' appeal is dismissed.

In plaintiff's appeal, affirmed in part, reversed in part.

In defendants' appeal, appeal dismissed.

Judges WELLS and WHICHARD concur.

STATE OF NORTH CAROLINA v. TED LANE SAMPLEY

No. 825SC655

(Filed 1 February 1983)

1. Criminal Law § 91.4— denial of continuance to obtain counsel

The denial of defendant's motion for a continuance made at the time of trial did not deprive defendant of his constitutional right to effective assistance of counsel of his choice where defendant's original counsel was permitted to withdraw from the case; the court continued the cases against defendant twice to allow defendant to obtain new counsel; defendant had over a month from the withdrawal of his original attorney in which to retain a new one; defendant did not seek a further continuance until the expiration date of the second of these continuances; on that date defendant informed the court that he would represent himself, and the record does not reveal a formal motion for further continuance until the precise moment set earlier on that date for commencement of the trial; the attorney desired by defendant had only commenced the private practice of law on that date; and the State was prepared for trial on that date, and its witnesses, including several individuals with significant responsibilities elsewhere in the court system and law enforcement, were present to testify.

2. Arrest and Bail § 6.2— right to resist arrest—instruction not required

The trial court properly declined to rule as a matter of law and to instruct the jury that defendant's arrest was unlawful and he thus had a right to use reasonable force to resist it where the uncontroverted evidence showed that defendant was not placed under arrest until he had assaulted a deputy sheriff by swinging his elbow at him; that this assault occurred while the deputy was discharging or attempting to discharge a duty of his office by responding, in his capacity as courtroom bailiff, to instructions from the presiding judge to preserve order and keep the peace, and defendant's arrest therefore was lawful under G.S. 14-33(b)(4); and that the force which defendant applied from that point forward was in resistance to a lawful arrest and could not be excused as necessary to prevent the unlawful restraint of his liberty.

APPEAL by defendant from *Davis, Judge.* Judgments entered 4 March 1982 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 11 January 1983.

Defendant was convicted of misdemeanor assault on an officer, resisting arrest, and two counts of simple assault. The court suspended sentence and placed defendant on supervised probation on the simple assault and resisting arrest charges. It sentenced him to imprisonment for not less nor more than two years, sixty days thereof to be active and the balance to be served on supervised probation, on the assault on an officer charge.

From these judgments, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Kaye R. Webb, for the State.

Bruce H. Jackson, Jr., and W. G. Smith, for defendant appellant.

WHICHARD, Judge.

[1] Defendant contends denial of his motion for continuance deprived him of his constitutional right to effective assistance of counsel of his choice. The pertinent facts are as follows:

Defendant was tried on or about 1 March 1982 on warrants issued 8 June 1981. A previous trial, in October 1981, had resulted in mistrial.

Defendant's counsel at that trial had moved, on 26 January 1982, to be allowed to withdraw on the ground that defendant had, contrary to his request and advice, published in a newspaper an open letter to the District Attorney regarding calendaring of his cases. By order of 2 February 1982, the court allowed the motion.

The court thereafter entered two continuance orders for the purpose of enabling defendant to obtain new counsel. The first, upon motion by the State, continued the cases from 1 February 1982 through 17 February 1982. The second, upon motion by defendant appearing *pro se*, and further motion by the State, continued them through 1 March 1982.

On 1 March 1982 defendant appeared and advised the court that he did not have an attorney. He further stated that the attorney he had "talked to" was in the process of leaving Legal Services and was "not available until after 1 March."

Upon inquiry by the court, the State advised that it planned to try the cases as the first jury trial. The court thereupon advised defendant that it "[saw] nothing in the file . . . to indicate . . . that the case . . . should be continued." The court stated further: "The case is almost a year old. . . . It appears that you do not have an attorney. . . . But the case is set for trial, and I would suggest, that if you want an attorney to represent you, that you get one quickly."

Defendant, upon request, was allowed to speak, and stated: "I will represent myself. I am neither feeble, ignorant or illiterate." Defendant reiterated that the attorney he had chosen was unavailable, and the court in turn advised defendant that many others in the county were available. Defendant indicated that he had approached other attorneys who requested fees he could not afford, and that he could handle the fees of the attorney who was then unavailable.

The court then indicated that the cases would be tried at 2:00 p.m. that day. It again informed defendant that he could represent himself if he wished, but that there were many attorneys available if he wanted one to represent him.

At 2:00 p.m. the attorney whom defendant had indicated he wished to employ appeared and made oral motion for continuance, which the court denied. The court also denied a written motion for continuance which this attorney filed at 5:05 p.m. on the same date. At that time the State had presented evidence from five of its eight witnesses. The court found, in denying the motion, that since the mistrial the case had been continued on at least three occasions at the request of defendant; that the attorney had filed no motion prior to the date set for trial and had only commenced the private practice of law on that date; and that to continue the case at that point "would create a hardship and inconvenience for the State" in that the witnesses for the State included a Superior Court judge, a court reporter who was assigned to court in another county, a magistrate, and some police officers.

> [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 constitutional 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). *See also State v. Maher*, 305 N.C. 544, 547, 290 S.E. 2d 694, 696 (1982). "[T]he right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice." *Powell v. Alabama*, 287 U.S. 45, 53, 77 L.Ed. 158, 162, 53 S.Ct. 55, 58 (1932). However, "[t]he right of the accused to select his own counsel cannot be insisted upon in a manner that will

obstruct an orderly procedure in the courts and deprive the courts of their inherent power to control the same." *State v. Montgomery*, 33 N.C. App. 693, 696-97, 236 S.E. 2d 390, 392, *appeal dismissed*, 293 N.C. 256, 237 S.E. 2d 258 (1977).

Under the circumstances here denial of defendant's motion for continuance, made at trial time, did not deprive him of his constitutional right to effective assistance of counsel of his choice. Subsequent to withdrawal of defendant's original counsel, the court continued the cases twice to allow defendant to obtain new counsel. Defendant, as a result, had over a month from the withdrawal of his original attorney in which to retain a new one. Until the expiration date of the second of these continuances, defendant did not seek a further continuance. On that date he informed the court that he would represent himself, and the record does not reveal a formal motion for further continuance until the precise moment set earlier on that date for commencement of trial. At that time the State was prepared for trial; and its witnesses, including several individuals with significant responsibilities elsewhere in the court system and law enforcement, were present to testify. The granting of a further continuance under these circumstances would have "obstruct[ed] . . . orderly procedure in the courts." *Montgomery, supra.* Further, given the time which the previous continuances had allotted to defendant for retention of counsel, granting the motion was not essential to afford defendant "a fair opportunity to secure counsel of his own choice." *Powell, supra.*

Defendant argues that *State v. McFadden, supra,* and *State v. Maher, supra,* while concededly based on facts different from those in his cases, nevertheless establish "the law . . . dispositive of the issue here." *McFadden* held that a defendant was denied effective assistance of counsel of his choice when his retained counsel was engaged in a trial in federal court, and the trial court denied continuance and required trial by a junior associate of said retained counsel, which associate had only practiced law for eighteen months, had only tried one previous jury case, and had only learned about defendant's case on the morning of trial. *Maher* held that defendant was denied effective assistance of counsel of his choice when his original counsel withdrew four days prior to trial, his newly retained counsel was at that time involved in a federal court trial, and the court, upon being advised by the new-

ly retained counsel on the date of trial that he was totally unprepared to offer defendant effective assistance of counsel, gave counsel only fifteen minutes to confer with defendant before proceeding to trial. The circumstances of those cases thus were significantly different from those here, and we do not find the cases controlling. This assignment of error is overruled.

[2] Defendant contends the court should have found as a matter of law, and should have charged the jury, that since his arrest was not lawful he had a right to use reasonable force to resist it. "It is axiomatic that every person has the right to resist an unlawful arrest." *State v. Mobley*, 240 N.C. 476, 478, 83 S.E. 2d 100, 102 (1954). One so resisting, however, "may use only such force as reasonably appears to be necessary to prevent the unlawful restraint of his liberty." *Id.* at 479, 83 S.E. 2d at 102.

The pertinent evidence for the State tended to show the following:

Defendant had been a witness in Superior Court in a criminal case against his stepfather for communicating threats to defendant. Judge Rouse had directed a verdict of not guilty. Defendant had then risen and said, "Your honor, I am a reasonable man." Judge Rouse thereupon told the deputy sheriff serving as courtroom bailiff to arrest defendant if he said anything else.

Defendant left the courtroom; and shortly thereafter his stepfather entered it and told Judge Rouse, "Your honor, that man is going to kill me." Judge Rouse instructed the bailiff to "go outside and see if you cannot keep peace," or words to that effect.

As the bailiff proceeded down the aisle toward the courtroom door, defendant entered the courtroom. The bailiff took him by the elbow, pointed him toward the door, and said, "Ted, let's talk outside." As they exited the courtroom, defendant "jerked his arm away" and said, "Let go of my [expletive deleted] arm." He then "came back towards [the bailiff's] face," and the bailiff "ducked to miss [his] elbow."

When they were outside the courtroom the bailiff told defendant he was under arrest and placed a handcuff on one of defendant's wrists. Defendant thereupon kicked the bailiff in the groin. Two police officers came from the courtroom to assist the bailiff, and defendant commenced flailing and kicking violently.

Defendant kicked the two police officers and the bailiff during the general melee which ensued.

Defendant testified that as he entered the courtroom the bailiff approached him, grabbed him by the arm, spun him around and "headed" him in the direction of the door. Upon reaching the door he tried to pull his arm free, and the bailiff increased his force and propelled him through the door. He could not recall what happened outside the door. He did recall struggling, and admitted he could have hit or kicked the officers. He did not recall the bailiff telling him he was under arrest for assault, but acknowledged that "[o]utside the door [the bailiff] could have possibly said that."

The uncontroverted evidence thus established that defendant was not placed under arrest until he had assaulted a deputy sheriff by swinging his elbow at him. When that assault occurred, then, no arrest had taken place; and defendant thus could not have been entitled to use force against the officer for the purpose of resisting an unlawful arrest.

The evidence also established that defendant did assault a deputy sheriff by swinging his elbow at him, either offensively or in trying to free himself; and that this assault occurred while the deputy sheriff was discharging or attempting to discharge a duty of his office, *viz.*, responding, in his capacity as courtroom bailiff, to instructions from the presiding judge to preserve order and keep the peace. This conduct by defendant violated G.S. 14-33(b)(4), and his arrest therefor was thus lawful and proper.

The force which defendant applied from that point forward was therefore in resistance to a lawful arrest, and it could not be excused as "necessary to prevent the unlawful restraint of his liberty." *Mobley, supra.* The court thus properly declined to rule as a matter of law that defendant had the right to use reasonable force to resist the arrest. It also properly declined to give the requested instruction to that effect, because the evidence did not support it. *State v. Bailey*, 254 N.C. 380, 386, 119 S.E. 2d 165, 170 (1961).

No error.

Judges ARNOLD and HILL concur.

WAYNE V. BROWN AND STROUT REALTY, INC. v. W. E. FULFORD, JR.

No. 8210SC4

(Filed 1 February 1983)

Brokers and Factors § 6— right to real estate commission—summary judgment for defendant improper

In an action brought by plaintiffs to recover their broker's commission allegedly due for selling defendant's property, the trial court erred in entering summary judgment for defendant where there was evidence from which the jury could find that defendant had an interest in the property, and where there was some evidence that the real estate agent arranged the first meeting between defendant and the eventual buyers of the property, which was some evidence that plaintiffs were at least an indirect cause of the sale.

APPEAL by plaintiffs from *Preston, Judge.* Judgment entered 22 September 1981 in Superior Court, WAKE County. Heard in the Court of Appeals 19 October 1982.

Plaintiffs brought this action to recover their broker's commission allegedly due for selling defendant's property, Belvedere Plantation, to United States Development Corporation. The following are the undisputed material facts in the pleadings and affidavits filed pursuant to defendant's motion for summary judgment.

On 21 October 1977, defendant had an option to purchase Belvedere Plantation from Wachovia Mortgage Company. The option was extended several times, it was finally due to expire 31 May 1978. The sale price for the property was $1,350,000.00. Fulford had paid $165,000.00 for the options. When he could not raise the money to purchase the property, he assigned the option to B. L. Lang. On 20 March 1978, Lang paid $785,000.00 and Fulford paid the difference, $400,000.00. Lang took the deed, but told Fulford he could buy it back within a year for $785,000.00 plus $100,000.00 and legal fees. In May 1979, the property was sold to United States Development Corporation for $1,900,000.00. The corporation was wholly owned by Terrance Domnick and David Dion. The proceeds were cash and a promissory note to Fulford secured by a second deed of trust.

The following contested material facts are contained in the pleadings and affidavits. Plaintiffs alleged, in their complaint, that

on 18 March 1978, Strout Realty and Fulford entered into a nonexclusive listing agreement where Strout Realty agreed to list Fulford's property, Belvedere Plantation, and Fulford agreed to pay a 10% commission if the property was sold. The listing agreement was as follows:

> I (we) the seller(s) employ you to procure a purchaser ready, willing and able to buy this property at the listed price and terms, or at price and terms acceptable to me and to accept a deposit thereon. I represent that this property description and listing information are correct; that I shall convey a marketable title and furnish a good and sufficient deed.
>
> If you procure a purchaser as defined above, I agree to pay you a commission of 10% of the selling price, or a minimum commission of $200, whichever is greater. All funds delivered to STROUT REALTY, INC. shall be retained in its authorized Escrow Trust Account. Any deposit forfeited by a buyer shall be divided one-half to you, the balance, less abstract, search, title, escrow or other charges, to me, except that your share shall not exceed your commission as defined above.
>
> I reserve the right to sell the property to a buyer procured by myself or through another agent and in such case no commission or other charge shall be due you, provided such sale or transfer is not made directly or *indirectly* to or through your prospect.
>
> This agreement is irrevocable but shall terminate with the sale of the property or by my giving you a withdrawal notice in writing which shall become effective thirty days from the date you receive it. This agreement shall expire three years from date without notice unless otherwise terminated as above, or unless I renew or extend it in writing. However, if within six months after the termination date of this agreement, I sell or transfer this property to a prospect procured by you prior to its termination I shall pay you your commission.
>
> The listing of this property, and the continued endeavor of STROUT REALTY, Inc. or its representatives, to sell the

same shall constitute a good and sufficient consideration for this agreement.

I acknowledge I have read and received a copy of this listing; that it constitutes the entire agreement between us and that no other understandings exist, written or oral, affecting this agreement. (Emphasis added.)

No commission was paid. In his affidavit, plaintiff Brown alleged the following. Brown called Dion and told him that he had some property he might be interested in buying. Dion said that he was interested, but first needed to talk to Domnick. A week later, Dion, Domnick and Brown met in Raleigh and Brown gave Dion and Domnick information on Belvedere Plantation. Domnick told Brown that he did not know that Fulford had an option on the property. Dion and Domnick had not met Fulford, so Brown arranged a meeting for them in April 1978. The purpose of the meeting was to discuss the sale and ways to finance the purchase of Belvedere Plantation. On 3 May 1978, Brown and officials of Strout Realty met to discuss the possible sale of Belvedere Plantation to Dion and Domnick. On 10 May 1978, Staton, a Strout Realty representative, and Brown took Fulford and his attorney to see the property. Brown spoke with Fulford about the property on two other occasions in May. On 30 May 1978, Brown quit working for Strout Realty. On 26 June 1978, Brown and Staton met with Fulford and Lang to discuss the property. Lang said that although the property was in his name, it was Fulford's and he took title to it only because he advanced money to Fulford. Fulford gave Brown an exclusive listing for the property. In July through April, Brown met with several potential buyers. On 30 April 1979, Fulford told Brown that he was going to sell the property to Domnick and Dion, and he did not want Brown to attend the closing but he would take care of the commission.

Fulford's pleadings and affidavits contained the following material allegations. He said he signed the listing agreement but did not fill it out. According to Fulford, Staton probably filled out a blank listing which had his signature. He said he met with Brown, Staton, Dion and Domnick in April. Subsequently, he met Brown several times. On 26 June 1978, he gave Brown a 30-day exclusive listing on the property, with the full understanding that his only interest in the property was that he could repurchase it

from Lang. Fulford said he did not remember telling Brown when the closing would be, but he knew he did not tell Brown not to come to the closing or that he would take care of his fee.

According to Domnick's affidavit, Wachovia officials contacted him in early 1977 to see if he was interested in Belvedere Plantation. In late 1977 or early 1978, he learned that Fulford was trying to buy the property. In early 1978, he and Dion met Brown and Fulford, he spoke with Fulford about the possibility of marketing the property, not purchasing it himself. He discussed buying the property with Fulford several times prior to purchasing the property from Lang. According to Domnick, neither Brown nor anyone else from Strout Realty ever contacted him for the purpose of selling him Belvedere Plantation. He said that he spoke to Brown three or four times regarding Belvedere, but the substance of the conversations was that if Brown could arrange financing, he would be paid a fee based on a percentage of the amount of financing.

Defendant's motion for summary judgment was granted.

David R. Cockman, for plaintiff appellants.

Everett and Cheatham, by C. W. Everett, Sr., and Robert W. Kaylor, for defendant appellee.

VAUGHN, Chief Judge.

The sole issue is whether the trial court erred in granting defendant's motion for summary judgment. Summary judgment shall be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." G.S. 1A-1, Rule 56(c). The purpose of summary judgment is to bring litigation to an early decision on the merits without the delay and expense of trial where it can be shown that no material facts are at issue. *Kessing v. National Mortgage Corporation*, 278 N.C. 523, 180 S.E. 2d 823 (1971). Under Rule 56, the following evidence may be considered: admissions in the pleadings, depositions on file, answers to interrogatories, admissions on file, affidavits, and any other material which would be admissible in evidence or of which judicial notice may be taken. *Jernigan v.*

State Farm Mutual Automobile Insurance Company, 16 N.C. App. 46, 190 S.E. 2d 866 (1972); 10 Wright and Miller, Federal Practice and Procedure § 2724 (1973). Plaintiffs contend that summary judgment was improperly granted because there were two material facts at issue: whether Fulford had an interest in the property and whether the plaintiffs needed to be the procuring cause of the sale to United States Development Corporation to entitle them to a commission. Regarding Fulford's interest in the property, it is undisputed that he had paid $165,000.00 for his option. When he assigned the option to Lang, and Lang purchased the property, Fulford paid an additional $400,000.00 and Lang paid $785,000.00. Thus, although title was in Lang's name, Fulford had invested $565,000.00. Lang obviously thought Fulford had an interest in the property. In his deposition he said:

> A deed was made from Wachovia Mortgage Company to me dated the 20th day of March, 1978. . . . We bought the property. . . . When I am talking about "we" I mean Dr. Fulford and myself. We had to get it done before 5:00. Dr. Fulford and I bought the property but it was put in my name. . . . I would get my expenses back and he would get his costs back and we would split the profit.

Lang said that he offered the property to Fulford for $1,200,000.00 because Fulford already "owned part of the property." He also said "Dr. Fulford had a vested interest in this property. . . ."

Although Lang held legal title, Fulford held an equitable interest. For example, had he needed to enforce his interest, it had all the factors required for a purchase money resulting trust which is defined as follows: When one person pays for land but title is taken in another, a resulting trust commensurate with his interest arises in favor of the one who furnished the consideration. *Cline v. Cline*, 297 N.C. 336, 255 S.E. 2d 399 (1979). Although Fulford strenuously argues that he never had an interest in the property, other than an option, clearly there is evidence from which the jury could find that he had an interest in the property.

Fulford next contends that plaintiffs were not a procuring cause of the sale to United States Development Corporation, and they are not entitled to a commission as a matter of law. In general, a broker with whom an owner's property is listed

becomes entitled to a commission whenever he procures a party who actually contracts for the purchase of the property at a price acceptable to the owner. *Cromartie v. Colby*, 250 N.C. 224, 108 S.E. 2d 228 (1959). *See* Webster's Real Estate Law in North Carolina § 130 (Hetrick ed. 1981). "The broker is the procuring cause if the sale is the direct and proximate result of his efforts or services." *Realty Agency, Inc. v. Duckworth & Shelton, Inc.*, 274 N.C. 243, 251, 162 S.E. 2d 486, 491 (1968); *Accord Cooper v. Henderson*, 55 N.C. App. 234, 284 S.E. 2d 756 (1981).

In this case, however, the contract between the parties provided: "I [Fulford] reserve the right to sell the property to a buyer procured by myself or through another agent and in such case no commission or other charge shall be due you, provided such sale or transfer is not made directly or *indirectly* to or through your [Strout Realty, Inc.] prospect." (Emphasis added.) Thus, even if plaintiffs were only a indirect cause of the sale, they would be entitled to their commission under the terms of the contract. According to plaintiff Brown's affidavit, he arranged the first meeting between Fulford and the eventual buyers of the property, which is some evidence that plaintiffs were at least an indirect cause of the sale.

Plaintiffs contend that the trial court erred in failing to consider Irvin Staton's handwritten statement on the motion for summary judgment. Since we find that summary judgment was improperly granted, there is no need to address that question.

Reversed and remanded.

Judges WELLS and WHICHARD concur.

GLENN A. LAZENBY, JR. AND JEAN G. LAZENBY v. DERWOOD H. GODWIN

No. 8214SC114

(Filed 1 February 1983)

1. Fraud § 8— no ratification and waiver

In an action to recover damages for alleged fraud by defendant in the purchase of plaintiffs' stock in a closely held corporation and his subsequent sale

of the corporation, plaintiffs did not, as a matter of law, ratify defendant's purchase of plaintiffs' stock and his sale of the corporation and thus waive any legal claims relating thereto where there was sufficient evidence to show a confidential relationship which would excuse plaintiffs' failure to discover the extent of the fraud, and where there was sufficient evidence for the jury to find that plaintiffs, after discovering some evidence of fraud, were further misled by defendant and therefore excused from actions which otherwise may have constituted a waiver.

2. Damages § 2; Interest § 1— damages for fraud—prejudgment interest

The trial court erred in permitting the jury to award prejudgment interest on compensatory damages for fraud where the damages were not liquidated and were not readily ascertainable.

3. Damages § 14; Fraud § 11— punitive damages—evidence competent to negate aggravated wrongdoing

In an action to recover damages for alleged fraud by defendant in the purchase of plaintiffs' stock in a closely held corporation, the trial court committed prejudicial error in the exclusion of evidence which tended to show that defendant offered to return plaintiffs' stock to them under certain conditions since such evidence was competent to mitigate the reckless, malicious and wanton nature of defendant's conduct and therefore reduce the amount of punitive damages awarded by the jury.

APPEAL by defendant from *Bailey, Judge.* Judgment entered 7 July 1981 in Superior Court, DURHAM County. Heard in the Court of Appeals 17 November 1982.

This civil action was instituted by the plaintiffs to recover $269,367, plus six percent annual interest from 16 March 1973 for alleged fraudulent acts of the defendant when defendant bought plaintiffs' stock in a closely held corporation. The plaintiffs also sought $300,730.08 as punitive damages.

For more details regarding the history of this case see *Lazenby v. Godwin,* 40 N.C. App. 487, 253 S.E. 2d 489 (1979) and *Lazenby v. Godwin,* 49 N.C. App. 300, 271 S.E. 2d 69 (1980).

At the second trial held on 5 May 1981, the parties offered evidence tending to show the following. In 1972 the plaintiffs and defendant owned shares of stock in Fayetteville Wholesale Building Supply, Inc., a corporation held closely by members of the Godwin family to which both parties belong. In February 1973 the defendant, through a purchase of stock from his brother, Larry Godwin, acquired a controlling interest in Fayetteville Wholesale. Soon thereafter the defendant notified the plaintiffs

and other shareholders that he would buy their remaining shares. However, he did not mention at that time his negotiations with Valley Forge Corporation to sell Fayetteville Wholesale. Plaintiffs agreed to sell their shares in Fayetteville Wholesale to the defendant and the defendant gave the plaintiffs a note of $120,000 with seven percent annual interest in payment for their shares.

Two weeks after this transaction the plaintiffs learned from another family member and shareholder that the defendant had sold Fayetteville Wholesale for $2.6 million to Valley Forge Corporation. Plaintiff Glenn Lazenby immediately contacted the defendant and was informed that a sale had been made. During the ensuing telephone discussion, the defendant convinced the plaintiff, Glenn Lazenby, that the plaintiffs had received a fair settlement for their stock. On 1 January 1974 the plaintiffs received information that the stock they sold for $120,000 was worth more than $300,000.

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

(1) Did Derwood H. Godwin stand in a confidential or fiduciary relationship to Glenn A. Lazenby, Jr., and Jean G. Lazenby at the time he acquired their stock on March 16, 1973?

ANSWER: YES

(2) If so, did Derwood H. Godwin exercise good faith in the purchase of the stock from Glenn A. Lazenby, Jr., and Jean G. Lazenby on March 16, 1973 and was the transaction open, fair and honest?

ANSWER: NO

(3) Did Derwood H. Godwin, by actual fraud and deceit, procure the stock of Glenn A. Lazenby, Jr., and Jean G. Lazenby?

ANSWER: YES

(4) Did the plaintiffs affirm and ratify the sale of their stock to Derwood Godwin as alleged in the Answer?

ANSWER: NO

(5) In what amount, if any, are the plaintiffs entitled to recover of the defendant:

A. For principal? $180,730.08
B. For interest? $ 88,557.39

(6) In your discretion, what amount of punitive damages, if any, are the plaintiffs entitled to recover of the defendant?

ANSWER: $150,000.00

From a judgment entered on the verdict, defendant appealed.

Nye, Mitchell, Jarvis & Bugg, by Jerry L. Jarvis and John E. Bugg for the plaintiffs, appellees.

James B. Maxwell and Poyner, Geraghty, Hartsfield & Townsend, by David W. Long and Cecil W. Harrison, Jr. for the defendant, appellant.

HEDRICK, Judge.

[1] The only question raised on appeal with respect to defendant's liability to plaintiffs relates to the fourth issue. In his brief, defendant states his argument as follows: "It is the position of the defendant that the plaintiffs' own evidence establishes, as a matter of law, that plaintiffs, after being afforded the opportunity to know all the facts surrounding the sale of the assets of Fayetteville Wholesale to Valley Forge Corporation, voluntarily ratified the sale of their stock to defendant and waived any legal claims relating thereto." Defendant argues that after the telephone conversation of 27 March 1973, the plaintiff Glenn Lazenby knew or had an opportunity to know all the material facts relating to defendant's purchase of stock from plaintiffs and the subsequent sale of Fayetteville Wholesale. Defendant argues that through his telephone conversation with Glenn Lazenby the plaintiffs learned that the defendant had failed to disclose the pending sale of Fayetteville Wholesale and that the eventual sale to Valley Forge Corporation had been for $2.6 million and that plaintiffs had also discovered some of the technical details of the sale such as liabilities and notes. Because of plaintiffs' failure to investigate further after gaining this knowledge, and by their acceptance of partial payment by defendant on the sale of their stock, the defendant argues the trial court erred in submitting the fourth issue to the jury, and in denying his motions for a directed verdict and judgment notwithstanding the verdict. However, we find this argument unpersuasive and hold that the plaintiffs did not,

as a matter of law, ratify the defendant's transactions of purchasing plaintiffs' stock and selling Fayetteville Wholesale.

Our Supreme Court has addressed the topic of waiver or ratification in situations involving fraud or deceit.

> In 12 R.C.L. (Fraud and Deceit), part sec. 157, p. 411-12, we find: "One may waive the right to sue for damages for fraud, by conduct inconsistent with an intention to do so. To constitute such a waiver in any case, however, the defrauded party must act with full knowledge of his rights, and of the material facts constituting the fraud. There can be no waiver where he did not know of the fraud, and had no means of discovering it. But knowledge of all the evidence tending to prove the fraud is not necessary. It is sufficient if the material facts which go to make it up are known. A failure sooner to discover the fraud may be excused by the existence of confidential relations between the parties, or by reason of the fact that he was misled by further false representations made by the other party."

Puckett v. Dyer, 203 N.C. 684, 693, 167 S.E. 43, 47 (1932). Applying this principle to the facts of this case, we find insufficient support for the defendant's contention that plaintiffs' actions constituted ratification as a matter of law. There are sufficient facts to show a confidential relationship which would excuse a failure to discover the extent of the fraud. Furthermore, the record contains testimony about a telephone call made by plaintiff, Glenn Lazenby, to the defendant the same day Lazenby heard about the sale of Fayetteville Wholesale. Glenn Lazenby testified regarding that telephone conversation:

> He [defendant] said, 'It is not at all like you think it is. What you and Jean are getting out of this with interest, I am paying you, you are going to end up getting just about the same amount per share of stock that I am going to get, so take my word for it. You have known me all of these years, and you have trusted me all of these years, just trust me, and take my word for it.'
>
> We talked on for some while, and I actually hung up sort of sad. I felt bad that he didn't have enough confidence in me to tell me about the situation. I wasn't going to go out and

> spill the beans to anybody, but he did convince me that he had a legitimate reason for lying to me, and that the thing that Jean and I were getting a proper and fair settlement for our stock.

Therefore, there was sufficient evidence for the jury to find that the plaintiffs, after discovering some evidence of fraud, were further misled by the defendant and therefore excused from actions which otherwise may have constituted waiver. Thus, the trial court did not err in submitting the fourth issue to the jury, and in denying defendant's motions for directed verdict and judgment notwithstanding the verdict. Therefore, the verdict establishing defendant's liability to plaintiffs represented by issues one through four will not be disturbed.

Defendant's remaining assignments of error relate to the issues on damages.

[2] Defendant contends the trial court erred in submitting to the jury an issue regarding prejudgment interest on the issue of compensatory damage, and in entering judgment awarding interest on the verdict. In breach of contract actions, prejudgment interest may be granted. *See* G.S. § 24-5. *See also, General Metals v. Manufacturing Co.*, 259 N.C. 709, 131 S.E. 2d 360 (1963). Prejudgment interest has also been granted under certain limited circumstances where the amount of a claim is obvious or easily ascertainable from the contract or insurance policy. *Wilkes Computer Services v. Aetna Casualty & Surety Co.*, 59 N.C. App. 26, 295 S.E. 2d 776 (1982). Yet, as a general rule, North Carolina courts do not recognize the granting of prejudgment interest on unliquidated damages. *Construction Co. v. Crain and Denbo, Inc.*, 256 N.C. 110, 123 S.E. 2d 590 (1962). Since the damages in the present case were not liquidated, and in our opinion were not readily ascertainable, we hold the trial court erred in allowing the jury to award prejudgment interest in this tort action.

[3] Defendant also assigns as error the trial court's refusal to allow "testimony concerning offers from defendant to plaintiffs allowing them to get back into the corporation as shareholders of the corporation." The defendant argues he was prejudiced because the jury was not permitted to hear evidence which would tend to mitigate the reckless, malicious and wanton nature of his conduct and therefore lessen the amount of punitive damages

awarded by a jury. We agree with the defendant that the evidence was excluded improperly.

Our Supreme Court in *Newton v. Insurance Co.*, 291 N.C. 105, 229 S.E. 2d 297 (1976), held that punitive damages may be awarded only on the basis of *intentional* wrongdoing and *aggravated* tortious conduct. In an earlier case, *Clouse v. Motors, Inc.*, 17 N.C. App. 669, 195 S.E. 2d 327 (1973), this court also refused to allow punitive damages because the defendant's tortious conduct was not sufficiently aggravated. That case involved misrepresentations about the history of an automobile, but finding no evidence of insult, indignity, malice, oppression or bad motive, this court disallowed punitive damages.

In the case at bar, the defendant presented evidence, outside the hearing of the jury, which tended to show that the defendant offered to return plaintiffs' stock to them under certain conditions on 24 January 1974 and 20 March 1974. Such evidence, if believed by the jury, may tend to mitigate the degree of intent, aggravation and maliciousness involved in defendant's fraud, thereby reducing the amount of punitive damages. Since the whole policy behind punitive damages is to punish *intentional* and *aggravated* wrongdoing, we hold the trial judge committed prejudicial error by excluding evidence which went directly to the degree of intent and aggravation of the defendant's conduct.

The defendant presents other assignments of error pertaining to evidence on the issues of damages, but we find it unnecessary to address each of those arguments individually since they are not likely to occur at any subsequent trial. Because the trial court erred in refusing to admit evidence which may have mitigated the intentional and malicious nature of the defendant's tort, and because, in our opinion, all of the issues involving damages are so intertwined with the degree of intent, we hold the defendant is entitled to a new trial as to all issues of damages. *See Carawan v. Tate*, 304 N.C. 696, 286 S.E. 2d 99 (1982) and *Carawan v. Tate*, 53 N.C. App. 161, 280 S.E. 2d 528 (1981).

The result is: we affirm the judgment imposing liability for fraud, and we remand this case for a new trial on all the issues of damages.

Affirmed in part; new trial on the issue of damages.

Judges WEBB and BECTON concur.

PAINE, WEBBER, JACKSON AND CURTIS, INCORPORATED v. W. C. STANLEY

No. 8218SC179

(Filed 1 February 1983)

1. **Accounts § 2— claim for account stated—summary judgment proper**

In an action by plaintiff to collect the unpaid balance in defendant's commodity futures account, the trial court did not err in granting plaintiff's motion for summary judgment on its claim for an account stated since defendant did not object in writing to the accuracy of defendant's account debit balance within ten days after the mailing of the statement in accordance with the terms of the Client Commodity Agreement, and since defendant's noncompliance, having been shown by a forecast of the evidence to be uncontradicted, presented no material or substantial issue of fact to submit to the jury.

2. **Actions § 8— counterclaim for negligent breach of contract—summary judgment for plaintiff proper**

Defendant failed to forecast any evidence of a genuine material fact to support his counterclaim for negligent breach of contract where the subject matter of notice and alleged negligence arising from the performance of the contract was encompassed within the terms of the written contract, and "an omission to perform a contractual obligation is never a tort unless such omission is also the omission of a legal duty."

APPEAL by defendant from *Wood, Judge.* Judgment entered 16 December 1981 in Superior Court, GUILFORD County. Heard in the Court of Appeals 12 January 1983.

Plaintiff sued to collect the unpaid balance in defendant's commodity (potatoes) futures account. Defendant counterclaimed for damages alleging that plaintiff had been negligent in failing to properly notify defendant of adverse market conditions and increased margin requirements. Plaintiff is a brokerage firm. Defendant is a potato farmer.

Following extensive discovery, plaintiff moved for summary judgment. After a hearing the court granted plaintiff's motion for

summary judgment, ordered defendant to pay the account unpaid balance of $26,750, plus interest, and dismissed defendant's counterclaim. Defendant appealed.

Womble, Carlyle, Sandridge & Rice by Jimmy H. Barnhill and Richard T. Rice for plaintiff appellee.

Finger, Park & Parker by M. Neil Finger and Raymond A. Parker, II, for defendant appellant.

BRASWELL, Judge.

The issue on appeal is whether the court erred in granting summary judgment in plaintiff's favor and in dismissing defendant's counterclaim.

The uncontradicted facts show that about February or March 1979 the parties discussed the subject of defendant's opening a potato futures account with plaintiff through Jeff Unger, an employee of plaintiff who became defendant's broker. The completed paper work opening the account is dated 12 April 1979. During the preliminary negotiations defendant said to Mr. Unger that he was a potato farmer, that he wanted to open a commodity futures account for the purpose of hedging potato futures contracts against his potato crops, that he was an experienced commodities futures trader, and that he had sufficient assets to operate a commodities futures account. On 12 April 1979 the Client Qualification Information section of the Client Commodity Agreement listed the defendant as having liquid assets of $100,000, a total annual income of $100,000, and a net worth of 1.5 million dollars.

On 12 April 1979 defendant executed to plaintiff a Client Commodity Agreement and a Commodity Hedge letter. Although two other documents in plaintiff's possession, a Commodity Risk Disclosure Statement and a Declaration of Non-Residence, bear defendant's signature, he says he does not recall receiving them or returning them to plaintiff. After all aforementioned documents were in plaintiff's possession, the account was opened for the defendant and trading began in May 1979. All trades were made in May and June 1979. Defendant deposited funds with plaintiff to meet his initial margin requirements, which totaled $14,375.

The only difference between the parties as to trading activities occurring in the defendant's account concerns the number of contracts traded. Plaintiff's evidence shows 70 contracts. Without producing any supporting documents of his own, the defendant has asserted in answers to interrogatories and by affidavit that he only gave orders for 24 contracts.

After defendant placed his orders, regardless of the number, the market moved drastically against defendant's position. Plaintiff then liquidated defendant's account. During the 10-day period of 15 June 1979 through 25 June 1979 when the market moved against defendant, he made no effort to bring his account into balance. By 25 June 1979 the defendant's account showed a negative total equity, and plaintiff was forced to liquidate defendant's account, using its own funds to repurchase the 70 potato futures contracts. When the final transaction was concluded, the account of defendant showed a debit balance of $26,750.

The plaintiff's statement, dated 25 June 1979, of defendant's debit balance in the account was mailed to defendant's address. During discovery defendant acknowledged receipt of same and produced the 25 June 1979 statement from his own records. This undisputed receipt of statement forms the basis for plaintiff's claim for account stated.

There were ten or more verbal communications between representatives of the plaintiff and defendant during the summer of 1979. On 6 August 1979 defendant informed Bill Fossinger, an Assistant Vice President of plaintiff, "that he had a cash-flow problem and that as soon as his harvest was over, he would be in a position to clear up his debit." The defendant sent his handwritten letter, dated 12 September 1979, to plaintiff. The letter said:

"Dear Sir:

This is to confirm our telephone conversation that I have sincere desire to get our account peacefully settled.

As it looks to me now our funds should begin to come in the last of this month or the first week in October. Bear with us if you can. If you can't take whatever action you feel necessary.

Truly yours,

W. C. Stanley"

The defendant's answer filed 10 September 1980, admits the commodity account, and admits some transactions with plaintiff, but denies (for the first time according to the evidence) that he owed the plaintiff $26,750, and denied the accuracy of the account.

By counterclaim, defendant alleges that plaintiff was negligent in not properly notifying the defendant of the drop in the market, and any increased margin requirements due to the drop. The counterclaim does not mention a specific number of futures contracts purchased, but does allege: ". . . the defendant purchased through the plaintiff certain Commodity Futures *which are the subject of plaintiff's action.*" (Emphasis added.)

By reply plaintiff denies any negligence, and alleges that it did promptly notify the defendant of the drop in the market and of the increased margin requirements.

Defendant's affidavit for summary judgment purposes stated that he placed an order to sell only 24 potato futures contracts, that he paid the initial margin requirements for all 24 contracts, and that at no time after the market moved against him was he ever notified of any additional requirements, or notified that his position would be liquidated, and that he was never afforded the opportunity to limit his losses or meet margin requirements.

In order to properly understand the positions of the parties, it is necessary to consider some select paragraphs from the undisputed Client Commodity Agreement's exhibit. They are as follows:

"RESPONSIBILITY FOR LOSSES

In consideration for your carrying my account, I will in no way hold Paine, Webber, Jackson & Curtis, Inc., responsible for any losses incurred through following its trading recommendations or suggestions.

* * * *

RIGHT OF FIRM TO LIQUIDATE POSITIONS OR CANCEL OPEN ORDERS

You may, in the event of my death or whenever you consider it necessary for your protection, sell any or all property held in any of my accounts, cancel any open orders with or

without notice to me, and you may borrow or buy in any property required to make delivery against any sale, including a short sale, effected for me. *Such sale* or purchase may be public or private and *may be made without* advertising or *notice to me* and in such manner as you may determine. No demands, calls, tenders or notices which you may make or give in any instance shall invalidate this waiver on my part. At any such sale you may purchase the property free of any right of redemption *and I shall be liable for any deficiency in my accounts.*

CONFIRMATIONS AND STATEMENTS OF ACCOUNT

Confirmation of orders and *statements of my accounts shall be conclusive if I do not object in writing within ten days after you mail them to me.* Communications mailed to me at the address specified hereon shall, until you have received notice in writing of a different address, be deemed to have been personally delivered to me and I agree to waive all claims resulting from failure to receive such communications. Your failure to insist at any time upon strict compliance with any terms of this agreement on your part shall not constitute a waiver of any of your rights." (Emphasis added.)

I. PLAINTIFF'S CLAIM AGAINST DEFENDANT

[1] The plaintiff's claim is for an account stated. Within 10 days of 25 June 1979, the uncontradicted date of the plaintiff's mailing of the statement of the defendant's account debit balance to him, the defendant did not object in writing to the accuracy of the account. By such failure to object in writing in accordance with the terms of the Client Commodity Agreement the statement became conclusive as a matter of law and became an account stated. *Teer Company v. Dickerson, Inc.*, 257 N.C. 522, 126 S.E. 2d 500 (1962); *Little v. Shores*, 220 N.C. 429, 17 S.E. 2d 503 (1941).

The plaintiff's full compliance with the terms of the Client Commodity Agreement, and the defendant's noncompliance, having both been shown by a forecast of the evidence to be uncontradicted, there was no material or substantial issue of fact to submit to a jury. *Lowe v. Bradford*, 305 N.C. 366, 289 S.E. 2d 363 (1982); *City of Thomasville v. Lease-Afex, Inc.*, 300 N.C. 651, 268

S.E. 2d 190 (1980); *McNair v. Boyette*, 282 N.C. 230, 192 S.E. 2d 457 (1972).

Although the defendant would now dispute the amount owed, contending a difference in the number of contracts purchased, under the law of account stated and the Client Commodity Agreement, the defendant is precluded from attacking the underlying transaction which gave rise to the statement for $26,750. *Teer Company v. Dickerson, Inc., supra; Little v. Shores, supra.* The defendant's forecast of evidence of placing 24 potato contracts instead of 70 contracts with the plaintiff is not a genuine material fact under the parties' contract, the Client Commodity Agreement.

II. THE DEFENDANT'S COUNTERCLAIM

[2] The amended answer purports to allege a counterclaim for negligent breach of contract, and bottoms the claim on two allegations:

(1) "failing to promptly notify the defendant of the drop in the market," and

(2) "failing to promptly notify the defendant . . . of the increased margin requirements until the plaintiff had already suffered substantial losses . . . ."

The counterclaim acknowledges commodity futures were purchased through the plaintiff in the spring of 1979. While the counterclaim gives no specifics as to numbers of contracts, it does affirmatively allege that ". . . the defendant purchased through the plaintiff certain Commodities Futures which are the subject of plaintiff's action."

When all the evidence had been forecast at the hearing on the motion for summary judgment, the undisputed facts showed an express contract through the Client Commodity Agreement to deal in potato futures. This contract established the relationship and duties between the parties on the identical subject matter of the alleged counterclaim. Nothing is alleged by defendant to show a duty not arising out of contract, or to show a recognizable independent tortious breach of contract. The subject matter of notice and alleged negligence arising from the performance of the contract is encompassed within the terms of the written contract.

As stated by our Supreme Court in *Greene v. Laboratories, Inc.*, 254 N.C. 680, 689, 120 S.E. 2d 82, 88 (1961), and as cited with approval by this Court in *Construction Co. v. Holiday Inns*, 14 N.C. App. 475, 477, 188 S.E. 2d 617, 618, *cert. denied*, 281 N.C. 621, 190 S.E. 2d 465 (1972), ". . . an omission to perform a contractual obligation is never a tort unless such omission is also the omission of a legal duty." The defendant failed to forecast any evidence of a genuine material fact to support his counterclaim. *See* and compare *North Carolina State Ports Authority v. Fry Roofing Co.*, 294 N.C. 73, 240 S.E. 2d 345 (1978).

As to the trial court's granting summary judgment on the plaintiff's claim against the defendant, we find no error.

As to the trial court's granting summary judgment in favor of the plaintiff on the defendant's counterclaim, we find no error.

Affirmed.

Chief Judge VAUGHN and Judge WELLS concur.

THOMAS STEPHEN HICKS, JANE LEA HICKS, VONNIE MONROE HICKS, III, AND HENRY WEST HICKS v. JEAN S. HICKS, EXECUTRIX OF THE ESTATE OF VONNIE M. HICKS, JR. AND JEAN S. HICKS, INDIVIDUALLY

No. 8110SC1218

(Filed 1 February 1983)

Declaratory Judgment Act § 4.6; Wills § 73— action to construe will provisions— no justiciable controversy

Plaintiffs' complaint was insufficient to present a claim justiciable under the Declaratory Judgment Act and G.S. 1A-1, Rule 57 as to the interpretation of two allegedly ambiguous articles of a will where the complaint failed to allege the existence of any property subject to disposition pursuant to such articles and failed to allege that defendant executrix has made any claims or taken any actions which cast uncertainty upon plaintiffs' rights under the will.

APPEAL by plaintiffs from *Brannon, Judge.* Order entered 21 August 1981 in Superior Court, WAKE County. Heard in the Court of Appeals 2 September 1982.

This is an action under the Uniform Declaratory Judgment Act, G.S. 1-253, et seq., wherein the plaintiffs Thomas Stephen Hicks, Jane Lea Hicks, Vonnie Monroe Hicks, III and Henry West Hicks, adult children of the testator by a former marriage, seek an interpretation of Articles IV and VI of the Last Will and Testament of their father, Vonnie Monroe Hicks, Jr. The defendant, Jean S. Hicks, surviving widow and executrix of the decedent's estate, filed a response to plaintiffs' complaint which *inter alia* moved to dismiss the complaint for failure to state a claim justiciable under and by virtue of G.S. 1-253, et seq. and Rule 57 of the Rules of Civil Procedure. Defendant's answer denies that any question of fact or law arises with respect to the language of the will. A hearing was conducted. The trial court considered the motions then outstanding, heard arguments of counsel and allowed the defendant's motion to dismiss, "upon grounds set forth in said motion." The plaintiffs' action was dismissed without prejudice to any and all rights which plaintiffs may have in connection with the administration of the decedent's estate. From the dismissal of their complaint, plaintiffs appeal.

Thomas Stephen Hicks, for plaintiff appellants.

Walter L. Horton, Jr., for defendant appellee.

JOHNSON, Judge.

The question on appeal is whether the trial court erred in allowing the defendant's motion to dismiss upon the grounds set forth in the motion that plaintiffs' complaint failed to state a claim justiciable under the Uniform Declaratory Judgment Act, G.S. 1-253 et seq. and Rule 57 of the Rules of Civil Procedure. We find no error and affirm.

The Last Will and Testament of Dr. Vonnie Monroe Hicks, Jr. was admitted to probate and his surviving widow, Jean H. Hicks, qualified as the executrix of his estate on 29 January 1980. At the time of probate the will was not accompanied by a document which was incorporated therein by reference. On 14 January 1981 the plaintiffs filed an action under the Uniform Declaratory Judgment Act to interpret the provisions of Articles IV and VI of the will.

Article IV states:

> My wife, JEAN S. HICKS, is a joint owner with me with right of survivorship of funds on deposit in our names in checking and savings accounts, and of certificates of deposit, shares of stock or beneficial interests, government and municipal bonds. Our residence at 847 Holt Drive, Raleigh, North Carolina, is likewise jointly owned by us as tenants by the entireties. It is my intent that all of the foregoing property will have passed to my wife upon my death by operation of law, and not by virtue of any provision of this will. If for any reason, however, there shall be any claim, action or suit alleging or contending that any portion of the foregoing is solely owned by me, and is includable in my residuary estate, then in such event it shall be deemed that I have given, bequeathed and devised to my wife, JEAN S. HICKS, all of my interest in and to any and all such property.

Article VI states:

> I have heretofore entered into an office and expense sharing agreement with Dr. William W. Foster, effective July 1, 1977 now in full force and effect. If at the time of my death I continue to be engaged in the practice of medicine under the foregoing arrangement with Dr. Foster, or any continuation or amendment to such agreement, the same is by this reference incorporated herein as if fully set forth for the purpose of clarifying this Article. Subject to the terms and conditions of the foregoing agreement, all proceeds from the sale or disposition of all tangible property and all accounts receivable related to or arising out of my medical practice, shall be deemed included in my residuary account.

In the complaint, plaintiffs allege that by reason of contended patent and latent ambiguities in Articles IV and VI of the will "questions have arisen" as to whether certain property described passes under Article IV or into the residuary estate for distribution under Article V to the plaintiff legatees, Dr. Hicks' adult children by his former marriage. The two questions plaintiffs contend to have arisen with respect to Article IV are as follows:

> Whether funds on deposit in checking and savings accounts, and of certificates of deposit, shares of stock or beneficial in-

terests, government and municipal bonds in the name of the testator only pass to Jean S. Hicks or whether they pass into the residuary estate.

Whether shares of stock or the proceeds thereof owned by the testator and Jean S. Hicks as tenants in common but not as joint tenants with rights of survivorship pass to Jean S. Hicks or whether they pass into the residuary estate.

With respect to Article VI, plaintiffs initially presented a question as to whether the office and expense sharing agreement dated 1 July 1977, under which Dr. Hicks and Dr. William W. Foster engaged in the practice of medicine, was required to be filed as a part of the probate of the will and administration of the estate. Subsequently, copies of the agreement and an amendment thereto were filed with the Assistant Clerk of Superior Court, Wake County. By subsequent amendment to the complaint plaintiffs allege an additional question to have arisen with respect to Article VI:

"Whether the office and expense sharing agreement that the decedent entered into with Dr. William W. Foster, effective 1 July 1977, which was incorporated by reference into the will of Vonnie M. Hicks, Jr. could be properly amended subsequent to the date of execution of said will."

An action for a declaratory judgment will lie only in a case in which there is an actual or real existing controversy between parties having adverse interests in the matter in dispute. *Lide v. Mears*, 231 N.C. 111, 56 S.E. 2d 404 (1949); *Kirkman v. Kirkman*, 42 N.C. App. 173, 256 S.E. 2d 264 (1979). In this appeal, plaintiffs argue that the alleged patent ambiguity contained in Article IV and latent ambiguity contained in Article VI give rise to an "actual, genuine existing controversy" as to the proper interpretation of the will in question.

In determining whether an actual controversy exists in the present case the following principles concerning the scope of the Declaratory Judgment Act must be kept in mind:

[The Act] does not undertake to convert judicial tribunals into counselors and impose upon them the duty of giving advisory opinions to any parties who may come into court and

> ask for either academic enlightenment or practical guidance concerning their legal affairs . . .
>
> . . .
>
> While the Uniform Declaratory Judgment Act thus enables courts to take cognizance of disputes at an earlier stage than that ordinarily permitted by the legal procedure which existed before its enactment, it preserves inviolate the ancient and sound juridic concept that the inherent function of judicial tribunals is to adjudicate genuine controversies between antagonistic litigants with respect to rights, status, or other legal relations.

Lide v. Mears, supra at 117-118, 56 S.E. 2d at 409.

In *Consumers Power v. Power Co.*, 285 N.C. 434, 439, 206 S.E. 2d 178, 182 (1974), the Supreme Court defined the applicable test for determining a motion to dismiss pursuant to Rule 12(b)(6) as follows:

> A Motion to Dismiss pursuant to Rule 12(b)(6) performs the same function as the old common law general demurrer. *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161. Thus well pleaded allegations in the Complaint and such relevant inferences of fact which might be deduced therefrom are taken as true. The Motion to Dismiss will be allowed only when the Complaint affirmatively shows that plaintiff has no cause of action. *Forrester v. Garrett, Comr. of Motor Vehicles*, 280 N.C. 117, 184 S.E. 2d 858; *Sutton v. Duke, supra.* The Motion is seldom an appropriate pleading in actions for declaratory judgments, and will not be allowed simply because the plaintiff may not be able to prevail. It is allowed only when the record clearly shows that there is no basis for declaratory relief as when the complaint does not allege an actual genuine existing controversy.

Application of this test to the plaintiffs' complaint reveals that no actual, genuine and presently existing controversy exists as to construction of the will in question. Plaintiffs have made no factual allegations to support their contention that "questions have arisen" under the will. As a preliminary matter we note that the complaint contains no allegations that the defendant executrix has in any manner failed to do any act required by law or that

there is any impropriety arising from the administration of her husband's estate. Plaintiffs seek neither an accounting nor distribution. There are no allegations that there has in fact been distribution of any assets of the estate of Vonnie M. Hicks contrary to the provisions of the will, or that any such action is threatened. The complaint does not allege that defendant has made any claims or taken any actions which cast uncertainty upon plaintiffs' rights under the will.

It is not necessary for one party to have an actual right of action against another for an actual controversy to exist which would support declaratory relief. However, it is necessary that the courts be convinced that the litigation appears to be unavoidable. *Consumers Power v. Power Co., supra* at 450, 206 S.E. 2d at 189. Plaintiff's complaint contains not even the slightest hint that circumstances exist rendering litigation unavoidable.

Most importantly the complaint fails to contain allegations that (1) the decedent was the sole owner at the time of his death of any funds on deposit in checking and savings accounts, and of certificates of deposit, shares of stock or beneficial interests, government and municipal bonds; (2) the decedent was owner as tenant in common with Jean S. Hicks of shares of stock or proceeds thereof; and (3) that the office and expense sharing agreement, incorporated by reference into the will, was in fact amended subsequent to the date of execution of the will.[1]

Without even these bare factual premises, plaintiffs' complaint lacks well pleaded allegations from which relevant inferences of fact might be deduced to determine if they indeed have a cause of action against defendant. In other words, the complaint fails to allege the existence of any property or amendment to the expense sharing agreement that gives rise to the questions plaintiffs present and to actual controversy between the parties. There are simply no allegations in the complaint that defendant has advanced an interpretation of the will which conflicts with plaintiffs' understanding of the will. In fact, no particular interpretation of the will is urged by plaintiffs in their complaint.

1. A copy of the expense sharing agreement was not included in the record on appeal.

The mere fact that "questions have arisen" in the minds of the plaintiffs as to what might happen to certain categories of property, should they be shown to exist, does not mean that an actual controversy exists as to a proper construction of Article IV of the will and the respective rights of the parties thereunder. The complaint does not state what language in Article IV is patently ambiguous and what language in Article VI is latently ambiguous. Until it is clear what property Article IV will be applied to and what extrinsic fact exists rendering the language of Article VI latently ambiguous, the plaintiffs' "questions" remain academic and purely abstract. This is far too early a point in the administration of the decedent's estate to answer the questions raised by plaintiffs.

It is not required for purposes of jurisdiction under the Uniform Declaratory Judgment Act that the plaintiff allege that his rights have been invaded by the defendant prior to commencement of the action. Nevertheless, the courts have construed the law in such a manner that the jurisdiction may be protected against mere academic inquiry when the questions presented are altogether moot, arising out of no necessity for the protection of any rights or avoidance of any liability, and where the parties have only a hypothetical interest in the decision of the court. *Tryon v. Power Co.*, 222 N.C. 200, 22 S.E. 2d 450 (1942).

The plaintiffs' "questions" as they are presented in the complaint do not provide a jurisdictional basis in that settlement of the plaintiffs' rights under the will must be made in reference to their rights in particular items of property and not in the abstract. Unless and until it is alleged that certain property exists, that the office agreement was amended after the will was executed and that defendant has made conflicting or improper claims to such property or agreement, no actual controversy exists upon which declaratory relief may be predicated. The complaint fails to state a claim upon which relief may be granted.

We have carefully examined plaintiffs' other argument regarding dismissal of the complaint and find it to be without merit.

Affirmed.

Chief Judge VAUGHN and Judge HILL concur.

STATE OF NORTH CAROLINA v. PHILIP JAMES LOCKLEAR

No. 8216SC698

(Filed 1 February 1983)

1. **Criminal Law § 99.7— admonition of witness—failure to speak up and answer question**

In view of a series of inaudible answers and declinations to respond, it was not an abuse of discretion for the court, out of the jury's presence, to instruct a witness to "speak up and answer the questions" and "to answer them truthfully." Nor was it inappropriate, when the witness' conduct compelled further instructions, for the court to warn that contempt proceedings might emanate from further such conduct.

2. **Criminal Law § 99.7— instructions to witness on consequences of perjury—suggestion witness hesitating to tell truth—no reversible error**

The court's instructions on the consequences of perjury combined with its suggestion that the witness was hesitating to tell the truth because defendant was present, did not constitute reversible error where the court's remarks were not offered in the presence of the jury and thus did not invade its province, the witness did not refuse to testify, there was no indication that she changed her testimony as the result of the remarks, where there was no indication that defendant's attorney was discouraged from eliciting essential testimony, and where there was no indication that defendant's due process right to trial before an impartial tribunal was adversely affected.

APPEAL by defendant from *Morgan, Judge.* Judgment entered 29 January 1982 in Superior Court, ROBESON County. Heard in the Court of Appeals 13 January 1983.

Defendant appeals from a judgment of imprisonment entered upon his conviction for discharging a firearm into occupied property.

Attorney General Edmisten, by Assistant Attorney General Donald W. Grimes, for the State.

Adam Stein, Appellate Defender, by Lorinzo L. Joyner, Assistant Appellate Defender, for defendant appellant.

WHICHARD, Judge.

[1] Defendant contends he was denied due process rights when the court intimidated the State's principal witness, the victim of

the alleged crime, by threatening her with confinement for contempt and prosecution for perjury. Under the circumstances presented we find no error.

Defendant was indicted for discharging a firearm into a trailer while it was occupied by the State's principal witness. He had been living with the witness, although he was married to someone else. A short time before the shooting incident he had indicated he did not want to see the witness any more. At trial time, however, he had resumed the live-in relationship.

In response to the prosecutor's first question the witness stated her name. Both the prosecutor and the court immediately told her she "need[ed] to speak up." In the testimony that followed she gave a further inaudible answer and was again asked by the prosecutor to "speak up." She then commenced pausing before answering some of the questions, and eventually made no response at all to a question.

The court excused the jury, instructed the witness to "speak up and answer the questions," and allowed further examination in the absence of the jury. When the witness made no response to three attempts by the prosecutor to elicit an answer to a question, the prosecutor requested that the court instruct her to answer the question. The court told the witness: "[Y]ou have been placed under oath and it's your obligation to . . . answer the questions as they are asked of you, and to answer them truthfully."

The examination continued and there ensued both a further direction by the court to the witness to "speak up," and a further instance of the witness not responding to a question. The court thereafter again instructed the witness, in pertinent part: "You are directed to answer the questions the District Attorney [asks] you. You can be punished by contempt if you do not answer those questions."

Further questions ensued, several of which the witness paused before answering. There were further instances of the court directing the witness to answer in an audible voice, and of the witness not responding fully until a question was repeated. Thereafter the court interrupted the questioning and stated to the witness:

> Your failure to answer [the] questions truthfully, can subject you [to] an indictment charge for perjury for telling . . . an untruth under oath. I want you to understand, completely, that you must answer the questions that are asked of you, and you must answer those questions in a truthful fashion. You must tell the truth when you answer them. I do not know what your relationship is with the defendant, but my impression is that you and he have known each other for some period of time and that you are in the process of not telling the truth because . . . hesitating . . . because there is some hesitation because he is sitting here. Whether or not it's your fault for what happened, or didn't happen, you are directed to tell the truth and to answer the questions. . . . You can be put in jail for thirty days for not answering and fined five hundred dollars. . . . If you fail to tell the truth, the District Attorney could indict you for perjury, an offense which is punishable possibly up to ten years.

Examination of the witness out of the jury's presence was then completed, and direct examination before the jury resumed. On five occasions following resumption of direct examination the court had to instruct the witness to hold the microphone or to speak into it. When a sixth instance occurred, the court excused the jury, advised the witness that its "patience [was] running out," instructed her to speak audibly into the microphone, and advised her that "[t]he next time we have to do . . . this, you're going to be in the custody of the Sheriff."

> The presiding judge is given large discretionary power as to the conduct of a trial. Generally, in the absence of controlling statutory provisions or established rules, all matters relating to the orderly conduct of the trial or which involve the proper administration of justice in the court, are within his discretion.

State v. Rhodes, 290 N.C. 16, 23, 224 S.E. 2d 631, 635 (1976). In view of the iteration of inaudible answers and declinations to respond, it was not an abuse of discretion for the court, out of the jury's presence, to instruct the witness to "speak up and answer the questions" and "to answer them truthfully." Nor was it inappropriate, when the witness' conduct compelled further instructions, for the court to warn that contempt proceedings might

emanate from further such conduct. "On the contrary it was an effort on the part of the court to expedite the trial and obtain a clear understanding of the evidence. This is a proper function of the trial judge." *State v. Hickman*, 23 N.C. App. 662, 665, 209 S.E. 2d 525, 527 (1974).

[2] The court's instructions on the consequences of perjury, combined with its suggestion that the witness was hesitating to tell the truth because defendant was present, present a more serious issue. Chief Justice Sharp's admonition in this respect in *Rhodes, supra*, merits reiteration:

> [A] trial judge may, if the necessity exists because of some statement or action of the witness, excuse the jurors and, *in a judicious manner*, caution the witness to testify truthfully, pointing out to him generally the consequences of perjury. [Citations omitted.]
>
> . . . [However], whether the reference to perjury be made in or out of the presence of the jury, 'error may be found in any remark of the judge . . . which is calculated to deprive the litigants or their counsel of the right to a full and free submission of their evidence upon the true issues involved to the unrestricted and uninfluenced deliberation of a jury . . . .' [Citation omitted.] Therefore, judicial warnings and admonitions to a witness with reference to perjury are not to be issued lightly or impulsively. Unless given discriminatively and in a careful manner they can upset the delicate balance of the scales which a judge must hold evenhandedly. Potential error is inherent in such warnings, and in a criminal case they create special hazards.

Rhodes, 290 N.C. at 23, 224 S.E. 2d at 636 (emphasis in original).

The *Rhodes* opinion cites four possible hazards consequent upon the trial court's intimating that a witness has committed perjury: (1) that the court will invade the province of the jury, which is to assess the credibility of the witness and determine the facts from the evidence adduced, (2) that the witness will be caused thereby to change his testimony to fit the court's interpretation of the facts or to refuse to testify at all, (3) that the court's admonition may intimidate or discourage the defendant's attorney from eliciting essential testimony from a witness, and (4)

that the court's manner of warning a witness may adversely affect the defendant's due process right to trial before an impartial tribunal. *Id.* at 24-28, 224 S.E. 2d at 636-38. The trial court's remarks there were held reversible error because they "probably had the effect of stifling the free presentation of competent, available testimony." *Id.* at 28, 224 S.E. 2d at 638.

In *Webb v. Texas*, 409 U.S. 95, 34 L.Ed. 2d 330, 93 S.Ct. 351 (1972), on which our Supreme Court partially relied in *Rhodes*, the sole defense witness refused to testify for any purpose after the trial court admonished him concerning the consequences of perjury and threatened him with indictment and a prison sentence if he lied on the stand. The United States Supreme Court reversed the conviction, holding that the court's admonition "effectively drove [the] witness off the stand, and thus deprived the [defendant] of due process of law under the Fourteenth Amendment." 409 U.S. at 98, 34 L.Ed. 2d at 333, 93 S.Ct. at 353.

The potential hazards cited in *Rhodes*, some of which produced reversible error there and in *Webb*, did not materialize here. The court's remarks were not offered in the presence of the jury and thus did not invade its province. The witness did not refuse to testify, and there is no indication that she changed her testimony as a result of the remarks. There is no indication that defendant's attorney was discouraged from eliciting essential testimony, nor is there indication that defendant's due process right to trial before an impartial tribunal was adversely affected.

The record indicates, on the contrary, that defense counsel subjected the witness to rigorous cross-examination, and that the witness' testimony in response contained numerous statements clearly beneficial to defendant and detrimental to the State. For example, the witness testified that she told defendant she was not telling the officers the truth when she told them he shot through the trailer; that she told defendant she knew he did not shoot into the trailer; that she could not swear who shot the trailer and was not certain it was defendant; that she told the officers at the time that the car she saw was defendant's, but that she could not at trial say for certain whose car it was; and that she told defendant she knew he was not the guilty party, but she was going to say he was because she was "mad at him."

> . . . [A] slide-rule definition of 'reversible error' to measure a trial judge's comments to a witness with reference to perjury has not been formulated. . . . 'The principal questions are . . . whether acts or reference regarding perjury . . . have the effect either of stifling the free presentation of all the legitimate testimony available, or of preventing the unprejudiced consideration of all the testimony given, either of which may be sufficient to constitute reversible error.'

Rhodes, 290 N.C. at 28, 224 S.E. 2d at 638. The record here reveals neither the stifling of free presentation of all legitimate testimony available nor prevention of unprejudiced consideration of all the testimony given. Under the circumstances presented we decline to hold that the court's remarks regarding perjury constituted reversible error.

We have carefully examined defendant's other two arguments, and we find therein no basis for reversal or re-trial.

No error.

Judges ARNOLD and HILL concur.

STATE OF NORTH CAROLINA v. MELVIN JAMES

No. 8212SC500

(Filed 1 February 1983)

1. Homicide § 21.7— second degree murder—sufficiency of evidence

The State's evidence in a prosecution for second degree murder was sufficient for the jury where it tended to show that defendant shot and killed deceased with a shotgun, although defendant presented evidence tending to show that the State's chief witness actually did the shooting.

2. Criminal Law § 87.4— evidence competent on redirect examination

An officer's testimony concerning a description of an assailant given him by a witness to a shooting was admissible on redirect examination to explain testimony brought out on cross-examination, although it might not have been proper in the first instance.

3. Constitutional Law § 48— effective assistance of counsel

A defendant on trial for a homicide was not denied his right to the effective assistance of counsel by failure of his counsel to make certain objections

during the trial where most of the alleged omissions were part of what appeared to be a well-planned trial strategy not to contest the admission of evidence that the victim was killed by a certain shotgun but to contend that the State's chief witness did the shooting rather than defendant.

4. Criminal Law § 113.3— failure to charge on subordinate feature—necessity for special request

The trial court did not err in failing to instruct the jury concerning the prior inconsistent statements of a State's witness where defendant failed to request special instructions on this subordinate feature of the case.

ON a writ of certiorari to review judgment of *Preston, Judge.* Judgment entered 8 November 1979 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 16 November 1982.

Defendant was indicted for first degree murder and tried for second degree murder in the shooting death of Nathaniel "Slim" Wright. Defendant was convicted of voluntary manslaughter and sentenced to 20 years imprisonment. His appeal was not timely perfected; however, this Court allowed certiorari.

Attorney General Edmisten, by Assistant Attorney General Christopher P. Brewer, for the State.

Reid, Lewis and Deese, by Marland C. Reid, for defendant appellant.

BECTON, Judge.

I

The issues on appeal concern whether the trial court erred in denying defendant's motions to dismiss, in admitting hearsay testimony, and in failing to charge on prior inconsistent statements; and whether defendant was denied his right to the effective assistance of counsel. We have considered all of the issues, and for the reasons that follow, we find no error.

The State presented evidence tending to show that Nathaniel "Slim" Wright was shot and killed by a shotgun blast near the Prince Charles Hotel in Fayetteville on the night of 8 December 1978. Glenn Keith Brown, who appeared for the State in exchange for immunity, testified that he and defendant were in the bar of the Prince Charles Hotel where defendant, with Brown's assist-

ance, fought with Wright over some bad dope Wright had sold to defendant. After the crowd broke up the fight, Brown and defendant went to defendant's girlfriend's apartment, where defendant got his shotgun. They returned to the parking lot of the hotel where they confronted Wright. Defendant retrieved the gun from some bushes where it had been hidden by Brown, told Wright that "he was going to float," and fired the fatal shot. Defendant gave the gun to Brown as they fled the scene. Brown broke the gun down and threw it into a creek.

Brown and defendant went to Henry Jackson's house where they hid overnight. Jackson testified that the two men came to his house that night stating that they were in trouble. Defendant told Jackson that he had shot Wright.

Defendant presented evidence tending to show that Brown shot Wright. He testified that after the fight he went to his sister's house. As he came out of his sister's house, he was asked by Brown to go back to the hotel. As they rode to the hotel, he noticed that Brown had a gun. Upon arrival, they parted. He did not see Brown until later that night when Brown ran up to him and said "I told him (Wright) that I would get even with him." They spent the night at his aunt's house.

The aunt verified that they spent the night there. Brown's former coach testified that he overheard Brown say that he shot Wright but defendant was going to take the rap for it. Other witnesses testified that defendant was not in the area of the hotel when the shooting occurred.

II

[1] Defendant first argues that the trial court erred in denying his motions to dismiss because the State's evidence essentially consisted of the inherently incredible testimony of Brown. We find no merit in this argument.

The rules of law governing the determination of a motion to dismiss are familiar. In ruling on a motion to dismiss, the trial court does not pass upon the credibility of the witnesses for the prosecution, or take into account any evidence contradicting them offered by the defense. The trial court merely considers the testimony favorable to the State, assumes it to be true, and deter-

mines its legal sufficiency to sustain the allegations of the indictment. The weight and credibility of the testimony are matters for the jury. *State v. Lester*, 294 N.C. 220, 240 S.E. 2d 391 (1978). For the State's evidence to withstand a motion to dismiss, there must be substantial evidence of each of the essential elements of the offense charged. *State v. Smith*, 40 N.C. App. 72, 252 S.E. 2d 535 (1979).

Applying these principles, we have reviewed the record and find that there was adequate evidence to take the case to the jury. Brown's testimony alone was sufficient to take the case to the jury. The weight and credibility of Brown's testimony were to be determined by the jury. Moreover, there was corroborating testimony from Henry Jackson, who testified that defendant admitted shooting Wright. Several witnesses testified that they saw two black males, one carrying a gun, running from the scene.

III

[2] Defendant next contends that the trial court erred in admitting hearsay testimony by a police officer concerning a description he had been given. The police officer testified on cross-examination that nothing in his investigation tied defendant to the case except a description of the assailant he had been given by a witness to the shooting. On redirect examination, the officer identified the witness as Mr. Tyndall. After the court overruled defendant's objection, he stated that the description given him by Tyndall was of "a black male approximately 27 years of age, 150-160 pounds, about five foot seven or eight."

This testimony was admissible on redirect since it explained the testimony brought out on cross-examination, although it might not have been proper in the first instance. *See State v. Albert*, 303 N.C. 173, 277 S.E. 2d 439 (1981). Moreover, the admission of the description was not prejudicial in light of defendant's defense that Brown did the shooting. The description also could have fit Brown. Brown, on cross-examination by defendant's counsel, described himself at the time of the shooting as being 5'9" tall, weighing 150 pounds, and having long sideburns, a goatee and mustache. Brown was also in the courtroom so that the jury was able to compare the description with Brown. Accordingly, this assignment of error is overruled.

IV

[3] Defendant next contends that he was denied his right to effective assistance of counsel. The alleged deficiencies in representation concern the failure to object to testimony relating to the shotgun and to certain hearsay testimony, the failure to object, or to request limiting instructions concerning the admission of corroborative testimony, the failure to make post-verdict motions, and the failure to perfect defendant's appeal.

While it is true that "[u]sually, the question of alleged failure of counsel to render effective representation arises on post conviction proceedings, . . . [it is also a fact that] the question can be considered on direct appeal." *State v. Hensley*, 294 N.C. 231, 239, 240 S.E. 2d 332, 337 (1978). *See State v. Brooks*, 38 N.C. App. 48, 247 S.E. 2d 38. In light of the Supreme Court's decision in *Hensley*, our decision in *Brooks*, and because of the facts in this case, we address defendant's contention on direct appeal.

The recently adopted test in North Carolina for determining whether there has been effective assistance of counsel is the standard used by the United States Supreme Court in *McMann v. Richardson*, 397 U.S. 759, 25 L.Ed. 2d 763, 90 S.Ct. 1441 (1970). *State v. Vickers*, 306 N.C. 90, 291 S.E. 2d 599 (1982).

Under *McMann*, the test is whether the assistance given was "within the range of competence demanded of attorneys in criminal cases." *McMann v. Richardson*, 397 U.S. at 771, 25 L.Ed. 2d at 773, 90 S.Ct. at 1449. We will not second guess counsel on questions of trial strategy. Each claim must be considered on a case by case basis. *State v. Sneed*, 284 N.C. 606, 201 S.E. 2d 867 (1974).

Applying these principles, we have examined each of the alleged omissions and find that defendant was not denied his right to effective assistance of counsel. Most of the alleged omissions were part of what appeared to be a well-planned trial strategy not to contest the admission of evidence that Wright was killed by a certain shotgun but to contend that Brown did the shooting rather than defendant. Moreover, even had trial counsel made all of the objections, the outcome of the trial would likely have been the same. Trial counsel conducted extensive cross-

examination of the key State witnesses and presented evidence on behalf of defendant.

With regard to defendant's claim that his trial counsel failed to perfect the appeal, we point out (1) that the only remedy would be appellate review, not a new trial; (2) that our grant of the writ of certiorari renders moot this claim; and (3) that the evidence, in any event, tends to show that trial counsel failed to perfect the appeal because defendant told him to drop the appeal.

V

[4] Defendant finally contends that the trial court erred by omitting from its charge to the jury an instruction as to the prior inconsistent statements of Brown. The trial court instructed on all the essential elements of the crime charged; thus, it charged on all the substantial features of the case. *State v. Hines*, 54 N.C. App. 529, 284 S.E. 2d 164 (1981). Following the instructions, both counsel were specifically asked if they desired further instructions. Both responded that they did not. Defendant's failure to request special instructions on this *subordinate feature* of the case bars him from complaining of that omission here. *Id. See, State v. Boyd*, 278 N.C. 682, 180 S.E. 2d 794 (1971).

For the foregoing reasons, we find

No error.

Judges HEDRICK and WEBB concur.

LUMBEE RIVER ELECTRIC MEMBERSHIP CORPORATION AND NORTH CAROLINA ELECTRIC MEMBERSHIP CORPORATION v. THE CITY OF FAYETTEVILLE, THE PUBLIC WORKS COMMISSION OF THE CITY OF FAYETTEVILLE, AND SOUTHWEST DEVELOPMENT CORPORATION OF CUMBERLAND COUNTY

No. 8212SC173

(Filed 1 February 1983)

Electricity § 2.3— furnishing electric service to subdivision—granting motion to dismiss for defendants error

The trial court erred in granting defendants' motion to dismiss at the close of plaintiffs' evidence in an action which plaintiffs instituted to seek a

temporary restraining order and preliminary and permanent injunctions to prohibit defendants from furnishing electric service to their subdivision. Plaintiff, a non-profit electric membership corporation owned public utility, was subject to more governmental regulation than the Public Works Commission, the subdivision is located four miles outside the Fayetteville city limits, and the extension outside the corporate limits of the electric service may or may not be within reasonable limitations. G.S. 160A-312.

APPEAL by plaintiffs from *Braswell, Judge.* Judgment entered 1 October 1981 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 9 December 1982.

Plaintiffs appeal from the dismissal of their action and the entry of judgment in favor of defendants.

Southwest Development Corporation (Southwest), developer of Montibello, a residential subdivision located four miles outside the Fayetteville city limits, entered into a contract with the defendant Public Works Commission (PWC) in which the PWC agreed to provide electric power to Montibello. Plaintiffs instituted this action seeking a temporary restraining order and preliminary and permanent injunctions to prohibit the PWC from furnishing electric service to Montibello. Plaintiffs alleged that plaintiff, Lumbee River Electric Membership Corporation (Lumbee River) had been granted the exclusive right to serve the area pursuant to a territorial assignment by the North Carolina Utilities Commission (Utilities Commission). Defendants answered, denying the material allegations of the complaint.

The parties stipulated to the following facts before trial: In 1969, the Utilities Commission, pursuant to G.S. 62-110.2(c)(1), assigned the territory including the Montibello subdivision to plaintiff Lumbee River Electric Membership Corporation (Lumbee River), a non-profit electric membership corporation owned public utility. Lumbee River, subject to substantially more governmental regulation than Public Works Commission, is required by law to extend electric service to any consumer requesting service from it within its assigned territory. Lumbee River operates a district office approximately two miles from the subdivision and currently has in place a single-phase 7.2 power line directly across from the subdivision property approximately 170 feet from the subdivision entrance. This line provided power to a resident located on the subdivision tract until 1957, after which the line to

the residence was removed. Lumbee River also has a three-phase 7.2/12.5 kv line approximately 1,850 feet from the subdivision. It is ready, willing and able to serve residents in the Montibello subdivision.

Public Works Commission, which provides power within the City of Fayetteville and outside the city limits, is an agency of the City of Fayetteville. Its rates are not regulated by the Utilities Commission, nor is it required to extend service to any consumer outside the city limits. It may, however, as allowed by G.S. 160A-312, extend service beyond the city limits "within reasonable limitations." Pursuant to the contract with Southwest, it has constructed 1,148 feet of three-phase 14.4/24.9 kv electric power line running parallel to the Lumbee River line to the entrance of the subdivision. The parties also stipulated:

> If Lumbee River Electric Membership Corporation is successful, it will pay PWC the total installed cost of the total electric system devoted solely to said subdivision and the total purchase cost of any spare dual voltage transformers purchased by PWC for such electric service less the costs of any non-dual voltage transformers.

The case was tried before a judge sitting without a jury. At the close of plaintiff's evidence, defendants moved for a directed verdict. In allowing the motion, the court made findings of fact and concluded that the extension of services outside the city limits by the Public Works Commission was "within reasonable limitations" within the meaning of G.S. Sec. 160A-312. The court accordingly entered judgment in favor of defendants.

Crisp, Davis, Schwentker and Page, by William T. Crisp and Joyce L. Davis, for plaintiff appellants.

Reid, Lewis and Deese, by Richard M. Lewis, Jr., and Renny W. Deese, for defendant appellees.

VAUGHN, Chief Judge.

In a trial without a jury, the proper motion to test the sufficiency of the plaintiff's evidence to show a right to relief is a motion to dismiss pursuant to Rule 41(b) of the North Carolina Rules of Civil Procedure. *Tanglewood Land Co. v. Wood*, 40 N.C. App.

133, 252 S.E. 2d 546 (1979). Accordingly, we will treat defendants' motion for a "directed verdict," as a motion to dismiss. Plaintiffs argue that the court erred in allowing the motion to dismiss.

In ruling on a motion made under Rule 41(b), the judge may weigh the evidence, find the facts against plaintiff and sustain defendant's motion at the conclusion of his evidence even though plaintiff has made out a prima facie case which would preclude a directed verdict for defendant in a jury case. *Helms v. Rea*, 282 N.C. 610, 194 S.E. 2d 1 (1973). We conclude that the facts found and the stipulations of the parties do not support the conclusion that the proposed extension of services to the subdivision is "within reasonable limitations."

The facts in the present case are substantially similar to those in *Domestic Electric Service, Inc. v. City of Rocky Mount*, 285 N.C. 135, 203 S.E. 2d 838 (1974). Domestic Electric Service, Inc. (Domestic), sought an injunction against the City of Rocky Mount to prevent it from extending electric service to an apartment complex outside the city limits in a territory that had been assigned to Domestic. The trial court refused to grant the injunction, concluding that the extension was within reasonable limitations within the meaning of G.S. 160A-312, which reads in pertinent part:

> A city shall have authority to acquire, construct, establish, enlarge, improve, maintain, own, operate and contract for the operation of any or all of the public enterprises as defined in this Article to furnish services to the city and its citizens. Subject to Part 2 of this Article, a city may acquire, construct, establish, enlarge, improve, maintain, own, and operate any public enterprise outside its corporate limits, *within reasonable limitations*, but in no case shall a city be held liable for damages to those outside the corporate limits for failure to furnish any public enterprise service. (Emphasis added.)

On appeal, this Court reversed the judgment of the trial court. 20 N.C. App. 347, 201 S.E. 2d 508 (1974). The Supreme Court affirmed our decision, but on different grounds, holding that the extension outside the corporate limits was not within reasonable limitations. Justice Lake wrote:

> It is equally clear that without legislative authority the (city) would not be permitted to extend its lines beyond the corporate limits for the purpose of selling electricity to nonresidents of the city. . . . Its power to extend its lines and distribute electric current beyond its corporate boundaries is expressly restricted to "reasonable limitations." . . . The primary function of a municipal corporation is to provide local government within its limits and authorized services to its inhabitants, not to engage in business enterprises for profit outside its corporate limits. . . . The term "within reasonable limitations" does not refer solely to the territorial extent of the venture but embraces all facts and circumstances which affect the reasonableness of the venture. (Citations omitted.)

285 N.C. at 144, 203 S.E. 2d at 844. In concluding that the extension beyond the city limits exceeded reasonable limitations, Justice Lake found the following facts and circumstances to be decisive: Domestic, the investor-owned utility, had been assigned the territory by the Utilities Commission, had its service lines in the immediate vicinity of the apartments, and was ready, willing, and able to serve the apartment complex. There was nothing to indicate that its service would not be adequate. Domestic's rates were subject to regulation by the Utilities Commission, while the city's rates were subject to no regulation except by the city. Substantially all of those factors are present in the case before us. Moreover, *Domestic Electric* involved a contiguous tract, part of which was inside the city limits, and the controversial part of which was outside the city limits. In the present case, however, the Montibello subdivision is located four miles outside the Fayetteville city limits. Hence, Lumbee River has a more favorable case.

Defendants argue that the General Assembly, by revising and consolidating the Charter of the City of Fayetteville, authorized the extension of electric service by the city to anywhere in Cumberland County as provided in Section 6.19 of the Charter. *See,* 1979 N.C. Sess. Laws Ch. 557. This revision occurred in 1979, well after the General Assembly had adopted the Electric Act in 1965 of which G.S. 160A-312 is a part and after the *Domestic Electric* decision. According to defendants, this action by the General Assembly reinforced the city's right to extend its

services outside the city limits. This argument is not persuasive. As a general rule, a municipal corporation has only such powers granted to it by the General Assembly in its specific charter or by the general laws of the State applicable to all municipal corporations, and the powers granted in the charter will be construed together with those granted in the general statutes. *Riddle v. Ledbetter*, 216 N.C. 491, 5 S.E. 2d 542 (1939). Thus, construing the Charter together with G.S. 160A-312, the City of Fayetteville can only extend electric service in Cumberland County "within reasonable limitations."

Although on the evidence and stipulations in this record plaintiff was entitled to judgment as a matter of law, the judge terminated the trial at the close of plaintiff's evidence. It would have been better to have waited until defendant offered its evidence, if any. *Helms v. Rea*, supra. As a practical matter, there appears to be little dispute as to the facts. Procedurally, however, defendant is entitled to offer any evidence it might have to compel a result different from that reached in this opinion.

The judgment of dismissal against plaintiff must be reversed. The case is remanded for proceedings not inconsistent with this opinion.

Reversed and remanded.

Judges WEBB and WHICHARD concur.

ODELL WILLIAMSON AND WIFE, VIRGINIA WILLIAMSON v. J. MILLER POPE, JR. AND WIFE, HELEN OTIS POPE, D/B/A WINDS STORE

No. 8213DC128

(Filed 1 February 1983)

1. Deeds § 19.5— enforcement of restrictive covenant—no laches

Plaintiffs were not barred by laches from enforcing a residential restrictive covenant, even if defendants built a convenience store on their lot in 1978, where the male plaintiff requested the defendants to cease operations of the store when he first found out about the store, defendants told him that the store was only for their motel guests and not for the general public, and plaintiffs began proceedings to enforce the restrictive covenant when they learned that the store was open to the general public.

2. **Deeds § 19.5— residential restrictive covenant—acquiescence in use of property for motel—right to enforce against convenience store**

Plaintiffs' waiver of any right to object to a motel on property subject to a residential restrictive covenant did not waive their right to enforce the covenant against a convenience store, which is a much more radical departure from the permitted use.

3. **Deeds § 19.6— residential restrictive covenant—no waiver of right to enforce**

A residential restrictive covenant in defendants' deed could not be waived because plaintiff developers leased some property in the development to a town for a water tower and conveyed an unrestricted lot.

4. **Deeds § 19.6— residential restrictive covenant—no fundamental change in neighborhood**

There was no substantial, radical and fundamental change in a development so as to render a residential restrictive covenant unenforceable against the operation of a convenience store on property in the development.

APPEAL by defendants from *Wood, Judge.* Judgment entered 6 November 1981 in District Court, BRUNSWICK County. Heard in the Court of Appeals 18 November 1982.

Plaintiffs brought this action to enforce a restrictive covenant which, they alleged, was breached by defendants.

Plaintiffs' and defendants' pleadings, depositions, and affidavits contained the following. Plaintiffs, who originally owned ninety percent of Ocean Isle, subdivided the island into four sections: A, B, C, and D. Plaintiff, Odell Williamson, sold lots in each section, the lots were subject to restrictive covenants limiting the use to residential purposes with certain allowances for commercial development in limited areas. The restrictive covenants were included in the deeds for each lot.

Plaintiffs alleged that defendants, who have owned a motel on Ocean Isle since 1973, breached the covenant by building a convenience store. Defendants' store sells groceries, beachware, and other items to the public. Plaintiffs requested a permanent injunction, prohibiting defendants from operating the store in violation of the restrictive covenant.

Defendants admitted they built a store on their property, but alleged that plaintiffs could not enforce the restrictive covenant because plaintiffs acquiesced in numerous violations of the covenant and were estopped from enforcing it. Defendants also alleged that the restrictive covenant was no longer in effect be-

cause "there has been such a substantial and radical change in the character of the property surrounding defendants' property from a residential to a commercial character that enforcement of the restrictions would be inequitable to the defendants and all other property owners similarly situated within the subdivision."

Defendants also contended that there has never been a general plan or scheme in Ocean Isle Beach, and alleged that there were several blocks which were changed from residential to industrial. Defendants asserted the affirmative defense of laches, claiming plaintiffs were barred from enforcing the covenant because defendants have operated a store, in violation of the restrictive covenant, since 1974.

In his affidavit and deposition, plaintiff, Odell Williamson, said that all of the beach is residential, the major exception is a T-shaped area in the entryway to the beach in section C, which is one and a half miles from defendants' store. Plaintiff said that there are several blocks in section A which are commercial and two blocks with no residential restrictions, which are undeveloped. According to plaintiff, defendants originally sold items from their motel office to their motel guests in 1977, and did not build their store until 1979. He said that when he first learned of the store, he asked defendants to cease their operation and was told that the store was only for the motel guests. When he found out that it was for the general public, he sought an injunction to enforce the restrictive covenant.

Plaintiffs and defendants moved for summary judgment. The trial judge granted plaintiffs' motion.

Walton, Fairley and Jess, by Elva L. Jess, for plaintiff appellees.

Frink, Foy and Gainey, by Henry G. Foy, for defendant appellants.

VAUGHN, Chief Judge.

[1] Defendants assign as error the trial judge's grant of plaintiffs' motion for summary judgment. Summary judgment should be rendered "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). Defendants' first argument is that summary judgment was improperly granted because there is an issue as to several material facts. An issue is material if the facts alleged constitute a legal defense, or affect the result of the action, or if the resolution of the issue is so essential that the party against whom it is resolved may not prevail. *Kessing v. National Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). Defendants claim that the year they began to operate their store is at issue. Plaintiff, Odell Williamson, said, in his affidavit, that defendants began to operate the store "sometime in 1979." Defendant Pope said, in his deposition, that they began to operate the store in 1978 or 1979. This is not a material fact in issue. It does not constitute a defense, or affect the result of the action. Even if the store was built in 1978, it would not support defendant's arguments, including his argument that plaintiffs are barred by laches. Laches is an affirmative defense. It must be pleaded, and the burden of proof is on the party who asserts the defense. *Taylor v. City of Raleigh*, 290 N.C. 608, 227 S.E. 2d 576 (1976).

> In equity, where lapse of time has resulted in some change in the condition of the property or in the relations of the parties which would make it unjust to permit the prosecution of the claim, the doctrine of laches will be applied. Hence, what delay will constitute laches depends on the facts and circumstances of each case. Whenever the delay is mere neglect to seek a known remedy or to assert a known right, which the defendant has denied, and is without reasonable excuse, the courts are strongly inclined to treat it as fatal to the plaintiff's remedy in equity, even though much less than the statutory period of limitations, if an injury would otherwise be done to the defendant by reason of the plaintiff's delay.

Teachey v. Gurley, 214 N.C. 288, 294, 199 S.E. 83, 88 (1938).

In this case, plaintiff Odell Williamson's uncontradicted testimony is that when he first found out about the store he requested defendants to cease operations, and they told him the store was only for their guests and not for the general public. When he learned that the store was open to the general public, he began proceedings to enforce the restrictive covenants. Clearly,

any delay in plaintiff's action was not due to neglect. Moreover, defendants do not contend that the store was not opened in 1979, they merely say that they are not sure whether it was 1978 or 1979. This is not a material fact in issue.

The second fact which defendants contend is at issue is a contradiction in plaintiff's testimony as to which areas are residential and which are commercial. Plaintiff, however, did not contradict himself. In his affidavit, he said that all the property on the beach is residential, but the "major exception" is the T-shaped area in the entrance to the beach in section C which is commercially developed. In his deposition, he said there are two blocks, 54 and 55, in section A which are unrestricted, but undeveloped. Section A also has a section of thirteen blocks designated as commercial property. This is also not a material issue of fact.

[2] Defendants' next argument is that the trial judge erred in granting plaintiffs' motion for summary judgment as a matter of law. Defendants contend that they have operated a motel, which is a commercial enterprise, since 1972, and a store (inside the motel) since 1977, so plaintiffs have acquiesced in the violation of the restrictive covenant and are barred from enforcing it. A similar issue was addressed in *Sterling Cotton Mills, Inc. v. Vaughan*, 24 N.C. App. 696, 212 S.E. 2d 199 (1975). In that case, a subdivision of sixty-two lots was subject to residential restrictive covenants. Four of the lots were, in fact, used for commercial purposes: a snack bar, a car repair shop, a used car lot, and a fabric shop. Defendant's mother had operated the snack bar on his lot, number 201, prior to 1956. Defendant began operating the snack bar in 1960, and continued until 1973. The snack bar sold sandwiches, soft drinks, cigarettes, groceries, hamburgers, hot dogs, beer, wine, and kerosene. In 1973, defendants converted the building to the "Tar Heel Lounge," painted it dark red with black trim, painted the windows black, and sold beer for consumption on the premises. Plaintiffs brought a declaratory judgment action to enforce the restrictive covenant. The trial court held that plaintiffs could enforce the covenant to restrict the neighborhood to residential use only and ordered defendants to cease using their property for other than residential purposes. In affirming the trial court, this Court disagreed with defendant's argument that the plaintiffs acquiesced in defendant's business operations, holding that a property owner has not waived his rights to en-

force restrictive covenants by his failure to take notice of violations which do not affect him.

In this case, defendants have made a more drastic change in the use of the property than in *Sterling Cotton Mills.* Defendants' motel, which rented units by the night, week, or month, although commercial, was somewhat residential in nature, but their convenience store was obviously a breach of the residential restrictive covenant. Plaintiffs' waiver of any right to object to the motel did not waive their right to enforce the covenant against the store, a much more radical departure from the permitted use.

[3, 4] Defendant also argues that plaintiffs have waived the residential restrictive covenant and cannot enforce it because they violated it themselves by leasing some property to the Town of Ocean Isle Beach for a water tower, and by conveying an unrestricted lot. We do not agree. The restrictive covenant was in defendants' deed and could not be waived because of plaintiffs' conveyances of other property to third parties. In determining whether the residential restrictive covenant is abandoned and unenforceable, the crucial factor is whether the character of the surrounding area has changed. In this case, even when viewed in the light most favorable to defendants, the lots which are not residential are a very small percentage of the entire property. Out of a total of about sixty-nine blocks, eleven full blocks and two half blocks in section A are used for commercial purposes. Two other blocks are not restricted, but are undeveloped. Eight blocks in section C are commercial. No blocks in sections B or D are zoned commercial. The main commercial area, in section C, is in the entrance to the island in a small section of the beach, about one and a half miles from defendants' property. In general, restrictive covenants are unenforceable only if there is a substantial, radical, and fundamental change in the development protected by the restrictive covenants. *Starkey v. Gardner,* 194 N.C. 74, 138 S.E. 408 (1927). Our Supreme Court quoted with approval from *Rombauer v. Compton Heights Christian Church,* 328 Mo. 1, 40 S.W. 2d 545: "No hard and fast rule can be laid down as to when changed conditions have defeated the purpose of restrictions, but it can be safely asserted the changes must be so radical as practically to destroy the essential objects and purposes of the agreement." *Tull v. Doctors Building, Inc.,* 255 N.C. 23, 39, 120 S.E. 2d 817, 828 (1961); *accord, Sterling Cotton Mills v. Vaughan,*

24 N.C. App. 696, 212 S.E. 2d 199 (1975). In this case, it is clear that only a small fraction of the property is used commercially, the character of the development is almost completely residential. There has not been a substantial, radical and fundamental change, and the restrictive covenant remains enforceable so as to prohibit the operation of the store. Since there is no issue as to any material fact and plaintiffs are entitled to judgment as a matter of law, the trial court was correct in entering summary judgment for the plaintiffs.

Affirmed.

Judges WELLS and WHICHARD concur.

JAE KYU PARK v. SLEEPY CREEK TURKEYS, INC., A NORTH CAROLINA CORPORATION; "RED" WILLIFORD; ELMO LONG; KATSUYA GOTO; HIRO NAKANO; AND AMERICAN CHICK SEXING ASSOCIATION, D/B/A AMCHICK

No. 8210SC187

(Filed 1 February 1983)

1. **Process § 1.1; Rules of Civil Procedure § 4— service of process on sole proprietorships—defective**

Service of process was defective where plaintiff failed to comply with the mandatory requirements of G.S. 1A-1, Rule 4(j)(1) for service of process on a sole proprietorship, and attempted service instead on defendant as an association under G.S. 1A-1, Rule 4(j)(8). Defendant, its assumed name to the contrary notwithstanding, was not an "unincorporated association" but was a sole proprietorship owned and operated by one person. The fact that that person signed the registered mail receipt and thereafter acquired actual notice of the lawsuit did not remedy the failure of plaintiff to address the complaint and summons to the owner personally as required by Rule 4(j)(1).

2. **Process § 9.1— minimum contacts—finding of lack of jurisdiction unsupported**

The trial judge erred in dismissing plaintiff's action for lack of personal jurisdiction where there was ample evidence of "minimum contacts" between defendant and North Carolina in that there were two longstanding contracts between defendant and North Carolina hatcheries, performance of the contracts had been over a twelve year period, and the payment arrangements called for by the contract were such that periodic payments of plaintiff's earnings were routed from North Carolina to defendant and subsequent payment by defendant to plaintiff in North Carolina. G.S. 1-75.4.

APPEAL by plaintiff from *Preston, Judge.* Judgment entered 12 November 1981 in Superior Court, WAKE County. Heard in the Court of Appeals 11 January 1983.

This is a civil action arising out of the allegedly wrongful interference with and termination of a contract between plaintiff Jae Kyu Park (hereinafter "Park") and David K. Nitta, trading as American Chick Sexing Association (hereinafter "Amchick"). Park's first cause of action is based upon injurious falsehood, slander, and alleged tortious interference by the other named defendants with Park's contractual relationship with defendant Amchick. Park's second cause of action is based upon defendant Amchick's alleged wrongful breach of its contractual relationship with Park, which consisted of defendant Amchick's alleged wrongful and unlawful discharge of Park. Defendant Amchick filed a motion to dismiss on grounds of failure to state a claim on which relief can be granted, lack of personal jurisdiction, insufficiency of process and of service of process, and *forum non conveniens.*

Execution of the contract between Park and Amchick and the subsequent performance of the duties and obligations recited therein form the basis for this assertion of jurisdiction over defendant Amchick by the courts of North Carolina.

On or about 17 December 1979, Park and "David K. Nitta trading as AMERICAN CHICK SEXING ASSOCIATION" entered into a "Subcontractor's Agreement." Paragraph 14 of the agreement states it ". . . shall become binding upon being signed by Subcontractor and accepted by Amchick and being mailed to Subcontractor." The agreement was signed by Park, accepted by David K. Nitta, Directing/Executive Manager for defendant Amchick, and was mailed to Park shortly thereafter.

The agreement recites that Amchick has entered into contracts with hatcheries in the "Raleigh, N.C. Area" and that Park "desires to subcontract the aforesaid hatchery contracts." Defendant Amchick is obligated by paragraph 3 to "transfer(s) and assign(s)" and Park is obligated to "accept(s)" hatchery contracts for the Raleigh area. It describes the monetary consideration Park should receive under the terms of the agreement, states that Park "shall be bound by and responsible for the faithful performance and completion of each hatchery contract accepted by

him or which he is obligated to accept . . .", and authorizes Amchick to "deduct, retain or otherwise procure from (Park's) chick sexing fees paid or payable by hatchery, 10% of the said fees, and, if deemed necessary by Amchick, an additional 20% thereof" in lieu of a commercial performance bond.

Park worked under this and similar subcontractor's agreements from March of 1968 until 13 January 1981, and at the Sleepy Creek Turkey Hatchery in Goldsboro, North Carolina, from March of 1969 until 13 January 1981 when he was advised by Amchick not to return to work. While Park worked at Sleepy Creek, he was paid for his services by Amchick, which, having been paid by Sleepy Creek, deducted its commission and remitted the balance to Park.

On 14 January 1981, Amchick managers Roth and Okazaki telephoned Park at his home in Garner, North Carolina, to tell him that he could no longer work as a sexor at Sleepy Creek Turkey Hatchery because he made too many mistakes. Several calls were exchanged on 14 and 15 January between Park and Amchick managers Roth and Okazaki.

The trial judge granted defendant Amchick's motions to dismiss for lack of personal jurisdiction, for insufficiency of process, and for insufficiency of service of process and plaintiff appealed.

Bode, Bode & Call by Robert V. Bode and Howard S. Kohn for the plaintiff-appellant.

Moore, Van Allen and Allen by Charles D. Case and Dean M. Harris, for defendant-appellee American Chick Sexing Association, d/b/a Amchick.

EAGLES, Judge.

Two issues are raised in this appeal—(1) whether defendant Amchick was properly served with process in this action and (2) whether there are sufficient minimum contacts with this State to authorize *in personam* jurisdiction over defendant as a function of our long arm statute, G.S. 1-75.4, and as a matter of constitutional due process.

I.

[1] Plaintiff contends that service of process is adequate because actual notice of the lawsuit was received by D. K. Nitta. We hold that service of process was defective in that plaintiff Park failed to comply with the *mandatory* requirements of G.S. 1A-1, Rule 4(j)(1) for service of process on a sole proprietorship, and attempted service instead on Amchick as an association under G.S. 1A-1, Rule 4(j)(8). American Chick Sexing Association, its assumed name to the contrary notwithstanding, is not an "unincorporated association" but is a sole proprietorship owned and operated by David K. Nitta. This is apparent from the first two lines of the printed "Subcontractor's Agreement" which was signed by plaintiff Park and which is at the heart of this dispute.

> This agreement is made in Lansdale, Pennsylvania by and between *David K. Nitta* trading as AMERICAN CHICK SEXING ASSOCIATION (hereinafter called "Amchick") and Jae Kyu Park (hereinafter called "Subcontractor"). (Emphasis added.)

Plaintiff does not dispute the fact that defendant Amchick, though operating under an assumed name and being called an association, is not an association. But defendant Nitta, trading as Amchick, did not receive service of process as required under Rule 4(j)(1) "[B]y delivering a copy of the summons and of the complaint to him or by leaving copies at the defendant's dwelling house or usual place of abode. . . ." The complaint and summons were sent by registered mail addressed to George Okazaki, executive manager of Amchick. The fact that D. K. Nitta signed the registered mail receipt for Okazaki and may have thereafter acquired actual notice of the lawsuit does not remedy the failure of plaintiff to address the complaint and summons to D. K. Nitta personally as required by Rule 4(j)(1).

"If a statute specifies that certain requirements must be complied with in the process of serving summons, failure to follow these requirements results in a failure of service." *Lynch v. Lynch*, 302 N.C. 189, 196, 274 S.E. 2d 212, 218 (1980).

II.

[2] Though our holding as to the service of process will uphold dismissal of this action against Amchick, we consider it ap-

propriate to also address the jurisdictional question. Plaintiff contends that the trial court erred in dismissing the action for lack of jurisdiction over D. K. Nitta and Amchick. The findings of the trial judge that defendant Amchick was "not engaged in substantial activity" and that the subcontract "has no significant connection with" North Carolina are not supported by the evidence. There is ample evidence of "minimum contacts" between defendant Amchick and North Carolina, i.e., two long standing oral hatchery contracts between Amchick and North Carolina hatcheries, performance over an extended period from 1968 through 1980 of the Sleepy Creek contract in North Carolina, and the payment arrangements called for by the contract by which periodic payments of Park's earnings were routed from Sleepy Creek Hatchery in North Carolina to Amchick and subsequent payment by Amchick to Park in North Carolina. The evidence pertaining to the contract and its performance clearly demonstrates sufficient contacts with North Carolina to satisfy both the statutory requirements of G.S. 1-75.4 and the constitutional requirements of due process. *Goldman v. Parkland*, 7 N.C. App. 400, 173 S.E. 2d 15 (1970). The trial judge erred in dismissing the action for lack of personal jurisdiction.

The trial judge's order dismissing the action for insufficiency of service of process was appropriate and is

Affirmed.

Judges HEDRICK and JOHNSON concur.

STATE OF NORTH CAROLINA v. JERRY LOWE, ALIAS TERRY WAYNE LOWE

No. 8216SC404

(Filed 1 February 1983)

1. Criminal Law § 99.9— questions by trial court—no expression of opinion

The trial judge in a breaking or entering and larceny prosecution did not express an opinion on the evidence in asking the victim to state her opinion as to the value of her stolen television set or in asking the victim whether she had given anyone permission to break into or enter her home or to take her televi-

sion set, since a judge may ask questions which elicit testimony proving an element of the State's case so long as he does not comment on the strength of the evidence or the credibility of the witness.

2. **Larceny § 7.1— lack of consent by victim—intent to permanently deprive victim of property**

In a prosecution for larceny of a television set, the evidence was sufficient for the jury to find a lack of consent on the part of the victim to defendant's taking of her television set and that defendant intended to deprive the victim permanently of the television set where the victim properly testified that she did not consent to defendant's taking of her television set, and where other evidence tended to show that defendant was in a group of two or more men who went into the victim's house and removed the television set to the woods behind her house, and that defendant fled from the scene when the victim's friends came to her house.

3. **Larceny § 9— felonious larceny—value of stolen property—no special finding by jury**

Where the indictment charged that the value of stolen property was more than $400.00, and the only evidence of value was that the stolen property was worth $800.00, it was not necessary for the jury to make a special finding in its verdict that the property was worth more than $400.00 in order to return a verdict finding defendant guilty of felonious larceny.

APPEAL by defendant from *Britt (Samuel E.), Judge.* Judgment entered 3 December 1981 in Superior Court, ROBESON County. Heard in the Court of Appeals 20 October 1982.

The defendant was tried for felonious breaking or entering and felonious larceny. Virginia Barbour testified for the State that she lived in the Lumber Bridge area of Robeson County. She was in an automobile with her daughter on 10 February 1981 when she saw two men standing at her front door. She and her daughter drove back and forth in front of the house. She testified further, "All of a sudden one disappeared, and at that point, I got suspicious for sure . . . ." She then drove to the home of her uncle to tell him what had happened.

The State's evidence further showed that several of Mrs. Barbour's neighbors went to her house where they saw two men fleeing across a field behind her house. Mrs. Barbour's television set was missing from her house. The defendant and Richard Cabey were apprehended short distances from Mrs. Barbour's house by the neighbors and sheriff's deputies, who had come to the scene. The television set was found in the woods behind Mrs. Barbour's house.

Richard Cabey testified for the State that he and the defendant were riding from Red Springs to Fayetteville with two peo-

ple, one of whom he knew. The driver of the automobile stopped in the driveway of Virginia Barbour's home. The driver and one other person left the automobile while the defendant and Richard Cabey remained in the back seat. The two men who left the automobile went to the back of the house and returned a few minutes later, at which time they summoned the defendant and Richard Cabey to follow them. The four men went to the rear of the house where the back door was open and glass from the back door was scattered on the ground. The defendant remained in the backyard while the three other men went into the house and moved a television set to a position in the doorway. Cabey testified that one of the men said, "We been spotted. Let's go." The defendant helped one of the other men move the television set out of the doorway and all four of them fled from the scene. Cabey and the defendant were apprehended a short time later.

The jury found the defendant not guilty of felonious breaking or entering and guilty of felonious larceny. The defendant appealed from the imposition of a prison sentence.

Attorney General Edmisten, by Assistant Attorney General David Roy Blackwell, for the State.

Rogers and Bodenheimer, by Hubert N. Rogers, III, for defendant appellant.

WEBB, Judge.

[1] In his first assignment of error the defendant contends the court expressed an opinion on the evidence by questions put to Mrs. Barbour, the witness. During the trial the following colloquy occurred:

"COURT: Do you have an opinion satisfactory to yourself as to the value of the T.V.?

WITNESS: I'm satisfied.

COURT: Yes, Ma'am. What is your opinion of its value?

WITNESS: It's value?

COURT: Yes, Ma'am.

WITNESS: Yes, sir. $800.

COURT: Does that include the rabbit ears?

WITNESS: Yes, sir.

* * *

COURT: Did you give any one [sic] permission to enter your house on that day?

WITNESS: No, sir.

* * *

COURT: You give anyone permission to break your door or enter your house?

COURT: Give anyone permission to take your T.V. set or rabbit ears from your room?

WITNESS: No, sir."

Mrs. Barbour's testimony in response to the judge's questions was the only evidence as to the value of the television set.

The defendant argues that by this colloquy the judge commented on the evidence in violation of G.S. 15A-1222. A judge may not by his questions to a witness intimate an opinion as to whether any fact essential to the State's case has been proved. *See State v. Hudson*, 295 N.C. 427, 245 S.E. 2d 686 (1978). A judge may ask questions, however, that elicit testimony which proves an element of the State's case so long as he does not comment on the strength of the evidence or the credibility of the witness. *State v. Stanfield*, 19 N.C. App. 622, 199 S.E. 2d 741 (1973). We believe the questions by Judge Britt were neutral, which, depending upon the answer, would benefit either the State or the defendant.

Although he did not make it a part of the assignment of error, the defendant argues under this assignment of error that at other times the court, by its questions, commented on the evidence. As we read these questions the court did not intimate any opinion as to whether a fact had been proved. They served to clarify the testimony of the witnesses. *See State v. Fuller*, 48 N.C. App. 418, 268 S.E. 2d 879, *cert. denied*, 301 N.C. 403, 273 S.E. 2d 448 (1980). The defendant's first assignment of error is overruled.

[2] In his second assignment of error the defendant argues that his motion to dismiss the charge of larceny should have been al-

lowed. He contends there was not sufficient evidence to submit to the jury the lack of consent on the part of Mrs. Barbour to his taking the set or that he intended to deprive Mrs. Barbour permanently of the television set. He argues that the testimony that Mrs. Barbour did not consent to his taking was improperly admitted and without this testimony there was not sufficient evidence that she did not consent. Assuming this was the only evidence of Mrs. Barbour's lack of consent, we have held it was not error to admit it. If it had been erroneously admitted, the motion to dismiss should not have been allowed. On a motion to dismiss all evidence favorable to the State must be considered whether it is or is not properly admitted. *See State v. Shaw,* 293 N.C. 616, 239 S.E. 2d 439 (1977).

As to the defendant's argument that there was not sufficient evidence that he intended to deprive Mrs. Barbour of the television set permanently, the evidence most favorable to the State is that the defendant was in a group of two or more men who went into Mrs. Barbour's house and removed the television set to the woods behind her house. The defendant fled from the scene when Mrs. Barbour's friends came to her house. We believe the jury could conclude from this evidence the defendant was acting in concert with some persons who took Mrs. Barbour's television set and left it in the woods behind her house. They could conclude from this that the men intended to deprive Mrs. Barbour of the set permanently. *In re Ashby,* 37 N.C. App. 436, 246 S.E. 2d 31 (1978).

The defendant's second assignment of error is overruled.

[3] In his third assignment of error the defendant, relying on *State v. Perry,* 305 N.C. 225, 287 S.E. 2d 810 (1982); *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), argues that it was error for the court to accept the verdict of guilty of felonious larceny when the court did not instruct the jury to fix the value of the property and the jury did not find the value of the stolen property exceeded $400.00. The cases cited by the defendant hold that if a defendant has been found not guilty of felonious breaking or entering, the court should not accept a verdict of guilty of felonious larceny unless the court has charged the jury that they must find the stolen property was worth more than $400.00 in

order to find the defendant guilty of felonious larceny. In this case, the court's charge to the jury has not been made a part of the record. We presume the charge was correct. *Elsevier v. Machine Shop*, 9 N.C. App. 539, 176 S.E. 2d 875 (1970).

We believe that the defendant has misconstrued the requirements of *Perry*, *Cornell*, and *Keeter* so far as requiring the jury to find the value of the property is concerned. G.S. 14-72(a) provides in part:

> ". . . In all cases of doubt, the jury shall, in the verdict, fix the value of the property stolen."

In this case, the only evidence of value was Mrs. Barbour's testimony that in her opinion the television set was worth $800.00. The indictment charged that the value of the property was more than $400.00. It was not necessary for the jury to make a special finding in its verdict that the property was worth more than $400.00. *State v. Jeffries*, 41 N.C. App. 95, 254 S.E. 2d 550 (1979).

The defendant's third assignment of error is overruled.

No error.

Judges HEDRICK and BECTON concur.

J. H. HARVEY v. NORFOLK SOUTHERN RAILWAY COMPANY, INC. AND SOUTHERN RAILWAY SYSTEM, INC.

No. 822SC142

(Filed 1 February 1983)

Corporations § 25— liability of railroad for contract made by railroad it purchased

The trial court properly granted defendant's motion for judgment notwithstanding the verdict because defendant Railway neither expressly nor by implication assumed the obligation to pay plaintiff's medical expenses incurred for injuries resulting from an accident while working with a railroad in which Railway purchased some of the bankrupt company's assets. Since the liability to plaintiff was solely the prior railroad's, Railway was obligated to pay plaintiff's medical expenses only if it expressly agreed, in writing, to do so, and

since there was no written agreement signed by Railway, plaintiff's action was barred by the Statute of Frauds. G.S. 22-1.

Judge WELLS dissenting.

APPEAL by plaintiff from *Peel, Judge.* Judgment entered 28 October 1982 in Superior Court, BEAUFORT County. Heard in the Court of Appeals 7 December 1982.

This case involves a contract between plaintiff and Norfolk Southern Railroad Company (Railroad). Plaintiff brought this action claiming defendants owe him $5,801.15 for his medical expenses incurred since 1977. Plaintiff's evidence tended to show that in 1923, when he was employed as a brakeman for Railroad, he was injured when he was caught between a railroad car and a freight platform. His pelvis was fractured, his bladder was ruptured in two places, and his urethra was cut in two. As a consequence of the accident, plaintiff was required to have his urethra opened every month. Plaintiff and Railroad entered into an agreement where plaintiff agreed not to file a claim against Railroad, and Railroad agreed to pay plaintiff $1,800.00, guarantee him a job for life, and pay all his medical expenses resulting from the accident for the rest of his life. Plaintiff said that the agreement was in writing, but he did not get a copy of it.

Defendant alleged in its answer that in 1932, Railroad filed for bankruptcy. On 19 September 1939, Norfolk Southern Railway Company (Railway) was chartered, and applied to the Interstate Commerce Commission for approval to acquire some of Railroad's assets. These assets were purchased on 10 March 1941.

According to plaintiff, Railway continued to employ him and pay his medical expenses which resulted from the accident. Although plaintiff retired in 1969, Railway continued to pay his medical expenses until 1977, when it was acquired by Southern Railway Systems. Plaintiff claimed that he had medical expenses totaling $5,801.15 since 1977.

At the conclusion of plaintiff's evidence, defendants moved for a directed verdict. Defendants did not present any evidence. The trial court granted defendant Southern Railway System's motion for directed verdict and denied defendant Railway's motion for a directed verdict. The jury returned a verdict finding defend-

ant Railway obligated to pay plaintiff's medical expenses since 1977, a total sum of $5,801.15. Defendant then moved to set aside the verdict and for judgment notwithstanding the verdict pursuant to G.S. 1A-1, Rule 50(b). The court granted defendant's motion for judgment notwithstanding the verdict and dismissed the action.

L. H. Ross, for plaintiff appellant.

Rodman, Rodman, Holscher and Francisco, by Edward N. Rodman, for defendant appellee.

VAUGHN, Chief Judge.

Plaintiff's sole argument is that the trial court erred in granting defendant Railway's motion for judgment notwithstanding the verdict because Railway either expressly or by implication assumed the obligation to pay his medical expenses for life. We do not agree. A motion for judgment notwithstanding the verdict is technically a renewal of the motion for a directed verdict. *Love v. Pressley*, 34 N.C. App. 503, 239 S.E. 2d 574 (1977), *review denied*, 294 N.C. 441, 241 S.E. 2d 843 (1978).

> Judgment notwithstanding the verdict should be granted only when the evidence is insufficient as a matter of law to support the verdict. Where the evidence admitted at trial, taken in the light most favorable to the non-moving party with all reasonable inferences drawn in his favor, is sufficient to support the verdict, it should not be set aside.

Beal v. K. H. Stephenson Supply Company, Inc., 36 N.C. App. 505, 507, 244 S.E. 2d 463, 465 (1978). Although the evidence, taken in the light most favorable to plaintiff, tends to show that defendant Railway continued to pay plaintiff's medical expenses for thirty-seven years, there is no evidence that defendant adopted the obligation either expressly or by implication. A corporation may, after it comes into existence, adopt a contract made on its behalf, either expressly or by accepting the benefits of the contract with knowledge of its provisions. *Whitten v. Bob King's AMC/Jeep, Inc.*, 292 N.C. 84, 231 S.E. 2d 891 (1977); *Smith v. Ford Motor Company*, 289 N.C. 71, 221 S.E. 2d 282 (1976); *McCrillis v. A & W Enterprises, Inc.*, 270 N.C. 637, 155 S.E. 2d 281 (1967). In this case, the contract was between Railroad and plaintiff. It could not have

been made on Railway's behalf because Railway came into existence fourteen years later, and was not Railroad's successor, it merely purchased some of the bankrupt Railroad's assets.

Plaintiff's reliance on *Beachboard v. Southern Railway Company*, 16 N.C. App. 671, 193 S.E. 2d 577 (1972), *cert. denied*, 283 N.C. 106, 194 S.E. 2d 633 (1973), to support his contention that Railway adopted the contract between plaintiff and Railroad, is misplaced. In *Beachboard*, an employee of Southern Railway Company (Southern), had his legs amputated when he was hit by a railway car while he was working at the railroad yard owned by U.S. Plywood-Champion Papers, Inc. (Champion). Southern filed a third party complaint against Champion alleging it was entitled to be indemnified pursuant to a contract entered into between Southern and Champion Fibre Company (Fibre Company), a predecessor of Champion, in 1905. The court found that although Fibre Company was not in existence in 1905, it acted under the contract and accepted the benefits after it was incorporated in 1906, and thus ratified the contract by implication and was bound to perform the obligations incident to the contract. In 1936, Fibre Company conveyed all its assets to its parent corporation, Champion Paper & Fibre Company, which expressly agreed to be bound by the contract. In 1967, Champion Paper & Fibre Company, which had changed its name to Champion Papers, merged with U.S. Plywood Corporation and became the third party defendant, U.S. Plywood-Champion Papers, Inc. (Champion). The court held that Champion was bound by the contract and was obligated to perform the duties which were imposed on Fibre Company. *Beachboard* clearly comes within the general rule mentioned above that contracts made on a corporation's behalf, prior to incorporation, may be adopted by implication if the corporation accepts the benefits of the contract with full knowledge of its provisions. *Beachboard* does not, however, support plaintiff's argument because in the present case the contract was between plaintiff and Railroad. It was not entered into on Railway's behalf. Railway was not Railroad's successor, it merely purchased some of the bankrupt Railroad's assets eighteen years after plaintiff's accident.

Since the liability to plaintiff was solely Railroad's, Railway could only be obligated to pay plaintiff's medical expenses if it expressly agreed, in writing, to do so. Since there was no written

agreement signed by Railway, plaintiff's action is barred by the Statute of Frauds. G.S. 22-1 provides, in part:

> No action shall be brought . . . to charge any defendant upon a special promise to answer the debt, default or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party charged therewith or some other person thereunto by him lawfully authorized.

Furthermore, the main purpose rule would not except this from the Statute of Frauds. The main purpose rule applies only when the promisor has a direct pecuniary interest in the transaction in which a third party is the primary obligor. *Burlington Industries, Inc. v. Foil*, 284 N.C. 740, 202 S.E. 2d 591 (1974). In this case, there was no evidence showing railway had any pecuniary interest whatsoever in the settlement between plaintiff and Railroad. Since this does not come within the main purpose rule exception, the Statute of Frauds bars plaintiff's action. The evidence was insufficient to support the jury's verdict, and the judgment notwithstanding the verdict was properly entered.

Affirmed.

Judge WHICHARD concurs.

Judge WELLS dissents.

Judge WELLS dissenting.

The grounds stated in the defendant's motion for a directed verdict was that "the evidence taken in the light most favorable to plaintiff fails to establish a claim upon which relief can be granted." Our review on appeal is limited to the grounds stated in defendant's motion. *Fabrics, Inc. v. Delivery Service*, 39 N.C. App. 443, 250 S.E. 2d 723 (1979).

Plaintiff's evidence clearly established that the defendant had assumed the contractual obligations to him originated by the agreement between plaintiff and Norfolk Southern Railroad Company, and that the defendant continued to recognize such obligations to plaintiff for 37 years. The clear inference, the only

reasonable inference, to be drawn by such conduct on defendant's part is that it adopted and ratified the contract between plaintiff and Railroad Company.

Although the majority opinion ultimately concludes that plaintiff's claim is barred by the Statute of Frauds, I do not believe that question to be before us, since plaintiff succeeded in establishing defendant's direct obligation to him.

Plaintiff's evidence being sufficient to withstand defendant's motion for a directed verdict, it follows that entry of judgment notwithstanding the verdict was improper. *Norwood v. Sherwin Williams*, 303 N.C. 462, 279 S.E. 2d 559 (1981).

I vote to reverse and remand for entry of judgment on the verdict.

JOHN E. KEITH v. CHARLES H. DAY AND ACE TOWN & COUNTRY HARDWARE STORE

No. 8210SC21

(Filed 1 February 1983)

1. **Injunctions § 16; Rules of Civil Procedure § 65— preliminary injunction—posting of bond—discretion of court**

The trial court has the authority under G.S. 1A-1, Rule 65(c) to dispense with the requirement of security by an applicant granted a preliminary injunction where the restraint will do the defendant no material damage, where there has been no proof of likelihood of harm, and where the applicant has considerable assets and is able to respond in damages if defendant does suffer damages by reason of a wrongful injunction.

2. **Injunctions § 16; Rules of Civil Procedure § 65— preliminary injunction—necessity for consideration of bond**

The trial court erred in entering a preliminary injunction requiring defendant to close his hardware store for violation of a covenant not to compete without considering whether plaintiff should be required to post a bond pursuant to G.S. 1A-1, Rule 65(c).

APPEAL by defendants from *Preston, Judge*. Judgment filed 18 November 1981 in Superior Court, WAKE County. Heard in the Court of Appeals 20 October 1982.

Defendant Charles Day was ordered, by preliminary injunction, to close a hardware store operated by him in Raleigh, North Carolina. Plaintiff stated in his supporting affidavit, *inter alia*, that he would be irreparably harmed if defendant continued to run his store, and that operation of the hardware store violated the terms of a covenant not to compete entered into by the parties. Plaintiff was not required to post a bond prior to entry of the injunctive relief.

Hunter, Wharton & Howell, by John V. Hunter, III, for defendant appellant.

Kimzey, Smith & McMillan, by James M. Kimzey, for plaintiff appellee.

BECTON, Judge.

I

Defendant first argues that the entry of the preliminary injunction by the trial court without requiring plaintiff to post a bond pursuant to N.C. Gen. Stat. § 1A-1 Rule 65(c) (1969) was fatal to the validity of that order. This is apparently a case of first impression for this Court as neither party nor our own research discloses any reported North Carolina decisions that address the precise issue of the Rule 65(c) security requirement. Generally, there are three areas of inquiry attendant to the grant of injunctive relief: whether there exists an adequate remedy at law, *Durham v. Public Service Co.*, 257 N.C. 546, 126 S.E. 2d 315 (1962); whether the facts show a reasonable probability of substantial and irreparable injury to the applicant from the activity of which it complains, *Goodman Toyota v. City of Raleigh*, 47 N.C. App. 628, 267 S.E. 2d 714 (1980), *rev'd on other grounds*, 301 N.C. 84, 277 S.E. 2d 690 (1980); and whether security is required of the applicant. The trial court failed to consider whether security should be required of this applicant. We thus vacate its order and remand this matter for proceedings in accord with our analysis below.

II

Because of the dearth of North Carolina precedent, and the fact that Rule 65(c) of the North Carolina Rules of Civil Procedure was adopted *verbatim* from the Federal Rules of Civil Procedure,

we look to federal decisions interpreting this section for guidance.

Rule 65(c) provides in pertinent part:

> No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, *in such sum as the judge deems proper*, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. [Emphasis added.]

The effect of the language, "no . . . injunction shall issue except upon the giving of security . . ." is more subtle than one would expect from words so apparently unambiguous. Since the purpose of the security requirement is to protect the restrained party from damages incurred as a result of the wrongful issuance of the injunctive relief, the trial court has the discretion to determine what amount of security, if any, is necessary to protect the enjoined party's interests. *Citizens v. Village of Elm Grove*, 472 F. Supp. 1183 (E.D. Wisc. 1979). For example, it is well-settled that no security is required when a preliminary injunction is issued to preserve the trial court's jurisdiction over the subject matter involved. *Bivens v. Board of Public Education*, 284 F. Supp. 888 (D.C. Ga. 1967). It is equally clear that when it is likely that the party against whom injunctive relief is granted will suffer damages, an undertaking should be required of the party seeking relief. *Steward v. West*, 449 F. 2d 324 (5th Cir. 1971). This principle is a long-standing one. The reported North Carolina decision, although handed down before the adoption of the Federal Rules of Civil Procedure, supports this conclusion.

Burnett v. Nicholson, 79 N.C. 548 (1878), was an appeal from the trial court's denial of a wrongfully restrained defendant's request for recovery in damages. In affirming the denial of damages to the defendant for injuries resulting from the closing of his mill by reason of a temporary restraining order, the Supreme Court rule that ". . . the party applying to the clerk . . . [for injunctive relief] shall first give a written undertaking with sufficient sureties . . . [to assure payment to the person enjoined] such damages . . . 'as he may sustain by reason of the injunction, if the Court shall finally decide that the plaintiff was not entitled thereto.' " *Burnett* at 549. Thirty-six years later the United States Court of Appeals for the Fourth Circuit held that when large in-

terests are involved and a plaintiff sues to prohibit someone from exercising a right normally theirs, a very substantial bond should be required. *Robinson v. Benbow*, 298 F. 561, 572 (4th Cir. 1924).

[1] Consequently, we agree with plaintiff that the ". . . as the court deems proper" language of the rule means that there are some instances when it is proper for no security to be required of a party seeking injunctive relief. It is also true that any rule that can be put in a nutshell belongs there; this rule is no exception. We therefore state the rule for North Carolina practice under Rule 65(c), in its entirety as follows:

> [T]he [trial court] has power not only to set the amount of security but to dispense with any security requirement whatsoever where the restraint will do the defendant "no material damage," [citations omitted] where there "has been no proof of likelihood of harm," [citations omitted] and where the applicant for equitable relief has "considerable assets and [is] . . . able to respond in damages if [defendant] does suffer damages by reason of [a wrongful] injunction" [citations omitted].

Federal Prescription Service, Inc. et al. v. American Pharmaceutical Assoc., 636 F. 2d 755, 759 (D.C. Cir. 1980).[1] It remains then to apply this rule to the facts of the case *sub judice*.

[2] Defendant had operated his business for over a year when the injunction issued. Arguably, a two-year shut-down of defendant's store would wreak havoc upon relationships with suppliers, clientele, and creditors, not to mention the likelihood of the total destruction of that all important asset, good will. We conclude that any order that precludes one from earning a livelihood and that has the potential to destroy that person's means of income production for years to come is too potent to issue without security. It is inherent in the use of discretion that it be exercised. Thus, it was reversible error, not necessarily to have failed to require bond, but to have failed expressly to consider the question of requiring a bond. *Reinders Brothers v. Rain Bird*, 627 F. 2d 44 (7th Cir. 1980); *Roth v. Bank*, 583 F. 2d 527 (6th Cir. 1978), *cert.*

1. We are aware that exceptional circumstances—for example, cases in which the movant is an indigent or a governmental entity—call for a different rule; as these factors are not present we express no opinion concerning them.

granted, 440 U.S. 944, 59 L.Ed. 2d 632, 99 S.Ct. 1420, *cert. dismissed*, 442 U.S. 925, 61 L.Ed. 2d 292, 99 S.Ct. 2852. Since there is no evidence in the record before us of plaintiff's ability to respond in damages should defendant be found to have been wrongfully enjoined, nor evidence that the trial court considered the likelihood of material damage and harm to the defendant upon entry of its order, we are compelled to find that the court below erred in failing to consider whether plaintiff should post a bond for defendant's protection.

Thus, the order of the trial court is vacated and the matter is remanded for proceedings not inconsistent with this opinion.

Vacated and remanded.

Judges HEDRICK and WEBB concur.

IN THE MATTER OF: CARL H. BUTLER v. J. P. STEVENS & CO., INC. AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

No. 8210SC245

(Filed 1 February 1983)

Master and Servant § 108.1 — denial of unemployment benefits — discharge for misconduct

Findings of the Employment Security Commission supported the conclusion that claimant's discharge was occasioned by misconduct connected with his work in that he was absent without a valid excuse for four days in a six month period contrary to the company rules. Therefore, disqualification for unemployment benefits was accordingly appropriate.

APPEAL by claimant from *Smith, Judge.* Judgment entered 16 October 1981 in Superior Court, WAKE County. Heard in the Court of Appeals 18 January 1983.

Smith, Patterson, Follin, Curtis, James & Harkavy, by Henry N. Patterson, Jr., and Jonathan R. Harkavy, for claimant appellant.

Haynsworth, Perry, Bryant, Marion & Johnstone, by John B. McLeod, for respondent appellee J. P. Stevens & Co., Inc.

T. S. Whitaker and V. Henry Gransee, Jr., for respondent appellee Employment Security Commission.

WHICHARD, Judge.

Claimant appeals from a judgment affirming a decision that he is disqualified for unemployment compensation benefits because he was discharged from employment for misconduct connected with his work. We affirm.

The Commission made the following pertinent findings of fact:

> 2. Claimant was discharged from this job for violating a company rule which states that any employee who is absent without a valid excuse for four days in a six month period is subject to termination.
>
> 3. On December 3, 1979, and on [March] 29, 1980, the claimant did not report to work and he did not notify the employer that he was going to be absent.
>
> 4. On April 25, 1980, the claimant told his supervisor that if a plumber did not fix his water pipe, he might be absent the following day. He was not given permission to be absent at that time. The following day, April 26, 1980, the claimant was absent. The claimant did not notify the employer on that day, that he was going to be absent. There was a phone available that the claimant could have used.
>
> 5. On May 20, 1980, the claimant was sick and did not report to work. Claimant did not call the employer. The claimant's daughter, who was with the claimant that day, did not call the employer. The claimant's wife attempted to call the employer on one occasion, but she was unsuccessful. Although the claimant did not have a phone, there were phones available to him in the neighborhood. When the claimant returned to work, he told the personnel manager that a

doctor had prescribed for the claimant, certain medications and that the claimant's wife bought this medicine at a certain pharmacy. The employer attempted to verify this statement but both the physician's nurse and the personnel in the pharmacy named by the claimant, denied that they had been contacted by the claimant, on or around May 20, 1980. The employer therefore concluded that the claimant's absence was unexcused and the claimant was discharged.

6. The company's employees are made aware of this rule in the following manner: The company rules are listed in the handbook, which the claimant received. The claimant was shown video tapes, explaining company policies. The claimant was given two warnings concerning his absences.

These findings are supported by competent evidence and are conclusive on appeal. G.S. 96-15(i); *In re Thomas*, 281 N.C. 598, 604, 189 S.E. 2d 245, 248 (1972); *Yelverton v. Furniture Industries*, 51 N.C. App. 215, 218, 275 S.E. 2d 553, 555 (1981).

Claimant, in fact, does not contend otherwise. He argues instead that the Commission failed to make findings and enter conclusions regarding whether good cause existed for his actions with regard to the absences. He relies on the discussion of good cause in *Intercraft Industries Corp. v. Morrison*, 305 N.C. 373, 289 S.E. 2d 357 (1982) wherein the following appears: "[I]t is generally recognized that chronic or persistent absenteeism, in the face of warnings, *and without good cause* may constitute wilful misconduct." (Emphasis supplied.) *Id.* at 375, 289 S.E. 2d at 359.

The decision of the appeals referee, which the Commission affirmed, stated the following:

It is concluded from the facts at hand that claimant violated a company rule of which the claimant should have been aware. The rule was reasonable and the employer had the right to expect that the claimant would not violate it. The claimant accumulated four unexcused absences in a six month period. On the first two occasions, the claimant was absent and he did not notify the employer in any way. On the third occasion, the claimant mentioned to his supervisor that he might be out, but he did not receive permission to do so.

> On the day he was out, he did not notify the employer. On the last occasion, the claimant was sick and did not call the employer. The claimant contends that he made every reasonable effort to notify the employer. However, the evidence is to the contrary. Although the claimant, his daughter, or his wife, could have called the employer, only one attempt was made to notify the employer, on the day that the claimant was absent. That attempt was unsuccessful. Also, it must be noted that the employer [gave] the claimant an opportunity to explain why he was absent on May 20, 1980. However, the claimant responded with an explanation that could not [be] verified by the employer. Certainly the burden must be placed with the claimant of giving the employer an accurate and truthful explanation as to why he was absent. If anyone should know the facts, the claimant should. At the hearing the claimant argued that the explanation he gave the employer was an error and so therefore, he should have not been discharged. It is clear that this argument cannot be accepted. Therefore, claimant's violation of the rule evinced a wilful disregard of the employer's interests.

It is clear from the foregoing, which is supported by competent evidence in the record, that the Commission considered and rejected claimant's contentions regarding good cause for his absences and failure to give notice thereof. We thus find without merit the contention that the Commission (and the court) failed to make required findings and enter appropriate conclusions with regard thereto.

A claimant is disqualified for benefits if the Commission determines he was discharged from employment for misconduct connected with his work. G.S. 96-14(2).

> * * * [T]he term 'misconduct' [in connection with one's work] is limited to conduct evincing such wilful or wanton disregard of an employer's interest[s] as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of

> the employer's interests or of the employee's duties and obligations to his employer. * * *

In re Collingsworth, 17 N.C. App. 340, 343-44, 194 S.E. 2d 210, 212-13 (1973) (quoting *Boynton Cab Co. v. Neubeck*, 237 Wis. 249, 259-60, 296 N.W. 636, 640 (1941)). *See Intercraft Industries, supra*, 305 N.C. at 375, 289 S.E. 2d at 359; *Yelverton, supra*, 51 N.C. App. at 218-19, 275 S.E. 2d at 555.

This definition of "misconduct" suffices to encompass an employee's violation of the employer's reasonable attendance rules, of which he has notice, and his failure to give the employer proper notice of absences for which good cause may exist.

> Most courts have held that persistent or chronic absences, at least where the absences are without excuse or notice, and the employee has been given warnings by the employer, constitute misconduct within the meaning of the unemployment compensation laws. . . .
>
> Obviously, when an employee is absent due to illness but fails to give proper notice the absence can amount to misconduct, not because of the illness *per se* but because the employee has an obligation to the employer to mitigate any damages an illness may cause the enterprise by giving appropriate notice.

Kirk v. Cole, 288 S.E. 2d 547, 550 (W.Va. 1982).

We thus hold that the findings support the conclusion that claimant's discharge was occasioned by misconduct connected with his work, and his disqualification for benefits was accordingly appropriate.

Affirmed.

Judges ARNOLD and HILL concur.

STATE OF NORTH CAROLINA v. CHARLES WINSLOW STANLEY

No. 825SC656

(Filed 1 February 1983)

1. **Bribery § 3; Public Officers § 11— police officer—bribery—failure to discharge duties of office—sufficiency of evidence**

The State's evidence was sufficient for the jury to find defendant police officer guilty of bribery and of willfully failing to discharge the duties of his office by failing to make an arrest where it tended to show that defendant and another officer stopped a vehicle occupied by two persons for failure to stop at a stop sign; the officers searched the vehicle and seized two pistols, a shotgun, an open bottle of bourbon, and a small amount of marijuana and some pills; the other officer told defendant that he was arresting the vehicle driver for drug, liquor and weapons offenses; before taking the occupants of the vehicle to the police station, the other officer asked defendant which of the guns he wanted, and defendant replied that he would rather have the shotgun; defendant overheard the other officer tell the vehicle occupants that "if we make a deal, if we work something out, you are not going to go out and tell everyone"; the vehicle driver prepared bills of sale showing that a pistol had been sold to the other officer and that the shotgun had been sold to defendant; each officer witnessed the other's bill of sale; the vehicle driver did not receive any money for either weapon; and the two vehicle occupants were never taken before a magistrate or served with any written citations or warrants, but were allowed to leave. G.S. 14-217; G.S. 14-230.

2. **Criminal Law § 50— *intent of witness***

In a prosecution of a policeman for bribery and failure to discharge the duties of his office, a witness was properly allowed to testify that he turned certain guns over to defendant and another officer because he didn't have enough money to pay a fine and he knew charges against him would be dropped if he gave up the weapons, since a witness may testify as to his own intention and understanding.

APPEAL by defendant from *Strickland, Judge.* Judgment entered 17 September 1981 in Superior Court, PENDER County. Heard in the Court of Appeals 11 January 1983.

Defendant was indicted for bribery, extortion, and willful failure to discharge the duties of his office as a policeman. The extortion charge was dismissed at the close of State's evidence. He was convicted of bribery and willful failure to discharge the duties of his office, and was sentenced to a one year prison term.

State's evidence tends to show that defendant and John Adams, police officers for the Town of Topsail Beach, stopped a

vehicle being driven by David Garland for failure to stop at a stop sign. Officer Adams searched the vehicle and seized a .38 Smith & Wesson pistol that belonged to Garland's passenger, Clara Manley; an open bottle of bourbon; a .22 pistol; and a small amount of marijuana and some pills. Defendant searched the vehicle and seized a Savage 20 gauge shotgun. Adams told Garland and defendant that he was arresting Garland for drug, liquor and weapons offenses.

Defendant told an SBI agent investigating the incident that, before taking Garland and Manley to the police station, Officer Adams asked defendant which of the guns did he want. Defendant replied that he would rather have the shotgun. Defendant also overheard Adams tell Garland and Manley that "if we make a deal, if we work something out, you are not going to go out and tell everyone. . . ."

While defendant was out, Garland prepared bills of sale showing that the .22 pistol had been sold to Officer Adams and the Savage shotgun had been sold to defendant. Upon defendant's return, each officer witnessed the other's bill of sale. Garland did not receive any money for either weapon.

Garland and Manley were never served with any written citations or warrants, nor were they taken before a magistrate. They were allowed to leave.

Defendant testified that he was following the orders of his superior, Officer Adams. At Adams' insistence, he told Adams that he preferred the shotgun. He did not arrest Officer Adams or take any other appropriate action because he was "gathering information as to questionable procedures being used by Officer Adams" as ordered by the police chief. He offered Garland $15.00 for the gun, but Garland refused the offer, telling him just to sign the bill of sale, that "everything has been took (sic) care of."

Attorney General Edmisten, by Assistant Attorney General Henry T. Rosser, for the State.

James K. Larrick, for defendant appellant.

ARNOLD, Judge.

[1] Defendant contends that the court erred in denying his motions to dismiss at the close of State's evidence and at the close of

all the evidence and for appropriate relief due to the insufficiency of the evidence. Defendant argues that there was no evidence that he agreed to drop charges in exchange for the weapon, or that he acted in concert with Officer Adams. He also argues that he did not have the lawful authority to arrest Garland or Manley for the offenses listed in the indictment since the offenses were committed out of defendant's presence. We disagree.

A motion to dismiss is properly denied when, considering the evidence in the light most favorable to the State, there is any evidence, whether introduced by the State or defendant, which will support the charges contained in the indictment. All contradictions and discrepancies in the evidence are to be resolved in the State's favor, and the defendant's evidence may be considered if it merely explains or clarifies and is not inconsistent with the State's evidence. There must be substantial evidence of the elements of the offense charged. *State v. McCoy*, 303 N.C. 1, 277 S.E. 2d 515 (1981).

Under G.S. 14-217, as applicable to the present case, a person is guilty of bribery if, while holding a public office, he receives something of value for omitting to perform an official act with the express or implied understanding that his official action or inaction was to be influenced by the thing of value. Under G.S. 14-230, as applicable to this case, defendant would be guilty of willfully failing to discharge the duties of his office by failing to make an arrest.

Applying these principles, we have reviewed the record and find that there was sufficient evidence of each of the essential elements of the offenses. The jury could have inferred that there was an agreement based upon the evidence of defendant's receipt of the gun and the dropping of the charges.

There was also sufficient evidence for the jury to find that defendant acted in concert with Adams in defendant's statement to Adams that he preferred the shotgun; in defendant's statement that he liked Savage shotguns and would not mind having one himself; in the signing and witnessing of the bills of sale with Adams; in receiving the gun without making any payment; and in allowing Garland and Manley to leave without any further action. The performance by defendant of some act forming part of the crime charged, although not required, constitutes strong evidence

that the defendant was acting in concert with another who did other acts leading toward the commission of the crime. *State v. Joyner*, 297 N.C. 349, 255 S.E. 2d 390 (1979).

Defendant had the authority to arrest Garland and Manley based upon his observing Adams removing the articles from the Garland vehicle, and Adams' informing defendant of what he had found and the offenses committed by Garland and Manley. Probable cause to make an arrest may be provided by the officer's own observations and information given him by other officers. *State v. Matthews*, 40 N.C. App. 41, 251 S.E. 2d 897 (1979).

[2] Defendant next contends that the court erred in admitting the following testimony of Garland, given in response to a question asking him why he turned the shotgun over to the officers: "I didn't have enough money to pay for a fine and I was out of state residence (sic); so I couldn't be bounded (sic) and I knew that the charges would be dropped if I gave the weapons up." We find no error. A witness may testify as to his own intention and understanding when they are relevant. 1 Brandis on North Carolina Evidence Sec. 130 (2d Rev. Ed. 1982).

Defendant's remaining assignments of error concern whether there was a fatal variance between the indictment and the proof at trial and whether the court instructed on law not presented by the evidence. Since defendant makes essentially the same arguments in support of these assignments of error as he did in challenging the sufficiency of the evidence, these assignments of error cannot prevail.

In the trial of defendant, we find

No error.

Judges HILL and WHICHARD concur.

IN THE MATTER OF: JESSIE B. WILLIAMS, APPELLANT v. SCM PROCTOR SILEX AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, APPELLEES

No. 8212SC222

(Filed 1 February 1983)

Master and Servant § 108.1— disqualification for unemployment benefits—discharge for misconduct

An employee's alteration of her production records, resulting in overpayment to the employee, constituted willful or wanton disregard of the employer's interest, in disregard of standards of behavior which the employer had a right to expect of the employee and supported the conclusion that claimant's discharge was occasioned by "misconduct connected with [her] work," and her disqualification for benefits was accordingly appropriate. G.S. 96-14(2).

APPEAL by claimant from *Brewer, Judge.* Judgment entered 28 October 1981 in Superior Court, HOKE County. Heard in the Court of Appeals 13 January 1983.

Lumbee River Legal Services, Inc., by Phillip Wright, for claimant appellant.

V. Henry Gransee, Jr., for defendant appellee Employment Security Commission.

No brief filed for defendant appellee SCM Proctor Silex.

WHICHARD, Judge.

Claimant appeals from a judgment affirming a decision by defendant Employment Security Commission that she is disqualified for unemployment compensation benefits because she was discharged from employment for misconduct connected with her work. She contends the pertinent findings are not supported by competent evidence, and that the conclusion of law that she was discharged for misconduct connected with her work was therefore erroneous. We affirm.

The Commission made the following pertinent findings of fact:

> 2. Claimant was discharged from this job for reporting an inaccurate number of parts run on her machine on the last shift that she worked. The claimant's machine had a counter attached to it which counted the number of parts the machine produced. It was possible for employees to alter the number on the counter. On the claimant's last day of work,

her counter recorded 4,272 parts. The claimant's supervisor counted the parts that had been run on the machine after the claimant's shift finished and recorded 1,663 parts. Thus the claimant's count was 2,600 parts too high. The claimant was given an opportunity to explain the discrepancy between actual parts and the number showing on the counter to the employer. She did not offer a satisfactory explanation.

3. The claimant has stated that some of the parts she had run were put in boxes partially filled by the previous shift. The employer's representative checked the boxes done by the shift prior to the claimant's and discovered them to have been full when the claimant's shift started. The discrepancy in the count caused the claimant to be overpaid by approximately $31.00.

These findings are supported by the following competent evidence:

Claimant's supervisor testified that his supervisor instructed him to assist in a count of claimant's parts. He saw the counting and personally assisted with it. Claimant's machine had been "checked out" by an electrician both before and after she started work.

The count of claimant's parts revealed that "they were off." This meant that claimant "could not have run the parts that she said she had run, that she had put down on her time card." Claimant had "put down 4,272 pieces on her card." The count showed 1,663 parts to be "her day's production."

The assistant personnel manager for defendant company also testified that claimant had said she ran 4,272 parts, while the maximum number of parts the company could account for was 1,663. He stated: "This was a difference of 2,609 parts. If we had let this go it would have resulted in something like a $31.00 overpayment." He indicated that the boxes from the previous shift were full, so the only boxes claimant "had to put elements in were empty . . . ."

This witness further testified that the machines could be "tripped" so that the counter would count without actually having parts, and that there had been questions regarding claimant's count over a period of a year. The company had been watching

the counts of claimant and others very closely. When it had questioned claimant before, she always had a response which left the company with some uncertainty. On this occasion, however, the company "could not come up with any excuses."

Because the foregoing evidence supports the above findings, the findings are conclusive on appeal. G.S. 96-15(i); *In re Thomas*, 281 N.C. 598, 604, 189 S.E. 2d 245, 248 (1972); *In re Abernathy*, 259 N.C. 190, 194, 130 S.E. 2d 292, 296 (1963); *Yelverton v. Furniture Industries*, 51 N.C. App. 215, 218, 275 S.E. 2d 553, 555 (1981); *In re Cantrell*, 44 N.C. App. 718, 720, 263 S.E. 2d 1, 2 (1980). *See also* G.S. 96-4(m). The sole remaining question is whether these findings sustain the conclusion that claimant was disqualified for benefits by virtue of G.S. 96-14, which provides, in pertinent part:

> An individual shall be disqualified for benefits:
>
> . . . .
>
> (2) . . . 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.

G.S. 96-14 (Supp. 1981).

In determining whether facts found constitute "misconduct" within the intent of G.S. 96-14(2), this Court has quoted with approval the following definition:

> * * * [T]he term 'misconduct' [in connection with one's work] is limited to conduct evincing such wilful or wanton disregard of an employer's interest[s] as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. * * *

In re Collingsworth, 17 N.C. App. 340, 343-44, 194 S.E. 2d 210, 212-13 (1973) (quoting *Boynton Cab Co. v. Neubeck*, 237 Wis. 249, 259-60, 296 N.W. 636, 640 (1941)). *See also Yelverton v. Furniture*

Industries, supra, 51 N.C. App. at 218-19, 275 S.E. 2d at 555. Our Supreme Court has, at least implicitly, approved this definition. *See Intercraft Industries Corp. v. Morrison*, 305 N.C. 373, 375, 289 S.E. 2d 357, 359 (1982).

That an employee's alteration of her production records, resulting in overpayment to the employee, constitutes wilful or wanton disregard of the employer's interest, in disregard of standards of behavior which the employer has the right to expect of the employee, can scarcely be gainsaid. The findings therefore support the conclusion that claimant's discharge was occasioned by "misconduct connected with [her] work," and her disqualification for benefits was accordingly appropriate.

Affirmed.

Judges ARNOLD and HILL concur.

JOHN EDWARD BROWN v. MARIAN DAVIS LANIER AND LINWOOD LANIER

No. 824SC178

(Filed 1 February 1983)

Pleadings § 17; Torts § 7.2— avoidance of release for fraud—reply not necessary —summary judgment

In a negligence action in which defendants' answer raised the affirmative defense of release, plaintiff was not required to file a reply alleging that the release was obtained by misrepresentation and fraud in order to seek avoidance of the release on that ground, since plaintiff was not required to plead matters in avoidance of affirmative defenses, he could not as matter of right file a reply to plead such matters, he was not required to seek leave to plead such matters, and the defense of release was deemed avoided or denied by G.S. 1A-1, Rule 8(d). G.S. 1A-1, Rules 7 and 9(b). Furthermore, summary judgment was improperly entered for defendants where there were genuine disputes as to whether plaintiff knew what he was signing when he signed the release and as to whether the release was obtained by a misrepresentation or fraud.

APPEAL by plaintiff from *Lane, Judge.* Judgment entered 21 September 1981 in Superior Court, ONSLOW County. Heard in the Court of Appeals 10 January 1982.

Plaintiff, an 85 year old retired farmer, commenced this action by filing a complaint alleging that injuries he sustained in an automobile collision were caused by the negligence of defendants. Defendants answered, denying that they were negligent, asserting that plaintiff's injuries were caused by plaintiff's own negligence, and raising as an affirmative defense that plaintiff, for valuable consideration, executed a release in full settlement of all claims which might arise against defendants out of the collision. No other pleadings were filed by either party. Discovery was commenced by defendants when they filed interrogatories and requests for admissions on the same day they filed their answer. Plaintiff duly responded to the interrogatories and requests for admissions, admitting that he signed the release, but asserting that he had signed it upon a misrepresentation that it was his acknowledgement that he had received insurance money for the damage to his car.

Defendants next moved for summary judgment, relying on the alleged release, filing affidavits in support of their motion. Plaintiff filed a response to defendants' motion, relying upon an affidavit in which he stated that defendants' insurance adjuster told plaintiff that he had to sign the release in order to receive insurance money for his damaged car, that he was never told that the document was a complete release, and that he was unable to read the document because his eyeglasses had been broken in the accident.

Upon hearing defendants' motion, Judge Lane granted summary judgment in favor of defendants. Plaintiff appealed.

Keith E. Fountain for plaintiff.

Dunn & Dunn, by Raymond E. Dunn, for defendant.

WELLS, Judge.

This appeal involves interpretation of the provisions of G.S. 1A-1, Rules 7, 8, and 9 of the Rules of Civil Procedure. More specifically, we address the question of whether plaintiff was required to file a reply alleging fraud and misrepresentation. Defendants contend that summary judgment was properly granted because plaintiff failed to specifically plead the fraud he relies on in avoidance of the release. We disagree and reverse.

Rule 7 of the Rules of Civil Procedure allows filing a reply only when, in an answer, a defendant expressly asserts a counterclaim or when the defendant's answer raises a defense of contributory negligence and the plaintiff wants to retort by alleging last clear chance. Otherwise, a reply may be served only on order of the trial court. *See generally Vernon v. Crist*, 291 N.C. 646, 231 S.E. 2d 591 (1977); *and* Shuford, N.C. Civ. Prac. & Proc. (2nd Ed.), § 7-6. Rule 8(d) deems affirmative defenses appearing in the answer to be denied or avoided if a reply is neither required nor permitted. *Vernon v. Crist, supra.* While Rule 9(b) provides that, in pleading, all averments of the circumstances constituting fraud shall be stated with particularity, "better pleading practice dictates that a plaintiff should not anticipate a defense and undertake to avoid it in his complaint." *Vernon v. Crist, supra, citing Exum v. Boyles*, 272 N.C. 567, 158 S.E. 2d 845 (1968).

Plaintiff was not required to plead matters in avoidance of affirmative defenses, he could not as a matter of right file a reply to plead such matters, and he was not required to seek leave to plead such matters. *See, e.g., Eubanks v. Insurance Co.*, 44 N.C. App. 224, 261 S.E. 2d 28 (1979), *disc. rev. denied*, 299 N.C. 735, 267 S.E. 2d 661 (1980). Thus, defendants' affirmative defense of release is deemed avoided or denied by Rule 8(d) and no further pleadings were required.

Under general principles of notice pleading,

> [a] pleading complies with [Rule 8(a)(1)] if it gives sufficient notice of the events or transactions which produced the claim to enable the adverse party to understand the nature of it and the basis for it, to file a responsive pleading, and—by using the rules provided for obtaining pretrial discovery—to get any additional information he may need to prepare for trial.

Sutton v. Duke, 277 N.C. 94, 176 S.E. 2d 161 (1970). Defendants' answer makes it clear that they were aware of the material facts pertaining to the lawsuit. Moreover, defendants' discovery efforts which commenced with the filing of their answer resulted in responses from plaintiff which clearly revealed his position as to the events surrounding the alleged release. Had defendants desired more specific pleadings, they could have moved the trial judge to order a reply pursuant to Rule 7.

Plaintiff's complaint stated a claim in negligence. Defendants' answer raised the affirmative defense of release. A release procured by fraud or misrepresentation is invalid. *Cunningham v. Brown*, 51 N.C. App. 264, 276 S.E. 2d 718 (1981). The duty of a person signing a contract to read the contract is not absolute. *Sexton v. Lilley*, 4 N.C. App. 606, 167 S.E. 2d 467 (1969).

The materials on file clearly show that, while the parties are in agreement that plaintiff did in fact sign the release, there are genuine disputes as to whether he knew what he was signing and as to whether the release was obtained by misrepresentation or fraud. At summary judgment, the trial court must consider not only the pleadings, but also the facts which are forecast by the evidentiary showing. *See Mims v. Mims*, 305 N.C. 41, 286 S.E. 2d 779 (1982), and cases cited therein. The judgment of the trial court must be reversed and the case remanded for trial.

Reversed and remanded.

Chief Judge VAUGHN and Judge BRASWELL concur.

BLUE RIDGE SPORTCYCLE COMPANY, INC. AND JOHN K. JONAS, JR. v. LEONARD SCHROADER AND WIFE, KATHY SCHROADER, INDIVIDUALLY; SCHROADER MOTORCYCLE, INC. D/B/A SCHROADER HONDA-KAWASAKI; KATHERINE J. WALDROP; LINDA JANETTE HOLCOMBE; LARRY D. HOLCOMBE AND DENNIS J. WINNER

No. 8228SC76

(Filed 1 February 1983)

Attorneys at Law § 5.1— negligence of attorney in preparing release—release declared void—no actionable negligence

Plaintiffs failed to show actionable negligence on the part of an attorney in representing plaintiffs in a transaction concerning an improperly drawn release since the release was declared void and plaintiffs were then presented with recourse against other parties for the value of the leasehold improvements which were the subject of the release.

APPEAL by plaintiffs from *Ferrell, Judge*. Judgment entered 16 September 1981, in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 11 November 1982.

Russell L. McLean, III, for plaintiff appellants.

Morris, Golding and Phillips, by William C. Morris, Jr., and John C. Cloninger, for defendant appellee Winner.

JOHNSON, Judge.

Plaintiffs sued defendant Winner, an attorney, for negligence in representing plaintiffs in a transaction by which plaintiffs allegedly released other defendants from liability to plaintiffs without protecting plaintiffs' interests. From summary judgment entered for defendant Winner in 1980, plaintiffs appealed, but this Court dismissed the appeal as being premature. *Sportcycle Co. v. Schroader*, 53 N.C. App. 354, 280 S.E. 2d 799 (1981). Plaintiffs now appeal from final judgment, raising the issue of whether the earlier summary judgment in favor of Winner was appropriate. For the reasons set forth below, we hold that it was and we affirm.

I

On 17 February 1970, defendants Waldrop and Holcombe, lessees of a building in Asheville, sublet the property to Blue Ridge Sportcycle Company, Inc. (hereinafter "Blue Ridge"), the sole owner of which was Jonas. After subletting the property, Blue Ridge made additions to the building and effected other changes having an alleged total market value of $60,000.

On 28 August 1975, Blue Ridge assigned its sublease to R. C. Muse who agreed to pay $500 per month to Waldrop and Holcombe, and $500 per month for leasehold improvements to Blue Ridge. Around June 1976, plaintiffs and Muse negotiated for a new sublease to alter the method by which Muse paid defendants Waldrop and Holcombe but to continue making the $500 payments for leasehold improvements to Blue Ridge. Defendant Winner represented plaintiffs in these negotiations and prepared a release by which Blue Ridge acknowledged defaults in making lease payments to Waldrop and Holcombe and by which Blue Ridge and Waldrop and Holcombe released one another from "any and all claims and demands." Allegedly, there were other documents to be prepared and executed which would have protected Blue Ridge's interest in the leasehold improvements, but these documents were never executed.

In the fall of 1976, Muse sold his motorcycle business to defendants Schroader, who agreed to make the lease payments to Waldrop and Holcombe and to pay plaintiffs $500 per month for the leasehold improvements. Defendants Schroader made the $500 per month payments to plaintiffs through July 1977, but they thereafter ceased making the payments to Blue Ridge.

Plaintiffs sued the various parties, including attorney Winner. The claim against Winner was that he had negligently represented plaintiffs in the negotiations with Muse, allowing Blue Ridge to release Waldrop and Holcombe from all claims, presumably including plaintiffs' claim for payment for the leasehold improvements, without otherwise protecting Blue Ridge's right to such payments. As noted earlier, the trial court granted summary judgment in favor of defendant Winner in June 1980. In the judgment from which this appeal arose, the trial court found that the release prepared by defendant Winner and executed by plaintiffs and Waldrop and Holcombe was void for lack of consideration.

II

The motion for summary judgment of defendant Winner was properly granted in this case if the pleadings and depositions presented to the trial court showed that there was no genuine issue as to any material fact and that Winner was entitled to judgment as a matter of law. G.S. 1A-1, Rule 56; *Kessing v. Mortgage Corp.*, 278 N.C. 523, 534, 180 S.E. 2d 823, 830 (1971). A defendant may show as a matter of law that he is entitled to summary judgment in his favor by showing that there is no genuine issue of material fact concerning an essential element of the plaintiff's claim for relief and that the plaintiff cannot prove the existence of that element. *Best v. Perry*, 41 N.C. App. 107, 109, 254 S.E. 2d 281, 283 (1979).

Plaintiffs' action against Winner was for the alleged negligence of Winner in causing plaintiffs to sign a release which was part of a series of documents designed to protect plaintiffs and in causing the release to pass to Waldrop and Holcombe or their attorney without having all documents necessary to protect plaintiffs' rights executed and filed on plaintiffs' behalf. According to plaintiffs' complaint, because Waldrop and Holcombe were thus

negligently released, plaintiffs suffered damages of $500 per month to March 1986.

Negligence, unless a proximate cause of injury, is not actionable. *McGaha v. Smoky Mountain Stages, Inc.*, 263 N.C. 769, 772, 140 S.E. 2d 355, 357 (1965). Injury, or damage, is an essential element of the tort.

In the present case, plaintiffs alleged that, *if* the release signed by them and granted to defendants Waldrop and Holcombe were valid, then defendant Winner, by negligently allowing the execution of the release without protecting plaintiffs' leasehold improvements interests, was liable for plaintiffs' injury. Such injury would have been clear, had the release been declared valid. The release, however, was declared void, allowing plaintiffs recourse against other parties for the value of the leasehold improvements. Plaintiffs, therefore, failed to allege that, under these circumstances, defendant Winner's negligence resulted in any damage to them. Their depositions showed no likelihood of damages. There being no injury, there was no actionable negligence, and defendant Winner was entitled to judgment as a matter of law.

Summary judgment in favor of defendant Winner is, therefore,

Affirmed.

Judges VAUGHN and WELLS concur.

IN THE MATTER OF: SHIRLEY JACKSON

No. 8212DC741

(Filed 1 February 1983)

1. Insane Persons § 1.2— mental illness—dangerousness to self or others—sufficiency of evidence

The trial court's finding that respondent was mentally ill was supported by the testimony of a psychiatrist who examined respondent on the day respondent was admitted to a mental institution, and the court's finding that respondent was dangerous to herself or others was supported by the testimony

of respondent's brother and her mother concerning threats and acts of violence by respondent.

2. **Constitutional Law § 4; Insane Persons § 1.1— involuntary commitment—no standing to challenge constitutionality of statutes**

Respondent had no standing to challenge the constitutionality of involuntary commitment statutes providing that the State would be represented at involuntary commitment hearings held at one of the four regional psychiatric centers and permitting the trial judge to preside at the involuntary commitment hearing and also question witnesses at the same proceeding since respondent was not adversely affected by the statutes. G.S. 122-58.7(b); G.S. 122-58.24.

APPEAL by respondent from *Cherry, Judge*. Order entered 29 April 1982 in District Court, CUMBERLAND County. Heard in the Court of Appeals 18 January 1983.

This is an appeal by respondent from an order involuntarily committing her to Dorothea Dix Hospital in Raleigh.

Respondent's mother obtained a petition for involuntary commitment on 20 April 1982. Respondent was involuntarily committed on the same day.

The petitioner presented three witnesses at the 29 April 1982 hearing. Doris Hart, respondent's mother, described respondent's behavior. She stated "I was afraid she was going to hurt herself because she threatened a lot of people in the area."

Vernon Hart, respondent's brother, testified that the respondent threatened to cut his throat and did cut his hand on 15 April 1982.

Dr. Stephen Jones, the screening psychiatrist at Dorothea Dix Hospital on the day that the respondent was admitted, stated that the respondent had "evidence of delusional thinking" and seemed "somewhat elated with hyperactivity." He described her condition as "bipolar disorder, manic type" and concluded that "I believe she is mentally ill." Jones added "I feel she would be a danger to herself and others outside a confined environment" and concluded that she was in need of commitment.

Respondent's motion to dismiss based on insufficiency of the evidence was denied.

Two witnesses for the respondent testified that they had not seen her exhibit irrational behavior and that her conversation

was coherent. Maxine Best, respondent's former attorney, stated that the respondent had not threatened to kill anyone in her presence.

At the close of all of the evidence, respondent's renewed motion to dismiss was denied.

An order involuntarily committing the respondent to Dorothea Dix Hospital for 90 days was entered at the conclusion of the hearing. It stated "the Respondent is mentally ill and is imminently dangerous to herself or others and ought to be committed for treatment." From this order, respondent appealed.

Attorney General Edmisten, by Assistant Attorney General Wilson Hayman, for the State.

Assistant Public Defender Richard B. Glazier for the respondent.

ARNOLD, Judge.

[1] Respondent first argues that the trial court's conclusion that she was dangerous to herself or others was unsupported by evidence. We disagree.

G.S. 122-58.7(i) states:

> To support a commitment order, the court is required to find, by clear, cogent, and convincing evidence, that the respondent is mentally ill or inebriate, and dangerous to himself or others, or is mentally retarded, and because of an accompanying behavior disorder, is dangerous to others. The court shall record the facts which support its findings.

Under the statute, two distinct facts must be found by clear, cogent, and convincing evidence: "first, that the respondent is mentally ill or inebriate and second, that the respondent is dangerous to himself or others." *In re Monroe*, 49 N.C. App. 23, 28, 270 S.E. 2d 537, 539 (1980).

It is not our function on appeal to determine if the evidence offered meets the statutory standard. Instead, our job "is simply to determine whether there was any competent evidence to support the factual findings made." *In re Crainshaw*, 54 N.C. App. 429, 431, 283 S.E. 2d 553, 554 (1981).

We find sufficient competent evidence to support the order here. Dr. Jones' observations of the respondent supported his conclusion and the court's finding that she is mentally ill. The testimony of Doris and Vernon Hart about the respondent's threats and acts of violence support a finding that she is dangerous to herself or others. Thus, the statutory standards are met.

Respondent next makes three untenable arguments attacking the lack of counsel for the petitioner in an involuntary commitment proceeding as a constitutional violation. She contends that the procedure violates her constitutional rights to due process, equal protection and a fair and impartial hearing.

We first note that the respondent was effectively represented by counsel at the commitment hearing. Thus, it is difficult to find prejudice to her because the petitioner did not have counsel.

[2] Respondent attacks two parts of the statute as unconstitutional. First, G.S. 122-58.7(b) and -58.24 provide that the State will be represented at involuntary commitment hearings held at one of the four regional psychiatric centers in North Carolina. There is no such provision guaranteeing counsel for the State or the petitioner for hearings held away from the centers.

Respondent's other argument is that it is unconstitutional to allow the trial judge to preside at an involuntary commitment hearing and also question witnesses at the same proceeding.

A litigant who challenges a statute as unconstitutional must have standing. To have standing, he must be adversely affected by the statute. *State v. Mems*, 281 N.C. 658, 190 S.E. 2d 164 (1972) and cases cited therein. *See also* 16 C.J.S. *Constitutional Law* § 76 (1956).

We find no prejudice to the respondent in the challenged portions of the statute. Thus, she has no standing to challenge their constitutionality.

The comments of the court in *French v. Blackburn*, 428 F. Supp. 1351 (M.D.N.C. 1977), *aff'd*, 443 U.S. 901 (1979), which held that our statutory scheme for involuntary commitment is constitutional, are persuasive. "The Court is of the general opinion

that the North Carolina General Assembly has enacted an excellent legislative scheme which adequately protects the interests of all who may be involved in an involuntary commitment proceeding." 428 F. Supp. at 1354. *See generally,* Miller and Fiddleman, *Involuntary Civil Commitment in North Carolina: The Result of the 1979 Statutory Changes,* 60 N.C. L. Rev. 985 (1982) (a description and analysis of the law in North Carolina in this area).

Affirmed.

Judges HILL and WHICHARD concur.

FREDDY RAY JONES v. EUGENE BOYCE

No. 8210SC269

(Filed 1 February 1983)

Attorneys at Law § 5.1; Rules of Civil Procedure § 8.1— professional malpractice action—matter in controversy exceeding $10,000—failure to properly state relief demanded—dismissal of action—no abuse of discretion

The trial court did not abuse its discretion in dismissing plaintiff's action, pursuant to G.S. 1A-1, Rule 41(b), for failure to comply with the requirement of G.S. 1A-1, Rule 8(a)(2), that "in all professional malpractice actions . . . wherein the matter in controversy exceeds . . . $10,000 . . . , the pleading shall not state the demand for monetary relief, but shall state the relief demanded is . . . in excess of $10,000 . . . ." As a responsive pleading had been served when plaintiff made a motion to amend, he could only do so by leave of court or by written consent of the adverse party. G.S. 1A-1, Rule 15(a).

APPEAL by plaintiff from *Bailey, Judge.* Orders entered 19 October 1981 in Superior Court, WAKE County. Heard in the Court of Appeals 20 January 1983.

David H. Rogers for plaintiff appellant.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Ronald C. Dilthey and Theodore B. Smyth, for defendant appellee.

WHICHARD, Judge.

I.

The principal issue is whether the court abused its discretion in dismissing plaintiff's action, pursuant to G.S. 1A-1, Rule 41(b), for failure to comply with the requirement of G.S. 1A-1, Rule 8(a)(2), that "in all professional malpractice actions . . . wherein the matter in controversy exceeds . . . ten thousand dollars . . . , the pleading shall not state the demand for monetary relief, but shall state that the relief demanded is . . . in excess of ten thousand dollars . . . ." We find no abuse.

II.

Plaintiff, an inmate at Central Prison, brought this professional malpractice action *pro se* against defendant, a licensed attorney. The *ad damnum* clause of plaintiff's complaint prayed for one million dollars as compensatory damages and two million dollars as punitive damages.

Defendant, by answer and by separate motion pursuant to G.S. 1A-1, Rule 41(b), prayed for dismissal of the action for plaintiff's failure to comply with the following proviso contained in G.S. 1A-1, Rule 8(a)(2): "Provided, however, in all professional malpractice actions . . . wherein the matter in controversy exceeds . . . ten thousand dollars . . ., the pleading shall not state the demand for monetary relief, but shall state that the relief demanded is . . . in excess of ten thousand dollars . . . ."

The court denied plaintiff's motions to amend his complaint, to continue a scheduled hearing on defendant's motion to dismiss, and to have the court recuse itself. It allowed defendant's motion to dismiss.

Plaintiff appeals.

III.

A defendant may move for dismissal of an action for plaintiff's failure to comply with the Rules of Civil Procedure. G.S. 1A-1, Rule 41(b). The grant of power to make the motion implies discretionary power to allow it. It equally implies appellate review limited to determination of whether abuse appears in the exercise of that discretion.

IV.

A responsive pleading had been served when plaintiff made his motion to amend. He thus was not entitled to amend as a matter of course, and could do so only by leave of court or by written consent of the adverse party. G.S. 1A-1, Rule 15(a). While leave of court "shall be freely given when justice so requires," G.S. 1A-1, Rule 15(a), and while justice might often so require where a layman appearing *pro se* inadvertently fails to conform to technical legal requirements, *see Gordon v. Leeke*, 574 F. 2d 1147, 1151 (4th Cir.), *cert. denied*, 439 U.S. 970, 58 L.Ed. 2d 431, 99 S.Ct. 464 (1978), judicial discretion may properly be exercised to subordinate these concerns to readily discernible countervailing legislative intent.

V.

The General Assembly enacted G.S. 1A-1, Rule 8(a)(2), in response to a perceived crisis in the area of professional liability insurance. A study commission thereon recommended "elimination of the ad damnum clause in professional malpractice cases [to] avoid adverse press attention prior to trial, and thus save reputations from the harm which can result from persons reading about huge malpractice suits and drawing their own conclusions based on the money demanded." *Report of the North Carolina Professional Liability Insurance Study Commission*, March 12, 1976, p. 33. Rather than eliminating the clause entirely, the Assembly chose to follow the Wisconsin approach in which "only a jurisdictional amount is named (e.g., the plaintiff claims in excess of $10,000 in damages)." *Id.* at p. 32. *See* Wis. Stat. Ann. § 655.009(1) (West 1980).

VI.

Rule 8(a)(2) prescribes no penalty for violation of its proscription against stating the demand for monetary relief. Absent application of the Rule 41(b) provision for dismissal for violation of the rules, litigants could ignore the proscription with impunity, thereby nullifying the express legislative purpose for its enactment.

The General Assembly thus must have intended application of the Rule 41(b) power of dismissal as a permissible sanction for violation of the Rule 8(a)(2) proscription. We consequently decline

to find an abuse of discretion in denial of the motions to amend and to continue, or in allowance of the motion to dismiss.

VII.

The record indicates that the recusal motion was first tendered following plaintiff's argument on his other motions. No evidence in support of the unverified allegations in the motion appears. In this state of the record, we are unable to perceive an abuse of discretion in denial of the motion.

Affirmed.

Judges ARNOLD and HILL concur.

MARY B. HOLDER, EMPLOYEE, PLAINTIFF v. NEUSE PLASTIC COMPANY, EMPLOYER, FEDERAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8210IC190

(Filed 1 February 1983)

Master and Servant § 67.1— workers' compensation—permanent partial disability of both back and leg—propriety of award

The Industrial Commission properly awarded compensation for permanent partial disability of both plaintiff's back and her leg although there was evidence that pain in and loss of use of plaintiff's leg were related to her back injury.

APPEAL by defendants from opinion and award of the North Carolina Industrial Commission filed 18 September 1981. Heard in the Court of Appeals 11 January 1983.

Defendants appeal from an award of workers' compensation to plaintiff for permanent partial disability of her back and leg.

Gene Collinson Smith for plaintiff appellee.

Young, Moore, Henderson and Alvis, P.A., by B. T. Henderson, II, Edward B. Clark, and William F. Lipscomb, for defendant appellants.

WHICHARD, Judge.

The issue is the propriety of awarding compensation for permanent partial disability of both plaintiff's back and her leg. Relying on *Little v. Food Service*, 295 N.C. 527, 246 S.E. 2d 743 (1978), and *Perry v. Furniture Co.*, 296 N.C. 88, 249 S.E. 2d 397 (1978), we affirm the award.

Defendants admitted that plaintiff sustained an injury by accident arising out of and in the course of her employment. By agreement they paid compensation for a back injury sustained in the accident, and they do not except to the award here of further compensation for that injury.

Their exception is to a finding that in addition to the back injury plaintiff sustained a fifty percent permanent partial disability of her leg, and to the award of compensation therefor. Our review is limited to whether there was competent evidence to support the finding, and whether the finding supports the conclusion that compensation should be awarded. *Perry v. Furniture Co., supra*, 296 N.C. at 92, 249 S.E. 2d at 400; *Smith v. Central Transport*, 51 N.C. App. 316, 319, 276 S.E. 2d 751, 753 (1981).

The finding is amply supported by the following competent evidence:

Plaintiff testified that she had pain in and down her leg, and that she was numb down the leg. She stated: "The sensation in my leg is just pain real bad. There is numbness and it gives away [sic]. It becomes weak. I continue to have weakness and it has remained about the same since I came from the hospital."

An orthopedic surgeon testified that he had treated plaintiff commencing two days after the accident. She had complained initially, *inter alia*, of "experiencing pain in the right leg and some numbness in the right foot." She subsequently "continued complaints of primarily pain radiating into the right leg." After three surgical procedures plaintiff continued to experience back and right leg pain. She had demonstrable right calf atrophy, numbness in her right foot and leg, depression of the right ankle reflex, and weakness in the right calf musculature. In the witness' opinion plaintiff had a fifty percent disability of the back and "a 50 percent disability of the right leg as well." He estimated that

"with the back and leg disability, . . . she probably has a 75% disability of the body as a whole."

Because the foregoing competent evidence supports the disputed finding, the finding is conclusive on appeal. *Hollman v. City of Raleigh*, 273 N.C. 240, 245, 159 S.E. 2d 874, 877 (1968); *Pennington v. Flame Refractories, Inc.*, 53 N.C. App. 584, 586, 281 S.E. 2d 463, 465 (1981). Whether it supports the conclusion that compensation should be awarded becomes the issue.

In *Little v. Food Service, supra*, the uncontradicted evidence tended to show that an employee had sustained injury to her spinal cord resulting in incomplete use of her extremities. Our Supreme Court held that an award of workers' compensation based on the back injury alone was improper; and that if the Industrial Commission determined that plaintiff had suffered additional impairments, "the award must take into account these and all other compensable injuries resulting from the accident." *Little*, 295 N.C. at 531, 246 S.E. 2d at 746. That Court has since stated: "The *Little* decision mandates the payment of compensation for *all* disability caused by the work-related accident." *Morrison v. Burlington Industries*, 304 N.C. 1, 17, 282 S.E. 2d 458, 469 (1981) (emphasis supplied; emphasis in original omitted).

In *Perry v. Furniture Co., supra*, plaintiff was awarded compensation for a back injury only. The record contained evidence of pain in and loss of use of plaintiff's legs as well. The Supreme Court directed remand to the Industrial Commission, with the instruction that "[i]f, in addition to his back injury, [plaintiff] has suffered some loss of use of either or both legs, the Commission shall make findings of fact as to the amount and . . . issue an award . . . ." *Perry*, 296 N.C. at 95, 249 S.E. 2d at 402.

We find *Little* and *Perry* controlling, and the award of compensation for both plaintiff's back and leg injuries accordingly proper. "[T]he injured employee is entitled to an award which encompasses all injuries received in the accident." *Giles v. Tri-State Erectors*, 287 N.C. 219, 225, 214 S.E. 2d 107, 111 (1975); *Caesar v. Publishing Co.*, 46 N.C. App. 619, 622, 265 S.E. 2d 474, 476 (1980). Those injuries here include both back and leg disabilities.

Defendants contend that because plaintiff's medical expert testified that "the source of any difficulty to her right leg stems

from the back," his back disability rating included the leg disability; and that there is thus no competent evidence to support the finding of permanent partial disability of plaintiff's leg as a result of the injury. We find the contention without merit for the following reasons:

Plaintiff's expert testified to his opinion of her back disability rating, and immediately thereafter testified that "she has a 50 percent disability of the right leg *as well.*" (Emphasis supplied.) The use of the phrase "as well" constitutes evidence supporting a finding that plaintiff's back and leg disabilities were separate and distinct.

This witness also testified that "with the back and leg disability, . . . [plaintiff] probably has a 75% disability of the body as a whole." The fact that the witness, when considering the back and leg disabilities together, gave a disability rating to the body as a whole which exceeded that given to the back alone, is further evidence that he viewed the back and leg disabilities as discrete.

Finally, the evidence in *Little*, like that on which defendants rely here, indicated that an injury to plaintiff's spinal cord was the cause of "weakness in all of her extremities, and numbness or loss of sensation throughout her body." *See Little, supra*, 295 N.C. at 530-31, 246 S.E. 2d at 745 (emphasis omitted). The Supreme Court there held that the award, in addition to compensating for the plaintiff's back injury, must take into account and provide compensation for the non-spinal impairments as well.

Affirmed.

Judges ARNOLD and HILL concur.

IN THE MATTER OF: KELLY A. PERKINS

No. 8212DC740

(Filed 1 February 1983)

1. **Insane Persons § 1.2— finding of imminent danger to self or others supported by evidence**

The evidence amply supported the trial court's findings that respondent was mentally ill and that he was dangerous to himself or others, G.S. 122-36 and G.S. 122-58.7(i), where there was evidence that respondent had fired a gun at the temporary fiduciary of respondent's funds and where a psychiatrist testified that respondent was dangerous to himself or others.

2. **Constitutional Law § 40— no per se constitutional right to opposing counsel**

There is no *per se* constitutional right to opposing counsel, and absence of counsel for petitioner did not violate certain constitutional rights of respondent in an involuntary commitment proceeding.

APPEAL by respondent from *Cherry, Judge.* Order entered 22 April 1982 in District Court, CUMBERLAND County. Heard in the Court of Appeals 18 January 1983.

Respondent appeals from an order finding that he is mentally ill and imminently dangerous to himself or others, and committing him involuntarily to the VA Hospital in Fayetteville.

Attorney General Edmisten, by Associate Attorney Walt M. Smith, for the State.

Staples Hughes, Assistant Public Defender, for respondent appellant.

WHICHARD, Judge.

[1] Respondent contends that because the evidence was insufficient to support the finding that he "is imminently dangerous to himself or others," the court erred in denying his motions to dismiss. We disagree.

The involuntary commitment statute, G.S. 122-58.1 to .27 (1981 & Supp. 1981), required as a condition to a valid commitment order that the court find, by clear, cogent, and convincing evidence, two distinct facts: first, that respondent was mentally ill or inebriate, as those words are defined in G.S. 122-36; and second, that respondent was dangerous to himself or others. G.S.

122-58.7(i); *In re Holt*, 54 N.C. App. 352, 353, 283 S.E. 2d 413, 414 (1981); *In re Carter*, 25 N.C. App. 442, 444, 213 S.E. 2d 409, 410 (1975).

The court found that respondent was mentally ill. A psychiatrist at the VA Hospital in Fayetteville testified that he had first seen respondent eight days earlier, and had last seen him the day before the hearing. He further testified: "[Respondent] is suffering from chronic schizophrenia and has recently had an acute flareup. In my opinion, he is mentally ill."

The trier of fact could and did find that the foregoing constituted clear, cogent, and convincing evidence to support a finding that respondent was mentally ill. The finding is thus conclusive on appeal, and the first of the two statutory requirements is satisfied. *See In re Underwood*, 38 N.C. App. 344, 347-48, 247 S.E. 2d 778, 780-81 (1978).

To satisfy the second requirement there must be (1) findings to support a conclusion that respondent was dangerous to himself or others, and (2) competent evidence to support such findings. *Id.; Holt, supra.*

The court found that respondent was dangerous to himself or others. The temporary fiduciary of respondent's funds testified that he had released to respondent funds he felt to be sufficient; that he had denied respondent's request for further funds; and that respondent thereupon had taken from his pocket what appeared to be a handgun, had placed it on the table, and had said, "Well, I guess I'll have to shoot you then." He further testified that respondent then removed the gun from the table, pointed it at him, and fired twice.

The psychiatrist who had examined respondent testified: "In my opinion, [respondent] is dangerous to himself or others." He further testified:

> [H]is thinking is . . . so disorganized that he can't think in a logical coherent fashion, and hence I don't feel that he could make sound rational judgments about his behavior with respect to himself and . . . other people at this time.
>
> . . . .

> I think the potential [to harm other people] is there . . . . I cannot say absolutely that [he] will, but I think the potential is there . . . .
>
> . . . .
>
> [I]n my experience any person who acts out in a potentially violent or aggressive way towards other people has the capacity to turn that violence upon himself . . . .

The trier of fact could and did find that the foregoing constituted clear, cogent, and convincing evidence to support a finding that respondent was dangerous to himself or others. The second of the statutory requirements is thus satisfied, *Underwood, supra,* and denial of the motions to dismiss was not error.

[2] Respondent also presents ingenious but untenable arguments to the effect that absence of counsel for *petitioner* violated certain constitutional rights of *respondent.* The gravamen of his contention is (1) that he was denied a fair hearing because, due to absence of counsel for petitioner, the court acted as petitioner's *de facto* counsel; and (2) that he was denied equal protection of the law because petitioners in hearings at state regional psychiatric facilities are represented by counsel, G.S. 122-58.7(b), -58.24, while petitioners in hearings held elsewhere are not. *See In re Jackson,* 60 N.C. App. 581, 299 S.E. 2d 677 (1983) in which identical contentions were presented.

We are aware of no *per se* constitutional right to opposing counsel. Nothing in the record indicates language or conduct by the court which conceivably could be construed as advocacy in relation to petitioner or as adversative in relation to respondent. Respondent thus fails to show that he has been adversely affected by the involuntary commitment statutes as applied, and he therefore has no standing to challenge their constitutionality. *See State v. Mems,* 281 N.C. 658, 669, 190 S.E. 2d 164, 172 (1972); 16 C.J.S., Constitutional Law § 76a (1956). *See also French v. Blackburn,* 428 F. Supp. 1351, 1354 (M.D.N.C. 1977), *aff'd,* 443 U.S. 901, 61 L.Ed. 2d 869, 99 S.Ct. 3091 (1979) ("[T]he North Carolina General Assembly has enacted an excellent legislative scheme which adequately protects the interests of all who may be involved in an involuntary commitment proceeding."). *See generally*

Miller and Fiddleman, *Involuntary Civil Commitment in North Carolina: The Result of the 1979 Statutory Changes*, 60 N.C. L. Rev. 985, 996 (1982); Hiday, *The Attorney's Role in Involuntary Civil Commitment*, 60 N.C. L. Rev. 1027, 1029 (1982).

Affirmed.

Judges ARNOLD and HILL concur.

STATE OF NORTH CAROLINA v. RUDY VALLY DORSEY, JANET LEE WHITE

No. 8226SC448

(Filed 1 February 1983)

Searches and Seizures § 19— search warrant—failure to rebut presumption of validity

The trial court erred in concluding that a search under a warrant based on information supplied by a police informant was illegal where defendants presented no evidence to rebut the presumption of the validity of the warrant.

APPEAL by the State of North Carolina from *Snepp, Judge*. Order entered 30 November 1981 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 9 November 1982.

Defendants Dorsey and White were charged with felonious trafficking in heroin, felonious possession of heroin with intent to sell, felonious possession of cocaine with intent to sell, and felonious possession of marijuana. At the hearing on the motion to suppress, the State offered evidence which tended to show the following. On 24 June 1981, an informant told Charlotte police officer Hawks that he had seen heroin at defendant Dorsey's apartment within the past forty-eight hours. According to Hawks, the informant had been used for a year, and his information had led to a number of arrests. Hawks' application for a search warrant contained the following: "This informant stated to this applicant that he has been inside of [Dorsey's] . . . apartment . . . within the past 48 hours and has observed heroin . . . and further has observed Rudy Dorsey in possession of heroin inside of this apartment. . . ."

A search warrant was obtained and Charlotte police officers and SBI agents searched defendant's apartment and found heroin, cocaine, marijuana, two pistols, and $2,000.00. Four packages of heroin were found in defendant White's purse.

Defendant did not offer any evidence at the suppression hearing.

In his memorandum opinion and order, the trial judge found the following facts:

> Officer Hawks had known the informant relied upon for some time. The informant had furnished him reliable information over a considerable period of time which led to the arrest of persons for possession of controlled substances. Each time he furnished reliable information, he was paid money by the police department. From January 1, 1981, up to June 24, 1981, the informant had received 15 payments, totalling $600.00, and, he was paid an additional $400.00 for the information given in these cases.
>
> Sometime before June 24, 1981, Officer Hawks told the informant that he suspected that the defendant Dorsey was engaged in the sale and distribution of controlled substances, and that he would like to have some information about him.
>
> On the morning of June 24th, the informant called Hawks and told him that he had been in Dorsey's apartment during the past 48 hours, and had observed what he believed to be heroin, based on his six years' experience with the substance. . . . [T]he evidence shows that the informant was used, as a source of information by the police on numerous occasions—some 15 in about six months—for which he was paid a total of a substantial sum of money. Officer Hawks had requested him to obtain information about Dorsey, for which, on the basis of past experience the informant certainly expected to be paid. True, the officer did not directly tell the informant to enter Dorsey's apartment in some manner, or specify how the information was to be obtained. Nevertheless, under all of these circumstances, it is crystal clear that the informant had become an instrumentality or agent of the State.

The affidavit states that the informant had been in the Dorsey apartment. If his entry was otherwise than legal under the Fourth Amendment, then the information upon which probable cause for the search warrant was based was "fruit of the poisoned tree". *Wong Sun v. United States*, 371 U.S. 471, 9 L.Ed. 2d 441.

A search of private property without proper consent is unreasonable unless it is authorized by a valid search warrant. *Camara v. Municipal Court*, 387 U.S. 523, 18 L.Ed. 2d 930 (1967). *The State has the burden to show that it was within one of the exceptions to the exclusionary rule. Bumper v. North Carolina*, 391 U.S. 543, 20 L.Ed. 2d 797. (Emphasis added.)

The trial judge concluded that "the search of defendant Dorsey's apartment on 24 June 1981, was illegal, and that all evidence seized as a result thereof must be excluded from evidence."

Attorney General Edmisten, by Assistant Attorneys General Grayson G. Kelley and J. Michael Carpenter, for the State.

Theo X. Nixon, for defendant appellee, Rudy Vally Dorsey.

Charles V. Bell, for defendant appellee, Janet Lee White.

VAUGHN, Chief Judge.

Although we do not concede the correctness of the judge's conclusion that the informant was an agent of the State or the legal consequence thereof if he had been, it is not necessary to reach that question in order to dispose of this appeal.

A search made pursuant to a valid search warrant is *prima facie* evidence of the reasonableness of the search within the meaning of the Fourth Amendment. *State v. Turnbull*, 16 N.C. App. 542, 192 S.E. 2d 689 (1972). A search warrant is presumed to be valid unless irregularity appears on its face. *State v. Spillars*, 280 N.C. 341, 185 S.E. 2d 881 (1972). If defendants had evidence to rebut the presumption of validity of the warrant, it was their obligation to go forward with their evidence. *State v. Gibson*, 32 N.C. App. 584, 233 S.E. 2d 84 (1977). That evidence must be presented at a hearing. G.S. 15A-977(d). Testimony at the hearing must be under oath. *Id.*

Defendants offered no testimony at the hearing. There is, therefore, not a shred of evidence to indicate that the informant obtained the information he supplied the police by any means that are offensive to the Constitution of the United States or the Constitution of the State of North Carolina.

The order allowing defendants' motion to suppress is reversed.

Reversed.

Judges WELLS and WHICHARD concur.

STATE OF NORTH CAROLINA v. RALPH OGBURN

No. 8218SC690

(Filed 1 February 1983)

Homicide § 28.1— instruction on self-defense not required

In this prosecution for felonious assault, the trial court was not required to instruct the jury on self-defense where defendant's testimony tended to show that a gun accidentally discharged while in the victim's hand when the defendant pushed the victim's hand and ducked, since such evidence tended to show an accident rather than self-defense.

APPEAL by defendant from *Davis, Judge*. Judgment entered 11 March 1982 in Superior Court, GUILFORD County. Heard in Court of Appeals 13 January 1983.

Defendant was charged in a proper bill of indictment with assaulting Pandora Ogburn (his wife) with a deadly weapon with intent to kill by shooting her in the head with a pistol inflicting serious injury.

Defendant was found guilty as charged, and appealed to this court from a judgment imposing a prison sentence of twenty years.

Attorney General Rufus L. Edmisten, by Assistant Attorney General James E. Magner, Jr. for the State.

W. Steven Allen for the defendant, appellant.

HEDRICK, Judge.

Defendant assigns error to the trial court's refusal to instruct the jury on self-defense. At trial, the State offered evidence tending to show that the defendant and his wife got into an argument, and the wife grabbed the defendant's "pants" and took a pistol from one of the pockets. Defendant took the gun away from his wife and shot her in the head inflicting serious and permanent personal injuries.

The defendant told the officer: "I don't know how many times I hit her but I know I emptied the gun."

At trial the defendant testified as follows:

> She reached in my pants pocket, pulled out the gun, and when she pulled out the gun, she pulled the trigger. I grabbed her hand and, you know, she fired it this way a few times. She fired—I don't know how many times—but she fired this way toward the wall, because she tried to fire at me. I was pushing her hand away like this so she finally got the gun up towards me like she was going to shoot me in the head and I ducked and pushed and when I ducked and pushed, the bullet hit the left side of her head and that's exactly how it happened.

We hold that the evidence presented by the defendant was not sufficient to warrant an instruction by the judge on self-defense. The evidence was sufficient to require instructions on the defense of accident and the trial judge properly gave such a charge to the jury. According to the defendant he did not shoot the victim at all. Rather, the gun accidentally discharged while in the victim's hand when the defendant pushed the victim's hand and ducked. An instruction on self-defense would have in effect suggested that the defendant was justified in shooting the victim, an act which from his testimony he did not do. Therefore, the trial court did not err in refusing defendant's request for an instruction on self-defense.

Defendant's second assignment of error pertains to the exclusion of evidence relating to the character of the victim. The evidence in question was offered to show the defendant's reasonable apprehension of bodily harm in developing his defense of self-defense. Since the issue of self-defense is one not borne out

by the evidence, we find the second assignment of error raised in defendant's brief without merit.

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

No error.

Judges JOHNSON and EAGLES concur.

RAYMOND McMANUS, ADMINISTRATOR OF THE ESTATE OF DANNY MICHAEL WYATT v. JOHN GAMBILL, ADMINISTRATOR OF THE ESTATE OF BURL WILLIAM LOVE, INDIVIDUALLY; BILLY WILLIAM LOVE, INDIVIDUALLY; DOUGLAS JAMES BROWN; NATIONWIDE MUTUAL INSURANCE COMPANY; BURL WILLIAM LOVE AND BILLY RAY BURKE, T/D/B/A B & B USED CARS

No. 8223SC234

(Filed 1 February 1983)

Appeal and Error § 45— appellate review limited to questions presented

Where the entry of summary judgment was assigned as error, but the only question presented in an appellant's brief for review was whether liability insurance policies covered a fatal accident which was the subject of the action, under Rule 28(a) of the Rules of Appellate Procedure, the appeal must be dismissed in that the appellate court's review is limited to questions presented by the appellant's brief.

APPEAL by plaintiff from *Davis, Judge*. Judgment entered 1 December 1981 in Superior Court, WILKES County. Heard in the Court of Appeals 14 January 1983.

This wrongful death action arose out of an automobile accident. According to the pleadings of the parties involved in this appeal, plaintiff's decedent, Danny Michael Wyatt, was a passenger in a car registered in the name of the defendant Brown, but operated by the defendant Gambill's decedent, Burl William Love, who along with the defendant Burke, jointly owned and conducted a business known as B & B Used Cars. The appellees Burke and B & B Used Cars denied that Love was about that enterprise's business when the fatal accident occurred and

alleged that he was on a personal venture of his own. During discovery many depositions were taken, much of the testimony being about Love's purpose in using the car on the occasion involved and the different liability insurance policies that various of the defendants and their spouses had.

The defendants Burke and B & B Used Cars then moved for summary judgment on the ground that there was no evidence that the decedent Love was acting as their agent at the time of the accident. After a hearing before Judge Davis, judgment allowing the motion was entered and the plaintiff appealed. Though the entry of the judgment was assigned as error, the only question presented in the brief for review was whether the liability insurance policies of B & B Used Cars and its partners covered the fatal accident.

Franklin Smith for plaintiff appellant.

Womble, Carlyle, Sandridge & Rice, by Allen R. Gitter, for defendant appellee Billy Ray Burke, d/b/a B & B Used Cars.

PHILLIPS, Judge.

Since, under Rule 28(a) of the Rules of Appellate Procedure, our review is limited to questions presented by the appellant's brief, the appeal must be dismissed.

The correctness of the summary judgment eliminating B & B Used Cars and the defendant Burke from the case not having been presented for our consideration, no opinion is expressed about it. Nor can we consider the insurance question that was presented, since that question was not ruled on by the trial judge.

Appeal dismissed.

Judges WEBB and BECTON concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 1 FEBRUARY 1983

BOWLING v. WINN-DIXIE No. 8227SC131	Cleveland (80CVS240)	No Error
BREWER v. HATCHER No. 824DC277	Duplin (79CVM518) (79CVM223)	No Error
IN RE SMITH No. 8228DC733	Buncombe (77J118)	Affirmed
NCNB v. BOYD No. 823DC230	Craven (81CVD291)	Reversed & Remanded
NORRIS v. BLUE CROSS- BLUE SHIELD No. 8111DC1260	Harnett (79CVD0900)	Affirmed
STATE v. BONDHILL No. 821SC645	Pasquotank (82CRS71)	No Error
STATE v. BYRD No. 8227SC783	Gaston (81CRS30180)	No Error
STATE v. GLEN & MILLER No. 8215SC530	Orange (81CRS8303) (81CRS8312)	No Error
STATE v. HARDY No. 821SC587	Pasquotank (81CRS4523)	No Error
STATE v. JACKSON & STANCIL No. 8219SC766	Cabarrus (82CR738) (82CR742)	No Error
STATE v. MASSEY No. 8220SC699	Union (82CRS0273) (82CRS0275)	No Error
STATE v. MITCHELL No. 8217SC773	Rockingham (81CR15429) (81CR15014) (81CR15015)	No Error
STATE v. SEELBINDER No. 8226SC659	Mecklenburg (81CRS33096) (81CRS33099)	Affirmed

STATE v. SIGMON No. 8222SC684	Iredell (81CRS16816)	Judgment revoking probation & activating suspended sentence Affirmed
STATE v. WHITFIELD No. 828SC770	Lenoir (81CRS12509) (81CRS12510)	No Error
STRICKLAND v. CRAWFORD No. 828SC195	Wayne (79CVS138)	Affirmed

STATE OF NORTH CAROLINA v. VIRGIL MAYO SANDERSON, SR., VIRGIL MAYO SANDERSON, JR., HUBERT MAYO SANDERSON

No. 824SC171

(Filed 15 February 1983)

1. **Criminal Law § 92.1— consolidation of charges against multiple defendants**

The consolidation for trial of the same charges against defendant and his two codefendants did not deny defendant a fair trial because some of the evidence admitted against the codefendants may not have been admissible against defendant since defendant's counsel could have requested a limiting instruction for any such evidence.

2. **Narcotics § 3.1— observation of growing marijuana—competency of witness**

An officer was properly permitted to testify that he saw what appeared to him to be marijuana plants growing in a field.

3. **Narcotics § 3.1— weight of marijuana—competency of witness**

A witness was competent to state the weight of marijuana on two trucks where the witness had weighed the trucks when they were loaded with marijuana and when they were empty.

4. **Narcotics § 4— trafficking in marijuana—manufacturing marijuana—sufficiency of evidence**

The State's evidence was sufficient to support conviction of defendant for manufacturing marijuana and for trafficking by manufacturing 100 pounds or more of marijuana where it tended to show that there were five separate patches of marijuana growing in cornfields on land owned or leased by defendant; defendant cultivated such land; some of the marijuana was growing near his grandson's trailer where he visited three or four times a week; and the total weight of all the marijuana was approximately 2,320 pounds.

5. **Criminal Law § 26.5; Narcotics § 5— possessing and manufacturing marijuana—trafficking by possessing and manufacturing—double jeopardy**

Conviction of defendants under G.S. 90-95(a) for possessing and manufacturing marijuana and under G.S. 90-95(h)(1) for trafficking by possessing and manufacturing marijuana violated defendants' rights against double jeopardy, and the convictions under G.S. 90-95(a) must be vacated, since possessing or manufacturing under G.S. 90-95(a) does not require proof of any additional facts beyond those required under G.S. 90-95(h)(1).

6. **Narcotics § 1.3— trafficking in marijuana by possessing and manufacturing—two separate crimes**

Under the decision in *State v. Anderson*, 57 N.C. App. 602 (1982), defendants could properly be convicted of both trafficking in marijuana by possession and trafficking in marijuana by manufacturing, since G.S. 90-95(h)(1) does not provide for only one crime of trafficking in marijuana but creates separate crimes of trafficking by sale, trafficking by manufacture, trafficking by delivery, trafficking by transportation, and trafficking by possession.

State v. Sanderson

APPEAL by defendants from *Llewellyn, Judge*. Judgments entered 9 October 1981 in Superior Court, ONSLOW County. Heard in the Court of Appeals 16 September 1982.

Defendants, Hubert Mayo Sanderson, Virgil Mayo Sanderson, Sr., and Virgil Mayo Sanderson, Jr., were each charged in separate bills of indictment with manufacturing marijuana, trafficking by manufacturing more than one hundred pounds of marijuana, conspiracy to traffic by manufacturing more than one hundred pounds of marijuana, possession with intent to sell and deliver marijuana, trafficking by possession of one hundred pounds or more of marijuana, and conspiracy to traffic by possessing one hundred pounds or more of marijuana.

The State's evidence tended to show the following. Defendants are related to each other; Virgil Mayo Sanderson, Jr. (Vic), age 22, is the son of Virgil Mayo Sanderson, Sr. (Virgil), age 45, who is the son of Hubert Mayo Sanderson. They live in a rural area of Duplin County. Virgil lives in a house belonging to his grandmother at Williams Crossroads, which is the intersection of state roads Nos. 1802 and 1804. Vic lives in a mobile home, owned by his mother, on state road No. 1804, approximately 600 yards west of Virgil's house. Vic's mobile home is on land owned by Hubert Sanderson. Hubert Sanderson lives in a house on Highway 41, two miles northwest of Williams Crossroads.

Sergeant Williams of the Beulaville Police Department testified that on 24 July 1981, as he flew in a small airplane over the farmland where Vic and Virgil live, he saw marijuana plants in several large clear places in the cornfields surrounding Vic's trailer. He radioed Detective Basden, who was on the ground, and told him that he saw the marijuana.

Sheriff King testified that he, an SBI agent, and a deputy sheriff arrived at the cornfield near Vic's trailer around seven o'clock. They discovered a thirty foot long clearing in front of the trailer with a path from the clearing to the trailer. Dried marijuana was spread out on three bed sheets in the clearing. The officers hid in the cornfield, and they saw Vic and Virgil ride up on mopeds. They arrested Vic, but Virgil ran away. Sheriff King found marijuana growing in a cornfield twenty-five feet behind Vic's trailer, and more marijuana drying in a ditch behind the trailer. Later, several other patches of marijuana were found near

the trailer, and a large patch was discovered in front of a neighbor's home. The plants were about six feet high. The total weight of all the marijuana was approximately 2,320 pounds.

The jury found Hubert Sanderson guilty of trafficking by manufacturing one hundred pounds or more of marijuana and manufacturing marijuana. He was sentenced to seven years imprisonment and a fine of $25,000.00 for trafficking, and two years for manufacturing marijuana. The sentences were to run concurrently.

The jury found both Virgil and Vic guilty on two counts of trafficking and two counts of conspiracy to traffic. The court sentenced each defendant to four consecutive seven-year terms, and fines totaling $100,000.00. They were also found guilty of manufacturing marijuana and possession with intent to sell and deliver. They were given a two-year sentence on each count to run concurrently with the trafficking sentences.

Attorney General Edmisten, by Assistant Attorney General Daniel F. McLawhorn, for the State.

Bailey, Raynor and Erwin, by Edward G. Bailey and Glenn O'Keith Fisher, for defendant appellants.

VAUGHN, Chief Judge.

Defendants present fifteen assignments of error in thirteen arguments. Their first two arguments are that the trial court erred in denying their pre-trial motions and renewed motions for severance of the cases for trial. Hubert Sanderson and Vic Sanderson filed motions for severance, but only Hubert Sanderson raises this argument on appeal. Vic's assignment of error is deemed abandoned. Rule 10(a), Rules of Appellate Procedure.

[1] The cases of all the appellants were properly joined pursuant to G.S. 15A-926(b)(2) which provides that "upon written motion of the prosecutor, charges against two or more defendants may be joined for trial: (a) When each of the defendants is charged with accountability for each offense. . . ." Since defendants were all charged with the same offense, they were properly joined. Thus, the disposition of defendant's motion for severance was a matter governed by the judge's discretion, and the ruling will not be disturbed on appeal unless defendant demonstrates an abuse of

judicial discretion depriving him of a fair trial. *State v. Lake*, 305 N.C. 143, 286 S.E. 2d 541 (1982).

Defendant, Hubert Sanderson, contends he was deprived of a fair trial because some of the evidence admitted against Vic and Virgil may not have been admissible against him, and in a separate trial the jury may have reached a different verdict. This argument is without merit. If there was evidence admissible against Vic or Virgil and not Hubert, defendants' counsel should have requested a limiting instruction. The transcript reveals no such request. Defendant has not shown any prejudice, but if any prejudice resulted, it was because defendant's counsel failed to request a limiting instruction, not because the cases were consolidated for trial. *See State v. Pierce*, 36 N.C. App. 770, 245 S.E. 2d 195 (1978).

[2] Defendants' next argument is that the trial court committed prejudicial error by overruling their objections to several questions which called for an impermissible opinion by the witness. The first question that defendants assign as error was asked by Mr. Hudson to Sergeant Williams. The question was, "What did it appear was growing other than corn?" Defendants objected: "Leading." The court overruled the objection and Sergeant Williams answered the question: "It appeared to me to be what I thought to be marijuana." The judge did not abuse his discretion in overruling the objection to leading and the witness was competent to testify as to what he saw growing in the fields. In general, a lay witness is competent to identify objects. These were growing plants with distinctive leaves and a characteristic color, not dried, cut up, vegetable matter. Any doubts the witness had would go to the weight of his testimony, not the admissibility. *See* 1 Brandis on North Carolina Evidence §§ 124, 129 (1982).

[3] The next questions and answers defendants contend were inadmissible were the following:

Mr. Hudson: Do you have an opinion as to the weight of the marijuana plants including the soil that was on the truck that day?

Mr. Johnson: Objection.

The Court: Overruled.

The witness (Deputy Sheriff Savage): It was approximately 500 pounds.

. . .

Mr. Hudson: And do you have an opinion as to the weight of the marijuana on [the second] truck, including stalks, roots, and the soil?

Mr. Johnson: Objection.

The witness (Deputy Sheriff Savage): Yes, sir.

The Court: Overruled.

The witness: Approximately 1800 pounds.

Since the witness had weighed the trucks when they were loaded with marijuana and when they were empty he was obviously qualified to state the weight of the marijuana based on his first-hand knowledge.

[4] Defendants' next argument is that the trial court committed prejudicial error by denying their motions to dismiss. This argument is brought forward only with respect to defendant Hubert Sanderson. A motion to dismiss requires consideration of the evidence in the light most favorable to the State, with any inconsistencies resolved in its favor. *State v. Spellman*, 40 N.C. App. 591, 253 S.E. 2d 320, *review denied*, 297 N.C. 616, 267 S.E. 2d 657, *cert. denied*, 444 U.S. 935, 100 S.Ct. 282, 62 L.Ed. 2d 193 (1979). If there is substantial evidence, whether direct, circumstantial, or both, to support a finding that the offense charged has been committed and defendants committed it, the motion to dismiss should be denied. *State v. McKinney*, 288 N.C. 113, 215 S.E. 2d 578 (1975).

It is undisputed that defendant Hubert Sanderson either owned or leased the land on which the marijuana was growing, and that he cultivated that land. Unquestionably, therefore, he was in possession of the growing marijuana to the same extent that he was in possession of the growing corn. Exclusive control is not required. *State v. Baxter*, 285 N.C. 735, 208 S.E. 2d 696 (1974). There were five separate patches of marijuana growing in his cornfields. Some of it was growing near his grandson's trailer where he visited three or four times a week. Obviously, the marijuana plants did not reach maturity overnight. When all the

evidence is considered in the light most favorable to the State, it permits a reasonable inference that Hubert Sanderson knew of the substantial quantity of growing marijuana on his land which he cultivated and frequented. His motion to dismiss was properly denied.

Defendants' next argument is that the trial judge's instruction to the jury constituted prejudicial error as to defendant Virgil M. Sanderson, Sr. The judge mistakenly used the name "Hubert Mayo Sanderson" instead of "Virgil Mayo Sanderson, Sr." three times in the manufacturing charge. At the trial, defendant made no attempt to correct this error. Our Supreme Court has said: "A mere slip of the tongue which is not called to the attention of the court at the time it is made will not constitute prejudicial error when it is apparent from a contextual reading of the charge that the jury could not have been misled thereby." *State v. Silhan*, 302 N.C. 223, 257, 275 S.E. 2d 450, 475 (1981). Since all three defendants were charged with the same offenses, and the same instructions were given on the manufacturing charge three times, there was no prejudicial error.

[5] Defendants also argue that the trial court committed prejudicial error by denying their motions to set aside the verdicts and for a new trial. Defendants contend they were placed in double jeopardy because they were subjected to multiple punishment for the same offense.

Defendants Virgil and Vic were found guilty of the following offenses: possession of marijuana with intent to sell; manufacturing marijuana; trafficking by possessing one hundred pounds of marijuana; trafficking by manufacturing one hundred pounds of marijuana; conspiracy to traffic by possession of marijuana; and conspiracy to traffic by manufacturing marijuana. Defendant Hubert Sanderson was found guilty of trafficking by manufacturing and manufacturing marijuana.

These offenses are contained in G.S. 90-95. The relevant sections are the following:

> (a) Except as authorized by this Article, it is unlawful for any person:

(1) To manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance. . . .

(h) (1) Any person who sells, manufactures, delivers, transports, or possesses in excess of 50 pounds . . . of marijuana shall be guilty of a felony. . . .

Defendants argue, and the State agrees, that G.S. 90-95(a) is a lesser included offense of G.S. 90-95(h)(1), and a conviction for both the greater and lesser included offenses would place defendants in double jeopardy.

It is fundamental that the constitutional guaranty against double jeopardy protects a defendant from multiple punishments for the same offense. *State v. Partin*, 48 N.C. App. 274, 269 S.E. 2d 250, *review denied*, 301 N.C. 404, 273 S.E. 2d 449 (1980). The test to determine whether one act constitutes one or two offenses is set forth in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306, 309 (1932): "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not."

Manufacturing or possession under G.S. 90-95(a) does not require proof of any additional facts beyond those required under G.S. 90-95(h)(1), therefore convictions under both statutes violate defendants' protection against double jeopardy, and the convictions for the lesser included offenses should be vacated.

[6] After vacating the G.S. 90-95(a) convictions, only the G.S. 90-95(h)(1) and G.S. 90-95(i) convictions remain for Virgil and Vic: trafficking by manufacturing, trafficking by possession, conspiracy to traffic by manufacturing, and conspiracy to traffic by possession. Hubert Sanderson is left with only the trafficking by manufacturing conviction. Defendants Virgil and Vic argue that they can only be guilty of one offense of trafficking in marijuana and one offense of conspiracy to traffic because G.S. 90-95(h)(1) provides for one crime of trafficking in marijuana rather than separate crimes of trafficking by sale, trafficking by manufacture, trafficking by delivery, trafficking by transportation, and traffick-

ing by possession. To answer defendants' argument, we must briefly discuss our previous marijuana statutes.

Originally, the statute regulating marijuana was G.S. 90-88: "It shall be unlawful for any person to manufacture, possess, have under his control, sell, prescribe, administer, dispense, or compound any narcotic drug, except as authorized in this article." (1935, c. 477, s. 2.) In 1971, G.S. 90-94 was enacted (1971, c. 919, s. 1; 1973, c. 476, s. 128), classifying marijuana as a Schedule VI controlled substance. In 1973 G.S. 90-95(a) was amended to its present form. The present statute is much more specific than its predecessor, clearly enumerating which acts are considered unlawful, with different penalties for each grade of controlled substance. Transactions of small amounts of marijuana are treated most leniently: a transfer of less than 5 grams for no remuneration is not considered a delivery, G.S. 90-95(b)(2), and possession of less than an ounce is a misdemeanor, G.S. 90-95(d)(4). In entirety, subsection (a) provides:

> Except as authorized by this Article it is unlawful for any person:
>
> (1) To manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance;
>
> (2) To create, sell or deliver, or possess with intent to sell or deliver, a counterfeit controlled substance;
>
> (3) To possess a controlled substance.

This means that the enumerated offenses in G.S. 90-95(a)(1): manufacturing, sale, delivery, possession with intent to manufacture, sell or deliver are separate offenses. *See, e.g., State v. Salem*, 50 N.C. App. 419, 274 S.E. 2d 501, *review denied*, 302 N.C. 401, 279 S.E. 2d 355 (1981); *State v. Cuthrell*, 50 N.C. App. 195, 272 S.E. 2d 616 (1980); *State v. Lankford*, 31 N.C. App. 13, 228 S.E. 2d 641 (1976); *State v. Shaw*, 28 N.C. App. 207, 220 S.E. 2d 634 (1975). Possession, however, is a lesser included offense of possession with intent to sell. *State v. Cloninger*, 37 N.C. App. 22, 245 S.E. 2d 192 (1978); *State v. Smith*, 27 N.C. App. 568, 219 S.E. 2d 516 (1975); *State v. Reindell*, 24 N.C. App. 141, 210 S.E. 2d 211 (1974). This interpretation is reasonable because the statute does not specifically provide that manufacture, sale, delivery, posses-

sion with intent to manufacture, sell or deliver are one crime, it merely says it is unlawful to do any of the enumerated acts. G.S. 90-95 was amended in 1979 to include sections (h) and (i). (Session Laws 1979, 2d sess. c. 1251, ss. 4-7, effective 1 July 1981.) Section (h) reads as follows:

> Notwithstanding any other provision 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 (avoirdupois) of marijuana *shall be guilty of a felony* which felony shall be known as *"trafficking in marijuana"*. . . . (Emphasis added.)

This statute was recently interpreted in *State v. Anderson*, 57 N.C. App. 602, 292 S.E. 2d 163, *review denied*, 306 N.C. 559, 294 S.E. 2d 372 (1982). The *Anderson* panel held that trafficking in marijuana refers to:

> [A] crime consisting of any one or more of the denounced acts, any one of which is a separate crime. . . . [I]f 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.

State v. Anderson, 57 N.C. App. at 606, 292 S.E. 2d at 166. In other words, *Anderson* interpreted G.S. 90-95(h)(1) as we have interpreted G.S. 90-95(a)(1): each of the enumerated offenses are separate offenses.

Although the doctrine of *stare decisis* leads us to follow the *Anderson* decision, for the following reasons we would reach a different result if we were addressing this question for the first time. In seeking to discover the legislative intent for interpretation of a statute, the court should consider the language of the statute, the spirit of the act, and what the act seeks to accomplish. *Stevenson v. City of Durham*, 281 N.C. 300, 188 S.E. 2d 281 (1972). It is an accepted rule of statutory construction that words of a statute will ordinarily be given their natural, approved, and recognized meaning. *Victory Cab Co. v. City of Charlotte*, 234 N.C. 572, 68 S.E. 2d 433 (1951). The words "shall be guilty of *a felony* which felony shall be known as 'trafficking in

marijuana' " seems to mean if a person does the forbidden act(s), he shall be guilty of one felony: trafficking in marijuana. Otherwise, the statute should read: "Any person who sells, manufactures, delivers, transports, or possesses in excess of 50 pounds shall be guilty of trafficking in marijuana." If the legislature intended G.S. 90-95(h)(1) to be interpreted in the same way as G.S. 90-95(a), they could easily have followed the language of G.S. 90-95(a): "It is unlawful for any person to sell, manufacture, deliver, transport or possess a controlled substance in excess of 50 pounds." Or, they could have simply increased the penalties provided in G.S. 90-95(b) for violations with large quantities of marijuana, and not included section (h) at all. Since they chose language which indicates that the offenses constitute one felony, logically the statute seems to refer to only one felony. Any other result implies the words "shall be guilty of a felony which felony shall be known as 'trafficking in marijuana' " are mere surplusage. We believe the legislative intent was to create one felony. In *Anderson* the Court said: "We find the words 'guilty of a felony . . . known as "trafficking in marijuana" ' relates primarily to the preceding words '50 pounds (avoirdupois) of marijuana.' " Of course, the felony cannot be "50 pounds of marijuana," rather, the felony is the sale, manufacture, delivery, transport, or possession of the fifty pounds of marijuana. The *Anderson* panel continued: "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. . . ." We agree with this statement that the singular crime of trafficking consists of one or more of the acts enumerated in the statute. We question however the *Anderson* panel's conclusion: "any one of which is a separate crime." If trafficking is a *singular crime* which may consist of any one or more of the denounced acts, we have difficulty seeing how each denounced act can be a separate crime. We have already examined the language of the statute and stated our opinion that the intent was to create one felony, which may consist of one or more of the enumerated acts. The spirit of the act, and what the act seeks to accomplish seem to be clear: its intent is to deter drug dealers. The offense of trafficking is limited to fifty pounds or more, with increasing penalties for larger amounts. G.S. 90-95(h)(1)(a), (b), (c), and (d). A person who has fifty pounds of marijuana is probably a dealer. It is unlikely that such a large quantity would be for personal use. Moreover, the statute would

be redundant if it did not refer to only one felony because a dealer who sold fifty pounds of marijuana would probably commit all the enumerated offenses. Prior to sale, however, the dealer would possess, manufacture, and probably transport the marijuana, but if the purpose of the act is to punish dealers, it would make sense for the punishment to be the same whether the dealer was caught before or after he made a sale. As previously stated, however, we will follow the decision in *Anderson.*

The convictions for possession with intent to sell and manufacturing are vacated and defendants' motions to arrest judgment in those cases are granted. The judgments as to the remaining convictions are affirmed.

Affirmed in part, reversed in part.

Judges WEBB and WELLS concur.

STATE OF NORTH CAROLINA v. LLOYD JAMES MORGAN

No. 8229SC384

(Filed 15 February 1983)

Criminal Law § 86.8— failure to give defendant notice of a grant of immunity to State's witness—prejudicial error

In a prosecution for second degree burglary where the only evidence against the defendant was the testimony of the State's witness, the failure of the prosecution to provide defendant with advance notice of the grant of immunity given the witness pursuant to G.S. 15A-1054(c), its allowance of the witness's denials that such immunity existed to stand uncorrected, and the trial court's failure to instruct the jury to consider the testimony of the immunized witness as it would consider the testimony of any other interested witness, pursuant to G.S. 15A-1052(c), resulted in manifest prejudice to the defendant requiring a new trial.

APPEAL by defendant from *Howell, Judge.* Judgment entered 27 March 1981 in Superior Court, TRANSYLVANIA County. Heard in the Court of Appeals 18 October 1982.

The defendant, Lloyd James Morgan, was indicted for second degree burglary. The indictment alleged that the defendant broke and entered the dwelling house of Mr. Billie Trotter in Lake Tox-

away, North Carolina at approximately 11:00 p.m., on 12 December 1979. The jury returned a verdict finding the defendant guilty as charged. The trial court entered judgment and commitment on the jury's verdict. From the verdict, judgment and commitment, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Richard L. Griffin, for the State.

Appellate Defender Adam Stein, for defendant appellant.

JOHNSON, Judge.

By his assignments of error defendant argues that (1) the prosecution's failure to give defendant notice of a grant of immunity to State's witness Harry Shelton, as required by G.S. 15A-1054(c), deprived defendant of his rights to confrontation and due process of law and (2) the trial court's failure to instruct the jury on the credibility of a witness who has been granted immunity, as required by G.S. 15A-1052 was prejudicial error. Our review of the record on appeal and assignments of error discloses prejudicial error requiring a new trial.

At trial, all of the evidence linking the defendant to the Trotter break-in came from the testimony of Harry Welch Shelton, a purported accomplice in the burglary. The gist of Shelton's testimony was that defendant and a man named J. C. Clayton came to his house on 12 December 1979 at about 9:00 or 10:00 p.m.; that they rode around in Clayton's car talking about breaking into Trotter's residence while Trotter was at work; that the three of them broke into Trotter's house at about 11:00 p.m. after first determining that he was at work; that they stole silver, jewelry and coins; and that they went to the defendant's residence where they divided up the stolen items.

The defendant testified in his own defense. He denied participation in the break-in of Trotter's residence and denied that he received any of the fruits of that crime. He testified that he had known Shelton for about four years, and did not know Clayton until they met in jail upon both being charged with the Trotter break-in.

The balance of the testimony at trial went primarily to either enhance or attack the credibility of Shelton and of the defendant.

Both Shelton and the defendant had prior criminal convictions. The State offered a prior statement made by Shelton to a Transylvania County Sheriff's Detective, Hubert Brown, as corroboration.

Detective Brown had investigated the Trotter break-in. On cross-examination, Brown admitted that he never recovered any of the stolen items and did not obtain any fingerprints at the crime scene. The defendant was never questioned regarding the Trotter break-in. Two or three months after the break-in Harry Shelton was questioned. Shelton denied having any part in it at that time. The Sheriff's office had no physical evidence to tie Shelton with the crime; however, Shelton was questioned again a number of times about the Trotter break-in and other crimes in Transylvania County. Detective Brown testified that the Sheriff's office was interested in having Shelton turn State's evidence. Eventually, Shelton was charged with a number of felony offenses. After an altercation with a man named Howard Owen, late in December 1980, Shelton agreed to turn State's evidence against other individuals who were involved in criminal cases with him. In January 1981, Shelton made a statement to Detective Brown admitting his participation in the Trotter break-in and implicating defendant and J. C. Clayton. Defendant was then indicted for the Trotter break-in on 27 January 1981.

The record does not show that the prosecution informed defendant or his counsel prior to trial, either orally or in writing, of the existence or terms of the agreement between the prosecution and Shelton whereby Shelton was granted immunity in exchange for his testimony. Defense counsel's attempts to elicit evidence of an agreement with the prosecution from Harry Shelton on cross-examination proved fruitless, as Shelton repeatedly denied the existence of such an agreement. During the course of Detective Brown's cross-examination, evidence of the existence of a grant of immunity to Harry Shelton was revealed. The agreement actually entered into by the State granted witness Shelton use immunity with respect to his testimony against the defendant and others.

> The undersigned Assistant District Attorney (Alan C. Leonard) for the 29th Judicial District hereby grants unto Harry Welch Shelton use immunity with respect to any state-

> ment that he may make in the prosecution of cases now pending in the Superior Court of Transylvania County against the following persons: Randy Orr, Lloyd Morgan, Harold Owen, Howard Owen, Gerald David Owen, Jerry Steve Revis, Ricky Lynn Galloway, Oral Randall Eubanks, J. C. Clayton, Steve Hamilton Shipman, Henry Terrill Queen and Stanley Morgan.

The record on appeal reveals that the document reflecting this agreement was filed with the clerk of the trial court on the day the case was submitted to the jury, 27 March 1981 at 3:00 p.m., *after* the jury retired to deliberate and before it returned its verdict.

The trial court's only reference to Shelton's testifying under a grant of immunity came during its charge to the jury as a part of the court's statement of defendant's evidence.

Article 61 of the Criminal Procedure Act, G.S. 15A-1051, *et seq.*, "formalizes and gives statutory sanction to the granting of immunity from prosecution." Eagles, *Articles 52 and 53 of Subchapter 9 and 10 of the Code of Pretrial Criminal Procedure—Motions Practice, Motions to Suppress, Pleas, Plea Arrangements and Immunity,* 10 Wake Forest L. Rev. 517, 535 (1974). It also provides a series of safeguards to protect against the "reputed unreliability of witnesses who are receiving *quid pro quo* for their testimony." *Id.* at 537. The separate provisions of Article 61 establish a pretrial and trial procedure designed to provide full and adequate prior disclosure of the prosecution's arrangement with its witness to the Attorney General and trial court, G.S. 15A-1052; to defense counsel or to the unrepresented defendant, G.S. 15A-1054(c); and to the jury, G.S. 15A-1052(c) and G.S. 15A-1055. These safeguards are aimed at ensuring that the jury be made aware that the witness is testifying under a grant of immunity or some other arrangement. The agreement entered into by the prosecution with its witness Harry Shelton is precisely the type of agreement covered by Article 61. Thus, the full panoply of its procedures should have been followed to protect the defendant's right to a fair trial.

G.S. 15A-1052(c) requires that the judge in a jury trial "inform the jury of the grant of immunity and the order to testify prior to the testimony of the witness under the grant of immuni-

ty." At no point during Harry Shelton's testimony, either on direct or cross-examination, was the jury informed that the witness was to receive a grant of immunity from the State in exchange for his testimony. Thus, defendant was deprived of the important right to have the jurors alerted of the need to listen to Shelton's testimony with extra care and caution.

With regard to the prosecution's pretrial disclosure duty, G.S. 15A-1054(c) provides:

> When a prosecutor enters into any arrangement authorized by this section, written notice fully disclosing the terms of the arrangement must be provided to defense counsel, or to the defendant if not represented by counsel, against whom such testimony is to be offered, a reasonable time prior to any proceeding in which the person with whom the arrangement is made is expected to testify.

The use immunity granted to Harry Shelton is clearly among the "arrangements" with a witness within the scope of G.S. 15A-1054. Therefore, the prosecution was under a duty, *a reasonable time prior to the trial,* to provide written notice disclosing the terms of the agreement with the witness. The prosecution's failure to provide advance notice of the grant of immunity is a clear violation of defendant's statutory discovery rights.

The State argues that the relief provided by G.S. 15A-1054(c) for the State's statutory failure is for defendant to compel the granting of a recess.[1] Further, that defendant, having failed to ask for a recess at trial, is precluded from claiming prejudicial error on appeal.

This Court has held that the State's failure to comply with G.S. 15A-1054(c) does not require suppression of the witness' testimony where the defendant is not prejudiced by the lack of required notice, *State v. Spicer*, 50 N.C. App. 214, 273 S.E. 2d 521 (1981). In *Spicer* the witness was granted charge reductions in exchange for his testimony. The defendants had failed to request a recess or except to the failure to grant a recess. On cross-exami-

1. G.S. 15A-1054(c). Upon motion of the defendant or his counsel on grounds of surprise or for other good cause or when the interests of justice require, the court must grant a recess.

nation the witness denied that a "deal" had been made, but nevertheless testified that he expected charge reductions in consideration of testimony. Inasmuch as the jury was fully informed of the existence of an agreement while the witness was testifying, this Court concluded that the defendants had failed to show any prejudice by the lack of required notice. *See also State v. Ginn*, --- N.C. App. ---, 296 S.E. 2d 825 (1982) where the defendant's statutory discovery rights were adequately protected by production of the plea agreement during trial and its utilization by defense counsel during cross-examination of the State's witness.

The record in the case *sub judice* demonstrates that defendant was prejudiced by the State's failure to comply with the advance notice requirement of G.S. 15A-1054(c). The defendant was not informed of the immunity agreement in advance of trial. On cross-examination, the witness Shelton denied repeatedly that he discussed receiving assistance in the disposition of charges pending against him if he would testify for the State, denied that any promises had been made to him and denied that he believed he would benefit by his testimony in any way.

> Q. Have you had conversations with Mr. Brown and Mr. Stroup regarding your testimony here today the jist (sic) of which is that if you will testify that they will assist you in disposing of charges that are now pending against you?
>
> A. No sir.
>
> * * *
>
> Q. Have you had a conversation subsequent to that time, the jist (sic) of which was if you will testify that the State will not prosecute you in this matter?
>
> A. No sir.
>
> Q. Have not?
>
> A. No sir.
>
> Q. No promises have been made to you?
>
> A. No sir.
>
> * * *
>
> Q. Mr. Shelton, do you believe that your testimony today will assist you in any matters that are now pending against you?

THE ASSISTANT DISTRICT ATTORNEY: OBJECTION

THE COURT: OVERRULED

A. No sir.

Q. Mr. Shelton, Mr. Brown or Mr. Stroup has never suggested to you that if you testify in this matter that you will derive any benefit with regard to the charges pending against you?

THE ASSISTANT DISTRICT ATTORNEY: OBJECTION

A. No sir.

THE COURT: OVERRULED

Q. You're here as a—doing your civic responsibility, is that correct, sir?

THE ASSISTANT DISTRICT ATTORNEY: OBJECTION

THE COURT: SUSTAINED.

After witness Shelton had been excused, Detective Brown testified. During cross-examination evidence of the immunity agreement was elicited from Detective Brown.

Q. Did you indicate to Mr. Shelton—let's go back to the meeting that occurred on the 3rd of November, Mr. Brown. You had been before the Grand Jury on October 6th in order to obtain Indictments against Mr. Shelton for the four break-ins of Laura's Restaurant, Champion Timberland and so forth?

A. I had appeared, yes sir.

Q. And true bills had come down, is that correct?

A. Yes sir, they had.

Q. So outstanding at your second or third and fourth and fifth meetings were the four felony indictments against Mr. Shelton, is that correct?

A. There were indictments, yes sir.

Q. And he knew that, did he not?

THE ASSISTANT DISTRICT ATTORNEY: OBJECTION

A. Yes he knew it.

* * *

Q. Mr. Brown, did you not tell him that you would see what you could do?

A. No, I didn't tell him I'd see what I'd do. I picked up the telephone, counsellor, and I called the D.A.'s office and the D.A. talked to him, Mr. Keith Melton.

* * *

Q. So there is an arrangement between the District Attorney's Office and Mr. Shelton with regard to the disposition of the four felonies?

A. No sir, not in disposition of four felonies.
Q. With regard to what?

A. In regard to the cases Mr. Shelton turned State's evidence in. He was given immunity from prosecution by the D.A.'s office in those matters.

We note that G.S. 15A-1055(a) provides express statutory authority for defendant's counsel to examine an immunized witness on the witness stand "with respect to that grant of immunity or arrangement," and for introduction of evidence or examination of other witnesses concerning the grant of immunity or arrangement. Subsection (b) expressly authorizes argument to the jury with respect to the impact of a grant of immunity or arrangement under G.S. 15A-1054 upon the credibility of a witness.[2]

Shelton's credibility as a witness was a material issue in the prosecution of defendant. *State v. Spicer, supra.* The State produced virtually no evidence other than Shelton's testimony of defendant's involvement in the Trotter break-in. The existence and terms of a grant of use immunity or any agreement with the district attorney was relevant to Shelton's credibility and the jury had a right to know about it. The importance of cross-examination regarding the conditions under which the witness is

2. G.S. 15A-1055(a). Notwithstanding any other rule of evidence to the contrary, any party may examine a witness testifying under a grant of immunity or pursuant to an arrangement under G.S. 15A-1054 with respect to that grant of immunity or arrangement. A party may also introduce evidence or examine other witnesses in corroboration or contradiction of testimony or evidence previously elicited by himself or another party concerning the grant of immunity or arrangement. (b) A party may argue to the jury with respect to the impact of a grant of immunity or an arrangement under G.S. 15A-1054 upon the credibility of a witness.

testifying is underscored by the statutory authorization of G.S. 15A-1055.

The situation at defendant's trial was unlike that presented in *State v. Spicer, supra,* in that Shelton denied that he would benefit from his testimony, and unlike *State v. Ginn, supra,* in that defense counsel never received a written copy of the grant of immunity. Defense counsel was thereby prejudicially hampered in his ability to effectively cross-examine Shelton on the witness stand about the terms of his agreement with the State due to the State's failure to comply with G.S. 15A-1054(c).

It is clear that an understanding existed between the prosecution and the witness Shelton that he would receive some form of immunity from prosecution in connection with his own criminal activity if he testified against defendant. Shelton's denials that his testimony would assist him in matters pending against him or that he would benefit in any way by his testimony were substantively false. The prosecution knew the situation but objected during cross-examination about it. The denials were then allowed to stand uncorrected by the prosecution. Knowing use by the prosecution of materially false testimony violates a defendant's right to a fair trial. This is true whether the evidence is solicited by the prosecutor or is simply allowed to stand uncorrected when it appears. *Giglio v. United States,* 405 U.S. 150, 31 L.Ed. 2d 104, 92 S.Ct. 763 (1972). "The principle that the State may not knowingly use false evidence applies where such evidence goes only to the credibility of a witness, since '[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence.' " *Campbell v. Reed,* 594 F. 2d 4, 7 (4th Cir. 1979), *quoting Napue v. Illinois,* 360 U.S. 264, 269, 3 L.Ed. 2d 1217, 1221, 79 S.Ct. 1173, 1177 (1959). *See also Gunning v. Cousin,* 452 F. Supp. 916 (W.D. N.C. 1978).

In *Napue v. Illinois* the Supreme Court held that failure of the prosecutor to correct the testimony of the witness which he knew to be false denied the defendant due process of law in violation of the fourteenth amendment. In *Giglio v. United States, supra,* the government's case depended almost entirely on the testimony of an unindicted co-conspirator who falsely testified that he had not been promised leniency in exchange for his testimony. The prosecution failed to correct this testimony. The

fact that the agreement which had been made was not made with the district attorney who actually prosecuted the case at trial was not considered controlling. The Supreme Court held that the witness' credibility was a material issue and the prosecution's failure to present all material evidence to the jury constituted a denial of due process and required a new trial. In *Campbell v. Reed, supra*, the Fourth Circuit found a denial of due process where the State had initially failed to give the defense counsel advance notice of a plea arrangement with its witness in violation of G.S. 15A-1054(c), and subsequently allowed its witness' denial that a plea arrangement had been made with the State to stand uncorrected.

> Viewing the record as a whole we conclude that the jury's verdict might have been different had it known the full extent of Miller's motivation to testify against Campbell. As we observed in *United States v. Sutton*, 542 F. 2d 1239, 1243 (4th Cir. 1976), "here the prosecution allowed a false impression to be created at trial when the truth would have directly impugned the veracity of its key witness."

594 F. 2d at 8. Much the same can be said of the case *sub judice*. The fact that the jury learned of the existence of a grant of immunity during cross-examination of Detective Brown is not sufficient to turn what was an otherwise tainted trial into a fair one. *Napue v. Illinois, supra*, 360 U.S. at 268, 3 L.Ed. 2d at 1221, 79 S.Ct. at 1173. Defendant was prejudicially deprived of his statutory right to pretrial disclosure of the immunity agreement and deprived of his right to due process of law by the false impression created at his trial.

In addition, these errors were compounded by the trial court's failure to give an interested witness instruction to the jury. G.S. 15A-1052(c) provides that when a witness testifies under a grant of immunity, "during the charge to the jury, the judge must instruct the jury as in the case of interested witnesses." The trial court's only reference to Shelton's grant of immunity came during the statement of the defendant's evidence. The trial court stated it was defendant's contention that the evidence tended to show that Shelton "was given some type of immunity by the District Attorney's office with respect to a charge pending against him." No further instruction was given as

to Shelton's status as an interested witness or how to regard the testimony of a witness receiving *quid pro quo* for his testimony. The trial court's failure to adequately instruct the jury concerning the credibility of the State's witness is prejudicial error.

In conclusion, the failure of the prosecution to provide advance notice of the grant of immunity pursuant to G.S. 15A-1054(c), its allowance of the witness' denials that such immunity existed to stand uncorrected and the trial court's failure to instruct the jury to consider the testimony of the immunized witness as it would consider the testimony of any other interested witness, pursuant to G.S. 15A-1052(c) resulted in manifest prejudice to the defendant requiring a

New trial.

Judge HILL concurs.

Judge ARNOLD dissents.

STATE OF NORTH CAROLINA v. SHEREE VONELLE SUDDRETH BYRD AND JOSEPH ALLEN BYRD

No. 8225SC615

(Filed 15 February 1983)

1. **Homicide § 21.9; Parent and Child § 2.2— death of child—child abuse—involuntary manslaughter**

The State's evidence was sufficient for the jury to find that the death of defendants' 25-day-old child was proximately caused by defendants' violation of the child abuse statute, G.S. 14-318.2(a), and that defendants were thus guilty of involuntary manslaughter of the child, where it tended to show that the child died as the result of a blunt trauma to the head, he had six broken ribs which injuries had been suffered from one to two weeks before the head injury, defendants' other child suffered from the Battered Child Syndrome, and the child was staying with defendants in the home of his grandmother at the time of his death, and where there was no evidence that any adults other than defendants had any responsibility for the care of the child while he was in the home of his grandmother.

2. **Criminal Law § 34.4— evidence of other crime—similarity to crime charged**

Evidence of a separate crime is admissible to prove the crime for which a defendant is being tried if the separate crime is similar to the one for which

the defendant is being tried and was committed within a time not too far removed from the crime with which the defendant was charged. Therefore, in a prosecution of defendants for the involuntary manslaughter of their 25-day-old son by inflicting or allowing a blow to the child's head, evidence that defendants' other child suffered from Battered Child Syndrome was admissible to prove the crime charged.

3. **Criminal Law § 102.6— jury argument—misstatements of law—absence of prejudice to defendants**

In this prosecution of defendants for the involuntary manslaughter of their 25-day-old child, defendants were not prejudiced by the prosecutor's misstatements of law in his jury argument which referred to the Battered Child Syndrome as if it had some force as a rule of law and which incorrectly told the jury that if a young child is with his parents and receives an injury, "then his parents are guilty" and that proof in cases where there is evidence of Battered Child Syndrome is different from ordinary murder and manslaughter cases, since the overall thrust of the prosecutor's argument was to the effect that if a child who is in the care of his parents receives an injury which would not likely have been caused by accidental means, the jury can conclude the parents violated the child abuse statute, G.S. 14-318.2(a), the court properly instructed the jury how to consider the evidence against defendants, and it is presumed that the jury followed the court's instructions.

Judge BECTON dissenting.

APPEAL by defendants from *Snepp, Judge.* Judgments entered 21 January 1982 in Superior Court, CALDWELL County. Heard in the Court of Appeals 8 December 1982.

The defendants were tried for the murder of their 25-day-old son. The State's evidence showed that at about 7:40 a.m. on 25 January 1981 the defendants took their infant son, Jo Von Cornelius Byrd, to the Emergency Room of Caldwell Memorial Hospital. The examining physician determined that the child had been dead for more than an hour. He detected no external signs of trauma, and dismissed a blue spot on the child's back as discoloration. The *feme* defendant told the physician that she and her husband had slept in the room with the infant the previous night. She said the child was all right at 3:00 a.m., but that she had awakened at 6:00 a.m. and discovered he was not breathing properly. Her husband attempted mouth-to-mouth resuscitation and they then took the child to the hospital. The defendants were staying in the home of the *feme* defendant's mother. The *feme* defendant's brother and uncle were also staying in the house.

A pathologist, who performed an autopsy the next day, discovered no external signs of trauma. He formed the opinion that

the child's death was from a natural cause, a spontaneous rupture of the blood vessels beneath the arachnoid membrane. Jo Von Cornelius Byrd was buried. On 4 September 1981, approximately seven months after the burial, his body was exhumed pursuant to a court order. The body was sent to Chapel Hill where an autopsy was performed by Dr. John Butts, Senior Assistant Chief Medical Examiner. Dr. Butts testified that in his opinion six of the infant's ribs had been broken from one to two weeks prior to his death. The child also had several areas of reddish-brown discoloration or bruises in his skull, the most severe of which had resulted in brain damage. In Dr. Butts' opinion, the cause of death was a blunt trauma to the head and not a vascular malformation.

Dr. Sarah Sinal testified over objection of the defendants that she had examined YaVonka Byrd, the defendants' other child, in December 1978 when the child was one month old and again on 10 May 1979. In her opinion, YaVonka had injuries which were an example of the Battered Child Syndrome. There was evidence that YaVonka had been removed from the defendants' custody.

The defendants did not offer evidence.

Each defendant was convicted of involuntary manslaughter and was sentenced from eight to ten years in prison. Each defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Nonnie F. Midgette, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Malcolm R. Hunter, Jr., for defendant appellant Sheree Vonelle Suddreth Byrd.

Wilson, Palmer and Cannon, by W. C. Palmer, for defendant appellant Joseph Allen Byrd.

WEBB, Judge.

[1] The defendants filed separate briefs, each of which raises three identical questions for the Court's determination. They first assign error to the denial of their motions to dismiss the charges of involuntary manslaughter. If the State introduced substantial

evidence that the defendants intentionally violated a statute designed for the protection of people and that violation proximately caused the death of Jo Von Cornelius Byrd, the defendants' motions to dismiss were properly denied. *See State v. Wilkerson*, 295 N.C. 559, 247 S.E. 2d 905 (1978). We believe there is sufficient evidence for the jury to find that each of the defendants intentionally violated G.S. 14-318.2(a) and the violation was the proximate cause of Jo Von Byrd's death. G.S. 14-318.2(a) provides:

> "Any parent of a child less than 16 years of age, or any other person providing care to or supervision of such child, who inflicts physical injury, or who allows physical injury to be inflicted, or who creates or allows to be created a substantial risk of physical injury, upon or to such child by other than accidental means is guilty of the misdemeanor of child abuse."

The evidence most favorable to the State showed that Jo Von Byrd died as the result of a blunt trauma to the head. He had six broken ribs which injuries had been suffered from one to two weeks before the head injury. There was evidence that the defendants' other child suffered from Battered Child Syndrome. At the time of the child's death, the infant was staying with his mother and father in the home of Mrs. Byrd's mother. Mrs. Byrd's uncle and brother were also staying in the home at that time. There is no evidence that any adults other than his natural parents had any responsibility for the care of Jo Von Byrd while he was in the home of his grandparents. We hold that the jury could find from the evidence that Jo Von Byrd suffered a blow to the head which was not accidental and this blow was a proximate cause of his death. We also hold that the jury could find that either of the defendants inflicted the blow to the child's head which caused his death, or that either of them allowed the blow to the child's head which caused his death. The defendants' first assignment of error is overruled.

[2] The defendants contend in their second assignment of error that the court erred in allowing testimony that the defendants' other child, YaVonka, suffered from Battered Child Syndrome, and that she had been removed from the defendants' home. The defendants argue that the only relevancy of this testimony is to

show the disposition of the defendants to abuse their children. The rule has been stated to be that evidence of other crimes or bad actions is inadmissible if its only relevancy is to prove the character of the defendant or his disposition to commit the alleged offense. In applying this rule, our courts have at times found evidence of other crimes to be relevant when it could be argued that the only relevancy was to show the disposition of the defendant to commit a similar crime. *See* 1 Brandis on N.C. Evidence § 92, 350, n. 17 (1982).

In *State v. Rick*, 304 N.C. 356, 283 S.E. 2d 512 (1981) evidence was held to be admissible in a rape case that the defendant had sexually assaulted another woman on the same day that the alleged rape occurred. In *State v. Williams*, 303 N.C. 507, 279 S.E. 2d 592 (1981) the defendant was tried for a first degree sexual offense with two children on 1 May 1980. Our Supreme Court held it was proper for another 12-year-old girl to testify "the defendant had lifted her skirt up and rubbed her breasts for about twenty minutes" on or about 1 May 1980. In *State v. Humphrey*, 283 N.C. 570, 196 S.E. 2d 516 (1973) the Supreme Court held that in a trial for rape, evidence was admissible that on the day of the alleged rape, the defendant exposed himself to another woman. In *State v. Greene*, 294 N.C. 418, 423, 241 S.E. 2d 662, 665 (1978) our Supreme Court noted that we had "been very liberal in admitting evidence of similar sex crimes in construing the exceptions to the general rule." There have been cases other than those involving sex crimes in which evidence of other crimes was held admissible. In *State v. Barfield*, 298 N.C. 306, 259 S.E. 2d 510 (1979), *cert. denied*, 448 U.S. 907, 100 S.Ct. 3050, 65 L.Ed. 2d 1137, *reh'g denied*, 448 U.S. 918, 101 S.Ct. 41, 65 L.Ed. 2d 1181 (1980) our Supreme Court held that in a prosecution for homicide by poisoning, evidence of prior poisonings of other persons was held properly admitted. In *State v. Irwin*, 304 N.C. 93, 282 S.E. 2d 439 (1981) testimony that the defendant had robbed drugstores in Ohio was held admissible in defendant's trial for attempted armed robbery and felony-murder of a drugstore operator in North Carolina. In *State v. Powell*, 55 N.C. App. 328, 285 S.E. 2d 284 (1982) evidence that a defendant charged with conspiracy to commit larceny had dealt regularly in the purchase and resale of stolen goods was held admissible. In *State v. Wilburn*, 57 N.C. App. 40, 290 S.E. 2d 782 (1982) evidence that the defendant

charged with attempting to obtain and conspiracy to obtain money by false pretenses had previously been involved in similar incidents was held admissible. *See also State v. Wilson*, 57 N.C. App. 444, 291 S.E. 2d 830 (1982) and *State v. Jones*, 57 N.C. App. 460, 291 S.E. 2d 869 (1982).

Some of the above cited cases say that evidence of other crimes was admissible to prove identity. Others say it proved either a common scheme or plan, intent, motive, or a state of mind. Some of the cases say it proved more than one of these things. We believe that based on the facts of the cases decided in this state, evidence of a separate crime is admissible to prove the crime for which a defendant is being tried if the separate crime is similar to the one for which the defendant is being tried, and was committed within a time not too far removed from the crime with which the defendant was charged. We hold that under this rule, evidence that YaVonka Byrd suffered from Battered Child Syndrome was admissible. The defendants' second assignment of error is overruled.

[3] In their third and last assignment of error the defendants contend that the district attorney made an improper argument to the jury. The district attorney argued in part as follows:

> "That is where the Battered Child Syndrome comes in, and the Battered Child Syndrome is our law, our courts have indorsed it. It's simply this: That where a young child is in a home, is with his parents and he receives an injury which can't be explained as a accidental injury, then his parents are guilty. We don't have to prove ---
>
> MR. PALMER: Your Honor, I OBJECT to that. That's not the law.
>
> THE COURT: OVERRULED. I'll instruct the Jury.
>
> . . . .
>
> ---We do not have to prove somebody saw one or both of these people strike that child. We do not. And Mr. Tuttle is in error when he argued that to you, I submit to you. He was in error and then they talk about it some more after I sit down. I hope you will keep in mind the fact we do not have to prove by someone who saw them strike the child that they

did it. The Battered Child Syndrome means that where a child in a home dies, not from natural causes, from injuries that have been exhibited in a pattern over a period of time. That that is all we have to show in order to meet our burden of proof.

MR. PALMER: Your Honor, I OBJECT to that argument.

THE COURT: Objection is OVERRULED.

Now, that's the Battered Child Syndrome. I hope you all won't get hung up on and their argument to you that we did not show by Joe Blow out here that he saw Sheree Byrd strike the child or Joe Byrd strike the child. We do not have to prove that and that is different from an ordinary murder or manslaughter case.

We have to do it in a ordinary murder or manslaughter case, but we do not where it is a young child. I hope you will remember that.

. . . .

Now, Ladies and Gentlemen, I just ask you: Don't require us to prove more to you than we have to prove to show who killed this child. Don't ask us to get to get [sic] in your mind. Don't get in your mind an idea that we've got to prove which one of these two did it. We don't.

MR. TUTTLE: OBJECTION.

And I say that without hesitation because that is the law.

MR. PALMER: Well, I OBJECT to that, Your Honor.

THE COURT: Objection is OVERRULED.

We do not have to prove that. The law says that when these things happen, this pattern of abuse over a period of time happens and the child dies by something that is unexplainable, while the parents has it and the parents had him because they brought him in that morning. And we do not have to prove which one of them did it.

MR. PALMER: I OBJECT to that, Your Honor.

THE COURT: Objection is OVERRULED.

And the law does not say that maybe somebody else did it. . . ."

The district attorney made several misstatements of the law in his argument. He referred to the Battered Child Syndrome as if it had some force as a rule of law. Battered Child Syndrome is a medical term. It refers to children who have injuries that are inconsistent with accidental origins by virtue of the distribution of the injuries. *See State v. Wilkerson, supra.* Battered Child Syndrome does not have by itself any legal consequences. The district attorney stated if a young child is home with his parents and receives an injury which cannot be explained as an accidental injury, "then his parents are guilty." This is not correct. It is evidence from which the jury may find the parents are guilty after considering it with all other evidence. He also said that the proof in cases where there is evidence of Battered Child Syndrome is different from ordinary murder and manslaughter cases. This is not correct. Evidence of Battered Child Syndrome is circumstantial evidence which should be treated as any other circumstantial evidence in a murder or manslaughter case. We also note that there was no testimony in this case that Jo Von Byrd, for whose homicide the defendants were being tried, had Battered Child Syndrome. The testimony was that YaVonka Byrd had Battered Child Syndrome.

In spite of the misstatements of the district attorney, we do not believe there was prejudicial error. We believe the overall thrust of his argument was to the effect that if a child who is in the care of his parents receives an injury that would not likely have been caused by accidental means, the jury can conclude the parents violated G.S. 14-318.2(a). This would not mislead the jury. The court properly instructed the jury how to consider the evidence against the defendants and we presume the jury followed these instructions.

No error.

Judge HEDRICK concurs.

Judge BECTON dissents.

Judge BECTON dissenting.

The rule enunciated in *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954)—that evidence of other crimes, offenses, or circumstances is inadmissible if its only relevance is to show the character of the defendant or his disposition to commit an offense of the nature of the one charged—is still the law. The exceptions to the rule, and there have been many, have not engulfed the rule. The cases cited by the majority all fall within the exceptions to the *McClain* rule. They suggest neither an extension of the rule nor a re-writing of the rule. I, therefore, disagree with the majority's statement, ante p. 6, that

> based on the facts of the cases decided in this [S]tate, evidence of a separate crime is admissible to prove the crime for which a defendant is being tried if the separate crime is similar to the one for which the defendant is being tried, and was committed within a time not too far removed from the crime with which the defendant was charged.

Thus, while I concur in what I believe to be a close non-suit issue, I dissent from the majority's resolution of the *McClain* issue and the improper closing argument issue.

I

In my view, the only relevancy of the evidence that the defendants' other child, YaVonka, suffered from Battered Child Syndrome and had been removed from defendants' home was to show the disposition of the defendants to abuse their children. There was no evidence in this case that defendants had been the exclusive caretakers of YaVonka. There was no evidence that YaVonka was in the care of defendants at the time she received her injuries. Significantly, Doctor Sinal testified that the defendants told her on 10 May 1979 that they had been caretakers of YaVonka for only about two weeks. Again, the evidence against defendants was far from overwhelming, and the improperly admitted evidence was prejudicial. That the *McClain* rule is alive and well is evidenced by the recent words of our Supreme Court in *State v. Shane*, 304 N.C. 643, 653-54, 285 S.E. 2d 813, 820 (1982):

> [S]ubstantive evidence of a defendant's past, and distinctly separate, criminal activities or misconduct is generally excluded when its only logical relevancy is to suggest defend-

> ant's propensity or predisposition to commit the type of offense with which he is presently charged. [Citations omitted.] 'Logical relevancy' is capably demonstrated whenever such evidence has some bearing upon genuine questions concerning knowledge, identity, intent, motive, plan or design, connected crimes, or consensual illicit sexual acts between the same parties. [Citations omitted.]
>
> * * *
>
> In addition, it must affirmatively appear that the probative force of such evidence outweighs the specter of undue prejudice to the defendant, and, in close cases, fundamental fairness requires giving defendant the benefit of the doubt and excluding the evidence. [Or, as it is more descriptively said in the game of baseball, the tie must go to the runner.] [Citations omitted.]

Id., 304 N.C. at 653-54, 285 S.E. 2d at 820.

II

"The trial court has a duty, upon objection, to censor remarks not warranted by either the evidence or the law. . . ." *State v. Monk*, 286 N.C. 509, 516, 212 S.E. 2d 125, 131 (1975). In the case *sub judice*, the defendants interposed several objections to the district attorney's argument, ante, pp. 7-8. The trial court overruled each objection, and the district attorney was permitted to continue the same line or argument. The majority correctly points out that the district attorney made several misstatements of the law, and further notes "that there was no testimony in this case that Jo Von Byrd, for whose homicide the defendants were being tried, had a Battered Child Syndrome. The testimony was that YaVonka Byrd had a Battered Child Syndrome." Ante, p. 8. Yet, the majority finds no prejudicial error. I disagree.

The district attorney's statements were grossly improper. The district attorney straightforwardly told the jury that since the State showed the Battered Child Syndrome, that the defendants were *ipso facto* guilty. That is not the law. The trial court lent its imprimatur to the statements by failing, in the face of repeated objections, "to sustain objection to the prosecuting attorney's improper and erroneous argument [and by failing] to instruct the jury that the argument was improper with prompt and

explicit instructions to disregard it." *State v. Monk*, 286 N.C. at 518, 212 S.E. 2d at 132.

The erroneously admitted evidence concerning the defendants' other child, YaVonka, and the improper arguments relating to the Battered Child Syndrome by the district attorney, were sufficiently prejudicial, in my view, to warrant a new trial.

COLONY ASSOCIATES, A VIRGINIA LIMITED PARTNERSHIP, BY ITS GENERAL PARTNERS, NORMAN V. WATSON, KAREN G. WATSON, G. COPE STEWART, III, ELIZABETH B. STEWART, THOMAS D. WEBB, III, CAROL B. WEBB, GLADE M. KNIGHT, KATHLEEN KNIGHT, AND HERITAGE ASSOCIATES, INC., A VIRGINIA CORPORATION, D/B/A COLONY APARTMENTS, AND QUADEL MANAGEMENT CORPORATION, A MARYLAND CORPORATION, D/B/A COLONY APARTMENTS v. FRED L. CLAPP & CO., A NORTH CAROLINA CORPORATION

No. 8218SC191

(Filed 15 February 1983)

1. Principal and Agent § 4— proof of agency sufficient

In an action to recover a deposit made on an unsuccessful loan commitment application, the trial judge erred in entering judgment notwithstanding the verdict for defendant since plaintiffs presented enough evidence of an agency relationship between them and defendant to withstand a directed verdict motion.

2. Principal and Agent § 5— agent responsible for acts of subagent

In an action to recover a deposit made on an unsuccessful loan commitment application, defendant agent was liable to plaintiff principals for the acts of its subagent where the defendant hired the subagent to carry out plaintiffs' request and where the facts showed that the defendant needed the subagent to obtain the refinancing and acted within the scope of its agency in employing the subagent. Although there was no specific permission from the plaintiffs to the defendant agent to employ a subagent, such consent by the principals could be implied "from the nature of the agency, the work to be done, and the particular circumstances."

3. Contracts § 28.2— jury instructions concerning damages—error

In an action to recover a deposit made on an unsuccessful loan commitment application, the trial judge erred in its instructions on damages where after stating that plaintiff should recover the amount of the deposit if the jury found that an agency existed, the trial court further stated that "if you fail to so find or if you have a doubt concerning those things which the plaintiffs

must prove . . . it would be your duty to answer the third issue in the amount which properly reflects your findings." The instruction allowed the jury to find damages in an amount other than the full deposit, and there was no relevant evidence to support the amount of the jury verdict.

4. **Rules of Civil Procedure § 50— j.n.o.v. improperly entered—remand for a new trial**

Where the appellate court found that j.n.o.v. was improperly entered by the trial court, it reversed and remanded the case for a new trial rather than reinstating the jury's verdict since an erroneous jury instruction on damages was given.

APPEAL by plaintiffs from *Seay, Judge.* Judgment entered 1 October 1981 in Superior Court, GUILFORD County. Heard in the Court of Appeals 11 January 1983.

This is an action to recover a deposit made on an unsuccessful loan commitment application.

Plaintiff Colony, acting through its controlled corporation Quadel, issued a check for $11,000, payable to Global Mortgage Company on 21 July 1975. The draft was drawn on Quadel's escrow account.

Defendant Clapp had been contacted by Thomas B. Webb, III, Quadel's vice-president, about obtaining refinancing for the Colony Apartments complex in Chapel Hill. Clapp instructed Webb that the check was necessary as a good faith deposit on the permanent loan application with National Appraisal Associates, Inc., which was represented by John Davis d/b/a Global Mortgage Company.

Webb delivered the check to Clapp and its associate O. Larry Ward in July, 1975. They forwarded it and an executed loan application to Davis of Global. The check was paid upon presentment.

Global and Clapp agreed in July, 1975 to work on a "fifty-fifty net split fee basis on any package" which Clapp originated. The fee splitting arrangement applied to the loan in this case.

After a number of inquiries by Ward to Davis about the status of the loan, Davis wrote Ward on 14 October 1975 that the plaintiffs should seek refund of their $11,000 deposit from National Appraisal. Ward answered this letter on the following day

with a request that Global return the deposit. Ward's 15 October 1975 letter to Davis provided:

> Your letter to me dated June 30, 1975, which enclosed the application, requested that we make the good faith deposit payable to Global Mortgage Company and not payable to National Appraisal Association. You told us the reason for this was so that if anything went wrong, you could refund the deposit quickly. Well, everything has gone wrong and you should refund the good faith deposit because we had "good faith" in Mr. John Davis.
>
> As I told you on the phone this morning, as agent for Quadel and by writing to you October 1, 1975, we complied with Paragraph 4.1 of the application.

The plaintiffs received a copy of the 15 October 1975 letter.

Plaintiffs moved before trial to amend their complaint. They sought to allege as an alternative ground of recovery that the defendant Clapp was engaged in a joint venture with Davis d/b/a Global Mortgage Company. The motion was denied on 1 December 1976. The same motion was denied at the close of plaintiff's evidence at trial.

The defendant's motion for a directed verdict was denied at the close of all the evidence. The trial judge had reserved a ruling on the same motion when defendant made it at the close of the plaintiff's evidence.

The jury found for the plaintiffs on the three issues that were submitted to them. They decided that Clapp acted as Quadel's agent in obtaining the loan commitment and, as a result, Clapp owed Quadel $5,500 plus interest.

Following the jury verdict the trial judge allowed the defendant's directed verdict motion and entered a judgment notwithstanding the verdict for the defendant, pursuant to G.S. 1A-1, Rule 50. The plaintiffs then appealed to this Court.

Newsom, Graham, Hedrick, Murray, Bryson, Kennon & Faison, by Josiah S. Murray, III and Joel M. Craig, for plaintiff-appellants.

Dees, Johnson, Tart, Giles & Tedder, by Charles M. Tate and Julius Dees, Jr., for defendant-appellee.

ARNOLD, Judge.

We determine that defendant's motion for directed verdict was improperly granted and that judgment notwithstanding the verdict [hereinafter j.n.o.v.] was improper.

G.S. 1A-1, Rule 50(b)(1) allows the grant of a j.n.o.v. in favor of a party who has previously moved for a directed verdict. *Graves v. Walston*, 302 N.C. 332, 275 S.E. 2d 485 (1981). The defendant twice moved for a directed verdict at trial, including at the close of all the evidence. Thus, he met this requirement.

The standard to be used in deciding if a directed verdict was properly granted in a case like the one *sub judice* has been stated by our Supreme Court as follows: "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." *Kelly v. Harvester Co.*, 278 N.C. 153, 158, 179 S.E. 2d 396, 398 (1971).

The same factors are considered in determining if a j.n.o.v. should be granted as in the directed verdict decision. *N.C. Nat'l Bank v. Burnette*, 297 N.C. 524, 256 S.E. 2d 388 (1979). *See* Sizemore, General Scope and Philosophy of the New Rules, 5 Wake Forest L. Rev. 1, 41 (1969); W. Shuford, N.C. Civil Practice and Procedure § 50-8 (2d ed. 1981).

Plaintiffs argue that they presented enough evidence of an agency relationship between them and defendant to withstand a directed verdict motion and a j.n.o.v. If an agency relationship is established, plaintiffs contend, the defendant would be liable for all of the $11,000 good faith deposit because Global did not act properly in its role as subagent. An agent may be liable for acts of a subagent.

Two essentials are present in a principal-agent relationship: "(1) Authority, either express or implied, of the agent to act for the principal, and (2) the principal's control over the agent." *Vaughn v. Dept. of Human Resources*, 37 N.C. App. 86, 91, 245 S.E. 2d 892, 895 (1978). "Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his

control, and consent by the other so to act." Restatement (Second) of Agency § 1(1) (1957).

An agency can be proved "generally, by any fact or circumstance with which the alleged principal can be connected and having a legitimate tendency to establish that the person in question was his agent for the performance of the act in controversy. . . ." *Smith v. Kappas*, 218 N.C. 758, 765, 12 S.E. 2d 693, 698, *modified on other grounds*, 219 N.C. 850, 15 S.E. 2d 375 (1941).

[1] The evidence of an agency in this case, when considered in the light most favorable to the plaintiff, is not so insufficient as to justify entry of a j.n.o.v. for the defendant and grant of its directed verdict motion. It cannot be said as a matter of law that a jury could not find for the plaintiffs.

The record shows six instances on which the jury could have based its finding of an agency. First, plaintiffs contacted the defendant to begin the process of obtaining the loan refinancing. Second, Ward made changes in the loan application agreement with Webb's approval. Third, Ward instructed Webb to make the deposit check payable to Global. Webb followed these instructions and delivered the check to Ward, who forwarded it to Global.

Fourth, Ward described himself as Quadel's agent in the 15 October 1975 letter requesting return of the deposit. Although the labeling of this relationship by Ward does not determine if an agency existed, *see Lindsey v. Leonard*, 235 N.C. 100, 103, 68 S.E. 2d 852, 855 (1952), it is one factor to be considered.

Fifth, Ward asked National Appraisal on 18 November 1975 to direct all future contacts about the matter to his attention, "so that I can be kept up-to-date until Mr. Webb has received his check and complete file." Finally, there was no direct contact between the plaintiffs and Global or National Appraisal before Ward's demand on Smith for a refund proved futile. Before that point, the chain of contact was Colony to Clapp to Global to National Appraisal.

[2] After finding evidence that an agency relationship existed between the plaintiffs and the defendants, we must now decide if the defendant is responsible to the plaintiffs for the acts of Global. Is the defendant agent liable to the plaintiff principals for the acts of its subagent?

The Restatement (Second) of Agency § 5(1) (1957) defines a subagent as "a person appointed by an agent empowered to do so, to perform functions undertaken by the agent for the principal, but for whose conduct the agent agrees with the principal to be primarily responsible." Global fits this definition although the defendants did not explicitly agree to be liable for them. However, such liability can be implied.

"Unless otherwise agreed, an agent is responsible to the principal for the conduct of a . . . subagent with reference to the principal's affairs entrusted to the subagent . . . ." *Id.* at § 406. Comment "b" to this section adds "Thus the agent is subject to liability to the principal for harm to the principal's property or business caused by the subagent's negligence or other wrong to the principal's interests."

Although there was no specific permission from the plaintiffs to the defendant agent to employ a subagent, such consent by the principal can be implied "from the nature of the agency, the work to be done, and the particular circumstances." 3 C.J.S. *Agency* § 261 (1973). The facts here show that the defendant needed Global to obtain the refinancing and acted within the scope of its agency in employing it.

Evidence supports a finding that the defendant agent is liable for the deposit that went to the subagent Global in this case.

> [I]f the agent, having undertaken to transact the business of the principal, employs a subagent on his own account to assist him in what he has undertaken to do, *even though he does so with the consent of the principal* he does so at his own risk, and there is no privity between such subagent and the principal. The subagent is, therefore, the agent of the agent only.

1 F. Mechem, A Treatise on the Law of Agency § 333 (2d ed. 1914) (emphasis added).

The facts here show that the defendant hired Global to carry out the plaintiffs' request. This is to be distinguished from the case where the subagent becomes the agent of the principal because the principal directed, either expressly or impliedly, the agent to hire the subagent. *See* W. Seavey, Handbook on the Law

of Agency § 156B (1964); P. Mechem, Outlines on the Law of Agency §§ 79-80 (4th ed. 1952); R. Lee, N.C. Law of Agency and Partnership § 47 (6th ed. 1977).

[3] Having found that the defendant may be held accountable for the acts of the subagent, we must then determine the amount of its liability. Plaintiffs argue that they should recover the entire $11,000 deposit and attack the jury verdict of $5,500 plus interest as the result of an erroneous instruction by the trial judge. In its instructions on damages, the trial judge in part stated:

> [I]f you find by the greater weight of the evidence that the plaintiffs have sustained an amount of damages under the rules which I have explained to you; that is, that they are entitled to recover the return of the funds advanced pursuant to the contract . . . it would be your duty to answer the third issue in that amount; specifically, $11,000.00.

Plaintiffs contend that this quoted portion of the instruction was correct but they attack the statement that followed as erroneous:

> Now, members of the jury, if you fail to so find or if you have a doubt concerning those things which the plaintiffs must prove or if you are unable to tell where the truth lies, it would be your duty to answer the third issue in the amount which properly reflects your findings.

This instruction is attacked by the plaintiffs as encouraging a compromise verdict by the jury. Defendants argue that even if there were error, it was beneficial to the plaintiffs because it permitted the jury to consider the issue even if plaintiffs did not prove their case.

We find that the portion of the instruction that allowed the jury to find damages in an amount other than $11,000 was reversible error. There is no relevant evidence to support the amount of the jury verdict here.

Because the defendant is the plaintiffs' agent it is either liable for the entire amount of the check or none of it. Evidence of the fifty-fifty fee-splitting arrangement between the defendant and Global is relevant only between those two parties. It has no bearing on defendant's liability to the plaintiffs.

As a result, the trial judge should have stopped his instruction to the jury after he stated that plaintiff should recover $11,000 if the jury found that an agency existed. This case is similar to *Terrell v. Chevrolet Co.*, 11 N.C. App. 310, 181 S.E. 2d 124 (1971), where the court commented that peremptory instructions should be given in certain cases. "When all the evidence offered suffices, if true, to establish the controverted fact, the court may give a peremptory instruction—that is, if the jury find the facts to be as all the evidence tends to show, it will answer the inquiry in an indicated manner." 11 N.C. App. at 314, 181 S.E. 2d at 127 *quoting Chisholm v. Hall*, 255 N.C. 374, 121 S.E. 2d 726 (1961). Once the agency relationship was established, there was no conflict in the evidence as to the amount of damages. *See* 12 Strong's N.C. Index 3d Trial § 31 (1978).

Plaintiffs raise as an alternative ground of recovery that the defendant was engaged in a joint venture with Global and as a result they should recover from the defendant because Global did not return the $11,000 check. Because of our resolution of the case, we find it unnecessary to discuss this contention.

[4] Because we find that the j.n.o.v. was improperly entered, we reverse and remand for a new trial. Although there is authority in North Carolina that would require us to reinstate the jury's verdict, *e.g., Musgrave v. Savings and Loan*, 8 N.C. App. 385, 174 S.E. 2d 820 (1970), we find those cases to be distinguishable on the facts.

In the case *sub judice*, an erroneous jury instruction was given. This is unlike *Musgrave* and other cases that would reinstate the jury verdict. The grant of j.n.o.v. was reversed in those cases only because there was sufficient evidence to justify the jury verdict.

There is substantial authority for our grant of a new trial, even though neither party made a motion for it. A leading treatise on civil procedure states: "Where no motion for a new trial was made, the appellate court, reversing a judgment n.o.v., may order entry of judgment on the verdict, *order a new trial*, or remand for consideration in light of the court of appeals' disposition of the judgment n.o.v." 5A Moore's Federal Practice ¶ 50.14 (2d ed. 1982) (emphasis added). *See also Kendrick v. Ill. Cent. Gulf*

R.R. Co., 669 F. 2d 341 (5th Cir. 1982); *Derr v. Safeway Stores, Inc.*, 404 F. 2d 634 (10th Cir. 1968).

Reversed and remanded for a new trial.

Judges HILL and WHICHARD concur.

LARRY JAMES, GUARDIAN AD LITEM FOR KRISTIN MARIE JAMES, A MINOR v. THE CHARLOTTE-MECKLENBURG BOARD OF EDUCATION AND SUSAN STEWART

No. 8226SC95

(Filed 15 February 1983)

1. **Schools § 11— school board—liability insurance—waiver of immunity**

The purchase of liability insurance constituted a waiver of governmental immunity against tort liability by defendant board of education. Former G.S. 115-53.

2. **Schools § 11— school teachers—absence from classroom—necessity for other adult supervision**

Foreseeability of harm to pupils in the classroom or at a school is the test of the extent of a teacher's duty to safeguard her pupils from dangerous acts of fellow pupils, and absent circumstances under which harm to her pupils might have been reasonably foreseen during her absence, a teacher is not under a duty to either remain with her class at all times or to provide other adult supervision at all times while she is absent.

3. **Schools § 11— absence of teacher from classroom—injury to student—no negligence by teacher**

In an action to recover for an injury to a sixth grade student's eye which occurred when two other students were fighting with pencils while defendant teacher was absent from the classroom, plaintiff's evidence was insufficient to show that harm to defendant's students might have been reasonably foreseen so that defendant's absence from the classroom without other adult supervision of her students constituted negligence where it tended to show that the only other previous incident of student misbehavior during defendant's absence from the classroom which was known to defendant occurred the day prior to the incident in question when other students were throwing an eraser at each other, and the evidence also showed that defendant was aware of an "orange" fight which had taken place in the hall near her classroom some weeks before the incident in question.

4. Rules of Civil Procedure § 15.2— denial of amendment of pleadings to conform to evidence

In an action against a Board of Education and a school teacher to recover for an injury to a student, the trial court did not abuse its discretion in the denial of plaintiff's G.S. 1A-1, Rule 15(b) motion to amend his complaint to assert the negligence of the principal of the school where plaintiff's motion was not made until after the trial court had declared a mistrial because of inability of the jury to reach a verdict, plaintiff had tendered issues before the case went to the jury which did not include the negligence of the principal, and plaintiff's proposed amendment did not assert that negligence on the part of the principal proximately caused the student's injury.

APPEAL by plaintiff from *Griffin, Judge.* Order and judgment entered 2 September 1981 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 16 November 1982.

Plaintiff, acting as guardian *ad litem* for his daughter, Kristin James, brought this action against Kristin's elementary school teacher, Susan Stewart, and the Charlotte-Mecklenburg Board of Education to recover damages for injuries sustained by Kristin.

On 1 February 1978 Kristin was enrolled in a Charlotte public school and was a student in Ms. Stewart's sixth grade class. The class of thirty students had returned from lunch and had been instructed to stay in their seats and perform an assignment placed on the board. The school had a policy, formulated by the principal, whereby the students would file to the cafeteria in groups of six. The teacher would leave the classroom with the last group. As each group finished lunch, the group would return to the classroom. On the date at issue, Ms. Stewart did not return to the classroom with the last group of students but remained in the cafeteria to finish her lunch. During her absence, two students began "sword fighting" with their pencils. One of the pencils flew back and hit Kristin in her left eye. When Ms. Stewart returned to the classroom, she was informed of the injury. Due to this injury, Kristin ultimately lost the sight in her left eye.

In his complaint plaintiff alleged that his daughter's eye injury was caused by defendants' negligence. He specifically alleged that Ms. Stewart was negligent in leaving eleven and twelve year old children unsupervised, in failing to remain with her students at all times "with the knowledge that the class members were prone to unruly and sometimes dangerous contact in the absence

of adult supervision" and in failing to provide "minimum disciplinary procedures." Plaintiff alleged that the Charlotte-Mecklenburg Board of Education (hereinafter the Board) was negligent in allowing Ms. Stewart to subject her students to "unrestrained and potentially dangerous conduct." He further alleged that the Board was negligent in failing to enforce existing rules or, in the alternative, to establish rules concerning constant supervision. The defendants denied any negligence on their part. They alleged as a defense that Ms. Stewart was a public officer exercising a discretionary function, and that she acted without malice or corruption. The Board admitted that it had secured liability insurance pursuant to G.S. 115-53 (subsequently repealed and recodified as G.S. 115C-42) and had thereby waived governmental immunity.

The case came to trial before a jury and ended in a mistrial. On the stipulation of the parties, the Court then reconsidered defendants' motion for a directed verdict, which the court had earlier denied. From the granting of a directed verdict for both defendants, plaintiff has appealed.

Ervin, Kornfeld, MacNeill & Ervin, by John C. MacNeill, Jr. and Winfred R. Ervin, Jr., for plaintiff-appellant.

Jones, Hewson & Woolard, by Hunter M. Jones, Harry C. Hewson and R. G. Spratt, III, for defendant-appellees.

WELLS, Judge.

In their motion for directed verdict, defendants asserted two specific grounds: one, limited immunity, and two, an insufficient showing of negligence. Both grounds are, therefore, before us in this appeal, and we shall deal with them *seriatim.*

[1] I. *Immunity.* The record shows that, pursuant to the provisions of G.S. 115-53, the Board was insured against tort liability. The purchase of such insurance constitutes a waiver of governmental immunity by defendant Board. *See Clary v. Board of Education,* 286 N.C. 525, 212 S.E. 2d 160 (1975). We therefore assume that the trial court's granting of defendant Board's motion for directed verdict was not on its asserted immunity grounds. As to defendant Stewart, we assume, without deciding, that she was not entitled to a directed verdict on her asserted

ground of limited immunity and that the trial court granted her motion on the alternative ground of lack of negligence. This appeal must be resolved, therefore, on the issue of whether there was a sufficient showing of negligence on the part of defendant Stewart to support a verdict for plaintiff, and we now move on to that issue.

II. *Negligence.* Within the general question of negligence, we must deal with each defendant discretely.

A. *Defendant Board of Education.*

Plaintiff produced no evidence whatsoever as to defendant Board's policies, practices, rules, regulations, or other requirements as to supervision of pupils in its elementary schools. This case was tried in the trial court and briefed and argued in this Court on the theory that defendant Stewart was negligent, and that Stewart's negligence must be imputed to defendant Board of Education under the principle of *respondeat superior.* Our decision that defendant Stewart was not negligent requires that we affirm the trial court's granting of defendant Board's motion for a directed verdict.

B. *Defendant Stewart.*

Plaintiff contends that defendant Stewart was negligent in leaving her class unsupervised or unmonitored by a person of suitable age and discretion; or, in failing to remain in the classroom when she knew or should have known that the unruly behavior of her students in her absence might result in one of them harming another. The dispositive question, therefore, as to defendant Stewart, is whether Stewart was under a duty to remain in her classroom at all times while her pupils were present in the class. We answer that question "no."

We are not aware of any previous decisions of our appellate courts involving the question we must now resolve. Decisions from other States reflect significantly differing standards of care required of public school teachers with respect to their duty to provide supervision of pupil conduct and activity. *See Annot.* 38 A.L.R. 3d 830. We have found that our Supreme Court, in three analogous situations, has provided a standard of care applicable to this case.

In *Toone v. Adams*, 262 N.C. 403, 137 S.E. 2d 132 (1964), the Court considered the duty of Raleigh Baseball, Inc. and the manager of a team operated by this corporation, to conduct themselves so as to not incite game fans against the plaintiff umpire and their duty to provide the plaintiff protection from incited fans. The facts in that case showed that Deal, the team's manager, had on a number of occasions during a game reacted with great hostility to calls made by the plaintiff umpire, one of these occasions being near the end of the game. When the game was over, incited Raleigh fans poured onto the field, followed the plaintiff from the field, cursing the plaintiff and challenging him to fight. One fan struck the plaintiff and injured him. Plaintiff umpire alleged that the defendant's club and its manager should have reasonably foreseen that Deal's conduct toward the plaintiff would incite the partisan crowd against plaintiff and result in an assault upon the plaintiff, and that the defendants breached their duty owed the plaintiff as an umpire to provide adequate protection for his personal safety. In sustaining the demurrer of both defendants, the Court, restating the general rule from the Restatement of Torts §§ 302 and 303, said that "an act is negligent if the actor intentionally creates a situation which he knows, or should realize, is likely to cause a third person to act in such a manner as to create an unreasonable risk of harm to another," but nevertheless held that it did not follow that Deal should have reasonably anticipated that the plaintiff would be assaulted. The Court quoted and relied on the following rule from the Court's decision in *Hiatt v. Ritter*, 223 N.C. 262, 25 S.E. 2d 756 (1943):

> "One is bound to anticipate and provide against what usually happens and what is likely to happen; but it would impose too heavy a responsibility to hold [defendants] bound in like manner to guard against what is unusual and unlikely to happen or what, as it is sometimes said, is only remotely and slightly probable."

Hiatt (cites omitted).

In *Foster v. Winston-Salem Joint Venture*, 303 N.C. 636, 281 S.E. 2d 36 (1981), the Court considered the duty of the owners of a shopping mall to protect its patrons from harmful acts of other persons on its premises. In *Foster*, plaintiff, a female adult, was

injured when two unidentified males assaulted her as she was attempting to place packages in her car parked in defendant mall's parking lot. On defendant's motion for summary judgment, the plaintiff's forecast of evidence showed that there had been 36 reported incidents of criminal activity at the mall during a period of one year prior to the assault on plaintiff. In overruling summary judgment for defendant, the Court established foreseeability as the test for determining the extent of a landowner's duty to safeguard his business invitees from the criminal acts of third persons, relying upon both the Restatement (Second) of Torts and previous decisions of the Court:

> The plaintiff need only show that in the exercise of reasonable care the defendant should have foreseen that some injury would result from his act or omission or that consequences of a generally injurious nature might have been expected.

In resolving the issue against defendant, the Court stated:

> We cannot hold as a matter of law that the 31 criminal incidents reported as occurring on the shopping mall premises within the year preceding the assault on plaintiff were insufficient *to charge defendants with knowledge that such injuries were likely to occur.*

Id. (emphasis added).

In *Moore v. Crumpton*, 306 N.C. 618, 295 S.E. 2d 436 (1982), the Court considered the extent of a parent's liability for the harmful acts of the parent's unemancipated child. In that case, on the defendant parents' motions for summary judgment, the plaintiff's forecast of evidence showed that she was injured when the defendant parents' unemancipated 17 year old son broke into the plaintiff's home and raped the plaintiff. The son had a long history of undisciplined behavior, including extensive abuse of drugs and alcohol, and the son was under the influence of both drugs and alcohol when the assault on the plaintiff occurred. The plaintiff contended that her injury was caused by the failure of the defendant parents to exercise reasonable control over their son. The Court, in resolving the issue against the plaintiff, held foreseeability to be lacking, stating the rule in such cases as follows:

> The correct rule is that the parent of an unemancipated child may be held liable in damages for failing to exercise reasonable control over the child's behavior if the parent had the ability and the opportunity to control the child and knew or should have known of the necessity for exercising such control. Before it may be found that a parent knew or should have known of the necessity for exercising control over the child, *it must be shown that the parent knew or in the exercise of due care should have known of the propensities of the child and could have reasonably foreseen that failure to control those propensities would result in injurious consequences.* This does not mean that the particular injury occurring must have been foreseeable, but merely that consequences of a generally injurious nature might have been expected. The issue in the final analysis is whether the particular parent exercised reasonable care under all of the circumstances.

Id. (cites omitted) (emphasis added).

[2] Following these well-reasoned decisions of our Supreme Court, we are persuaded that foreseeability of harm to pupils in the class or at the school is the test of the extent of the teacher's duty to safeguard her pupils from dangerous acts of fellow pupils, and absent circumstances under which harm to her pupils might have been reasonably foreseen during her absence, that defendant Stewart was not under a duty to either remain with her class at all times or to provide other adult supervision at all times while she was absent.

[3] Plaintiff contends that previous acts of unruly and undisciplined conduct by other pupils in Kristin's class were sufficient to charge defendant Stewart with the knowledge that injuries to her pupils might occur while she was absent from her classroom. We do not agree. The evidence shows that defendant Stewart was aware of only one previous incident of pupil misbehavior during her absences from the classroom, an incident on the day preceding the day of Kristin's injury when other pupils were throwing an eraser at each other. That incident reflects conduct of a mischievous and unruly nature, not of an assaultive or dangerous nature, and was not sufficient to charge defendant Stewart with the requisite knowledge that the pupils might injure or harm each other in her absence.

The evidence showed that defendant Stewart was also aware of an "orange" fight which had taken place in the hall near Stewart's classroom, some weeks previous to Kristin's injury. Plaintiff contends that such an incident was sufficient to put defendant Stewart on notice of the danger that her pupils might harm each other in her absence. Again we disagree. Elementary school children, while certainly capable of harming one another, cannot be expected to be model citizens at all times, and the mild exuberance demonstrated by throwing oranges or portions of oranges at one another is not an example of assaultive or dangerous conduct.

Taking plaintiff's evidence as true and considering it in the light most favorable to plaintiff, giving plaintiff the benefit of every reasonable inference to be drawn therefrom, *Manganello v. Permastone, Inc.*, 291 N.C. 666, 231 S.E. 2d 678 (1977), and giving plaintiff the benefit of any of defendant's evidence which was favorable to plaintiff, *Home Products Corp. v. Motor Freight, Inc.*, 46 N.C. App. 276, 264 S.E. 2d 774, *disc. rev. denied*, 300 N.C. 556, 270 S.E. 2d 105 (1980), recovery cannot be had by plaintiff under any view of the facts which the evidence tended to establish. The directed verdict for defendant Stewart was correctly entered.

[4] Plaintiff has brought forward one additional assignment of error, to the trial court's denial of plaintiff's G.S. 1A-1, Rule 15(b) motion to amend his complaint to assert the negligence of the principal of the school. Plaintiff's motion was not made until after the jury indicated its inability to reach a verdict and the trial court had declared a mistrial. As we stated earlier, the case was tried on the theory of defendant Stewart's negligence. Before the case went to the jury, plaintiff tendered issues which did not include the negligence of the principal. The issues submitted by the Court to the jury made no reference to the negligence of the principal, but referred only to the negligence of defendant Stewart. While plaintiff's proposed amendment did assert negligence on the part of the principal, it did not allege that such negligence proximately caused Kristin's injury. Under these circumstances, the decision as to whether to allow the amendment was in the discretion of the trial court, and we see no abuse of that discretion in denying the motion.

The judgment and orders below are in all respects

Affirmed.

Judges VAUGHN and WHICHARD concur.

FRANCINE LA GRENADE v. DWIGHT GORDON, BETSY GORDON AND ROBERT GORDON

No. 8221SC201

(Filed 15 February 1983)

1. **Appeal and Error § 68.2— granting of motion for directed verdict—former review by Court on dismissal of plaintiff's action for failure to state claim—former case as the law of the case**

In an action brought to recover actual and punitive damages allegedly resulting from the abduction of plaintiff's infant son, the trial court erred in entering a directed verdict for defendant at the close of plaintiff's evidence where the appellate court had previously found the trial court erred in dismissing plaintiff's action for failure to state a claim. Implicit in that holding was a ruling that if, at trial, plaintiff presented evidence to support the essential allegations of her complaint, the case must go to the jury unless plaintiff's own evidence also conclusively established a complete defense for defendant. When a question before an appellate court has been previously answered on a former appeal in the same case, the answer to that question in the former case becomes the law of the case for purposes of the subsequent appeal.

2. **Courts § 21.5— North Carolina law applying to tort action**

In an action to recover actual and punitive damages allegedly resulting from the abduction of plaintiff's infant son, North Carolina tort law applied to the case where the wrongs allegedly committed by defendants were continuing wrongs, plaintiff's alleged injuries were suffered both within North Carolina and outside of North Carolina, it was in North Carolina where defendants finally manifested the intent to deprive plaintiff of the custody of her son, and where the most significant of plaintiff's injuries occurred in North Carolina.

3. **Abduction § 1; Appeal and Error § 68.5; Parent and Child § 6.2— father's agreement that mother have child custody—mother's action for abduction of child—former appeal on issue**

Where the appellate court previously held that a contract between plaintiff and defendant father, by which defendant father contracted away his common law right to custody of his minor child by executing an agreement giving custody to plaintiff mother but reserving his right to institute a custody action, was valid, the previous holding became the law of the case, and defendants' contention that the invalidity of the contract required a directed verdict be granted for defendants was without merit.

4. **Conspiracy § 2— statements of co-conspirators admissible if in furtherance of conspiracy**

In an action brought to recover actual and punitive damages allegedly resulting from the abduction of plaintiff's infant son, the trial judge erred in limiting the admissibility of a statement by one of the defendants since it was a declaration of a co-conspirator made during and in furtherance of a conspiracy to abduct plaintiff's child. Another conspirator's declaration made in district court should have been admitted against that conspirator as an admission of a party opponent but was properly excluded as to his co-conspirators because it was not made in furtherance of the conspiracy but was a mere narration of past acts done during the course and in furtherance of the conspiracy.

5. **Evidence § 28— order of another court awarding custody of child—exclusion of exhibit error**

In an action to recover actual and punitive damages allegedly resulting from the abduction of plaintiff's infant son, the trial court erred in excluding an order of a South Carolina court awarding custody of the child to plaintiff since the exhibit was relevant for purposes of showing plaintiff's damages in that it helped to show the steps she had taken in order to recover custody of her son.

APPEAL by plaintiff from *Walker, Judge*. Judgment entered 14 October 1981 in FORSYTH County Superior Court. Heard in the Court of Appeals 12 January 1983.

Plaintiff, Francine La Grenade, brought this action to recover actual and punitive damages allegedly resulting from the abduction of her infant son, Alexandre. The named defendants were Robert Gordon, her former husband and the infant's father, and Dwight and Betsy Gordon, plaintiff's former in-laws and the infant's paternal grandparents.

In her complaint, plaintiff alleged, in part, that she and defendant Robert Gordon were married, residing together with their child, Alexandre, in Quebec, Canada on 30 April 1979. That day, plaintiff and her husband executed a written agreement contemplating a separation of the parties so that her husband could go to the United States to seek suitable employment. Under the terms of the agreement, plaintiff agreed not to consider her husband's absence to be a "desertion" and not to hold his leaving against him so far as his custody or visiting rights of Alexandre were concerned and defendant Robert Gordon agreed that in the meantime plaintiff would retain custody of Alexandre. Plaintiff further alleged that defendant Robert Gordon conspired with defendants Dwight and Betsy Gordon to abduct and secrete the in-

fant, that on 1 May 1979 Robert Gordon did in fact abduct the infant, taking him to Maine where they were met by defendant Betsy Gordon, and that defendant Robert Gordon and defendant Betsy Gordon carried the child to his grandparent's home in Winston-Salem, North Carolina. Plaintiff alleged that she came immediately to Winston-Salem, that defendants denied her access to or custody of Alexandre, that defendants secretly removed the infant to South Carolina, and that she hired a detective in North Carolina and attorneys in North and South Carolina to help her gain custody of the child.

Defendants moved pursuant to Rule 12(b) to dismiss plaintiff's action, contending that the complaint failed to state a claim on which relief could be granted, and defendants' motion was allowed by Judge Rousseau. Plaintiff appealed that ruling and this Court reversed, holding that plaintiff had stated a remediable claim for abduction. *See La Grenade v. Gordon*, 46 N.C. App. 329, 264 S.E. 2d 757, *disc. rev. denied and appeal dismissed*, 300 N.C. 557, 270 S.E. 2d 109 (1980).

The case came on for trial and plaintiff put on evidence tending to prove the allegations detailed above. At the close of plaintiff's evidence, defendant made a motion pursuant to Rule 50 of the Rules of Civil Procedure for directed verdict, arguing that "plaintiff's evidence presented has failed to state a claim of relief for which under the Canadian law, which we contend this case is bound." [sic]. The trial judge allowed defendant's motion and plaintiff appealed.

Clyde C. Randolph, Jr. for plaintiff-appellant.

William M. Speaks, Jr. for defendant-appellees.

WELLS, Judge.

[1] By her third assignment of error, plaintiff contends that the trial judge erred in granting defendants' motion for directed verdict. On a defendant's motion for directed verdict, all the evidence must be considered in the light most favorable to the plaintiff, and a directed verdict may be granted only if when so viewed the evidence is insufficient to justify a verdict for the plaintiff. *Manganello v. Permastone, Inc.*, 291 N.C. 666, 231 S.E. 2d 678 (1977). The moving party must state the specific grounds for his

directed verdict motion, G.S. 1A-1, Rule 50(a), and our appellate courts will not consider grounds other than those stated at trial upon reviewing a trial court's ruling on a Rule 50(a) motion. *See Feibus & Co. v. Construction Co.*, 301 N.C. 294, 271 S.E. 2d 385 (1980). We construe the grounds stated by defendants in support of their motion at trial to pose two questions for our review: first, whether the law of Quebec governs any part of the present case, and second, if the law of Quebec does apply, taking the evidence in the light most favorable to plaintiff, whether the law of Quebec is such as to preclude any recovery by plaintiff.

In the former appeal of this case, plaintiff's complaint was before this Court on review of a trial court ruling dismissing plaintiff's action for failure to state a claim. We note that plaintiff's complaint contains no alternative claims for relief and that the contract between plaintiff and defendant Robert Gordon was made part of the complaint. We held that plaintiff had stated a claim on which relief could be granted. Implicit in that holding was that if at trial plaintiff presents evidence to support the essential allegations of her complaint, the case must go to the jury, unless plaintiff's own evidence also conclusively establishes a complete defense for defendant (and such is not the present case). Where evidence has been presented to support the material allegations of plaintiff's complaint, and where, as here, the evidence does not raise an insurmountable bar to plaintiff's recovery, if the plaintiff's complaint has stated a claim for relief, a directed verdict for the defendant may not be properly granted. When the case was tried, plaintiff did in fact present evidence to support the material allegations of her complaint. Plaintiff's evidence in the present case would allow but not require a jury to find that she was entitled to the custody of Alexandre; that defendants conspired to abduct and did abduct Alexandre; that defendants wrongfully and maliciously deprived plaintiff of the companionship of Alexandre; and that by reason of defendants' acts, plaintiff endured mental and emotional suffering and incurred various expenses. *See* 3 Lee, North Carolina Family Law § 243 (4th ed. 1981).

When a question before this Court has been previously answered on a former appeal in the same case, our answer to that question in the former case is the law of the case for purposes of the subsequent appeal. *Transportation, Inc. v. Strick Corp.*, 286

N.C. 235, 210 S.E. 2d 181 (1974). The question presently before this Court having already been answered adverse to defendants, the trial court erred in directing a verdict for defendants and we need not address the questions raised by this assignment of error. Nevertheless, since there must be a new trial where the same questions are likely to arise, we will address such questions as we deem necessary to facilitate retrial.

[2] As we noted in *La Grenade v. Gordon, supra*, plaintiff's action is for abduction, a tort. Our courts continue to apply the law of the place of the plaintiff's injury, the *lex loci*, in tort cases. *Henry v. Henry*, 291 N.C. 156, 229 S.E. 2d 158 (1976). The actual damages plaintiff seeks to recover in her action are for expenses incurred in her attempts to recover custody of her son and for emotional and mental suffering. Plaintiff came to North Carolina almost immediately after discovering that Alexandre was missing. Upon arrival, plaintiff confronted defendants, defendants denied her the right to be with her child, they secreted Alexandre, eventually to South Carolina, and plaintiff, unable to regain custody of her son or even to locate him, had to hire a detective and a law firm. While the wrongs allegedly committed by defendants in the present case were continuing wrongs, and plaintiff's alleged injuries were suffered both within North Carolina and outside of North Carolina, it was in North Carolina where defendants finally manifested the intent to deprive plaintiff of the custody of Alexandre, and the most significant of plaintiff's injuries occurred in North Carolina. Thus, North Carolina is the place of the tort and the place of the injury, and North Carolina tort law applies to this case. Moreover, we note that *La Grenade v. Gordon, supra*, clearly contemplates that North Carolina tort law is to be applied to this case.

[3] Defendants contend that the contract between plaintiff and defendant Robert Gordon was ineffective to give plaintiff a superior right to the custody of Alexandre. While the substantive law of North Carolina must be applied to the tort aspects of the present case, plaintiff's right to custody of Alexandre, being wholly dependent upon the validity of the contract which plaintiff and defendant Robert Gordon entered into, *see La Grenade v. Gordon, supra* (stating that a father may, by contract, surrender his common law right to custody of his child), must be determined under the law of Quebec, the place where the contract was made. *Fast*

v. Gulley, 271 N.C. 208, 155 S.E. 2d 507 (1967). A decision on a former appeal is the law of the case on all matters necessary to the decision and, as such, it is binding on the appellate court when the same question is raised on a subsequent appeal. *Transportation, Inc. v. Strick Corp., supra.* When our courts are confronted with cases involving questions of the law of foreign countries, G.S. 8-4 requires that we, *sua sponte*, take notice of such law. In the former appeal of this case, we addressed the question of whether plaintiff's complaint stated a claim for relief and we held that it did state a remediable claim for abduction. As plaintiff's complaint contained a duplicate of the actual written agreement of the parties, the same contract that was before the jury at trial was before this court on the former appeal. There, we stated that, taking the allegations of plaintiff's complaint as true,

> defendant Robert Gordon contracted away his common law right to custody of the minor child, but reserved a right to institute a custody action . . ., plaintiff was vested by contract with legal custody of the child . . . [and by] contractual agreement . . . she . . . had the right to institute a cause of action for abduction . . . .

La Grenade v. Gordon, supra. From the foregoing, it is clear that this Court has already considered the validity of the contract involved in the present appeal. We have no reason to believe that this Court failed to take notice of and apply the law of Quebec in its review of the contract. Our decision that the contract was valid was clearly necessary to the decision in the prior appeal because, had the contract been invalid, plaintiff's complaint would not have stated a claim for relief. *See La Grenade v. Gordon, supra.* Since our previous holding that the contract of the parties is valid is the law of the case, defendants' contention that the invalidity of the contract requires that a directed verdict be granted for defendants is without merit.

[4] By her first assignment of error, plaintiff contends that the trial judge erred in limiting the admissibility of certain evidence. At trial, plaintiff testified that when she was first reunited with her husband and her child at the grandparents' house in Winston-Salem, she took the baby in her arms only to have him forcibly taken away from her by defendants who then locked the baby in

the bathroom with his father away from plaintiff. Plaintiff testified that at that juncture defendant Betsy Gordon said to plaintiff, "we didn't do all that for nothing. We're going to keep the baby—and you just go out there." Upon defendants' objection, the trial judge instructed the jury that the statement could be used only against the declarant, Betsy Gordon, and not against defendants Robert and Dwight Gordon. Later, plaintiff proffered evidence as to what the testimony of defendant Dwight Gordon had been in a district court proceeding. Specifically, plaintiff sought to prove that defendant Dwight Gordon admitted in district court that it was he who had arranged for Robert Gordon and Betsy Gordon to bring Alexandre to North Carolina. Plaintiff sought to have this evidence admitted against defendant Dwight Gordon alone, but the trial court excluded the evidence upon defendants' objection.

Once a conspiracy has been established, the declaration of one of the conspirators, if made while the conspiracy existed and in furtherance of it, is admissible against his co-conspirators. *State v. Tilley*, 292 N.C. 132, 232 S.E. 2d 433 (1977); 2 Brandis on North Carolina Evidence § 173 (1982) and cases cited therein. The trial judge has the discretion to admit declarations of a conspirator against his co-conspirators subject to later proof of the conspiracy. *Id.* The rule is applicable in civil cases as well as in criminal cases. *Hart Cotton Mills v. Abrams*, 231 N.C. 431, 57 S.E. 2d 803 (1950); 2 *Brandis* § 173. It has been stressed that the *statement itself* must be in furtherance of the common design and that mere narrative of past declarations, even if originally made during the existence of the conspiracy, may not be offered at trial against the "narrator's" co-conspirators. *State v. Cole*, 249 N.C. 733, 107 S.E. 2d 732 (1959); 2 *Brandis* § 173. It is well established that a prior admission of a party to an action is admissible at trial against him in spite of the fact that, as offered, it is hearsay evidence. *See* 2 *Brandis* § 167 and numerous cases cited therein. Such admissions may consist of written or oral statements or nonverbal conduct and, apparently, it does not need to be shown that the declarant has personal knowledge of the admitted facts. *Id.* The only limitation on such evidence is the normal relevancy limitation. *Id.* Of course, admissions made during the course of judicial proceedings are admissible. *Id., citing Allen v. Allen*, 213 N.C. 264, 195 S.E. 801 (1938).

Applying these rules to the two items of evidence proffered by plaintiff, defendant Betsy Gordon's statement was admissible against all defendants as a declaration of a co-conspirator made during and in furtherance of a conspiracy to abduct Alexandre. Defendant Dwight Gordon's declaration made in district court should have been admitted against him as an admission of a party opponent but was properly excluded as to his co-conspirators because it was not made in furtherance of the conspiracy but was a mere narration of past acts done during the course and in furtherance of the conspiracy. As to defendant Betsy Gordon's declaration we note that it was admissible because plaintiff had already made a *prima facie* showing of the existence of a conspiracy by testifying, without objection, to the fact (among others) that Dwight Gordon had told her that he, Dwight Gordon, had arranged with Betsy Gordon and Robert Gordon to bring Alexandre to Winston-Salem. Clearly, Betsy Gordon's statement was made in furtherance of the plan to deprive plaintiff of the custody of her son. Thus, her declaration was admissible against all defendants. Defendants contend that under the rule of *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed. 2d 476 (1968), Betsy Gordon's statement was not admissible against her co-defendants because Betsy Gordon did not testify and therefore her co-defendants had no opportunity to cross-examine her. This contention is without merit. The exception which *Bruton* creates to the co-conspirator declaration hearsay exception is narrow and it is based solely on the right to confrontation, which right belongs to criminal defendants. *Bruton* creates no exception to the rules set out in 2 *Brandis* § 173 as they apply to this case. As to defendant Dwight Gordon's district court admission, we think it readily apparent from the above discussion why that admission is admissible against him.

[5] By her second assignment of error, plaintiff contends that the trial court erred in excluding plaintiff's exhibit number five, an order of a South Carolina court awarding custody of the child Alexandre to plaintiff, as evidence against defendants Dwight and Betsy Gordon. Plaintiff contends that the exhibit was relevant for purposes of showing her damages because it helps to show what steps she had to take in order to recover custody of Alexandre. We agree that the exhibit was relevant for those purposes. Defendants maintain that the exhibit was properly excluded because

it was potentially prejudicial to defendants Dwight and Betsy Gordon, especially since they were not parties to the custody proceeding. While we agree with defendants that the evidence was potentially prejudicial, nevertheless it was admissible, and a limiting instruction could have effectively prevented any prejudice from resulting from its admission. To exclude the exhibit as to defendants Dwight and Betsy Gordon was error.

For the reasons stated, the trial court erred in directing a verdict for defendants and this case must be remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded for a new trial.

Chief Judge VAUGHN and Judge BRASWELL concur.

STATE OF NORTH CAROLINA v. WILLIAM WAYNE McGEE AND MICHAEL CORNELL SMITH

No. 8221SC649

(Filed 15 February 1983)

1. Attorneys at Law §§ 4, 6— testimony that attorneys involved in crime being tried—denial of attorneys' motion to withdraw error

In a prosecution for conspiracy to traffic cocaine, the trial judge erred in refusing to allow defendants' attorneys to withdraw after a State's witness testified that the attorneys were involved in the illegal drug operation. The facts were sufficient under G.S. 15A-144 to show "good cause" so as to justify withdrawal where the facts tended to show that the State's witness irreparably damaged defendant's defense by accusing his attorneys of unlawful acts, it appeared that defendant's counsel was surprised by the State's witness's testimony, and another attorney was prepared to take over the defense.

2. Criminal Law § 92.5— motion to sever improperly denied

In a prosecution for conspiracy to traffic cocaine, the trial court erred in failing to sever one defendant's trial from that of the other defendant where the other defendant's attorneys were linked by the testimony of a State's witness to the drug dealing involved. G.S. 15A-927(c)(2).

3. Criminal Law § 7.1— defense of entrapment having no application to case

In a prosecution for conspiracy to traffic cocaine, the defense of entrapment had no application to defendants' cases where the evidence tended to

show that one defendant first suggested cocaine as a way to make money and that defendant brought the other defendant into the matter. Further, one defendant's contention that because the other defendant was entrapped, he should be absolved of any guilt was unpersuasive, since there is no derivative entrapment doctrine.

APPEAL by defendants from *Walker (H. H.), Judge.* Judgment entered 20 November 1981 in Superior Court, FORSYTH County. Heard in the Court of Appeals 11 January 1983.

The defendants were indicted by a grand jury for conspiracy to traffic cocaine, a Schedule II controlled substance, in violation of G.S. 90-95(h)(3)(a). Both pled not guilty and were tried before a jury.

The State's primary witness was Ann Toms. She was hired by the Winston-Salem Police Department in August 1981 to participate in an undercover drug operation.

On 24 August 1981, Toms met the defendant McGee at his office at the Convention Center in Winston-Salem. She contacted McGee after the police gave his name to her. The two discussed Toms' plans for a fashion show. Toms stated that she wanted to make money off of the show. At this meeting, she showed McGee a bank deposit slip that made it appear that she had $50,000 in her account. The Vice Division of the police department had arranged the deposit.

Toms called McGee on 26 August and told him that she was interested in making her money work for her. She expressed concern over the risk involved with a way to make money that her nephew had suggested. McGee responded, "Say no more. I know what you're talking about, and it's very risky. . . . We can talk about it later."

After McGee called Toms to set a meeting time, the two met at the Convention Center on Saturday, 29 August. McGee asked Toms how she felt about making a 35 percent return on $10,000 in 30 days and told her that he was talking about investing in cocaine. When Toms expressed concern about the risk involved, McGee told her that she would be an investor like him and not have to touch the drugs.

McGee made a telephone call and then informed Toms that 116 grams of cocaine would cost $7,800. McGee told her that he

had called a young man named Michael, with whom he had before done business. Michael was going to California two days later.

Toms testified that McGee mentioned that two attorneys were also involved in the operation and knew what to do if anything happened. Toms then showed him $3,000 in cash that she had with her.

On 31 August, Toms met McGee at a Winston-Salem restaurant. She requested the meeting in order that she could meet Michael. At the restaurant, a man came to the table and introduced himself as Michael Smith.

Smith told Toms that he normally did not meet with investors or deal in amounts of money less than $25,000. Toms told Smith that she wanted her nephew, who was outside in the car, to hear the details of the plan. Smith reluctantly agreed. The nephew was State Bureau of Investigation Special Agent J. F. Bowden.

McGee talked with Bowden about becoming part of the operation. He told Bowden that he should call Carl Parrish and Bob Tally, two attorneys that McGee said were part of the operation, if he got caught. Parrish and Tally were counsel for McGee at the trial of this case.

Toms and Bowden went to the Convention Center later in the afternoon of 31 August and gave McGee $3,000. Of that total, $1,000 was designated as travel money for Smith to go to California.

On 1 September, Smith picked up the $3,000 from McGee at the Convention Center and then went to Toms' apartment. Toms and Bowden gave Smith $5,700, which he put in a satchel. As Smith left the apartment, he was arrested. McGee was arrested on the same day.

Toms testified that she had been convicted of writing worthless checks and for obtaining property by false pretenses. She also discussed a book that she wrote about her experiences during this case.

Special Agent Bowden's testimony corroborated what Toms stated in her testimony.

McGee's attorneys Parrish and Tally made a motion to withdraw because Toms had linked them to the drug dealing and other illegality. The attorneys sought to withdraw because they wanted to testify to refute Toms' statements. The motion was denied. McGee also made a motion to allow Tally and Parrish to withdraw. In the motion, he stated that Harrell Powell, Jr. was prepared to represent him in the case and sought to have Powell substituted as counsel. The court denied the motion.

A number of tapes that contained telephone and meeting conversations among the participants in the case were played for the jury.

McGee's testimony was similar to what Toms said. Although McGee testified that he resisted involvement in anything illegal, he finally gave in to the temptation. He stated:

> I'm sure the show of the money on Saturday morning, along with all of the other pressures of saying no, the invitations and so forth, I guess maybe I just decided that that Saturday morning the apparent show of money and considering my financial situation, I guess it was just a little bit more than, I guess I just could not withstand the temptation of the cash money and the deal that was being offered. I'm sorry.

After deciding to be a part of the illegality, McGee called Smith and got prices for the drugs. McGee denied using, selling, or talking about cocaine prior to the meetings with Toms. He had no prior criminal record.

Defendant Smith did not testify but he did present character witnesses.

Motions by both defendants to dismiss and to direct a verdict were denied by the trial judge.

Both defendants were found guilty by the jury of conspiracy to traffic in cocaine. Each was given a sentence of seven years and fined $50,000. Both defendants then appealed to this Court.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Thomas B. Wood, for the State.

Powell and Yeager, by Harrell Powell, Jr., and David E. Crescenzo, for defendant McGee.

Nancy S. Mundorf for defendant Smith.

ARNOLD, Judge.

Four identical arguments are raised by both defendants. Smith raises four additional contentions. But because of our disposition of this case, we find it necessary only to discuss two arguments.

[1] McGee argues that his attorneys should have been allowed to withdraw after Toms testified that they were involved in the illegal drug operation in this case. He contends that this was a denial of the right to effective assistance of counsel, as guaranteed by the Sixth Amendment of the United States Constitution and Article I, Section 23 of the North Carolina Constitution. The record establishes that if McGee's counsel, Parrish and Tally, had been allowed to withdraw, they would have refuted Toms by testifying.

Withdrawal of an attorney in a criminal case in North Carolina depends upon a showing of good cause. G.S. 15A-144. The decision is in the court's discretion.

Because we find that it was an abuse of discretion by the trial judge to deny the motions to withdraw in this case, both defendants are entitled to a new trial.

McGee's appeal depends on the answer to the following questions: When a witness for the State testifies that the defendant's attorneys were involved in the illegality that is the subject of the trial, is it reversible error for the trial judge to deny the attorneys' motion to withdraw in order to deny the wrongdoing by testifying, given that another attorney was prepared to take over the defense? That is, do these facts show G.S. 15A-144 "good cause" so as to justify withdrawal?

Although research has located no North Carolina cases that squarely address the issue presented here, the Supreme Court in *Smith v. Bryant*, 264 N.C. 208, 141 S.E. 2d 303 (1965), addressed the attorney withdrawal issue. "Whether an attorney is justified in withdrawing from a case will depend upon the particular circumstances, and no all-embracing rule can be formularized." 264 N.C. at 211, 141 S.E. 2d at 305. *See* 7 Am. Jur. 2d *Attorneys at Law* § 173 (1980).

Two facts justify our decision to grant McGee a new trial. First, Toms irreparably damaged McGee's defense by accusing his

attorneys of unlawful acts. Once the statements were made, McGee's attorneys could only refute them by testimony. The taint of wrongdoing that was attached to McGee's attorneys made any attempt to continue the defense almost futile. Juries normally separate any illegality committed by a defendant from his attorney. But when the attorneys are also linked to the crime by testimony, they become ineffective advocates.

Second, it appears that McGee's counsel was surprised by Toms' testimony. There is a statement by the District Attorney when the motion was being heard that "Your Honor, [it would] be a different matter if these attorneys had not been forewarned what the facts of the case would be before they came in here." But this statement by itself does not show pretrial knowledge. As a result, the case *sub judice* is distinguishable from *State v. Brady*, 16 N.C. App. 555, 192 S.E. 2d 640 (1972), *cert. denied*, 282 N.C. 582, 193 S.E. 2d 745 (1973), where a motion to withdraw was denied because the attorney knew before trial that he might be a witness.

It is also notable that once Toms implicated McGee's attorneys in the crime, they prepared another attorney to take over the defense. The motion to withdraw was not used as a delay tactic. Whether another attorney is prepared to take over the defense without delay is a factor to be considered in the withdrawal decision. *State v. Potts*, 42 N.C. App. 357, 256 S.E. 2d 497 (1979).

When the motion to withdraw was denied, a motion for a mistrial by either defendant would have been appropriate. G.S. 15A-1061. In fact, perhaps the trial judge should have declared a mistrial *ex mero motu*. G.S. 15A-1061 and -1063. If granted, such a motion would have saved the time and expense of completing a trial at which the defendants were already substantially and irreparably prejudiced by Toms' testimony. But failure of either defendant to make such a motion will not prevent us from rendering appropriate relief.

We note that there is authority for our grant of a new trial because of refusal to allow an attorney to withdraw. *See* 81 Am. Jur. 2d *Witnesses* § 98.5 (1976); Annot., 52 A.L.R. 3d 887 (1973); 7 C.J.S. *Attorney and Client* § 110 (1937).

Because "the roles of an advocate and of a witness are inconsistent," Code of Professional Responsibility, EC 5-9, we find that McGee was denied his constitutional right to the effective assistance of counsel when his attorneys were not allowed to withdraw.

[2] Although refusal to allow McGee's counsel to withdraw may not alone justify granting Smith a new trial, the denial of Smith's motion to sever his trial from McGee's was reversible error.

G.S. 15A-927(c)(2) provides that a severance of defendants is proper when it is "necessary to promote a fair determination of the guilt or innocence . . ." of a defendant. Such a ruling is in the trial judge's sound discretion. *State v. Lake*, 305 N.C. 143, 286 S.E. 2d 541 (1982). The ruling will not be disturbed on appeal absent a showing by the defendant of abuse of judicial discretion that effectively deprived him of a fair trial. *State v. Porter & Ross*, 303 N.C. 680, 281 S.E. 2d 377 (1981). Whether the ruling is proper depends on the circumstances of each case. *State v. Nelson*, 298 N.C. 573, 260 S.E. 2d 629 (1979), *cert. denied*, 446 U.S. 929 (1980).

The fact that Smith was being tried with McGee made a fair trial impossible, even though they had separate attorneys. Smith was linked to the taint surrounding McGee's attorneys by his presence in the same courtroom at the same table with McGee and his attorneys. This is true even though Toms testified that Smith's counsel was not involved in the crime.

Although the trial judge did instruct the jury that they should consider the verdicts in the two cases separately, the nature of conspiracy requires an agreement by two or more persons. The only person indicted for a criminal conspiracy here was McGee. Given McGee's lack of effective assistance of counsel and Smith's trial at the same time, the severance motion should have been granted.

[3] Both defendants raise entrapment as a possible defense. That doctrine has no application in this case.

Toms testified that McGee first suggested cocaine as a way to make money, mentioned the high rate of return in a short period of time, and brought Smith into the matter. Thus, he was predisposed to commit this crime and no inducement by law en-

forcement officers to persuade him to commit the crime has been shown.

Smith contends that because McGee was entrapped, Smith should be absolved of any guilt. We know of no such derivative entrapment doctrine and find this argument unpersuasive and feckless.

We hold that both defendants are entitled to new trials for the reasons discussed above. But we do not make a ruling on whether they must be tried separately.

That determination should be made after a pretrial conference at which it should be determined if the State's evidence would prejudice the defendants as it did in the trial that is the basis of this appeal. The severance ruling is in the trial judge's discretion. *Lake*, 305 N.C. 143, 286 S.E. 2d 541.

New trial for both defendants.

Judges HILL and WHICHARD concur.

GARLAND S. TUCKER, JR. AND WIFE, JEAN B. TUCKER v. CHARTER MEDICAL CORPORATION

No. 8110SC1187

(Filed 15 February 1983)

1. Landlord and Tenant § 19.1— action for rent—no interference with use of property by lessor

In an action to recover rental payments for the lease of a tract of land, the record did not support defendant's contention that plaintiff lessors deliberately encouraged or acquiesced in action by the city council approving a connection road across the leasehold property so as to constitute a breach of the covenant of quiet enjoyment, constructive eviction of defendant lessee, or tortious interference with the leasehold.

2. Landlord and Tenant § 6— assistance to lessee not required—lease not subject to rescission

Defendant lessees were not entitled to rescission of a lease on the ground that plaintiff lessors failed to give it reasonable assistance in obtaining approvals, licenses, and permits for a 150 bed hospital as required by the lease where defendant lessee had decided not to build a 150 bed hospital on the leased premises.

3. Landlord and Tenant § 6— purpose of lease not frustrated

The purpose of a lease was not frustrated so as to entitle defendant lessee to rescind the lease where the lease provided that the lessee could use and occupy the leased premises for any lawful purpose, including but not limited to the construction, operation and expansion of medical care facilities, office buildings or other structures permitted by zoning ordinances, and the lessee has merely been denied site approval by the city for construction of a 40,000 square foot building which would have been in the path of a proposed connection street across the leased property.

4. Landlord and Tenant § 6— rejection of lessee's site plan because of proposed road—no constructive condemnation

The city council's rejection of a lessee's site plan for an office building on the leased property because the proposed building would lie in the path of a proposed connection street across the leased property did not constitute a constructive condemnation of a portion of the leased property so as to give the lessee the option under the lease to reduce the rent proportionately where no formal steps have been taken by the city either to initiate condemnation procedures or to begin road construction.

5. Rules of Civil Procedure § 56— conclusory statement in affidavit—no consideration on motion for summary judgment

The trial court properly ruled that a statement in an affidavit that plaintiff had the opportunity to reject a road across his property if he had chosen to do so was conclusory and should not be considered by the court in ruling on a motion for summary judgment.

6. Trial § 3.2— summary judgment hearing—denial of motion for continuance—no abuse of discretion

The trial court did not abuse its discretion in the denial of defendant's motion for a continuance of a hearing on plaintiffs' motion for summary judgment because defendant was informed three days before the scheduled hearing that the assigned judge would disqualify himself from the hearing and defendant ceased preparation of its case where defendant was advised one or two days prior to the hearing that another judge would preside on the date originally scheduled; after hearing the matter on the scheduled date, the trial judge adjourned the case until six days later, with leave for other affidavits to be filed within three days; and defendant filed an additional affidavit within the allotted time.

APPEAL by defendant from *Herring, Judge.* Order entered 20 July 1981 in Superior Court, WAKE County. Heard in the Court of Appeals 2 September 1982.

Plaintiffs are the owners of a parcel of land located in the City of Raleigh. On 28 January 1981 they instituted this action in District Court against their lessee, Charter Medical Corporation (Charter), for the recovery of two rental payments, due 1 Decem-

ber 1980 and 1 January 1981, which remained unpaid after demand. Plaintiffs moved for summary judgment and upon defendant's motion, the matter was transferred to Superior Court. Plaintiffs' motion for summary judgment was granted.

Manning, Fulton and Skinner, by Howard E. Manning and Samuel T. Oliver, Jr., for plaintiff-appellees.

Jordan, Brown, Price and Wall, by John R. Jordan, Jr., and Joseph E. Wall, and Trotter, Bondurant, Miller and Hishon, by H. Lamar Mixson, for defendant-appellant.

VAUGHN, Chief Judge.

Defendant's first argument is that the trial judge erred in granting the plaintiffs' motion for summary judgment. Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." G.S. 1A-1, Rule 56(c). "An issue is material if the facts alleged would constitute a legal defense or would affect the result of the action." *North Carolina National Bank v. Gillespie*, 291 N.C. 303, 310, 230 S.E. 2d 375, 379 (1976). The moving party has the burden of showing there is no triable issue of fact when the evidence is regarded in the light most favorable to the non-moving party. *Kent v. Humphries*, 303 N.C. 675, 281 S.E. 2d 43 (1981).

The following material uncontradicted evidence was presented at the hearing. In 1971 plaintiffs owned a parcel of land on the east side of Glenwood Avenue in Raleigh and another parcel located across the street on the west side of Glenwood Avenue. On 26 August 1971 defendant, intending to build a hospital, entered into a 40-year lease (effective 15 September 1973) with plaintiffs for the east parcel. The property was zoned Residential -10, which permitted the construction of a hospital.

In February 1975, the City of Raleigh rezoned a portion of the east parcel from Residential -4 to Conservation/Buffer. The rezoned portion was a one hundred fifty foot strip on the eastern boundary of the property.

In January 1977, residents of the area on the west side of Glenwood Avenue petitioned the Raleigh City Council to state their opposition, previously expressed in a petition filed in 1974, to the connection of Blenheim Drive, running through their communities and bordering the Tucker land, with Glenwood Avenue at Women's Club Drive which borders the land leased by Charter. On 25 April 1977, plaintiffs applied to the City of Raleigh for a subdivision of the west parcel. At the 7 June 1977 meeting of the Raleigh Planning Commission the subdivision request was approved. The Commission noted the opposition of citizens concerned with the Blenheim Drive-Glenwood Avenue connection and considered alternate routes for traffic flow onto Glenwood Avenue, one of which was a connection between two existing roads across the east parcel. This matter was discussed at the 28 June 1977 meeting of the Raleigh Public Works Committee, where residents again voiced opposition to a Blenheim connection. The proposed connection road across the east parcel was discussed and plaintiff Garland Tucker voiced his opposition to the building of such a road on his land, saying the road might make the property unusable by his lessee. The Committee recommended approval of Tucker's subdivision request and of the extension of the connection road across the east parcel. On 19 July 1977 the Raleigh City Council approved the basic plan for subdivision on the west parcel and the concept of the road extension on the east parcel. On 28 February 1979 Charter petitioned for the rezoning of the east parcel stating the need in the area for small professional office buildings. On 4 May 1979, in an effort to facilitate its rezoning request, Charter entered into an agreement with adjoining property owners which added an additional 75 foot buffer zone to the property and imposed further building restrictions in the buffer zones and along two adjoining roads. On 5 June 1979 the City Council approved Charter's request for rezoning to "Office and Institutional-III," a type of zoning which is more restrictive in that, among other things, site plan approval for any use of the land has to be given by the City Council. On 30 June 1980 Charter submitted to the City of Raleigh a site plan for the construction of a 40,000 square foot building on the east parcel. On 16 September 1980 the City Council voted to uphold the recommendation of the Planning Commission that previous Council action approving the concept of the connection road across Charter's property be referred back for plan approval. The City took no for-

mal condemnation action and no plans for street construction were implemented. On 7 October 1980 the City Council denied Charter's request for construction of its proposed building because it was in the path of the proposed street. Charter did not appeal from that decision. Charter failed to make its December 1980 and January 1981 rent payments.

The record presents no genuine issue as to any material fact affecting this controversy. The only question remaining is whether the trial judge correctly ruled, as a matter of law, that defendant's counterclaims and defenses were without merit and the rent payments were due to plaintiffs.

[1] Defendant classifies its defenses and counterclaims into three basic theories. The initial category includes breach of the covenant of quiet enjoyment resulting in a breach of contract, constructive eviction, and tortious interference with the leasehold. The crux of defendant's allegations is that plaintiffs deliberately encouraged or acquiesced in the action by the City Council approving the connection road across the leasehold property. These acts or omissions allegedly resulted in serious injury to defendant's use, enjoyment, and possession of the leased property, particularly as to the original purpose for which the property was leased, the construction of a hospital. The record does not support defendant's allegations. Defendant acknowledges that landlords are not usually liable for the independent acts of government officials in condemning or otherwise placing restrictions on leased premises. *See generally,* 49 Am. Jur. 2d *Landlord and Tenant,* §§ 322, 584 (1970). Nor do we find in the record the purposeful actions or inaction on the behalf of plaintiffs as contended by defendant. The single reference to plaintiffs concerning the City's approval of this particular connection road, is in the minutes of the 28 June 1977 meeting of the Public Works Committee where plaintiff Garland Tucker addressed the Committee stating that it was "not his request that the road be extended across [the leased premises] and that he would rather it not be extended as it would serve no purpose in development of this land." Tucker further submitted an affidavit to the court wherein he affirmed his appearance before the Committee to state his personal opposition to the plan for the road.

[2] Defendant also argues that it is entitled to rescission of the lease because the plaintiffs failed to give it reasonable assistance

or because they acted unreasonably to its detriment. Defendant fails to cite any authority for using a reasonable care standard, which is the standard of care applied to a negligence action. The argument lacks merit even if reasonable care was an appropriate standard in this case. In the lease agreement, the plaintiffs agreed to "cooperate with Charter in obtaining such approvals, licenses, and permits as may be required for it to construct a 150-bed, expandable to a 200-bed acute care medical-surgical hospital with obstetrical services on the premises without any expense to Lessors." Defendant decided not to build a 150-bed hospital on the site because it "wanted to switch to a piece of property that would have afforded the chance to expand the hospital into a five hundred (500) bed hospital." This would require about fifteen acres. The east parcel is approximately 6.88 acres. Since the lease stated that the lessors would assist defendant in obtaining approvals, licenses, and permits for a 150-bed hospital, and the defendant decided not to build a 150-bed hospital, plaintiffs had no express duty to assist defendant. There is no merit to the contention that plaintiffs acted unreasonably to the defendant's detriment.

[3] Defendant argues that the proposed road through its property is in effect a breach of the leasehold agreement. It contends that its known purpose of constructing a hospital has been substantially frustrated by the space limitations imposed by the road and that plaintiffs have breached their implied covenant not to interfere with its use and development of the land. As previously discussed, we find no support in the record for the allegation that the Tuckers have purposefully hindered the development of the leasehold. Nor do we conclude that the purpose of the lease has been frustrated. The lease provides that Charter may use and occupy the premises for any lawful purpose, expressly including but not limited to the construction, operation, and expansion of medical care facilities, office buildings, or any other structures permitted by zoning ordinances presently or hereafter in force." Charter has merely been denied site approval by the City for construction of a 40,000 square foot building in the right-of-way of the proposed road. The proposed street plan would not have affected defendant had it not requested that the east parcel be rezoned to Office and Institutional-3 which requires the City Council to approve all site plans before anything is built on

the land. The City Council may refuse approval on the grounds that it fails to provide unity of development with other properties, fails to protect the public from a dangerous arrangement of vehicle and pedestrian ways, or that it fails to adequately protect other property from any adverse effect of an office operation. Raleigh Code § 10-2038. Had defendant not requested the property to be rezoned to Office and Institutional-3 it could have built the office building without site approval.

There is no evidence that other commercially feasible ventures have been frustrated or prohibited. In order for the doctrine of frustration of purpose to constitute a defense to the obligation to pay rent under a valid lease, the subject of the contract must be destroyed. *Sechrest v. Forest Furniture Co.*, 264 N.C. 216, 141 S.E. 2d 292 (1965); *Knowles v. Carolina Coach Company*, 41 N.C. App. 709, 255 S.E. 2d 576, *review denied*, 298 N.C. 298, 259 S.E. 2d 913 (1979).

[4] We also find no merit in defendant's third basis for relief: constructive condemnation. The lease provides that if the entire property is condemned and possession taken by a public authority, then the lease shall cease and the rent be accounted for. A partial taking by a public authority gives Charter the option to reduce the rent proportionately or to receive the condemnation award. It is clear that there has been no actual condemnation of this land by any public authority. Charter however contends that the land use restriction represented by the proposed road constitutes a functional taking of the property, an inverse condemnation. The rejection of Charter's site plan by the City Council is not, however, a taking within the meaning of the lease. Furthermore, no formal steps have been taken by the City either to initiate condemnation procedures or begin road construction. The preparation of maps or even the adoption of a plan (which may never be carried out) is not a taking or damaging of the property affected so as to constitute a condemnation in any form. *Barbour v. Little*, 37 N.C. App. 686, 247 S.E. 2d 252, *review denied*, 295 N.C. 733, 248 S.E. 2d 862 (1978).

It is undisputed that Charter has not paid the December and January rent payments due under the lease. We find that the trial judge was correct in finding no merit in the defenses and counterclaims raised by Charter to the nonpayment. The entry of summary judgment was correct.

[5] Defendant next assigns error to the trial judge's ruling that the following statement in the affidavit of James Donald Blackburn was conclusory and would not be considered by the court in its ruling on the summary judgment motion: "Mr. Tucker had the opportunity [at the 28 June 1977 meeting of the Raleigh Public Works Committee] to reject this extension but did not do so." Affidavits filed in support of a summary judgment motion "shall set forth such facts as would be admissible in evidence." G.S. 1A-1, Rule 56(e). Although Mr. Blackburn was present at several public meetings in which the proposed road was discussed, his statement merely contains his conclusion that Tucker could have rejected the road if he had so chosen. We agree that the statement was correctly stricken from the affidavit.

[6] Defendant next argues that the trial judge erred in denying its motion for a continuance. It contends that when it was informed three days before the scheduled hearing that the assigned judge was to disqualify himself from the hearing, it justifiably ceased preparation of its case. The record shows that "one or two days" prior to the hearing the defendant was advised that another Superior Court judge would preside on the date originally scheduled. After hearing the matter on the scheduled date, the trial judge adjourned the cause until six days later, with leave for other affidavits to be filed within three days. Defendant filed an additional affidavit within the allotted time period. We find no evidence of abuse of the trial court's discretion based upon these facts.

The judgment below is

Affirmed.

Judges HILL and JOHNSON concur.

STATE OF NORTH CAROLINA, PLAINTIFF v. J. T. TAYLOR, JR., ZACHARY TAYLOR, AND GORDON H. DENTON, DEFENDANTS; AND L. J. MOORE, BOY'S RANCH FOUNDATION, ALICE S. HEATH, CLIFFORD EARL HEATH, AND DONNA KAREN HEATH (MINOR), ADDITIONAL DEFENDANTS; AND SAMUEL L. WHITEHURST, JR., GUARDIAN AD LITEM FOR DONNA KAREN HEATH (MINOR), ADDITIONAL DEFENDANTS; AND FLOYD D. WHITE, INTERVENOR DEFENDANT; AND LARRY T. HEATH, INTERVENOR DEFENDANT; AND L. J. MOORE, CROSS COMPLAINANT & THIRD PARTY PLAINTIFF v. STATE OF NORTH CAROLINA, PLAINTIFF & THIRD PARTY DEFENDANT; AND J. T. TAYLOR, JR., ZACHARY TAYLOR, AND GORDON H. DENTON, AND ALICE S. HEATH, CLIFFORD EARL HEATH, AND DONNA KAREN HEATH (MINOR), AND FLOYD D. WHITE, THIRD PARTY DEFENDANTS

No. 823SC246

(Filed 15 February 1983)

1. State § 2— State lands—presumption that title in State—constitutional

The statutory presumption created by G.S. 146-97 that, where the State is a party in a suit for any land, the title to the land shall be deemed to be in the State until otherwise shown, is constitutional.

2. Adverse Possession § 19— adverse possession under color of title against State—not 21 years

In an action instituted by the State to remove a cloud on title to certain land, one group of defendants failed to show adverse possession under color of title against the State since they first entered the land in 1968 and since the party claiming title must possess the land identified under known and visible lines and boundaries for 21 years as provided in G.S. 1-35.

3. Adverse Possession § 25.2— adverse possession under color of title against trustee—insufficient evidence

In an action instituted by the State to remove a cloud on title to certain land, one group of defendants failed to prove adverse possession under color of title against the trustee pursuant to G.S. 1-38 where they claimed color of title under a deed and where the description of the property was insufficient in that it purported to give title to "any and all other land and interest in land . . . owned by David Allison."

4. Deeds § 1— deed ineffective to convey title

A trust deed was ineffective to convey title where it lacked evidence of full execution, recordation or delivery.

5. Adverse Possession § 25.2— simple adverse possession against State—insufficient evidence

In an action by the State to remove a cloud on title to certain lands, a group of defendants failed to make a case of simple adverse possession without color of title under known and visible boundaries where the group testified that someone else had used the property and built some roads, their possession was not continuous, uninterrupted, or exclusive, and where an exchange

of deeds intended to create some title in the property was fraudulent and made with full knowledge by each party thereto that neither had any title to the land.

APPEAL by defendants from *Rouse, Judge*. Judgment entered 21 August 1981 in Superior Court, CRAVEN County. Heard in the Court of Appeals 18 January 1983.

The State of North Carolina instituted this action to remove a cloud on title to certain land located in Craven County, to restrain trespass and timber removal, and to recover damages for timber wrongfully removed. The original defendants were J. T. Taylor, Jr., Zachary Taylor, and Gordon H. Denton (Taylor Group). L. J. Moore; Boy's Ranch Foundation; and Alice S. Heath, Clifford Earl Heath, and the minor Donna Karen Heath were joined as defendants upon motion by the Taylor Group. Later, Larry T. Heath was allowed to intervene; he aligned himself with the other Heaths in what will be referred to as the Heath Group. Intervenor Floyd White and Boy's Ranch Foundation were subsequently dismissed from the case.

Each group of defendants filed answers averring that they were the owners of the tract in question. Defendant Moore's answer asserted a cross-claim against the plaintiff and the other defendants for trespass and for damages for timber removal.

The issues of title and damages were severed for separate trial. At trial before the jury on the issue of title, the court denied the motions of all defendants for a directed verdict and granted the State's motion for directed verdict at the close of all the evidence. Judgment was entered declaring the State to be the fee simple owner of the tract, consisting of 2,705.0254 acres.

Defendants Taylor Group, Heath Group and Moore appeal.

Attorney General Edmisten, by Special Deputy Attorney General T. Buie Costen, Assistant Attorney General Roy A. Giles, Jr., and Assistant Attorney General R. Bryant Wall, for the State.

Henderson & Baxter, P.A., by David S. Henderson for defendant-appellants J. T. Taylor, Jr., Zachary Taylor, and Gordon H. Denton.

Broughton, Wilkins & Crampton, P.A., by J. Melville Broughton, Jr., for defendant-appellant L. J. Moore.

Jones and Wooten, by Everette L. Wooten, Jr., for defendant-appellants Alice S. Heath, Clifford Earl Heath, Larry T. Heath and Donna Karen Heath (minor).

ARNOLD, Judge.

G.S. 146-79 provides in pertinent part:

> In all controversies and suits for any land to which the State or any State agency or its assigns shall be a party, the title to such lands shall be taken and deemed to be in the State or the State agency or its assigns until the other party shall show that he has a good and valid title to such lands in himself.

Relying upon the presumption created by G.S. 146-79, the State presented the testimony of Robert T. Newcomb, a surveyor, who surveyed the land in question and described monuments he found and those he placed on the ground; he also testified concerning an aerial photograph he prepared and a survey map delineating the boundaries of the land. On cross-examination, he testified that the land was located within the boundaries of Land Grant No. 819. This evidence was sufficient to withstand defendants' motions for a directed verdict.

[1] We hold that the defendants cannot succeed in their argument that the statutory presumption created by G.S. 146-97 is unconstitutional. The presumption is reasonable since title to all lands in North Carolina, except those previously granted by the Crown, originated from the State, and the State has ultimate title to the soil. *Moore v. Byrd*, 118 N.C. 688, 23 S.E. 968 (1896). In addition, "the statute does not authorize a 'taking' of property. The presumption of title in the State lasts only until the rival claimant establishes valid title in himself." *State v. Chadwick*, 31 N.C. App. 398, 399, 229 S.E. 2d 255, 256 (1976).

[2] Each group of defendants offered evidence in support of their claims to title. Evidence presented by the Taylor Group which they contend established their chain of title was as follows:

1. Grant No. 819 from the State of North Carolina to David Allison.

2. David Allison's death without having disposed of the lands described in Grant No. 819.

3. Trust deed dated 10 December 1908 from the Allison heirs and State Board of Education to George H. Roberts, Trustee. This deed was allegedly executed in settlement of a dispute between the Allison heirs and the State.

4. Recorded deed from Florence E. Phipps (a purported Allison heir) to E. S. English dated 1 January 1967.

5. Special Partition Proceeding No. N-1-232.

6. Recorded deed from Bernard B. Hollowell, Commissioner to E. S. English dated 17 November 1967.

7. Recorded deed from E. S. English to G. H. Denton dated 13 December 1967.

8. Recorded deed from G. H. Denton to Zachary Taylor dated 24 June 1968.

9. Adverse possession by the defendants Taylor and Denton.

The Taylors contend that the State was divested of title by virtue of the trust deed dated 10 December 1908; thereafter, the remaining deeds constituted color of title in defendants Taylor and Denton.

These arguments fail for several reasons. Chiefly, to claim title to land through adverse possession under color of title against the State, the party claiming title must possess the land identified under known and visible lines and boundaries for 21 years as provided in G.S. 1-35. Since the Taylor Group first entered the land in 1968, clearly they have not possessed the land for the requisite period of time against the State.

[3] Having failed to prove adverse possession against the State, the Taylors attempt to prove adverse possession under color of title against the trustee and reap the benefit of the shorter seven year possession period provided in G.S. 1-38. Again, the Taylors fail.

The description in the Phipps deed upon which the Taylors rely to claim title to the entire tract in question reads:

> Beginning at the George Pollock Patent beginning corner and runs west 1805 feet; then East 815 feet to a branch; then down said branch to the beginning, containing 15½ acres.
>
> And any and all other land and interest in land within Craven County, North Carolina, owned by David Allison at the time of his death . . . .

The Taylors cannot claim color of title to "any and all other land and interest in land . . . owned by David Allison" due to the insufficiency of the description and the lack of any reference to some source from which the deficiency in the description may be supplied. *Carrow v. Davis*, 248 N.C. 740, 105 S.E. 2d 60 (1958). Furthermore, the deed from English to Denton refers to the Hollowell deed, which conveys those lands particularly described in the Phipps deed. The words "*particularly described*," given their ordinary, natural and customary meaning, operated to convey only the 15½ acre tract, and not the lands involved in this action.

Moreover, the Taylor Group presented the testimony of Bryant Wall, Assistant Attorney General, that he found a sheriff's deed to the Governor of North Carolina dated 25 September 1801, conveying the lands covered by Grant No. 819 to the State.

[4] Defendant Moore offered evidence of a chain of title based upon the 1908 trust deed common to the Taylor chain. However, the 1908 trust deed was ineffective to convey title since it lacked evidence of full execution, recordation or delivery. Moore made no claim of title by possession.

[5] The Heath Group offered evidence in support of their claims to title through adverse possession.

Larry Heath testified that he bought land next to the lands in question in 1943 and allowed his cattle to roam onto the lands in question "a good long ways." He fenced the land he bought and part of the lands in question but the fence did not go "all the way around." He cut timber along the edges of the property in question every year for 15 to 20 years, beginning in or about 1945 and again in 1965. He built some roads on the property after 1958 and gave the Forestry Service permission to run fire lanes across the property in the early 1960's. He paid taxes on 500 acres of the property, beginning with a payment for five years back taxes in

1958 and every year thereafter until 1969, when he and his brother Earl were restrained from entering the property by a temporary restraining order. After the temporary restraining order was lifted, he reentered the property and continued to graze livestock, cut timber and build roads. Others testified that they observed the Heath brothers carry on these activities on the property.

The Heath Group's evidence fails to make a case of simple adverse possession without color of title under known and visible boundaries. Heath testified that someone else had used the property and built some roads. Heath also testified on cross-examination that he and his brother gave a deed for the property to a Mr. H. D. Dickerson of Durham County in 1965. He was getting "fed up with the property" because "it had been nothing but trouble for me, and the best thing for me to do was to get out of it." The Heaths' possession was, therefore, not continuous, uninterrupted, or exclusive.

Heath also testified that he and his brother Earl exchanged deeds for the property in 1958 in an attempt to create some title to the property. This exchange of deeds was fraudulent and made with full knowledge by each party thereto that neither had any title to the land. Larry Heath testified:

> Earl knew when he gave me his deed and I knew when I received it that Earl didn't own that property. Earl knew when I gave him my deed, and when he received it, that I didn't own the property described in that deed.

Exchange of those deeds cannot constitute color of title. In order for a deed to constitute color of title, the grantee must enter the land under the deed *in good faith. Trust Co. v. Parker*, 235 N.C. 326, 69 S.E. 2d 841 (1952). Good faith entry under the deed is lacking here.

Each group of defendants failed to present sufficient evidence in support of their claims to title. Therefore the granting of a directed verdict in favor of the State was proper.

We have reviewed the contentions of the Taylor Group that the trial court erroneously excluded certain testimony and find no prejudicial error.

The contention of the Heath Group that evidence of seven years adverse possession under color of title or twenty years adverse possession not under color of title is sufficient to rebut the presumption created by G.S. 146-79 is also without merit.

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

Affirmed.

Judges HILL and WHICHARD concur.

STATE OF NORTH CAROLINA v. MACK LEO THOMPSON

No. 828SC747

(Filed 15 February 1983)

1. **Criminal Law § 138— Fair Sentencing Act—erroneous findings of aggravating factors**

In imposing a sentence for felonious breaking or entering and felonious larceny, the trial court erred in finding as aggravating factors that (1) the offenses were for pecuniary gain and (2) they involved an attempted taking of property of great monetary value where the only evidence in the record as to pecuniary gain and the value of property which defendant intended to take or the damage done to the building and its contents was evidence that defendant broke into the building with the intention of taking copper, since this evidence was necessary to prove the elements of breaking or entering and larceny and thus could not be used to prove any factor in aggravation, and since the same evidence was improperly used to support more than one factor in aggravation. G.S. 15A-1340.4(a)(1).

2. **Criminal Law § 138— Fair Sentencing Act—aggravating factors—prior convictions—statements by prosecutor**

Statements by the prosecutor that there was an indication on defendant's folder that defendant had been convicted of larceny and that it was his memory that defendant had been convicted of larceny in another county were insufficient to support a finding of a prior conviction as an aggravating factor.

3. **Criminal Law § 138— Fair Sentencing Act—aggravating factors—prior convictions—necessity for showing representation by counsel**

A statement by defendant on cross-examination that he had been convicted of forgery and driving under the influence of alcohol was credible evidence of prior convictions. However, the State had the burden of proving that defendant was not indigent or that he had waived counsel at the time of his prior convictions, G.S. 15A-1340.4(e), and defendant's statement was insuffi-

cient proof to support a finding of prior convictions as an aggravating factor where there was no evidence in the record as to the indigency of defendant or his representation by counsel at the time of the convictions.

APPEAL by defendant from *Llewellyn, Judge*. Judgment entered 7 April 1982 in Superior Court, LENOIR County. Heard in the Court of Appeals 19 January 1983.

Defendant was tried for felonious breaking or entering and felonious larceny. The State's evidence tended to show that Ronald Taylor owned a building in Kinston. Equipment, motors and compressors were stored in a shed inside the building. On 2 December 1981, a burglar alarm went off in the building. Law enforcement officers responding to the alarm discovered that a large hole had been torn in the tin which covered the back of the building. Defendant and another man were found inside. Defendant told the officers that he and the other man were "just after copper." Ronald Taylor's brother testified that the motors and compressors contained a great deal of copper and that the motors had been "snatched off the frame and knocked around." A motor was found at the door of a cooler and six other motors were in another walkway. A compressor "had been taken partly apart." One of the officers testified that "[t]he compressor there was torn a loose and someone tried to take some of the copper a loose from it." Another compressor (or motor) which had been enclosed in a wood frame on the other side of the building was missing. No one had permission to be in the building on 2 December 1981.

Defendant testified that the door to the building was unlocked and that he had gone inside "to relieve" himself. He did not move any of the motors or equipment around and did not say anything to the officers about copper. On cross-examination, defendant admitted that he had been convicted of forgery and that he had also been convicted four or five times of driving under the influence. He denied having any larceny convictions.

Defendant was found guilty of breaking or entering and larceny. Prior to sentencing, the prosecutor informed the court that defendant had four or five prior convictions for driving under the influence. The following discourse then took place between the court and the prosecutor:

"Court: What all else has he been convicted of?

Mr. Heath: I have an indication on the folder he's been convicted of two counts of larceny. He has denied it. The only thing I have to offer to the Court is that that shows on his record two convictions for larceny. I do not have any further indication other than that.

Court: He indicated he was convicted of forgery.

Mr. Heath: In this county and it's my memory that the man was convicted in Jones County of larceny. That is my personal memory only. I do not purport to tell the court that is a fact.

In sentencing defendant, the court found as aggravating factors for each of the offenses that:

"The offense was committed for hire or pecuniary gain.

. . . .

The offense involved an attempted or actual taking of property of great monetary value or damage causing great monetary loss, or the offense involved an unusually large quantity of contraband.

. . . .

The defendant has a prior conviction or convictions for criminal offenses punishable by more than 60 days' confinement."

After finding as a mitigating factor that defendant voluntarily acknowledged wrongdoing to a law enforcement officer prior to arrest or at an early stage of the criminal process, the court concluded that the aggravating factors outweighed the mitigating factor and imposed sentences in excess of the three-year presumptive term for each offense. From the imposition of concurrent sentences of six years for breaking or entering and four years for larceny, defendant appealed.

Attorney General Edmisten, by Associate Attorney William N. Farrell, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Nora B. Henry, for defendant appellant.

WEBB, Judge.

All the defendant's assignments of error are addressed to the finding of aggravating factors for the imposition of more than the presumptive sentence. G.S. 15A-1340.4 provides in part:

> (a) . . . If the judge imposes a prison term, whether or not the term is suspended, and whether or not he sentences the convicted felon as a committed youthful offender, he must impose the presumptive term provided in this section unless, after consideration of aggravating or mitigating factors, or both, he decides to impose a longer or shorter term . . . . In imposing a prison term, the judge, under the procedures provided in G.S. 15A-1334(b), may consider any aggravating or mitigating factors that he finds are proved by the preponderance of the evidence, and that are reasonably related to the purposes of sentencing, whether or not such aggravating or mitigating factors are set forth herein, but unless he imposes the term pursuant to a plea arrangement as to sentence under Article 58 of this Chapter, he must consider each of the following aggravating and mitigating factors:
>
> (1) Aggravating factors:
>
> . . . .
>
> c. The offense was committed for hire or pecuniary gain.
>
> . . . .
>
> m. The offense involved an attempted or actual taking of property of great monetary value or damage causing great monetary loss, or the offense involved an unusually large quantity of contraband.
>
> . . . .
>
> o. The defendant has a prior conviction or convictions for criminal offenses punishable by more than 60 days' confinement. . . .
>
> . . . .

> Evidence necessary to prove an element of the offense may not be used to prove any factor in aggravation, and the same item of evidence may not be used to prove more than one factor in aggravation.
>
> . . . .
>
> (2) Mitigating factors:
>
> . . . .
>
> l. Prior to arrest or at an early stage of the criminal process, the defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer.
>
> . . . .
>
> (b) If the judge imposes a prison term for a felony that differs from the presumptive term provided in subsection (f), whether or not the term is suspended, and whether or not he sentences the convicted felon as a committed youthful offender, the judge must specifically list in the record each matter in aggravation or mitigation that he finds proved by a preponderance of the evidence. If he imposes a prison term that exceeds the presumptive term, he must find that the factors in aggravation outweigh the factors in mitigation, and if he imposes a prison term that is less than the presumptive term, he must find that the factors in mitigation outweigh the factors in aggravation . . . .
>
> . . . .
>
> (e) A prior conviction may be proved by stipulation of the parties or by the original or a certified copy of the court record of the prior conviction. . . . No prior conviction which occurred while the defendant was indigent may be considered in sentencing unless the defendant was represented by counsel or waived counsel with respect to that prior conviction. . . .

[1] In this case the court found as aggravating factors that: (1) the offenses were for pecuniary gain and (2) they involved an attempted taking of property of great monetary value. We hold this was error. The only evidence in the record as to pecuniary gain

and to the value of property which the defendant intended to take or the damage done to the building and its contents was the evidence that the defendant broke into the building with the intention of taking copper. This evidence was necessary to prove the elements of breaking or entering and larceny. The statute provides: "Evidence necessary to prove an element of the offense may not be used to prove any factor in aggravation." The court should not have found aggravating factors based on this evidence. We also note that the same evidence was used to support both these aggravating factors, which is forbidden by the statute.

[2, 3] The court also found as an aggravating factor that the defendant had a prior conviction or convictions for criminal offenses punishable by more than 60 days' confinement. We hold this was error. The evidence as to these crimes consisted of the defendant's statement on cross-examination that he had been convicted of forgery and several charges of driving under the influence of intoxicating beverages. The prosecuting attorney also stated that there was an indication on the folder that he had been convicted of larceny and the prosecuting attorney said that in his memory he had been convicted of larceny in Jones County. We do not believe the statement of the prosecuting attorney is sufficient to support a finding of a prior conviction. As to the statement by the defendant on cross-examination that he had been convicted of forgery and driving under the influence of alcohol, we believe this is credible evidence. G.S. 15A-1340.4(e) provides the proof of a prior conviction *may* be by stipulation of the parties or by the original or certified copy of the court record of the conviction. The statute does not make this the exclusive method of proof and we believe the defendant's own testimony on cross-examination can prove a prior conviction.

Nevertheless, we do not believe there was sufficient proof of the prior convictions to constitute an aggravating factor. The method of proof of prior convictions is set forth in G.S. 15A-1340.4(e). That subsection also provides: "No prior conviction which occurred while the defendant was indigent may be considered in sentencing unless the defendant was represented by counsel or waived counsel with respect to that prior conviction." There is no evidence in the record as to the indigency of the defendant or his representation by counsel at the time of the prior convictions. The court could not have found by a

preponderance of the evidence that the defendant was not indigent or that he had counsel or had waived it at the time of his prior convictions. We believe this is a feature of the aggravating factor of prior convictions that has to be proved. We do not believe the burden should be on the defendant to prove he was indigent and did not have counsel or waive counsel. The statute provides for a presumptive sentence unless the aggravating factors outweigh the mitigating factors. The burden should be on the State to prove the aggravating factors if the presumptive sentence is not to be imposed.

We reverse the judgment of the superior court as to the sentences imposed and remand for a new hearing if either party so desires. If neither party moves for a new hearing, the presumptive sentences will be imposed in both cases.

Reversed and remanded.

Judges BECTON and PHILLIPS concur.

RUTH S. BOYCE v. ROBERT S. BOYCE

No. 8215SC105

(Filed 15 February 1983)

Husband and Wife § 16— mortgages on entirety property—husband receiving all proceeds from loans—wife not allowed to "her share" of loan proceeds

Where, during their marriage, plaintiff and defendant mortgaged their entirety property, plaintiff received none of the proceeds from the loans, and the parties, upon termination of the marriage, made a voluntary sale of the property, plaintiff's allegation that respondent was *allowed* to use *her shares* of the loan proceeds, insofar as her interest in the proceeds arose out of the fact that they were derived from entirety property, was without legal basis. The husband was entitled to the use of the proceeds for his purposes regardless of the wife's having acquiesced in such use, just as he would have been entitled to use of all other rents, profits and *usufruct* derived from the property during their marriage. Therefore, the respondent's use of all the funds obtained by the mortgages could give rise to no legal liability to his wife.

APPEAL by petitioner from *Battle, Judge.* Judgment entered 30 October 1981 in Superior Court, ORANGE County. Heard in the Court of Appeals 17 November 1982.

Boyce v. Boyce

Petitioner Ruth Boyce commenced this proceeding for a partition sale of real property she and the respondent Robert Boyce owned as tenants in common. The property was subject to certain deeds of trust placed upon it when the parties were married and owned the property as tenants by the entirety. The first cause of action seeks a partition of the property. In the second cause of action it is alleged that the parties mortgaged the entirety property by separate mortgages executed in 1972, 1976 and 1978, and executed notes and deeds of trust on the property to evidence and secure the mortgages. Petitioner prayed that the respondent be held to be indebted to her and that she have an equitable lien on the proceeds of the partition sale on account of the deeds of trust which had been placed on the property for the benefit of the respondent. The petitioner alleged that she had received none of the proceeds from the loans which the deeds of trust secured and that she had not intended to make a gift to the respondent of the loan proceeds. Judge Brewer dismissed the second cause of action pursuant to Rule 12(b)(6) of the Rules of Civil Procedure for failure to state a claim upon which relief could be granted. This Court dismissed petitioner's attempted appeal of Judge Brewer's order as interlocutory and premature. *Boyce v. Boyce*, 51 N.C. App. 422, 276 S.E. 2d 494 (1981).

Meanwhile, the parties made a voluntary sale of the property subject to a stipulation that the net proceeds would be held in escrow until final disposition of petitioner's second cause of action. The parties next made cross-motions for summary judgment as to all remaining issues in the action, and these motions were resolved by voluntary dismissals of all remaining issues. Judge Battle entered a final judgment giving effect to the dismissal of petitioner's second cause of action and ordering the Orange County Superior Court Clerk to distribute the proceeds from the partition of the property equally between the parties. From entry of this judgment, petitioner appeals.

Hogue & Strickland, by Lucy D. Strickland, for petitioner appellant.

Haywood, Denny & Miller, by James H. Johnson, III, for respondent appellee.

JOHNSON, Judge.

This case involves an appeal from the order dismissing petitioner's second cause of action in which she claimed that respondent was indebted to her and that the debt should constitute an equitable lien on respondent's share of the partitioned property. The issue dispositive of this appeal is whether the trial court erred in dismissing petitioner's second cause of action for failure to state a claim upon which relief may be granted. A review of the record and applicable principles of law leads to the inescapable conclusion that petitioner's second cause of action was properly dismissed.

It is well established principle that no complaint is to be dismissed for failure to state a claim upon which relief can be granted unless it appears to a certainty that the plaintiff is entitled to no relief under any state of facts that could be proved to support the claim. *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970); *Yates v. City of Raleigh*, 46 N.C. App. 221, 264 S.E. 2d 798 (1980). Further, the sufficiency of a claim to withstand a motion to dismiss is tested by its success or failure in setting out a state of facts which, when liberally considered, would entitle plaintiff to some relief. *Yates, id.* at 225, 264 S.E. 2d at 800. In testing the legal sufficiency of the complaint "the well pleaded material allegations of the complaint are taken as admitted; but conclusions of law or unwarranted deductions of facts are not admitted." *Sutton v. Duke, id.* at 98, 176 S.E. 2d at 163; *accord Lloyd v. Babb*, 296 N.C. 416, 251 S.E. 2d 843 (1979). In *Sutton v. Duke* the Supreme Court quoted the following passage from 2A Moore's Federal Practice § 12.08 (2d ed. 1968) in stating the rule as to when dismissal is proper:

> "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 of facts sufficient to make a good claim*, or in the disclosure of some fact which will necessarily defeat the claim."
> (Emphasis added.)

277 N.C. at 102-03, 176 S.E. 2d at 166; *accord Brown v. Brown*, 21 N.C. App. 435, 204 S.E. 2d 534 (1974).

In this case, the petition alleges in the second cause of action that petitioner and respondent were husband and wife from 1952

to 1979. During their marriage they purchased a house and lot as tenants by the entirety. On separate occasions in 1972, 1976 and 1978 they encumbered the house and lot by executing notes and deeds of trust on the property to secure the mortgages. Loan proceeds from the 1976 mortgage went, in part, to pay off the 1972 note, leaving the 1976 and 1978 notes outstanding against the property at the time of suit.

The petitioner alleges that when the parties entered into the mortgages, "the entire loan proceeds thereof were used exclusively by respondent for his purposes" and "[p]etitioner allowed respondent to use her share of the loan proceeds, but she made no gift to him of her share of the said proceeds." Further, "[w]hen petitioner provided respondent the use of her share of the said loan proceeds, respondent became indebted to petitioner" and that "[i]n acknowledgement of his duty to repay petitioner and to account to her in the interim, respondent undertook to keep the payments current on the outstanding notes from 1972 forward." In conclusion, the petitioner prays that respondent be declared indebted to her for one-half of the loan proceeds and that respondent's share of the property or its proceeds be declared subject to an equitable lien in favor of petitioner.

To test the legal sufficiency of the petition we must discount conclusions of law or unwarranted deductions of facts, take as true petitioner's factual allegations and determine whether these allegations as a matter of law demonstrate the existence of a debt arising out of the respondent's having used all of the mortgage proceeds "for his purposes." *Sutton v. Duke, supra; Lloyd v. Babb, supra.*

The allegation that an "indebtedness" arose by virtue of petitioner providing respondent with the use of her share of the loan proceeds presents a legal conclusion rather than a statement of fact. Similarly, that respondent undertook to keep the payments current on the outstanding notes "in acknowledgement of his duty to repay petitioner" would appear to be an unwarranted deduction of fact rather than a factual allegation. Nowhere in the petition is it alleged that petitioner "loaned" her share of the loan proceeds to respondent with the understanding that she would be "repaid," or that she entered into any type of formal contract, agreement or transaction with respondent. Nor is it alleged that

respondent made any promise, whether oral or written, to petitioner with respect to the loan proceeds.

It is clear from the remaining factual allegations that petitioner's claim for a debt owing is based upon her assertion that one-half the loan proceeds from the 1976 and 1978 mortgages were her sole and separate personal property. However, it is also clear that petitioner's only alleged property interest in the mortgage proceeds arises out of the fact that the proceeds were derived from the parties' voluntary encumbrance of their entirety property while married. The second cause of action is devoid of any other allegations supporting petitioner's claim of a separate personal property interest in the proceeds. The absence of such allegations is fatal to the claim of an enforceable indebtedness in the second cause of action because the law of this State is to the effect that one of the incidents of ownership of real property by a husband and wife as tenants by the entirety is that mortgage proceeds from entirety property mortgaged during the marriage are, in effect, the separate property of the husband.

An estate by the entirety is a form of co-ownership of real property by a husband and wife in which each is deemed to be seized of the entire estate, with neither spouse having a separate or undivided interest therein. *Davis v. Bass*, 188 N.C. 200, 124 S.E. 566 (1924); *Wall v. Wall*, 24 N.C. App. 725, 212 S.E. 2d 238 (1975). In discussing the incidents of ownership of real property held by the husband and wife during marriage as an estate by the entirety, the Supreme Court in *Gas Co. v. Leggette*, 273 N.C. 547, 551, 161 S.E. 2d 23, 26-27 (1968) stated:

> Although neither the husband nor the wife can separately deal with the estate, and the interest of neither can be subjected to the rights of creditors so as to affect the survivor's right to the estate, the husband, during coverture is entitled to the full control, possession, income, and *usufruct* of the estate. *Bryant v. Bryant*, 193 N.C. 372, 137 S.E. 188.
>
> In the exercise of this control, use, and possession, he may, without joinder of the wife, lease the property, mortgage the property, grant rights-of-way, convey by way of estoppel—qualified in all of those instances by the fact that the wife is entitled to the whole estate uneffected by his acts if she survive him. See 41 N.C. Law Review 67, 85, "Tenancy by the

Entirety in North Carolina" by Dr. Robert E. Lee, and the cases therein cited.

See also Webster, *Real Estate Law in North Carolina*, § 114 p. 131 and the cases cited.

The petitioner's reliance upon *Bowling v. Bowling*, 252 N.C. 527, 114 S.E. 2d 228 (1960) in support of her claim to separate ownership of one-half the loan proceeds is misplaced. In *Bowling*, the land owned by the parties as a tenancy by the entirety was sold. The Supreme Court ruled that the proceeds derived from the sale of entirety property are personalty and belong to the husband and wife as tenants in common; therefore, when the wife permits the husband to use the entire net sale proceeds for his own purposes, a trust arises by operation of law in favor of the wife. 252 N.C. at 531, 114 S.E. 2d at 231. However, prior to the time of sale by the husband and wife, it is the *husband* alone who is *entitled* to full use of the income from the property, including the proceeds derived from the mortgages. *Gas Co. v. Leggett, supra.* The rule announced in *Bowling* is inapplicable in a case in which the proceeds derived from entirety property maintain their identity as the *usufruct* of an estate owned by the entirety, subject to the separate use and control by the husband, and are not converted into tenancy in common property by the transaction.

All of the other cases relied upon by petitioner in her brief are clearly distinguishable from the case under discussion for similar reasons. *Wilson v. Ervin*, 227 N.C. 396, 42 S.E. 2d 468 (1947), *Fulp v. Fulp*, 264 N.C. 20, 140 S.E. 2d 708 (1965) and *Wall v. Wall, supra* all dealt with situations where the husband acquired property in his own name either from money which was the separate property of the wife or from proceeds from the sale of entirety property, one-half of which is recognized by law as being the separate property of the wife. None of these cases are applicable to loan proceeds from entirety property where the mortgages were voluntarily entered into by the husband and wife during the marriage of the parties.

Thus, petitioner's allegation that respondent was *allowed* to use *her shares* of the loan proceeds, insofar as her interest in the proceeds arises out of the fact they were derived from entirety property, is without legal basis. The respondent-husband was entitled to use of those proceeds for his purposes regardless of the

petitioner-wife's having acquiesced in such use, just as he would have been entitled to use of all other rents, profits and *usufruct* derived from the property during their marriage. Therefore, the respondent's use of all the funds obtained by the mortgages could give rise to no legal liability to petitioner. While this result may appear unjust to the wife, it is clearly dictated by the real property law of tenancy by the entirety as it exists in North Carolina. Relief for one in the petitioner's position must come, if at all, through the Legislature.[1]

The state of facts set out in the petition, even when liberally construed, fails to demonstrate the existence of a debt arising out of the respondent's having used the loan proceeds from the entirety property for his own purposes. There is an absence of law to support the petitioner's claim to a separate property interest in the funds upon which to base her further allegations for money advanced and debt owed. In addition, there is an absence of facts sufficient to make a good claim to separate ownership of the proceeds under any other theory, just as there is an absence of facts sufficient to show any contract, promise or agreement by the respondent with regard to repayment of the outstanding notes. Under the rule of *Sutton v. Duke*, *supra* and *Brown v. Brown*, *supra* the petition is clearly without merit and was properly dismissed on motion pursuant to Rule 12(b)(6) of the Rules of Civil Procedure.

Affirmed.

Judges ARNOLD and HILL concur.

1. Although not applicable to the case *sub judice*, effective 1 January 1983, G.S. 39-13.6 (North Carolina General Statutes, 1982 Interim Supplement) expressly changes the common law incidents of tenancy by the entirety for all real property acquired on and after 1 January 1983. G.S. 39-13.6(a) provides that a "husband and wife shall have an equal right to the control, use, possession, rents, income and profits of real property held by them in tenancy by the entirety." We note that a Bill is currently before the General Assembly to amend Chapter 39 to further equalize between married persons the right to income, possession and control on property owned concurrently in tenancy by the entirety by making G.S. 39-13.6 applicable to all property *held* as tenancy by entirety after 1 July 1983 *without regard to when acquired.* S.39, Reg. Sess., 1983, *reprinted in* Legislative Reporting Service, Daily Bulletin, Bulletin No. 12, at 84.

JAMES R. PAYNE, EMPLOYEE, PLAINTIFF v. CONE MILLS CORPORATION, EMPLOYER, AND LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8210IC215

(Filed 15 February 1983)

Master and Servant §§ 68, 91— workers' compensation—occupational disease—time for filing claim

The Industrial Commission erred in concluding that plaintiff timely filed his claim on 17 October 1979 for workers' compensation under G.S. § 97-58(c) where plaintiff's disability began on 26 November 1970, which was the day he went to the hospital emergency room because he had difficulty breathing and the last day he worked for defendant employer, where plaintiff received hospital treatment for "asthmatic bronchitis secondary to exposure to textile particles" from 30 November 1970 to 14 December 1970, and where his physician advised him not to return to the mill because of the "work environment." Although plaintiff's condition was not diagnosed until 4 December 1979, plaintiff was informed by competent medical authority of the nature and work-related cause of his disease in 1970.

Judge EAGLES concurring.

APPEAL by defendants from the North Carolina Industrial Commission. Opinion and award filed 7 December 1981. Heard in the Court of Appeals 13 January 1983.

Plaintiff filed a claim with the North Carolina Industrial Commission on 17 October 1979 to recover workers' compensation for chronic pulmonary disease caused by exposure to cotton dust in defendant employer's cotton mill where plaintiff worked from August 1927 to 26 November 1970. This case was heard by Deputy Commissioner Ben E. Roney, Jr. of the North Carolina Industrial Commission who made findings of fact and concluded that plaintiff had not filed claim "within two years after determining that his pulmonary disease was occupationally related." Therefore, the deputy commissioner held the plaintiff's recovery was barred by N.C. Gen. Stat. § 97-58(b) and (c).

The full Industrial Commission reviewed the case on 19 November 1981 and filed an opinion and award on 7 December 1981 which reversed the Deputy Commissioner's ruling and granted plaintiff's claim. Chairman Stephenson filed a dissenting opinion. The Commission made the following pertinent findings of fact:

. . .

3. Plaintiff was exposed to cotton dust, an occupational hazard peculiar to and characteristic of the textile industry and known to result in chronic obstructive pulmonary disease, during those 43 years.

. . .

7. Plaintiff was experiencing a bad cough and severe shortness of breath by the end of the working day on November 26, 1970. He went to the hospital and was seen in the emergency room on the evening of that date and received treatment for his affliction. He was admitted to the hospital by Dr. R. B. Steelman on November 30, 1970. Plaintiff was treated by Dr. Steelman for asthmatic bronchitis secondary to exposure to textile particles, the exact allergen unknown, but was not given clinical pulmonary tests. He was discharged from the hospital on December 14, 1970 in an improved condition.

8. Dr. Steelman advised plaintiff not to return to his job because of his "work environment" but did not advise him that he was suffering from a permanent lung condition or otherwise inform him of the nature and work-related cause of his occupational disease.

9. Plaintiff continued to consult Dr. Steelman after his discharge from the hospital until his condition was diagnosed on December 4, 1979 by Dr. Herbert A. Saltzman, a member of the Commission's Textile Occupational Disease Panel, upon referral by the Commission.

10. Plaintiff filed a claim for compensation for disability caused by his pulmonary disease on October 17, 1979, prior to the diagnosis of his condition by Dr. Saltzman on December 4, 1979.

. . .

Based on these facts, the Commission concluded the plaintiff's claim had been filed within the statutory time period and awarded plaintiff compensation. From the Commission's opinion and award, defendants appealed.

Boone, Wall, Higgins, Chastain & Dennis, by Peter Chastain for the plaintiff, appellee.

Smith, Moore, Smith, Schell & Hunter, by J. Donald Cowan, Jr. and Caroline Hudson for defendants, appellants.

HEDRICK, Judge.

The sole issue on this appeal is whether the plaintiff filed his claim within the statutory time period set out by N.C. Gen. Stat. § 97-58(b) and (c) which in pertinent part provides:

> (b) The report and notice to the employer as required by G.S. 97-22 shall apply in all cases of occupational disease except in cases of asbestosis, silicosis, or lead poisoning. The time of notice of an occupational disease shall run from the date that the employee has been advised by competent medical authority that he has same.
>
> (c) The right to compensation for occupational disease shall be barred unless a claim be filed with the Industrial Commission within two years after death, disability, or disablement as the case may be. . . .

In *Poythress v. J. P. Stevens*, 54 N.C. App. 376, 382, 283 S.E. 2d 573, 577 (1981) *disc. rev. denied*, 305 N.C. 153, 289 S.E. 2d 380 (1982), this court, in affirming the Industrial Commission's dismissal of a claim as not having been timely filed, held:

> [T]he two-year time limit for filing claims under N.C.G.S. 97-58(c) is a condition precedent with which claimants must comply in order to confer jurisdiction on the Industrial Commission to hear the claim.

In an earlier case, *Taylor v. Stevens & Co.*, 300 N.C. 94, 102, 265 S.E. 2d 144, 149 (1980), our Supreme Court interpreted N.C. Gen. Stat. § 97-58 and held:

> [W]ith reference to occupational diseases the time within which an employee must give notice or file claim begins to run when the employee is first informed by competent medical authority of the nature and work-related cause of the disease.

In the present case the defendant was hospitalized because of his condition in November 1970, and he did not return to work for

the defendant employer after his hospitalization. Yet, the plaintiff did not file claim with the Industrial Commission until October 1979, almost nine years after he stopped working. However, the plaintiff contends the statutory time period did not begin to run until 4 December 1979, which was two months after he filed his claim on 17 October 1979, because he was not informed that his disease was brown lung or byssinosis, an occupational disease, until that date. He further argues that the medical advice he received in 1970 was insufficient to inform him of "the nature and work related cause of the disease." We do not agree.

The parties stipulated that plaintiff's disability began on 26 November 1970, which was the day he went to the hospital emergency room because he had difficulty breathing and the last day he worked for defendant employer. The Commission's findings of fact reveal that the plaintiff received hospital treatment for "asthmatic bronchitis secondary to exposure to textile particles" from 30 November 1970 to 14 December 1970 and that his physician, Dr. R. B. Steelman, advised him not to return to the mill because of the "work environment." With respect to the communication between plaintiff and Dr. Steelman, the record discloses Dr. Steelman's deposition, which was taken by telephone on 10 December 1980, ten years after his original diagnosis:

. . .

> I have read briefly those documents which you sent me earlier, including a letter from Dr. Sam LeBauer to Mr. Chastain dated September 22, 1980, a History and Physical consisting of two pages on Moses Cone Memorial Hospital forms, and a third document entitled Discharge Summary from Moses Cone Hospital. To the best of my knowledge, the History and Physical from Moses Cone Hospital consisting of two pages dictated on the 28th of January, 1971, and the discharge summary consisting of one page signed by me with the same date accurately reflect the history, examination, and diagnosis of Mr. Payne as done by me in January of 1971. These documents refresh my memory as to my seeing and treating Mr. Payne. I recall Mr. Payne. I do not really recall specific conversations I may have had with Mr. Payne concerning the causes of his condition that required his hospitalization.

There is a diagnosis at the bottom of the one-page discharge summary signed by me. I think I did have a conversation with Mr. Payne about my diagnosis as indicated on that form. He was quite ill, and I think the history reflected that his *symptoms were related to exposure to something at work he felt. Because of that I suspected that he might be allergic to some airborne allergen at work.* Historically, that seemed to be the case and I was suspicious of that. *Mr. Payne suspected that something at work was related to the problems he was experiencing at this hospitalization.* I really don't recall specific conversations. I recall Mr. Payne, the kind of illness that he had, and obviously the hospital records, but I don't recall specific conversations that I had with him.

Referring to the first page of the History and Physical under the paragraph entitled present illness, where it is indicated that Mr. Payne was an elderly white man with a *long history of exposure to textile particles who has experienced repeated episodes with asthma, and that his history of wheezing goes back four years and occurs after exposure to his work environment,* to the best of my recollection that was the history given to me by Mr. Payne. The history of present illness reflects what the patient has told the physician and is recorded in that manner. Keeping in mind what Mr. Payne told me and referring again to the diagnosis on the bottom of the one-page discharge summary, and concerning whether I had any conversations with Mr. Payne indicating that *he had asthmatic bronchitis secondary to exposure to textile particles, I am sure that I expressed that I was suspicious that that was the cause of his respiratory difficulty.* It is not a proven diagnosis, but I suspected that his asthmatic bronchitis was secondary to exposure to textile particles.

Q. Do you recall any recommendations you made to Mr. Payne concerning continued employment in the textile industry at this time?

A. Well, I don't recall specific conversations, but I wouldn't be surprised if I suggested that if repeated exposure seemed to provoke repeated respiratory difficulty that it might be wise that he not expose himself ah to that work environment.

As to whether I recall making any statements to Mr. Payne to the effect that he should not go back into the card room at Cone Mills or dusty areas in that plant because it would kill him, I think that what I expressed is what I have already recounted to you, and that was *concern that exposure to airborne particles at work might be responsible for his respiratory insufficiency and that it was concordant with his previous history that he might consider not exposing himself to that environment.* . . . (Emphasis added.)

The plaintiff also testified as to his understanding of what Dr. Steelman told him:

. . .

I was in Dr. Steelman's office the first time I ever saw him. He conducted an examination of me in his office. He asked me to blow into a tube. After Dr. Steelman did this examination and before he put me in the hospital, Dr. Steelman told me the results of the examination in his office.

Q. What did he tell you?

A. He told me I had a breathing problem; probably had asthma, emphysema or something like that. People didn't know anything about a brown lung then.

After Dr. Steelman told me that I had a breathing problem he admitted me to Moses Cone Hospital the same day. I stayed in Moses Cone Hospital about sixteen days. While I was in Moses Cone Hospital Dr. Steelman was my main doctor. He continued to conduct breathing tests on me, and he gave me medication for my breathing problem. When Dr. Steelman discharged me from the hospital after the sixteen-day stay, he said I would always have a breathing problem, and that he could not cure the whole thing. He gave me some medicine to take and told me I would have to take it as long as I lived. I'm not sure if Dr. Steelman saw me anymore after that. I was not admitted to Moses Cone Hospital anymore that I know of.

After I saw Dr. Steelman and he admitted me to Moses Cone Hospital, I did not see any other doctors for my breathing problems other than Dr. Saltzman. I had been see-

ing Dr. Bonner before I saw Dr. Steelman. When Dr. Steelman discharged me from the hospital he said something to me about not going back to work in the card room. He told me if I went back in the card room and got in the same shape not to come to him because he couldn't do anything else for me.

Q. What did Dr. Steelman say would happen if you worked in the card room again?

A. He said it would kill me.

Q. Did he tell you why?

A. Yeah, said the dust would kill me.

Q. The cotton dust?

A. Yes, sir.

Q. And did Dr. Steelman tell you this when he discharged you from the hospital sometime in December 1970?

A. Yes, sir.

. . .

We hold such communication, in November and December 1970, by a competent physician to the plaintiff was sufficient to inform him of the nature and work-related cause of the disease and of the plaintiff's disability. The evidence in the record does not support the Commission's critical Finding No. 8. The evidence in the record will support only a finding that Dr. Steelman, during December 1970, did advise and inform the plaintiff of the nature and work-related cause of his disease. We hold the Commission erred in concluding that plaintiff timely filed his claim within the meaning of N.C. Gen. Stat. § 97-58(c). We hold plaintiff failed to comply with N.C. Gen. Stat. § 97-58(c) so as to confer jurisdiction on the Industrial Commission. The opinion and award of the Industrial Commission, therefore, must be vacated.

Vacated.

Judges JOHNSON and EAGLES concur.

Judge EAGLES concurring.

I am compelled to concur based on the language of the statute, G.S. 97-58(b), and the failure of the statute to describe more clearly what constitutes notice to a potential claimant from a competent medical authority that he has a compensable related disease. As presently phrased, the statute is satisfied by the fact that claimant was told by Dr. Steelman that he had a breathing problem which he would have "all his life" and that if he went back into the card room of the mill to work it would "kill" him. Relief from the statute's employee notice provisions is available, if at all, only through the legislative process.

MALCOLM M. LOWDER, MARK T. LOWDER AND DEAN A. LOWDER, PLAINTIFFS v. ALL STAR MILLS, INC., LOWDER FARMS, INC., CAROLINA FEED MILLS, INC., ALL STAR FOODS, INC., ALL STAR HATCHERIES, INC., ALL STAR INDUSTRIES, INC., TANGLEWOOD FARMS, INC., CONSOLIDATED INDUSTRIES, INC., AIRGLIDE, INC., AND W. HORACE LOWDER, DEFENDANTS, AND CYNTHIA E. LOWDER PECK, MICHAEL W. LOWDER, DOUGLAS E. LOWDER, LOIS L. HUDSON, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR STEVE H. HUDSON, BRUCE E. HUDSON, BILLY J. HUDSON, ELLEN H. BALLARD, JENELL H. RATTERREE, DAVID P. LOWDER, JUDITH R. LOWDER HARRELL, EMILY P. LOWDER CORNELIUS AND MYRON E. LOWDER, INTERVENING DEFENDANTS

No. 8220SC255

(Filed 15 February 1983)

1. Judges § 5— failure to recuse judge proper

A trial judge properly ruled that another judge should not have recused himself in a stockholders' derivative action where the trial judge did not demonstrate that he was biased or prejudiced for or against any party to the action.

2. Appeal and Error § 68— same arguments presented in another appeal—law of the case

In a stockholders' derivative action where the same arguments were brought forward in a companion case and ruled on in a prior opinion by the appellate court, under the law of the case, all the factual questions ruled upon in the prior decision ruled the case before the Court.

3. Judges § 5; Rules of Civil Procedure § 43— hearing on motion for recusal of judge—limiting evidence to affidavits—no abuse of discretion

Under G.S. 1A-1, Rule 43(a) a trial judge's decision to hear a motion for another judge's recusal only on affidavits did not reveal an abuse of discretion.

APPEAL by six defendants only: All Star Foods, Inc., All Star Hatcheries, Inc., All Star Industries, Inc., Consolidated Industries, Inc., Airglide, Inc., and W. H. Lowder, from *Mills, Judge.* Order filed 12 February 1982 in Superior Court, STANLY County. Heard in the Court of Appeals 19 January 1983.

Appellants filed a motion on 29 May 1981 seeking to have Judge Thomas W. Seay, Jr., recuse himself in this stockholders' derivative action wherein receivers have been appointed for seven corporations. The case is yet to be tried on its merits. These same parties have been before the appellate division previously on related matters as shown in 45 N.C. App. 348, 263 S.E. 2d 624 (1980), 301 N.C. 561, 273 S.E. 2d 247 (1981), and 60 N.C. App. 275, 300 S.E. 2d 230 (1983). Judge Seay is the Senior Resident Superior Court Judge of the Nineteenth Judicial District. During the Spring Sessions of 1979, Judge Seay was the regularly assigned Judge in the Twentieth Judicial District, which includes Stanly, Union, and Richmond Counties, wherein it is alleged Judge Seay made certain orders in the case.

Judge Seay, while not recusing himself, declined to rule on the factual matters alleged in the motion but referred the motion to Judge F. Fetzer Mills, the Senior Resident Judge of the Twentieth Judicial District. By order of Judge Charles T. Kivett, dated 10 November 1981, the Attorney General's office was appointed to represent the interests of Judge Seay.

A hearing on the merits of the motion to recuse was heard before Judge Mills in January 1982. On 12 February 1982 Judge Mills entered an order denying the motion to recuse Judge Seay. The hearing before Judge Mills was on affidavits and briefs, the defendants' motion to allow live witnesses and cross-examination having been denied.

As a further statement of the facts, we adopt the following language taken substantially from the brief for the State as relevant and as supported by a review of the record.

On 15 January 1979, prior to the initial hearing on the case scheduled for 22 January 1979, Horace Lowder and his wife appeared before Judge Seay and requested a continuance; this was denied and Judge Seay urged Lowder to hire an attorney. Notwithstanding this advice, Lowder appeared to defend himself and the corporations of which he was president without an attorney. He was also appearing without a lawyer in the federal tax cases then pending. At the end of the hearings on 22 January and 29 January 1979, the Court, on 5 February 1979, entered a receivership order placing the companies under the authority of John M. Bahner, Jr., and Henry S. Doby, Jr. The court, over plaintiffs' objections, allowed Horace Lowder to remain working for the companies so long as he cooperated with the receivers. This order was subsequently modified when the receivers informed the court that Horace Lowder would not cooperate with them and would not abide by the receivership order. In early February, the receivers, who were vested with the responsibility for hiring attorneys and accountants to try to defend against the pending federal tax trials, and who had unsuccessfully contacted a law firm in Charlotte, discussed with Judge Seay hiring the firm of Moore and Van Allen, who represented the plaintiffs, as receivers' attorneys. They also discussed hiring Brown, Brown and Brown as tax attorneys, since Lane Brown had done prior tax work for the companies. The receivers and the prospective attorneys went to see Judge Seay in Richmond County to decide if such an appointment could be made. After checking with the State Bar, Judge Seay issued an order permitting this employment, but warning if conflicts arose, the receivers should inform the court. Horace Lowder was not present at this conference. Thereafter, Horace Lowder employed Ernest DeLaney to represent him, and counsel has since that time filed numerous motions opposing the receivership. Mr. Lowder was held by the court to be in contempt due to his failure to cooperate with the receivership order, but this contempt finding was subsequently vacated by the Supreme Court in *Lowder v. All Star Mills, supra.*

On 24 April 1979, Lowder filed a Chapter XI bankruptcy proceeding which divested the state receivers of jurisdiction over the corporations and reinvested the assets in Horace Lowder as debtor in possession. Judge Seay called Judge Wolfe, the bankruptcy judge, and inquired as to whether the corporations had, in fact,

gone into Chapter XI since such a filing would divest the state court of jurisdiction. Thereafter, the plaintiffs' attorneys requested the case be converted to a Chapter X proceeding, which required the appointment of a trustee. Trustees were appointed. After Judge Reynolds dismissed the proceedings, the case was sent back to state court and the receivers reinvested with the assets.

Judge Seay signed an order retaining jurisdiction in the case on 26 June 1979, and then held hearings in Moore County, over the objections of Lowder and his corporate defendants, to set receivers fees and to authorize the receivers to deal with certain pending business decisions of the companies.

In early May, 1981, Judge Seay held three weeks of hearings on various motions filed by the receivers and defendants. At the conclusion of the three weeks, Ernest DeLaney, on behalf of his clients, filed the recusal motion which is the subject of this appeal.

Attorney General Rufus L. Edmisten by Assistant Attorney General Joan H. Byers for the State.

DeLaney, Millette, DeArmon and McKnight by Ernest S. DeLaney for defendant appellants.

BRASWELL, Judge.

A ruling on a motion to recuse a trial judge is an interlocutory order and is not immediately appealable. *See Industries, Inc. v. Insurance Co.*, 296 N.C. 486, 251 S.E. 2d 443 (1979). However, since an accusation about a judge's partiality goes to the fundamental issue of maintaining confidence in our court system, we have elected to treat the case as though a petition for certiorari had been allowed and to proceed to the merits, as should the parties henceforth with the case.

[1] We hold that Judge Mills' order correctly concluded, based upon the factual supporting evidence in the record and the law applicable thereto, that Judge Thomas W. Seay, Jr. "has not demonstrated that he is biased or prejudice [*sic*] for or against any party," and that Judge Seay has not given "the appearance of bias or prejudice for or against any party." Judge Seay should not have recused himself. Judge Mills ruled correctly in ordering

Judge Seay not to be removed. The appellants' motion was properly denied. *Compare, Bank v. Gillespie,* 291 N.C. 303, 230 S.E. 2d 375 (1976), and *Ponder v. Davis,* 233 N.C. 699, 65 S.E. 2d 356 (1951).

From the nine assignments of error four questions were presented for review. Before asserting a catch-all fourth question of whether the judge should recuse himself or be recused, the appellants' counsel inquires (1) whether Judge Mills correcty limited the evidence to affidavits, (2) whether Judge Seay acted properly in allowing Horace Lowder to appear on behalf of the corporate defendants, and (3) whether Judge Seay's meeting with the receivers and their attorneys in Richmond County was proper.

[2] At the outset we note that the same motion to recuse Judge Seay, listing the same eight alleged specific instances of bias and including the same subject matter brought forward here under questions 2, 3, and 4, was discussed in a companion opinion of this Court filed 18 January 1983, *Lowder v. All Star Mills, Inc., supra.* While the companion opinion did not rule upon the issue of whether Judge Seay should have recused himself permanently from the case, it did rule that he was not required to recuse himself before ruling on 19 pretrial motions. After listing and considering the cases cited and relied on by the appellant, our Court said: "In none of those cases did the party making a motion for recusal wait until the presiding judge had virtually concluded the hearings. In this case, Judge Seay had conducted hearings for three weeks on 19 motions. We believe he acted properly in ruling on the motions before referring the matter to some other judge for a hearing on the motion for recusal." *Lowder, supra* at 293, 300 S.E. 2d at 241. To the contention advanced in the January opinion and in our record that only recently had it been revealed to appellants' counsel that Judge Seay held an *ex parte* hearing without notice to defendants, the January opinion concluded: "We have held in this opinion that the appellants suffered no prejudicial error from that hearing." *Id.* Under the law of the case all the factual questions ruled upon in the 18 January 1983 decision, *Lowder, supra,* are *res judicata. Transportation, Inc. v. Strick Corp.,* 286 N.C. 235, 210 S.E. 2d 181 (1974); *Carpenter v. Carpenter,* 25 N.C. App. 235, 212 S.E. 2d 911, *cert. denied,* 287 N.C. 465, 215 S.E. 2d 623 (1975); 1 Strong's N.C. Index 3d *Appeal and Error* § 68 (1976).

In the January opinion of *Lowder, supra* at 285, 300 S.E. 2d at 236, our Court discussed the allegation that "the corporations did not have an attorney [at the show cause hearing on the appointment of receivers] but were represented by W. Horace Lowder, a layman. They contend it is a violation of public policy for a layman to act as an attorney . . . ." This is the same basic argument as presented in the second question before us. For the same reasons given by our Court in *Lowder, supra,* as well as the law of the case, *Transportation, Inc. v. Strick Corp., supra,* this assignment of error is overruled.

The third question alleges that Judge Seay conducted an improper *ex parte* hearing out of Stanly County and in Richmond County in February 1979. In their brief appellants now say: "The defendants do not claim or allege any impropriety in the receivers' meeting and conferring with Judge Seay," but now basically contend that Judge Seay acted improperly in conducting an *ex parte* hearing which affected appellants' substantial rights out of term and out of county. This identical subject has been ruled upon adverse to appellants in the January opinion, *Lowder, supra* at 282-83, 300 S.E. 2d at 235, and is now the law of the case.

[3] Thus, there remains for us only the procedural challenge of the way Judge Mills conducted the hearing on the motion for Judge Seay to be recused. Judge Mills limited the evidence before him to affidavits. The appellant complains that he was denied the right to cross-examine the persons submitting affidavits and was denied a right to present oral testimony.

A recusal motion is a pretrial motion. It does not go to the merits of the pleadings. Rule 43(a) of the Rules of Civil Procedure provides the form of receiving evidence in court by stating, "In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules." The rules do "otherwise provide" through Rule 43(e):

> "When a motion is based on facts not appearing of record the court *may* hear the matter on affidavits presented by the respective parties, but the court *may* direct that the matter be heard wholly or partly on oral testimony or depositions." (Emphasis added.)

Judge Mills' decision to hear the motion only on affidavits is in keeping with our Rules of Civil Procedure and is fully sup-

ported in the cases. Abuse of judicial discretion is not revealed. For pretrial motion hearings it is affidavits and not oral testimony that is the preferred form of evidence. *Pearce Young Angel Co. v. Enterprises, Inc.*, 43 N.C. App. 690, 260 S.E. 2d 104 (1979). *See also, Insurance Co. v. Chantos*, 21 N.C. App. 129, 203 S.E. 2d 421 (1974); *Morgan, Attorney General v. Dare To Be Great*, 15 N.C. App. 275, 189 S.E. 2d 802 (1972). In a hearing on motion for relief from default judgment where judge limited evidence to oral testimony, *compare Webb v. James*, 46 N.C. App. 551, 265 S.E. 2d 642 (1980).

The appellant places his reliance upon *Shepherd v. Shepherd*, 273 N.C. 71, 77, 159 S.E. 2d 357, 362 (1968); and *In re Custody of Gupton*, 238 N.C. 303, 77 S.E. 2d 716 (1953). We conclude neither is apropos. Both *Shepherd* and *Gupton* involved evidence leading to final custody of a child. They involved evidence on a claim or defense which turned upon a final factual adjudication on the merits of the case itself. This recusal motion does not affect the final outcome on the merits of the stockholders' derivative claim.

We hold that the procedure adopted and followed by Judge Mills was proper. Because of the seriousness of the challenge to Judge Seay's partiality we have, nonetheless, examined all the findings of fact and conclusions of law as set out in Judge Mills' order, and find the order to be fully supported by the record.

Affirmed.

Chief Judge VAUGHN and Judge WELLS concur.

STATE OF NORTH CAROLINA v. FRED YOUNG, III

No. 8216SC470

(Filed 15 February 1983)

1. Criminal Law § 43.1— mug shot photographs of defendant—admissibility

Two police department "mug shot" photographs of defendant were properly admitted to illustrate testimony relating to defendant's identity where police information on the photographs was covered over by a piece of masking tape before the photographs were received into evidence and viewed by the jury.

2. Criminal Law § 86.1— failure to subpoena witness—cross-examination admissible to impeach defendant

In a prosecution for breaking or entering and larceny in which the State's evidence showed that defendant sold items of the stolen property to two pawn shops, cross-examination of defendant about his failure to subpoena a person from whom he testified that he bought the stolen property was admissible for the purpose of impeaching defendant's testimony.

3. Larceny § 7.3— ownership alleged in husband—proof of ownership in wife—joint possession—no fatal variance

There was no fatal variance between a larceny indictment alleging ownership of the stolen property in a husband and evidence that the stolen items were owned by his wife where the evidence showed that the husband and wife had joint possession of the property in a home which they maintained together, since such joint possession gave the husband a sufficient special property interest in the stolen property to support the allegation of ownership contained in the indictment.

4. Burglary and Unlawful Breakings § 5.5— felonious breaking or entering—intent to commit larceny—occupancy of building—ownership of property—proof that defendant was at building

In a prosecution for breaking or entering with intent to commit larceny, it was not incumbent upon the State to prove the occupancy of the building or the ownership of the property which defendant intended to steal. Furthermore, it was not necessary for the State's evidence to place defendant at the building which was broken into and entered where the evidence was sufficient to be submitted to the jury on the theory of defendant's possession of recently stolen property.

APPEAL by defendant from *Britt, Judge*. Judgment entered 8 December 1981 in Superior Court, ROBESON County. Heard in the Court of Appeals 8 November 1982.

The State's evidence tended to show that on 16 April 1981 the home of Douglas P. Murray and Gertie B. Murray in Lumberton was broken into and personal property taken therefrom. Entry was gained through a sliding glass door. No one was given permission to enter and remove the property. Mrs. Murray testified that the fair market value of the items taken was between $9,000 and $10,000. Later, after being contacted by law enforcement officials, she identified some of the jewelry at the Plaza and Second Street Pawn Shops in Lumberton as belonging to her. Judy Lawson, operator of Second Street Pawn Shop, testified that on 16 April 1981 defendant sold her three rings. Bob Stogner, operator of Plaza Pawn Shop, testified that on 20 and 21 April 1981 defendant sold to him several items of jewelry. Both

pawn shop operators testified that defendant was a regular customer and they had written records of their transacting with him. The rings and jewelry sold to the pawn shops were identified by Mrs. Murray as her property. Police Detective Robert A. Grice testified he showed two of defendant's photographs to the pawn shop operators and they were able to identify defendant from the photographs. Over objection, these photographs were shown to the jury.

Defendant testified that although he sold the jewelry to the pawn shops, he did not steal it and did not know that it was stolen property. Defendant testified further that he bought the jewelry from a man named Ronald Hunt, that he gave a description of Hunt to the police and asked them to locate Hunt for him.

Defendant was convicted of felonious breaking and entering and felonious larceny. Judgment was entered and an active prison term imposed. From the judgment and sentence, defendant appeals.

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

Robert F. Floyd, Jr., for defendant appellant.

JOHNSON, Judge.

Defendant presents four assignments of error on appeal: (1) the trial court erred in admitting into evidence, over defendant's objection, two mug shot photographs of defendant; (2) the trial court erred in allowing the State to cross-examine defendant concerning his failure to subpoena a witness; (3) the trial court erred in failing to dismiss the charge of felonious larceny where there was a fatal variance between indictment and proof; and (4) the trial court erred in failing to dismiss the charge of felonious breaking and entering where the State's evidence failed (a) to show that the building was occupied, (b) to establish ownership of the property, subject of the intended larceny and (c) to place defendant at the building which was broken into and entered.

[1] By his first assignment of error defendant argues that the photographs admitted into evidence are irrelevant and highly prejudicial because they were "mug shot" photographs of the defendant.

Officer Robert A. Grice testified that sometime after 16 April 1981, he carried two photographs of defendant to the Second Street and Plaza Pawn Shops, "to attempt to get a subject identified." That he exhibited the photographs to Bob Stogner and Judy Lawson, but did not identify the photographs nor the case he was investigating to them. Stogner and Lawson immediately identified the photographs as those of the defendant and they both identified defendant by name.

Originally each photograph bore a nameplate, identification number, charge number, date and the inscription "Newburg Town Police Department." This information on the photographs was covered over by a piece of masking tape before the photographs were received into evidence and viewed by the jury for the purpose of illustrating the testimony of the witness.

The issue defendant raises is whether the "mug shot" photographs in which police information has been covered over were properly admitted into evidence. This exact question was answered by the Supreme Court in *State v. Hatcher*, 277 N.C. 380, 177 S.E. 2d 892 (1970). In *Hatcher*, the trial court allowed into evidence a police department "mug shot" photograph of the defendant where the inscription "Greensboro Police Department —11/67" was deleted. The photograph was offered and received to illustrate testimony of a witness regarding the question of defendant's identity. The Supreme Court held that where the name of the police department and date were first deleted, use of a mug shot will not connect a defendant with previous criminal offenses in the minds of the jurors and the photograph of defendant was therefore properly admitted for illustrative purposes on the question of identity. *See also State v. Patton*, 45 N.C. App. 676, 263 S.E. 2d 796 (1980). The record indicates that the police information on defendant's mug shots was sufficiently covered over so as to avoid prejudicing the jury. Therefore, defendant's assignment of error is without merit.

[2] Defendant next contends the trial court erred by allowing the State to cross-examine him about his failure to subpoena a witness. The evidence shows that on 16 April 1981 the Murray's house was broken into and personal property taken. On the same day, defendant sold several of the stolen items to the Plaza Pawn Shop and on 20 April 1981, defendant sold several more of the

stolen items to the Second Street Pawn Shop. Defendant testified in his own behalf and admitted that he sold those items to the two pawn shops but denied that he stole them or knew that they were stolen; stating that he purchased the items from a Ronald Hunt who lived in Fairmont. Over defendant's objection, the State asked defendant, "Did you ever cause a subpoena to be issued for him [Ronald Hunt]?" Defendant answered, "No, I didn't."

When a defendant testifies as a witness, he occupies the same position as any other witness and is equally liable to be impeached or discredited. *State v. Sheffield*, 251 N.C. 309, 111 S.E. 2d 195 (1959). In *State v. Carver*, 286 N.C. 179, 209 S.E. 2d 785 (1974) the defendant testified in his own behalf that he shot the deceased in self-defense, that Roy Paylor and William Pointer were present when the shooting occurred, and that after the shooting occurred a crowd approached the defendant. Defendant did not subpoena any people from the "crowd" and in particular failed to subpoena Roy Paylor and William Pointer. Other than himself, the only witnesses to the shooting offered by the defendant were his half brother and a friend who apparently helped to precipitate the altercation. On cross-examination and over objection, the defendant was asked if he ever made any effort to find any witnesses, other than his half brother and friend, who could verify his contention. The defendant replied that he contacted Roy Paylor and William Pointer. The defendant was then asked if he had subpoenaed them to come to court, and he answered, "no, I had not." The Supreme Court held that this cross-examination was properly allowed as tending to impeach defendant's testimony. 286 N.C. at 182, 209 S.E. 2d at 787. Under the rule of *Carver*, cross-examination regarding defendant's failure to subpoena the two witnesses was properly allowed.

[3] Next, defendant contends that there was fatal variance between indictment and proof as to the charge of felonious larceny and, therefore, the trial court should have dismissed this charge. The indictment alleges *inter alia* that "1 Pioneer stereo amplifier, 1 Sylvania stereo amplifier, two S and W.32 caliber blue steel handguns, 1 white gold necklace . . . 1 cultured pearl necklace, 1 set cultured pearl earrings, 1 14 karat gold charm bracelet . . . 1 fraternity pin with initials D.P.M., 1 gold necklace with 8 pearls, 1 white gold necklace with two gold beads and 1 jade bead, 1 14 karat gold man's diamond ring, 1 sterling silver charm bracelet, 1

14 karat gold man's watch . . . 1 black broach . . . 1 set sterling earrings with initials G.B.M., 1 set gold earrings with initials G.B.M., 1 Timex watch, 1 14 karat gold ruby necklace . . . 4 or 5 karat gold chains, an assortment of miscellaneous costume jewelry . . . the personal property of Douglas P. Murray" were stolen by defendant. Defendant argues that all of the evidence produced at trial indicates that the property taken and retrieved by the police belonged to Gertie Murray and, therefore, a fatal variance exists between indictment and proof. However, defendant concedes that if Douglas Murray, the owner named in the indictment, had a general or special interest in the property no fatal variance would exist.

Douglas Murray did not testify in this case. Gertie Murray's testimony corroborates the allegations of the indictment as to the named items of property taken. She testified further that she was able to identify her jewelry at the pawn shops and that she and her husband, Douglas Murray, live together in their house with their family.

In *State v. Greene*, 289 N.C. 578, 584, 223 S.E. 2d 365, 369 (1976) the Supreme Court stated "the general law has been that the indictment in a larceny case must allege a person who has a property interest in the property stolen and that the State must prove that the person has ownership, meaning title to the property or some special property interest."

The State argues there is no fatal variance between allegation and proof; that the evidence shows that the property was maintained by Douglas and Gertie Murray, husband and wife, in their home where they live together; therefore, Douglas and Gertie Murray had joint possession of the property, thereby giving Douglas Murray a sufficient special property interest in the stolen property to support the allegation of ownership contained in the indictment.

An allegation of ownership in a husband is supported by proof that the things stolen, although constituting a part of his wife's separate estate, were in the joint possession of the husband and wife, as where they were taken from the residence in which she lived with him. In such a case the husband's possessory interest is the equivalent of a special property interest. *State v.*

Hauser, 183 N.C. 769, 111 S.E. 349 (1922); *accord State v. Robinette*, 33 N.C. App. 42, 234 S.E. 2d 28 (1977).

It is clear from the record that the property was taken from Douglas and Gertie Murray's joint possession as it was stolen from the house in which they, as husband and wife, lived together. Douglas Murray had, at the very least, a "special property interest" in the stolen items sufficient to support the allegation of ownership contained in the indictment. Therefore, no fatal variance existed between allegation and proof and defendant's assignment of error is without merit.

[4] Defendant's last contention is that the felonious breaking and entering charge should have been dismissed because the State failed to prove that the building was occupied by Douglas P. Murray; failed to prove the ownership of the property, subject of the intended larceny at the time of the breaking and entering; and failed to prove that defendant was at the Murray's residence.

Defendant's argument is without merit. Occupancy is not an element of either of the offenses of which defendant was convicted, G.S. 14-54 and G.S. 14-72. In the prosecution for feloniously breaking and entering it was incumbent upon the State to establish, at the time the defendant broke and entered, that he intended to steal something. However, it was not incumbent upon the State to establish ownership of the property which he intended to steal, the particular ownership being immaterial. *State v. Crawford*, 3 N.C. App. 337, 164 S.E. 2d 625 (1968). In addition, defendant entirely overlooks the theory upon which the State relies, the doctrine of recent possession, to prove defendant's guilt of the breaking and entering. It is well established that where there is evidence that a building has been broken into and entered and the property in question has thereby been stolen, the possession of such stolen property recently after the larceny raises the presumption that the possessor is guilty of the larceny and also of the breaking and entering. *State v. Black*, 14 N.C. App. 373, 188 S.E. 2d 634 (1972). The State's evidence was sufficient to be submitted to the jury on issues of defendant's guilt of felonious breaking and entering and felonious larceny on the theory of defendant's possession of recently stolen property. The charge of the trial court not being included in the record, it is presumed that such proper instructions were given.

In defendant's trial we find

No error.

Judges ARNOLD and HILL concur.

CARLOS DIAZ, EMPLOYEE v. UNITED STATES TEXTILE CORPORATION, EMPLOYER AND FIDELITY AND GUARANTY INSURANCE COMPANY, INSURER, DEFENDANTS

No. 8210IC703

(Filed 15 February 1983)

Master and Servant §§ 55.1, 55.6— workers' compensation—electrical burns—neither injury by "accident" nor injury in course of employment

In a workers' compensation proceeding, the Industrial Commission erred in finding that plaintiff suffered a compensable injury. The evidence did not satisfy the requirement of an injury by "accident" since plaintiff, an experienced electrician, should have known that if he hit a wet board with his bare hand while standing on wet grass and while the board was resting on a wire with at least 3,000 volts of electricity running through it, he would receive severe electrical burns. Further, the evidence tended to show that the injury did not occur in the course of plaintiff's employment in that there was no evidence that plaintiff had been directed to enter the substation where the injury occurred, and where, even if he had, the evidence showed that plaintiff had completed his possible duty before he reentered the substation a second time.

APPEAL by defendants from Opinion and Award of the North Carolina Industrial Commission filed 1 April 1982. Heard in the Court of Appeals 10 November 1982.

This is a proceeding under the North Carolina Workers' Compensation Act, N.C. Gen. Stat. § 97-1, *et seq.* to recover compensation for injuries sustained to plaintiff Carlos Diaz.

On 3 December 1978 plaintiff was employed by defendant United States Textile Corporation (hereinafter U.S. Textile) as an electrician and was working at U.S. Textile's plant in Newland, North Carolina. On this date a co-worker found plaintiff lying unconscious in the fenced area of a substation located behind the building housing U.S. Textile and Glen Raven Mills. The substa-

tion consisted of three transformers with a primary voltage of 7,200 running through each transformer. Defendant had come in contact with one of the wires leading from the transformers and was severely burned. As a result, both arms were amputated.

On 29 July 1981 Deputy Commissioner Ben E. Roney, Jr., filed an Opinion and Award denying plaintiff's claim on the basis that his "injuries were proximately caused by his willful intention to kill himself and did not arise out of or in the course of the employment. NCGS 97-12(3) . . . ." The Full Commission with the Chairman dissenting, reversed the Opinion and Award of Deputy Commissioner Roney and awarded plaintiff compensation. Defendants have appealed.

Gene Collinson Smith for plaintiff-appellee.

Jones, Hewson & Woolard, by Harry C. Hewson, for defendant-appellants.

HILL, Judge.

Defendants argue that the award of the Full Commission is not supported by the evidence.

> "In passing upon an appeal from an award of the Industrial Commission, the reviewing court is limited in its inquiry to two questions of law, namely: (1) Whether or not there was any competent evidence before the Commission to support its findings of fact; and (2) whether or not the findings of fact of the Commission justify its legal conclusions and decisions. (Citations omitted.)" *Henry v. Leather Co.*, 231 N.C. 447, 479, 57 S.E. 2d 760, 762 (1950).

Inscoe v. Industries, Inc., 292 N.C. 210, 216, 232 S.E. 2d 449, 452 (1977). Defendants have assigned error to paragraphs 3, 4 and 7 of the following findings of fact on the ground that they are not supported by the evidence:

> 1. Plaintiff was born in Carralillos, Cuba on 31 August 1939. He is a Latin American who speaks fluent Spanish and some English. He was educated in schools through the eighth grade and received additional school training in technical school where he completed courses in electricity. He began his career as an electrical worker in 1972 when he was

employed as a maintenance electrician in Spain. He has continued to do electrical work for various employers since 1972.

2. Plaintiff went to work for defendant employer as an electrician on a date uncertain prior to December 1978. He began work at defendant employer's Charlotte plant and was eventually transferred to the Newland plant. He was assigned to install knitting and sewing machines at the Newland plant. Plaintiff's principal duties with regard to this installation involved electrical wiring, which consisted of adapting the new machines to the existing voltage at the plant.

3. During the course of the installation process, on the morning of December 3, 1978, plaintiff entered the smaller of two electrical sub-stations on defendant employer's premises to check and make sure that the power source was resistant enough to bear the load of the charge that was going to be put upon it. He had never been inside either of the sub-stations on defendant employer's premises prior to this date. He gained entrance to the enclosed sub-station by placing a wooden stepladder against the fence surrounding the sub-station and climbing over the fence. Plaintiff made an inspection of the transformer and discovered a piece of wood, approximately two to three feet long resting between a wire and one of the transformers. He did nothing about the board at that time, and left the sub-station.

4. Claiment (sic) returned to defendant employer's plant and changed some microswitches inside the plant. Plaintiff then took a coffee break with two coemployees, Bernd Veerkamp and Gerald Storandt. Plaintiff decided to reenter the sub-station and remove the piece of wood to avoid a serious accident. Plaintiff reentered the sub-station by climbing the same stepladder as before and approached the piece of wood by walking between the two transformers. When he reached the piece of wood, he gave it a hard blow with his left hand, at which point, plaintiff received a great electrical shock.

. . .

7. On December 3, 1978, plaintiff sustained an injury by accident arising out of and in the course of his employment

as an electrician with defendant employer. As a result of the injury by accident giving rise to this claim, plaintiff is totally and permanently disabled.

The Commission concluded as a matter of law that plaintiff sustained an injury arising out of and in the course of his employment with U.S. Textile. We reverse the Commission's award on grounds that there is no competent evidence to support Finding of Fact No. 7 and the corresponding Conclusions of Law.

An injury is compensable under the Workers' Compensation Act only if it is by accident arising out of and in the course of employment. G.S. 97-2(6). "Accident" has been defined as "an unlooked for and untoward event which is not expected or designed by the person who suffers the injury." *Porter v. Shelby Knit, Inc.*, 46 N.C. App. 22, 26, 264 S.E. 2d 360, 363 (1980), *quoted in Hensley v. Cooperative*, 246 N.C. 274, 278, 98 S.E. 2d 289, 292 (1957). Whether or not the statutory requirements of "arising out of and in the course of the employment" are met is a mixed question of law and fact. *Barham v. Food World*, 300 N.C. 329, 266 S.E. 2d 676, *reh'g denied*, 300 N.C. 562, 270 S.E. 2d 105 (1980).

> The words "arising out of and in the course of employment" have been interpreted many times. The phrases "arising out of" and "in the course of" are not synonymous and both must be fulfilled in order for the plaintiff to recover. An accident arises out of employment where any reasonable relationship to the employment and the accident exists or the employment is a contributory cause of the accident. (Citation omitted.)
>
> * * * *
>
> The phrase "in the course of" employment deals with time, place, and circumstance. All three of the conditions must be fulfilled for the plaintiffs to recover. (Citation omitted.) . . . . If the employee is doing work at the direction and for the benefit of the employer, the time and place of work are for the benefit of the employer and a part of the employment of the employee. . . . . In respect to "circumstance," compensable accidents are those sustained while the employee is doing what a man so employed may reasonably do within a time he is employed, and at a place where he may reasonably be during the time to do that thing.

Brown v. Service Station, 45 N.C. App. 255, 256-257, 262 S.E. 2d 700, 702 (1980).

Upon application of the aforesaid body of law to the evidence in the record, we conclude that at least two of the statutory requirements for compensation were not met. Plaintiff testified that prior to his employment at the Newland plant he worked at Brevoni Hosiery and the U.S. Textile Plant in Charlotte. His duties at these plants involved electrical installation of machines. He was not responsible for connecting the wiring from the substation to the machinery. When he began working at the Newland plant of U.S. Textile his duties were the same. On the day of the injury, plaintiff entered one of the substations to determine the voltage. He indicated that this was necessary since a number of new machines were being installed. Plaintiff obtained a ladder, climbed over the fence surrounding the transformers and read the plaque on the middle transformer in order to ascertain the voltage. He noticed a piece of wood "almost balancing between the wire and the transformer." Diaz then climbed out of the substation. He testified:

> At first I saw the piece of wood and I didn't give it any importance or I didn't dare to take it away, to remove it. After I left the sub-station I went and had coffee with Benny and Storandt. I started thinking how if it were windy the piece of wood could fall and provoke an accident, so I decided to remove it. It was just a matter of giving it a blow and it would fall.

Plaintiff then reentered the substation by way of a ladder. The wet board was resting on a wire with a voltage of at least 3,000 volts. Plaintiff gave the board a blow with his left hand. He remembered nothing until regaining consciousness in the ambulance.

A deputy sheriff with the Avery County Sheriff's Department testified that he interviewed plaintiff after he was taken to Duke Hospital. There plaintiff informed him "he needed a board inside the fence and fell down."

On the day plaintiff entered the substation it was rainy and cold. The fence around the substation was locked and signs reading "Danger High Voltage" were located in prominent positions on the fence. Both of plaintiff's co-workers and people in-

vestigating the incident testified that they found no board inside the substation.

The aforesaid evidence does not satisfy the requirements of injury by "accident." Plaintiff, an experienced electrician, should have known that if he hit a wet board with his bare hand while standing on wet grass and while the board was resting on a wire with at least 3,000 volts of electricity running through it, he would receive severe electrical burns. Plaintiff acknowledged his awareness of this fact when he testified "At first I saw the piece of wood and I didn't give it any importance or I didn't dare to take it away."

The facts also show that the injury did not occur in the course of plaintiff's employment. There was no evidence that plaintiff had been directed by U.S. Textile to enter the substation. Assuming that plaintiff's duties entailed ascertaining the voltage on the transformers in the substation, the evidence shows that plaintiff had completed this duty before he reentered the substation. Furthermore, neither of plaintiff's explanations, that he hit the board to thwart a possible accident or because he needed the board, would support a conclusion that he was acting within the scope of his employment. Plaintiff was not doing what a man so employed may reasonably do at a time he was employed and at a place where he may have been during the time to do that thing. We hold that the findings of fact do not support an award of compensation.

Defendants have raised other assignments of error concerning the admissibility of evidence of an alleged suicide note written by plaintiff. Because of our disposition of the cause, we deem it unnecessary to deal with them.

The cause is remanded to the Industrial Commission for entry of an order denying compensation.

Reversed and remanded.

Judges ARNOLD and JOHNSON concur.

STATE OF NORTH CAROLINA v. GARY LUNDY HICKS

No. 8222SC519

(Filed 15 February 1983)

1. **Weapons and Firearms § 3— discharging weapon into occupied dwelling—sufficiency of evidence**

In a prosecution for discharging a firearm into occupied property in violation of G.S. 14-34.1, the evidence was sufficient for the jury to find that defendant knew or had reasonable grounds to believe that the house was occupied at the time of the shooting where the evidence tended to show that defendant and the owner of the home lived in a small community; they had known each other since 1973; an accomplice visited the occupant of the home at his house three days before the shooting; and the shooting occurred at 5:00 a.m.

2. **Criminal Law § 117.4— accomplice not given formal immunity—request for accomplice instruction only—no error to fail to instruct on quasi-immunity**

Where a witness had an agreement with the district attorney that if she testified the charges against her would be dropped, the agreement was pursuant to G.S. 15A-1054 and not pursuant to G.S. 15A-1052. G.S. 15A-1054 does not require the trial judge to give an interested witness instruction to the jury, and since defendant requested an accomplice instruction only, the trial judge did not err in only giving that instruction.

ON certiorari by defendant from *Rousseau, Judge*. Judgment entered 10 April 1980 in Superior Court, IREDELL County. Heard in the Court of Appeals 16 November 1982.

Defendant was charged with two counts of discharging a firearm into occupied property, in violation of G.S. 14-34.1. The State's evidence tended to show the following. State Trooper Ward testified that on 16 September 1979 he saw defendant under the hood of a Pontiac which was stopped on the road. Defendant said he could not get it to start and Ward told him to move it onto the shoulder of the road. Then Ward pursued a Buick and arrested the driver, Ronnie Hall, for driving under the influence. When Ward returned to where he had last seen defendant, the Pontiac was sitting in a ditch and the trunk was smashed in. Defendant blamed Ward for the accident and told him that if he had helped get the car off the road the accident would not have occurred. Ward also said that on 19 September 1979 Ronnie Hall visited him at his house and asked him for help when he had to go to court on the DUI charge.

Hall testified that on 22 September 1979 he, defendant, and Barbara Lackey, defendant's girlfriend, were drinking beer together. While they were out drinking they decided to shoot at Ward's house. At 5:00 or 5:30 a.m. they drove to Ward's house with two .22 caliber rifles. They stopped the car about 150 or 200 yards from the house and Hall and defendant each fired twelve to fifteen rounds. Hall saw a dim light in the house, and did not see any cars parked in the driveway. After shooting at Ward's house they drove down the street and defendant shot five or six rounds into a house belonging to James Ray Summers. Then they returned to defendant's trailer, hid the guns, drank more beer, and went to bed.

Jerry Ward, Trooper Ward's son, testified that on the morning of 22 September 1979 he was awakened by the sound of shots. At approximately 9:00 a.m. he went outside and found nineteen or twenty rifle shells.

Trooper Ward testified that he found nineteen bullet holes in his house. He said that on the day the shooting occurred the "rock work" in front of the house was not completed.

Barbara Lackey testified for the State. She essentially corroborated Hall's testimony. She also said defendant hid the guns behind his trailer. She found them and gave them to Officer Redmond. She admitted she told Officer Redmond that she and defendant were in bed at the time of the shooting because defendant asked her to lie. On cross-examination she said the district attorney promised her the charges against her would be dismissed if she testified.

Defendant did not testify. The jury found him guilty of shooting into Ward's house, and not guilty of shooting into Summers' house. He was sentenced to not less than eight nor more than ten years and the court recommended he pay Ward restitution of $500.00. Defendant's appeal was dismissed for failure to comply with the Rules of Appellate Procedure, *State v. Hicks*, No. 8022SC1153, 21 April 1981. A petition for writ of certiorari was allowed by this Court.

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

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

VAUGHN, Chief Judge.

[1] Defendant's first argument is that the trial court erred in denying his motion to dismiss at the close of the State's evidence. Defendant's motion to dismiss requires the trial court to consider all the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference drawn from the evidence. *State v. Stewart*, 292 N.C. 219, 232 S.E. 2d 443 (1977). The question is whether there is substantial evidence, direct, circumstantial, or both, to support a finding that the offense charged has been committed and the accused committed it. *State v. Smith*, 291 N.C. 505, 231 S.E. 2d 663 (1977).

The offense of discharging a firearm into occupied property, G.S. 14-34.1, is defined as follows:

> Any person who willfully or wantonly discharges or attempts to discharge:
>
> (1) Any barreled weapon capable of discharging shot, bullets, pellets, or other missiles at a muzzle velocity of at least 600 feet per second; or
>
> (2) A firearm
>
> into any building, structure, vehicle, aircraft, watercraft, or other conveyance, device, equipment, erection, or enclosure while it is occupied is guilty of a Class H felony.

This statute was explained in *State v. Williams*, 284 N.C. 67, 73, 199 S.E. 2d 409, 412 (1973):

> We hold that a person is guilty of the felony created by G.S. 14-34.1 if he intentionally, without legal justification or excuse, discharges a firearm into *an occupied building* with knowledge that the building is then occupied by one or more persons or when he has reasonable grounds to believe that the building might be occupied by one or more persons. (Emphasis in original.)

Defendant contends that there was insufficient evidence for the jury to find that he knew or had reasonable grounds to believe that Ward's house was occupied at the time of shooting. The evidence, however, viewed in the light most favorable to the State tends to show that defendant and Ward lived in a small community; they had known each other since 1973; Hall visited Ward, at his house, three days before the shooting; and the shooting occurred at 5:00 a.m., a time when people are usually at home. Furthermore, Ward's house had a garage, which explains why no cars were parked in front of his house. Defendant contends that the State offered evidence that the house was "under construction" and thus appeared unoccupied. While it is true that if the State's evidence tends only to exonerate a defendant from a particular charge his motion for nonsuit should be allowed, *State v. Hamby*, 276 N.C. 674, 174 S.E. 2d 385 (1970), *death penalty vacated*, 408 U.S. 937, 33 L.Ed. 2d 754, 92 S.Ct. 2862 (1972), this evidence does not indicate that the house appeared unoccupied. Viewed in the light most favorable to the State, the "rock work" was probably covering the cement block foundation. That it was unfinished did not make the house uninhabitable. Since there was no evidence that the house was otherwise incomplete, the unfinished "rock work" would not indicate the house was unoccupied. Clearly there was substantial evidence to support a finding that the offense was committed, and defendant committed it. Defendant's motion to dismiss was properly denied.

[2] Defendant's second argument is that the trial judge erred by failing to instruct the jury on testimony of a witness with immunity or quasi-immunity as follows:

> There was evidence which tends to show that Barbara Lackey was testifying under an agreement to dismiss the charges against her in exchange for her testimony. If you find that she testified in whole or in part for this reason you should examine her testimony with great care and caution in deciding whether or not to believe it. If, after doing so, you believe her testimony in whole or in part, you should treat what you believe the same as any other believable evidence.

Defendant contends that since Lackey had an agreement with the district attorney that if she testified the charges against her would be dropped, the above instruction was required by G.S.

15A-1052(c). We do not agree for two reasons: the applicable statute does not require the instruction, and at trial defendant requested an *accomplice* instruction, not the above instruction. G.S. 15A-1052 provides, in pertinent part:

> (a) When the testimony or other information is to be presented to a court . . . the order to the witness to testify or produce other information must be issued by a superior court judge. . . .
>
> (c) In a jury trial the judge must inform the jury of the grant of immunity and the order to testify prior to the testimony of the witness under the grant of immunity. During the charge to the jury, the judge must instruct the jury as in the case of interested witnesses.

As the official commentary to G.S. 15A-1051 explains, a formal grant of immunity is not conferred unless the witness is asked an incriminating question, he claims his privilege against self-incrimination, the judge orders him to answer the question, and the witness then answers the question. Clearly, Lackey was not granted formal immunity. Her agreement was pursuant to G.S. 15A-1054, which does not require particular jury instructions. The statute provides:

> (a) Whether or not a grant of immunity is conferred under this Article, a prosecutor, when the interest of justice requires, may exercise his discretion not to try any suspect for offenses believed to have been committed within the judicial district, to agree to charge reductions, or to agree to recommend sentence concessions, upon the understanding or agreement that the suspect will provide truthful testimony in one or more criminal proceedings.
>
> (b) Recommendations as to sentence concessions must be made to the trial judge by the prosecutor in accordance with the provisions of Article 58 of this Chapter, Procedure Relating to Guilty Pleas in Superior Court.
>
> (c) When the prosecutor enters into any arrangement authorized by this section, written notice fully disclosing the terms of the arrangement must be provided to defense counsel, or to the defendant if not represented by counsel, against whom such testimony is to be offered, a

> reasonable time prior to any proceeding in which the person with whom the arrangement is made is expected to testify. Upon motion of the defendant or his counsel on grounds of surprise or for other good cause or when the interests of justice require, the court must grant a recess.

The official commentary to G.S. 15A-1054 explains that the statute was enacted, with a notice requirement as a safeguard, because "[T]he Commission thought that formal grants of immunity . . . would probably be few and far between. Several persons described a more informal assurance of lenience or nonprosecution . . . as being more effective and much more prevalent. . . ."

In *State v. Bagby*, 48 N.C. App. 222, 268 S.E. 2d 233 (1980), *review denied*, 301 N.C. 723, 276 S.E. 2d 284 (1981), this Court held that when a witness enters into an arrangement with the prosecutor under G.S. 15A-1054, absent a request from defendant, the trial court need not charge the jury that the witness testified as an accomplice or that the jury closely scrutinize the testimony because the witness testified under an agreement with the district attorney. Thus the statute, G.S. 15A-1054, and *Bagby*, set forth the rule that, absent request, the trial judge need not give an interested witness instruction to the jury. Since defendant requested an accomplice instruction only, the trial judge did not err in only giving that instruction, which was as follows:

> Now, in this case there is evidence that shows that the witness, Ronnie Hall, and the witness, Barbara Lackey, were accomplices in the commission of the crimes charged in this case. . . .
>
> Now, an accomplice is considered by law to have an interest in the outcome of the case. Since these two witnesses were accomplices, *you should examine every part of their testimony with the greatest care and caution.* If, after doing so, you believe their testimony in whole or in part, you should treat what you believe the same as any other believable evidence. (Emphasis added.)

Furthermore, the jury was fully aware of the agreement between Lackey and the district attorney because it was elicited on cross-examination.

We have carefully reviewed defendant's assignments of error and find no error.

No error.

Judges WELLS and WHICHARD concur.

H. C. CODY AND WIFE, LENA JO CODY, PLAINTIFFS v. DEPARTMENT OF TRANSPORTATION, DEFENDANT AND THIRD-PARTY PLAINTIFF v. ASHEVILLE CONTRACTING COMPANY AND TRAVELERS INDEMNITY COMPANY, THIRD-PARTY DEFENDANTS

No. 8224SC189

(Filed 15 February 1983)

1. **Indemnity § 3; Rules of Civil Procedure § 14— indemnity claim as third-party claim—denial of motion to dismiss third-party claim at end of defendant's evidence proper**

The trial court did not err in denying the third-party defendant's motion for directed verdict at the close of defendant's evidence since plaintiffs had to establish their claim against defendant before defendant as third-party plaintiff could ascertain the extent of any claim for indemnification it might have against the third-party defendant. Therefore, the trial judge properly excluded the introduction of the indemnification contract until the jury established the amount of damages, if any, to which plaintiff was entitled.

2. **Trial § 40— inverse condemnation proceeding—failure to determine issues other than damages prior to trial—no prejudicial error**

The third-party defendant was not prejudiced, if there was error, in the trial court's failing to determine the issues other than damages in an inverse condemnation case prior to trial as required by G.S. 136-108. All parties stipulated that other issues as to the proper designation of parties, ownership of land in question, the legal ownership and title to the building had been settled.

3. **Eminent Domain § 13— inverse condemnation action—award of attorney fees—proper**

In an inverse condemnation action, there was no error in the court's award of $5,000 in attorney fees to plaintiff's attorney pursuant to G.S. 136-119.

APPEAL by third-party defendants from *Howell, Judge*. Judgments entered 24 September 1981. Heard in the Court of Appeals 11 January 1983.

This is an appeal by third-party defendants from judgments entered against them for damages arising in an inverse condemnation proceeding and under an indemnity agreement.

Bennett, Kelly & Cagle, by Harold K. Bennett, for plaintiffs-appellees.

Attorney General Edmisten, by Assistant Attorney General Guy A. Hamlin, for defendant and third-party plaintiff-appellee.

Adams, Hendon, Carson & Crow, by George W. Saenger, for third-party defendants-appellants Asheville Contracting Company and Travelers Indemnity Company.

HILL, Judge.

Plaintiffs brought this action for inverse condemnation against the Department of Transportation (hereinafter referred to as DOT), alleging their store building was damaged by blasting which occurred during construction of the adjacent highway. DOT subsequently filed two pleadings: an answer and crossclaim that were served on plaintiffs; and a third-party complaint that was served on Asheville Contracting Company and Travelers Insurance Company, its surety, pursuant to G.S. 1A-1, Rule 14. The third-party complaint sought indemnification for damages for which DOT might be liable to plaintiffs, pursuant to a contract of indemnity provided by Asheville Contracting Company and Travelers Insurance Company, its surety, with DOT as beneficiary. Asheville Contracting Company and Travelers answered the complaint of plaintiffs, admitting a contract with DOT, but denying liability. Neither third-party defendant demanded a jury trial.

At trial, plaintiffs offered evidence of damages arising out of the blasting, and thereafter DOT offered evidence in mitigation of damages. Asheville Contracting Company assisted in the selection of the jury, cross-examined witnesses, and otherwise participated in the trial. Plaintiffs and DOT rested their cases, and Asheville Contracting Company and Travelers moved for a directed verdict pursuant to G.S. 1A-1, Rule 50, or alternatively for an involuntary dismissal pursuant to G.S. 1A-1, Rule 41(b), contending that no evidence of the liability of Asheville Contracting Company had been introduced. The motions were denied. The attorney for DOT moved to reopen his case and offer evidence of the contract and

the standard specifications to show the liability of Asheville Contracting Company, but the trial judge denied DOT's motion. Thereafter, Asheville Contracting Company presented evidence of its defenses against plaintiffs and rested its case. Plaintiffs offered rebuttal evidence, and DOT again tendered the contract. Since the third-party defendants admitted in their answer a contract for construction of the DOT highway project, the trial judge allowed the contract into evidence to the extent that it had been admitted by third-party defendants. Asheville Contracting Company renewed its motions pursuant to G.S. 1A-1, Rule 50 and Rule 41 which were denied. On the single issue of damages, the jury awarded plaintiffs $16,000.00.

The court entered judgment on the jury verdict and announced that it would consider the third-party claim and the question of indemnity the next day. At that time, the court received evidence, including the contract of indemnity, made findings of fact and entered judgment against Asheville Contracting Company and Travelers Insurance Company. Third-party defendants appealed both the original judgment and the judgment in which indemnification was ordered. We have examined the assignments of error raised by Asheville Contracting Company's brief and affirm in all respects the actions of the trial judge.

[1] By its first assignment of error, Asheville Contracting Company in its brief argues that the trial judge erred in denying its motion for a directed verdict, or alternatively for an involuntary dismissal at the close of DOT's evidence, there being no evidence of any obligation of indemnity or otherwise at that time. We find no error.

Asheville Contracting Company and Travelers Insurance Company were joined as third-party defendants pursuant to G.S. 1A-1, Rule 14. This rule anticipates the disposition in one trial of cases involving multiple parties. It is particularly adapted to cases such as this one where the liability of a third-party defendant is contingent upon liability of another party, and upon claims the exact amount of which is not fixed at the beginning of trial. The rule permits the defendant as a third-party plaintiff to cause "a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of plaintiff's claim against him."

In the case *sub judice*, plaintiffs had to establish their claim against DOT before defendant as third-party plaintiff could ascertain the extent of any claim for indemnification it might have against the third-party defendant. Determination of plaintiff's rights constitutes the "adjudication of the main claim." Thereafter, the third-party defendant must have the right to defend against any contingent liability arising out of the main claim. It is only after liability is adjudicated under the main claim that the question of indemnification arises. Hence, the trial judge appropriately excluded the introduction of the indemnification contract until the jury established the amount of damages, if any, to which plaintiff was entitled. The contract of indemnity was properly introduced when the question of indemnification was before the judge, sitting as the finder of fact.

By resting its case, DOT did nothing more than announce termination of the main claim brought by plaintiffs. We find nothing in the record that indicates trial on the question of indemnification had begun when DOT rested. "It is the duty of the court to supervise and control the trial to prevent injustice to either party." 12 Strong N.C. Index 3d, Trial, § 9, p. 360. In directing that the issues of damages and indemnification be tried separately, the trial judge exercised his discretion in an appropriate manner.

[2] Third-party defendant in its brief next contends that the court erred in failing to determine the issues other than damages prior to trial as required by G.S. 136-108. This statute provides:

> After the filing of the plat, the judge, upon motion and 10 days' notice by either the Department of Transportation or the owner, shall, either in or out of term, hear and determine any and all issues raised by the pleadings other than the issue of damages, including, but not limited to, if controverted, questions of necessary and proper parties, title to the land, interest taken, and area taken.

The statute refers specifically to the determination of issues by the trial judge on motion of the Department of Transportation or the owners. Asheville Contracting Company waited to make its objection until the time for submitting issues to the jury.

The judge made findings of fact at the close of the evidence and concluded that only one issue would be submitted to the jury,

and a separate hearing would be held on indemnity. However, all parties stipulated that other issues as to proper designation of parties, ownership of land in question, the legal ownership and title to the building had been settled.

If there was error, it was not prejudicial to the third-party defendants. This assignment is overruled.

[3] We find no error in the court's award of $5,000.00 in attorney fees to plaintiff's attorney pursuant to G.S. 136-119. In his judgment filed 24 September 1981, the trial judge found that Harold K. Bennett as attorney for plaintiff instituted this action under the provisions of G.S. 136-111 and performed professional services in handling the case to conclusion, entitling him to reasonable attorney fees of $5,000.00; that said sum is fair, just, and reasonable under all the circumstances of the case. The court then taxed the defendant with this sum as part of the costs of this action. Asheville Contracting Company assigns as error failure of the trial judge to make findings of fact to substantiate his order. We find no error.

When a statute provides for attorney fees to be awarded as a part of the costs to be paid by the governmental authority which is appropriating the property, it is not a contingent fee, but an amount equal to the actual reasonable value of the attorney services. *Redevelopment Comm. v. Hyder*, 20 N.C. App. 241, 201 S.E. 2d 236 (1973).

G.S. 136-119 provides that the judge "shall determine and award or allow to such plaintiff, as a part of such judgment, such sum as will in the opinion of the judge reimburse such plaintiff for his reasonable cost, disbursements and expenses . . . ." Attorney fees are a cost, disbursement and expense. The award of attorney fees is in the sound discretion of the trial judge and is unappealable unless there is an abuse of discretion. *Stanback v. Stanback*, 270 N.C. 497, 155 S.E. 2d 221 (1967).

The attorney for the plaintiff filed an affidavit detailing the work done by him and an outline of the steps taken in the disposition of the case. The trial judge had this information before him before entry of his order allowing attorney fees. Asheville Contracting Company has shown no abuse of discretion by the trial judge in his order. The assignment is overruled.

By its final assignment of error, Asheville Contracting Company contends the court erred by entering judgment against it as third-party defendant. To substantiate the assignment, this party emphasizes certain findings of fact and conclusions of law made in the 24 September 1981 judgment that refer specifically to the holding of this Court in a prior appeal of this case. *See Cody v. Dept. of Transportation*, 45 N.C. App. 471, 263 S.E. 2d 334, *disc. rev. denied*, 300 N.C. 372, 267 S.E. 2d 674 (1980). We do not find it necessary to address in detail all of third-party defendant's contentions. In disposing of this case when it appeared before this Court previously, Judge Martin (now Justice Martin), ably pointed out that the trial judge erred in dismissing the action against DOT for the reason that contracting parties cannot by terms of a private agreement eliminate a cause of action created by statute to benefit citizens of North Carolina. This Court concluded that the plaintiff could sue DOT, or Asheville Contracting Company, under strict liability for damages resulting from blasting, or both. This Court did not compel joinder of the parties as defendants. Plaintiffs' election to sue DOT alone and DOT's proper joinder of Asheville Contracting Company fall within the guidelines of the prior case.

We have no quarrel with treating this case as an inverse condemnation proceeding to the point of establishing damages; and subsequently proceeding with the question of indemnification for reasons previously set out. Damages must be established against DOT before any liability would exist as to Asheville Contracting Company. Had the jury found no damages, the question of indemnification would not have arisen. Without detailing the evidence supporting the findings of fact, we conclude that the findings are sufficient; and that the findings of fact support the conclusion.

In the trial of the case, we find

No error.

Judges ARNOLD and WHICHARD concur.

TOWN OF WINTERVILLE v. JAMES W. KING, NELLIE V. KING, COTTIE LOUVENIA PERSON, MARY P. MOORE, SAMUEL E. PERSON, JOSEPH PERSON, ICELEAN PERSON, JAMES PERSON AND LOSSIE PERSON

No. 823SC243

(Filed 15 February 1983)

Injunction §§ 2, 2.1— permanent injunction—findings of inadequacy of legal remedy and irreparable injury not supported by evidence

In an action brought by plaintiff to permanently enjoin defendants from obstructing a street, preventing the general public from using the street, and preventing plaintiff from maintaining the street, the trial judge erred in entering a permanent injunction against defendants where its conclusions that irreparable harm would result to plaintiff if it was prevented from maintaining the street, that sufficient grounds existed for permanent injunction, and that plaintiff was entitled to a permanent injunction, insofar as the conclusion related to the defendants other than James W. King, were not supported by the findings of fact. Further, even though there was evidence that James W. King attempted to prevent the plaintiff from grading the street or to prevent the general public from using the street, the findings of fact were insufficient to show that plaintiff had no adequate remedy at law with respect to the acts and conduct of James W. King.

APPEAL by defendants from *Rouse, Judge.* Judgment entered 14 August 1981 in Superior Court, PITT County. Heard in the Court of Appeals 18 January 1983.

In this civil proceeding, tried by the judge without a jury, the plaintiff sought to permanently enjoin defendants "from obstructing said street, preventing the general public from using said street or preventing plaintiff, its servants or employees from maintaining said streets [sic]."

After a hearing the judge made the following pertinent Findings of Fact:

1. In 1960 a Laura Edwards, Joe Daniels, Artillery Carmon, and Cottie Louvenia Person attended a public meeting held by the Board of Aldermen of the Town of Winterville and requested that plaintiff open and maintain a public street through their properties.

2. On the date of said meeting, Laura Williams Edwards, Joe Daniels, and Artillery Carmon owned property which adjoined that of the Person heirs.

3. That the boundary line dividing the lands of Laura Williams Edwards, Joe Daniels and Artillery Carmon from the lands of the X. P. Person heirs is described as follows: (metes and bounds description omitted).

4. That on the date of said meeting Cottie Louvenia Person offered to give a strip of land approximately 690.66 feet in length and 15 feet in width bounded on the west by the Laura Williams Edwards, Joe Daniels, and Artillery Carmon properties, which parcel of land is more particularly described as follows: (metes and bounds description omitted).

5. That defendant Person made said offer conditioned upon plaintiff improving said property as a public street, opening and maintaining the same for use by the public for travel and transportation, and naming said street Person Street.

6. That on the date of said meeting the heirs of law of X. P. Person were the owners of the following described real property: (metes and bounds description omitted).

7. That plaintiff and defendants have stipulated in open court that the heirs of X. P. Person on the date of said meeting were his wife, Cottie Louvenia Person, and his children, Nellie V. King, Mary P. Moore, Samuel E. Person, Joseph E. Person, Icelean Person, James Person, Lossie Person and Columbus Person who is now deceased.

8. That Laura Williams Edwards, Joe Daniels, and Artillery Carmon agreed to give to plaintiff a similar strip of land 15 feet in width and approximately 690.66 feet in length which parcel of land was situated on the western side of the boundary line hereinabove referred to.

9. That in 1960 plaintiff constructed water and sewer lines on said boundary line referred to and embarked on opening said street lying between Boyd and Worthington Streets in the Town of Winterville by clearing defendants' property and improving same.

10. That said street was opened its full length from Boyd to Worthington Streets but was not opened to its full width of 30 feet.

11. That at the time said street was opened it was named Person Street.

12. That between the date of the opening said street and 1979 defendants never contacted plaintiff and demanded either the return of their property or compensation for the taking of the property; but that defendant Cottie Louvenia Person did contact Town officials and complained that said street was creating a drainage problem on her property.

13. That since the date of the opening of said street plaintiff has continuously maintained said street by grading same twice a week for a twenty (20) year period.

14. That since the opening of the said street, the street has been continuously utilized for the past twenty (20) years by the general public for travel or transportation.

15. That since said street has been opened Joe Daniels and Laura Williams Edwards have utilized said street in order to gain access to their residences situated on said street.

16. That on March 9, 1978 Nellie V. King, being one of the children of X. P. Person, and James W. King, acquired by deed recorded in Box H-47, at Page 370, of the Pitt County Registry, the following described property: (metes and bounds description omitted).

17. That the description in the deed to the Kings' property encompassed a portion of Person Street.

18. That in 1979 defendants, Cottie Louvenia Person, Lossie Person, Nellie V. King and James W. King demanded that plaintiff compensate them for the right of way which was taken in 1960.

19. That since 1979 defendant, James W. King, has threatened with violence Town employees who attempted to maintain and grade Person Street and prevented them from maintaining the street; that since said date the street has become filled with holes.

20. That defendant, James W. King, has dumped materials into the street in order to impede the general public from using said street.

21. That Person Street has become hazardous to the general public and for the persons who live on said street.

Based on the foregoing Findings of Fact the Court made the following Conclusions of Law:

1. That defendants through their acts or conduct dedicated the following described property to the Town of Winterville to be used as a public street: (metes and bounds description omitted).

2. That in 1960 said property was opened and accepted by the Town of Winterville and accepted by the general public.

3. That plaintiff's acceptance of the dedication through opening, improving and maintaining a portion of Person Street, less than full width, constituted an acceptance of the dedication of the entire 30 feet width of the street.

4. That upon the plaintiff's opening said street for use by the general public, a right of public way immediately arose.

5. That Person Street has been maintained by plaintiff and utilized by the general public for travel or transportation for twenty (20) years or more.

6. That defendants failed to bring any action to recover their property or damages for the taking of same within two years from the time said street was opened.

7. That plaintiff has no adequate remedy at law.

8. That irreparable harm will result to plaintiff if it is prevented from maintaining Person Street.

9. Sufficient grounds exist for permanent injunction and that plaintiff is entitled to a permanent injunction.

From an order permanently enjoining defendants "from obstructing Person Street, or preventing the general public from using said street, or preventing plaintiff, its servants or employees from maintaining said street" defendants appealed.

Dixon, Horne & Duffus, by J. David Duffus, Jr. for the plaintiff, appellee.

Robert L. White for the defendants, appellants.

HEDRICK, Judge.

Our review is limited to the question of whether the findings of fact and conclusions of law support the order appealed from. *See*, North Carolina Rule of Appellate Procedure 10(a).

In its eagerness to prove that defendants dedicated at least a portion of their property to be used as a public street, the plaintiff seems to have lost sight of the rule that a permanent injunction will not lie where there is a full, adequate, and complete remedy at law and without a determination that the applicant will suffer irreparable injury from the acts and conduct of the party to be enjoined. *Barrier v. Troutman*, 231 N.C. 47, 55 S.E. 2d 923 (1949); *Clinton v. Ross*, 226 N.C. 682, 40 S.E. 2d 593 (1946); *Guyton v. Board of Transportation*, 30 N.C. App. 87, 226 S.E. 2d 175 (1976); *Frink v. Board of Transportation*, 27 N.C. App. 207, 218 S.E. 2d 713 (1975).

With respect to the "acts and conduct" of the defendants which allegedly would cause irreparable "harm, damage and injury" to the plaintiff, if not enjoined, the plaintiff in its complaint alleged: "Defendant, James W. King acting on behalf of defendants has prevented plaintiff's employees from grading said road by threatening them with violence."

There is no evidence in this record whatsoever that any of the defendants, other than James W. King, did anything to prevent the plaintiff from grading the street or to prevent the general public from using the street, or that they made threats of any kind toward the plaintiff or any of its servants or employees. Moreover, the judge made no findings of fact that any of the defendants, other than James W. King, did anything to prevent the plaintiff or its servants or employees or the general public from using or maintaining the street in question. Thus, the conclusions that irreparable harm will result to plaintiff if it is prevented from maintaining Person Street, that sufficient grounds exist for a permanent injunction, and that plaintiff is entitled to a permanent injunction, insofar as it relates to the de-

fendants other than James W. King, are not supported by the findings of fact.

Assuming arguendo that Finding of Fact Nos. 19 and 20 with respect to the defendant James W. King are sufficient to show that the plaintiff will suffer irreparable harm and injury if his conduct as described in those findings of fact is not permanently enjoined, we find no support for the Conclusion of Law No. 7 that plaintiff has no adequate remedy at law with respect to the acts and conduct of the defendant, James W. King. *Board of Pharmacy v. Lane*, 248 N.C. 134, 102 S.E. 2d 832 (1958); *Mills v. Cemetery Park Corp.*, 242 N.C. 20, 86 S.E. 2d 893 (1955); *Dare County v. Mater*, 235 N.C. 179, 69 S.E. 2d 244 (1952); *Clinton v. Ross*, 226 N.C. 682, 40 S.E. 2d 593 (1946). Defendant James W. King might have been charged with violating any or all of the following Statutes: N.C. Gen. Stat. § 14-399; N.C. Gen. Stat. § 136-90; N.C. Gen. Stat. § 14-277.1. Thus the plaintiff has an adequate remedy at law. We hold the court erred in granting a permanent injunction against all of the defendants, including James W. King.

While our decision does not require us to elaborate on what we perceive to be other fatal defects requiring a vacation of the order appealed from, it seems appropriate to point out that Conclusion of Law No. 1 is erroneous since only one of the defendants, Cottie Louvenia Person, in any way participated in or was a party to the meeting with the Board of Aldermen of the Town of Winterville in 1960, wherein the defendants purportedly agreed to give fifteen feet of the property in question to the plaintiff to be used as a public street. The order appealed from is

Vacated.

Judges JOHNSON and EAGLES concur.

MARIE WATSON, ADMINISTRATRIX OF THE ESTATE OF HOBART WATSON, DECEASED v. ROBERT E. STORIE

No. 8225SC202

(Filed 15 February 1983)

1. **Evidence § 50.4— medical expert—treatment decedent would have received**

A qualified medical expert may testify through appropriate questions as to the type, nature, and extent of medical attention and treatment a person who had received specific injuries could or would have received had he sought medical attention promptly. Testimony concerning treatment decedent would have received had he sought medical attention was appropriate in this wrongful death action to show decedent's failure to mitigate damages by seeking prompt medical attention.

2. **Damages § 9; Death § 7.5; Negligence § 38— instructions—contributory negligence—failure to seek medical attention—mitigation of damages**

The trial court in this wrongful death action erred in instructing the jury that it could find that the decedent was contributorily negligent by failing promptly to seek medical attention after the accident in question since decedent's failure to obtain medical attention could not be a cause of the accident that produced the injuries. Rather, evidence of decedent's failure to seek prompt medical attention should have been considered by the jury on the question of mitigation of damages.

APPEAL by plaintiff from *Lamm, Judge.* Judgment entered 2 November 1981 in Superior Court, CALDWELL County. Heard in the Court of Appeals 12 January 1983.

On 17 September 1979, decedent Hobart Watson, defendant, and two other men were riding in defendant's pickup truck traveling on an unpaved, rural Wilkes County road. All of the men were drinking beer and wine.

Defendant was driving, while decedent sat next to the door on the far right-hand side of the truck. Defendant drove down a hill, ran off the road hitting an embankment two times before coming to a halt. Before coming to a final stop, the right front side of the truck was damaged, the cab was warped, the windshield was knocked out of the truck and blood was on the right-hand side of the hood and right-hand passenger area.

Following the wreck Hobart Watson, the decedent, was asked by the defendant, defendant's brother, and his own wife to go to a doctor. He refused all requests to seek medical attention.

On 19 September 1979, decedent finally agreed to go to the doctor but went first to his daughter's house to take a bath. While bathing, decedent stopped breathing due to a tear in the aortic arch, caused by the accident. Some motion of decedent's arm apparently pulled open the tear in the aortic arch, resulting in his immediate death. Other injuries found by the medical examiner were massive contusions of the anterior chest wall and multiple rib fractures.

Decedent's wife brought this wrongful death action on 17 June 1980, alleging defendant caused decedent's death by his negligent driving of the pickup truck. Defendant filed his answer on 4 August 1980 in which he denied negligence and pleaded in defense contributory negligence, failure to mitigate damages and sudden emergency.

The case was tried at the 19 October 1981 Civil Session of Caldwell County Superior Court. The court held a precharge conference, and then instructed the jury on the issues of negligence, contributory negligence and damages. Following a jury verdict finding negligence and contributory negligence, plaintiff appealed.

Ted West Professional Association by Ted G. West and David S. Lackey for plaintiff appellant.

Todd, Vanderbloemen & Respass by Bruce W. Vanderbloemen for defendant appellee.

BRASWELL, Judge.

[1] In plaintiff's first assignment of error, she argues that it was error for the trial court to allow defense counsel to ask the medical examiner questions which called for speculative answers as to the treatment plaintiff's decedent would have received had he sought medical attention. While speculative answers are not approved, we hold that a qualified medical expert can testify through appropriate questions as to the type, nature, and extent of medical attention and treatment a person who had received specific injuries could or would have received had he sought medical attention promptly. *See* G.S. 8-58.12. "[E]xpert medical evidence is admissible to show the nature and extent of the plaintiff's injuries, the effect of such injuries on the plaintiff's capacity to work or to use his physical powers, and the probable result of

future medical or surgical treatment of the plaintiff." *Mintz v. Atlantic Coast Line Railroad*, 236 N.C. 109, 114, 72 S.E. 2d 38, 42-43 (1952). *See*, 1 Brandis on North Carolina Evidence § 135 (1982), and *cf. Hunt v. Bradshaw*, 242 N.C. 517, 522, 88 S.E. 2d 762, 765 (1955): "In determining whether the operation should have been undertaken, resort must be had to the evidence of experts. Expert opinion must be founded upon expert knowledge."

Dr. Robert Rogers, the Caldwell County Medical Examiner, testified as a witness for plaintiff and was subject to reasonable cross-examination by defendant's attorney. He testified without objection that decedent would have been monitored and tested for internal bleeding and that internal bleeding could be determined by the use of dyes or exploratory surgery if necessary. This testimony concerns the allegation of whether or not decedent failed to seek medical attention, which bears directly on defendant's defense of failure to mitigate damages by seeking prompt medical attention. Therefore, questions concerning treatment decedent would have received had he sought medical attention were appropriate.

[2] In her third assignment of error, plaintiff alleges that the trial court erred in instructing the jury that it could find that the decedent was contributorily negligent by failing promptly to seek medical attention. We agree.

First, contributory negligence "is negligence on the part of the plaintiff which joins, simultaneously or successively, with the negligence of the defendant alleged in the complaint to produce the injury of which the plaintiff complains." *Jackson v. McBride*, 270 N.C. 367, 372, 154 S.E. 2d 468, 471 (1967). It is "a plaintiff's negligence which concurs with that of the defendant in producing the occurrence which caused the original injury . . . ." *Miller v. Miller*, 273 N.C. 228, 237, 160 S.E. 2d 65, 73 (1968). Clearly, decedent's failure to promptly obtain medical attention for injuries suffered in the accident in issue cannot be a cause of the accident that produced the injuries.

Second, to instruct that decedent's failure to promptly obtain medical attention constituted contributory negligence would result in foreclosing a plaintiff from receiving damages otherwise compensable under the law, such as damages to his own personal

property, *i.e.*, wristwatch, eyeglasses, clothes. This result is undesirable.

For these reasons, decedent's failure to promptly seek medical attention cannot constitute contributory negligence and the trial court, therefore, erred in instructing the jury that it could find that decedent was contributorily negligent by failing to seek medical attention.

However, decedent's failure to go to the doctor or hospital was a proper subject for the jury to consider concerning mitigation of damages, but under the damage issue rather than under the issue of contributory negligence. " 'A party injured . . . is required to protect himself from loss if he can do so with reasonable exertion or trifling expense, and ordinarily will be allowed to recover from the delinquent party only such damages as he could not, with reasonable effort, have avoided.' (Citations omitted.)" *Harris and Harris Construction Co. v. Crain & Denbo, Inc.*, 256 N.C. 110, 121, 123 S.E. 2d 590, 598 (1962). Therefore, having determined that defendant was negligent, and if the jury had appropriately found that plaintiff was not contributorily negligent, the jury should have considered the decedent's duty to exercise ordinary care to mitigate his damages in fixing the amount of damages to which plaintiff was entitled.

> "The rule in North Carolina is that an injured plaintiff, whether his case be tort or contract, must exercise reasonable care and diligence to avoid or lessen the consequences of the defendant's wrong. If he fails to do so, for any part of the loss incident to such failure, no recovery can be had. *Johnson v. R.R.*, 184 N.C. 101, 113 S.E. 606. This rule is known as the doctrine of avoidable consequences or the duty to minimize damages. Failure to minimize damages does not bar the remedy; it goes only to the amount of damages recoverable. 22 Am. Jur. 2d *Damages* §§ 30-32 (1965)."

Miller v. Miller, 273 N.C. 228, 239, 160 S.E. 2d 65, 73-4 (1968).

We believe it is unnecessary to discuss plaintiff's other assignments of error. Because of the improper jury instruction of contributory negligence, this case is, therefore, remanded for a new trial.

New trial.

Chief Judge VAUGHN and Judge WELLS concur.

STATE OF NORTH CAROLINA v. WILLIAM JOSEPH BYRD

No. 8226SC696

(Filed 15 February 1983)

Searches and Seizures § 23— validity of search warrant to search a residence—sufficiency of affidavit to establish probable cause

An affidavit in support of a search warrant was sufficient to establish probable cause for the issuance of the warrant to search a residence for cocaine where the affidavit showed that a man had sold cocaine to an agent on four occasions during a seven-week period; that the man would leave his home in his car and drive to his source and return with the drugs; that on one occasion he was seen entering the residence in question, and subsequently returned to the place of delivery with the cocaine in a plastic bag which was delivered upon payment to the agent; and that on the day the warrant was issued he was seen making his usual preparations to complete sale and delivery, except that the warrant is silent about whether he entered defendant's house described in the warrant. On the day the warrant was issued, negotiations for four ounces of cocaine had been made, but only one ounce was delivered for inspection and approval. It was reasonable to expect the remainder of the order would be at the residence named in the indictment where the first ounce was obtained.

APPEAL by defendant from *Ferrell, Judge*. Order entered 22 March 1982 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 13 January 1983.

Under the provisions of G.S. 15A-979(b), defendant appeals from an order denying his motion to suppress evidence that was made before final plea negotiations. Defendant entered a plea of guilty to possession with intent to sell and deliver cocaine in violation of G.S. 90-95(a)(1). Judgment was entered requiring defendant to pay a fine of $5,000.

Attorney General Edmisten, by Assistant Attorney General Francis W. Crawley, for the State.

Murchison, Guthrie & Davis, by K. Neal Davis and Dennis L. Guthrie, for defendant-appellant.

HILL, Judge.

A single question is presented to this Court: Was the affidavit in support of the search warrant sufficient to establish probable cause for the issuance of the warrant to search the premises and, as a consequence, to permit introduction of the fruits of the search into evidence?

On 23 November 1981, L. E. Welch, a Charlotte police officer, made application upon affidavit to a magistrate for the issuance of a search warrant for a residence located on Reames Road in Charlotte, North Carolina. Acting on the warrant issued, Officer Welch searched the premises and seized "cocaine, a brown suitcase containing U.S. currency," and various other items. The defendant was subsequently charged with possession with the intent to sell and deliver a controlled substance. Thereafter, defendant filed a motion to suppress evidence which was denied by the hearing judge. The defendant pleaded guilty but reserved his right to appeal in accordance with G.S. 15A-979(b), which provides: "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."

The search warrant accurately described the real estate to be searched. The application and affidavit filed in support of the warrant referred to cocaine and currency used to buy cocaine that was located in the dwelling described in the warrant and further detailed four instances in which Special Agent Beatty purchased cocaine from "a Roger Smith": October 1, 1981, November 13, 1981, November 18, 1981, and November 23, 1981. The application and affidavit showed substantially that on 1 October 1981, Agent Beatty gave Roger Smith $550.00 in Smith's residence at 6931 Random Place for the purchase of one-quarter ounce of cocaine. Smith left his house in a Pontiac car, returned some two hours later and gave Beatty a plastic bag containing cocaine.

Agent Beatty next met Smith at Smith's Random Place residence on 13 November 1981, gave him money for cocaine and agreed to meet him at an abandoned service station later. Smith left his home in a Pontiac car while under police surveillance, drove to a place between Reames Road and Sunset Road, where he made a telephone call. Still under surveillance, he drove to the

site on Reames Road described in the warrant. He was seen entering and leaving the premises on Reames Road and driving his Pontiac car to the service station, where he delivered the cocaine in a plastic bag to Agent Beatty.

Next, on 17 November 1981, Agent Beatty telephoned Smith about purchasing cocaine on 18 November 1981. Smith told Beatty he would have to get the cocaine from another source, since his usual connection was out of town until 21 November 1981.

On 18 November 1981, Beatty purchased cocaine from Smith at the Random Place residence and, while there, discussed a future purchase of four ounces of cocaine. Smith said that "the deal would probably be done in a motel and that Roger Smith's connection might be somewhere nearby."

At 2:01 p.m. on 23 November 1981, Agent Beatty contacted Smith and discussed the purchase of cocaine. At 2:17 p.m., the air and ground surveillance teams observed Smith leave his home at 6931 Random Place and proceed toward Reames Road. Enroute he made a telephone call and drove directly to the premises described in the search warrant, arriving at 2:35 p.m. At 2:52 p.m., a pickup truck arrived at the Reames Road site. Nothing in the affidavit indicates whether Smith or the truck driver entered the house on Reames Road. Fifteen minutes later Smith and the driver of the truck left Reames Road and went to a motel parking lot where Smith gave Beatty a bag containing one ounce of cocaine. Beatty paid Smith shortly thereafter and then drove away.

At 6:15 p.m. on the same day, Agent Beatty secured a search warrant for the Reames Road house and found cocaine and other items used in connection with drug trafficking on the premises.

Defendant contends that the affidavit supporting the search warrant fails to establish probable cause because it does not implicate the premises to be searched. We do not agree.

Our State Supreme Court has said that there must be "reasonable grounds at the time of . . . issuance of the warrant for the belief that the law was being violated on the *premises to be searched* . . . ." (Emphasis added.) *State v. Campbell*, 282 N.C. 125, 132, 191 S.E. 2d 752, 757 (1972), *quoting Dumbra v. United States*, 268 U.S. 435, 45 S.Ct. 546, 69 L.Ed. 1032 (1925).

We first address the question whether the affidavit set forth sufficient facts to establish probable cause to believe that contraband would be found on the premises.

Probable cause does not mean actual and positive cause, nor does it import absolute certainty. The determination of the existence of probable cause is not concerned with the question of whether the accused is guilty or innocent, but only with whether the affiant has reasonable grounds for his belief. If the apparent facts set out in an affidavit for a search warrant are such that a reasonably discreet and prudent person would be led to believe there was a commission of the offense charged, there is probable cause justifying the issuance of a search warrant. *State v. Campbell, supra*, at 129, 191 S.E. 2d at 755.

Possession of contraband drugs for the purpose of sale is a surreptitious act. The seller on the street often does nothing more than solicit orders for delivery from a source located far from the place of sale. Generally, the contraband is concealed on premises, its presence known only to the person in charge of safekeeping. The case before us follows this pattern. The pattern of sales used by Smith and defendant Byrd, however, is sufficient to lead a reasonably prudent person to believe that illicit drugs were kept in the Reames Road house for the purpose of sale.

We first note that affidavits used in connection with search warrants "are normally drafted by non-lawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity which once existed under common law pleadings have no place in this area . . . . This is not to say that probable cause can be made out by affidavits which are purely conclusory, stating only the affiant's or an informant's belief that probable cause exists without detailing any of the underlying circumstances upon which that belief is based . . . . However, where these circumstances are detailed, where reason for crediting the source of the information is given, and when a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hyper-technical, rather than a commonsense, manner." *United States v. Hodge*, 539 F. 2d 898, 903 (1976), *cert. denied*, 429 U.S. 1091, 97 S.Ct. 1100, 51 L.Ed. 536

(1977), quoting *United States v. Ventresca*, 380 U.S. 102, 108-109, 85 S.Ct. 741, 746, 13 L.Ed. 2d 684, 689 (1965).

The warrant and affidavit in the case fall within the "commonsense" rule. Substantially, the affidavit shows Roger Smith had sold cocaine to Agent Beatty on four occasions during a seven-week period; that Smith would leave his home in his Pontiac car and drive to his source and return with the drug; that on one occasion he was seen entering the house on Reames Road, the place described in the search warrant, and subsequently returned to the place of delivery with the cocaine in a plastic bag, which he delivered upon payment to Agent Beatty; that on the day the warrant was issued he was seen making his usual preparations to complete sale and delivery, except that the warrant is silent about whether he entered defendant's house on Reames Road. On the day the warrant was issued, negotiations for four ounces of cocaine had been made, but only one ounce was delivered for inspection and approval. It is reasonable to expect the remainder of the order would be at the Reames Road location where the first ounce was obtained. A commonsense approach leads us to the conclusion that there was probable cause to believe there was a connection between the Reames Road house and the source of the contraband drug.

Defendant argues that the affidavit is insufficient because it refers to only one occasion on which Smith entered the Reames Road house, which occurred some ten days before issuance of the search warrant; and that any evidence to support the affidavit was therefore remote and stale. This argument is without merit. The test for "staleness" is whether the facts indicate probable cause at the time the warrant issues. *Sgro v. United States*, 287 U.S. 206, 53 S.Ct. 138, 77 L.Ed. 260 (1932); *State v. King*, 44 N.C. App. 31, 259 S.E. 2d 919 (1979). The occasion referred to in the affidavit was but one step in Smith's consistent pattern of selling drugs, and it actually strengthened the affidavit.

The magistrate and the trial court correctly found there was probable cause to believe that Reames Road was the site of the source; that the facts provided in the application and affidavit implicated the property and persons within the house at the address. We concur in the decision of the magistrate and the trial judge.

Affirmed.

Judges ARNOLD and WHICHARD concur.

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

No. 8210SC206

(Filed 15 February 1983)

Highways and Cartways § 2.1— revoking outdoor advertising sign permit error—finding plaintiff cut vegetation to improve visibility of advertising structure not supported by evidence

The superior court properly found that a decision of the Department of Transportation which had concluded that the petitioner had destroyed the vegetation near an outdoor sign it maintained was not supported by the evidence where the evidence presented by the Department of Transportation showed only that vegetation around the petitioner's sign had been cut, that the advertisement on the sign had been changed near the time the vegetation was cut, and that the petitioner had worked on its sign at approximately the same time. G.S. § 136-134.1.

APPEAL by respondent from *Cornelius, Judge.* Judgment entered 27 November 1981 in Superior Court, WAKE County. Heard in the Court of Appeals 13 January 1983.

The record reveals the following facts. On 21 July 1980 the North Carolina Department of Transportation's District Engineer for Vance County notified the petitioner, National Advertising Company, that its outdoor advertising sign permit No. I-0085-39073 had been revoked. On 29 July 1980 National Advertising informed the District Engineer for Vance County that it was appealing the revocation to the Secretary of the Department of Transportation pursuant to N.C. Gen. Stat. § 136-134. By a letter of 4 September 1980, a copy of which was served upon the petitioner on 29 September 1980, the Secretary of the Department of Transportation denied the appeal. The letter read in part:

> Your permit was revoked because vegetation was cut and destroyed on the highway right of way in order to increase or enhance the visibility of an outdoor advertising structure.

Our staff has investigated this matter and informed me the area of vegetation cut was triangular with dimensions of approximately 200′ by 45′ with a fence delineating the right of way.

North Carolina General Statute 136-93 provides that it is unlawful for any person to cut trees or shrubs from the State highway rights of way.

Section 19A NCAC 2E. 0210(8) provides for the revocation of a sign permit for the unlawful destruction of trees or shrubs or other growth located on the right of way in order to increase the visibility of an outdoor advertising structure.

. . .

From the above information, it is my conclusion District Engineer Ross made the proper decision in this matter.

I must uphold the decision and inform you the sign must be removed within thirty (30) days from receipt of this notice or the Department of Transportation will remove the signs at your expense.

. . .

Sincerely,
s/T. W. Bradshaw
Thomas W. Bradshaw, Jr.
Secretary

The petitioner appealed this decision, as provided by N.C. Gen. Stat. § 136-134.1, by filing a petition with the Superior Court of Wake County on 6 October 1980.

At a hearing before Judge Cornelius, each party presented only one witness. Laura Orazi, an employee of National Advertising, testified that her company had done work on the sign in question at approximately the same time the vegetation had been cut but the company was not aware of any cutting done by any of its agents or employees. She testified further that after her company's examination of its records and personnel it had been unable to determine who was involved in cutting the vegetation. Cortez M. Lewis, an engineer technician with the Department of Transportation, testified he passed the sign in question daily go-

ing to and from work, and he had made a photographic record of the sign. A photograph dated 29 August 1979 revealed vegetation up and down the front of the sign, but a photograph dated 15 July 1980 showed the vegetation had been cut. Lewis also testified that between the dates of the two photographs the advertising on the signboard had been changed. After discovering the vegetation had been cut, Lewis checked with the Highway Patrol and other individuals to determine who had done the cutting, but he was unsuccessful in finding out their identity.

After hearing this evidence the trial court made the following pertinent findings of fact:

. . .

3. That the person or persons involved in the cutting on the highway right-of-way which caused the Department of Transportation to revoke the said sign permit of Petitioner, National Advertising Company, have not been identified nor established by law by any competent or credible evidence before the Court.

. . .

5. That there is no evidence before the Court that Petitioner, National Advertising Company, or any of its personnel or anyone acting in the capacity of an agent for National Advertising Company or acting under their supervision or guidance or instructions did at any time cause the destruction of vegetation as set forth in the decision of the Secretary of Transportation.

The trial court then concluded as a matter of law that there was no competent evidence to establish that petitioner had destroyed the vegetation near the sign and no reasonable inference could be drawn which showed the petitioner had been involved in any cutting. Therefore, Judge Cornelius entered an order reversing the decision of the Secretary of Transportation. From that judgment, the respondent, Secretary of Transportation, appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Thomas H. Davis, Jr. for the Secretary of the Department of Transportation, respondent-appellant.

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

HEDRICK, Judge.

The trial court heard this case pursuant to N.C. Gen. Stat. § 136-134.1 which reads in part:

> The review of the decision of the Secretary of Transportation under this Article shall be conducted by the court without a jury and shall hear the matter de novo pursuant to the rules of evidence as applied in the General Court of Justice. The court, after hearing the matter may affirm, reverse or modify the decision if the decision is:
>
> (1) In violation of constitutional provisions; or
>
> (2) Not made in accordance with this Article or rules or regulations promulgated by the Department of Transportation; or
>
> (3) Affected by other error of law.
>
> The party aggrieved shall have the burden of showing that the decision was violative of one of the above.
>
> A party to the review proceedings, including the agency, may appeal to the appellate division from the final judgment of the Superior Court under the rules of procedure applicable in civil cases. The appealing party may apply to the Superior Court for a stay for its final determination or a stay of the administrative decision, whichever shall be appropriate, pending the outcome of the appeal to the appellate division.

This statute clearly limits the scope of review in this case to (1) constitutional violations, (2) statutory or regulatory irregularities or (3) other errors of law. After a hearing, the Superior Court judge made findings of fact and pointed to errors of law compelling the reversal of the Secretary of Transportation's decision. Judge Cornelius found no evidence that established that the petitioner, National Advertising Company, or any of its personnel or

agents had cut the vegetation surrounding the highway advertising sign in question. He further concluded:

> [T]he Court cannot draw any legitimate permissible inference or conclusion from the evidence presented to the Court that National Advertising Company or any person acting under its authority, supervision, or direction did at any time violate the regulation in question and that the revocation of the permit for the sign applying the test of reasonableness and fairness is beyond the powers and authority of the Secretary of Transportation and Department of Transportation to revoke said permit.

We have reviewed the trial court's findings of fact and conclusions of law and the entire record on appeal. We can find no error in the judge's ruling that there was insufficient evidence to support an inference that petitioner had cut vegetation in violation of the Department of Transportation regulations. The evidence presented by the Department of Transportation showed only that vegetation around the petitioner's sign had been cut, that the advertisement on the sign had been changed near the time the vegetation was cut, and that the petitioner had worked on its sign at approximately the same time. The evidence fails to show the identity of those who did the cutting or to connect the petitioner to the cutting in any way. We hold the party aggrieved, National Advertising Company, carried its burden of showing that the decision of the Secretary of the Department of Transportation was not supported by competent evidence in the record.

Affirmed.

Judges JOHNSON and EAGLES concur.

STATE OF NORTH CAROLINA v. RAYMOND MORRIS

No. 8227SC464

(Filed 15 February 1983)

1. **Criminal Law § 163— jury instruction conference—necessity for request**

Defendant could not assert as error the trial court's failure to conduct a jury instruction conference where defendant failed to request an instruction conference as contemplated by G.S. 15A-1231(b), since Superior and District Court Rule 21 which requires an instruction conference must give way to the provisions of the statute. G.S. 7A-34.

2. **Criminal Law § 163— opportunity to object to instructions—effect of failure to object**

Defendant was given a sufficient opportunity to object outside the hearing of the jury to the trial court's instructions pursuant to the requirement of Superior and District Court Rule 21 when, at the conclusion of the instructions, the trial judge inquired as to whether there was anything further from the State or the defendant, and where defendant failed to object to the court's instruction concerning his failure to testify, he did not properly preserve for appeal his assignment of error to such instruction under Appellate Rule 10(b)(2).

3. **Criminal Law § 138— offense before Fair Sentencing Act—finding of aggravating factors—no prejudice to defendant**

Defendant was not entitled to a new sentencing hearing because the trial court found three aggravating circumstances in imposing a sentence for an offense which occurred prior to the effective date of the Fair Sentencing Act where the sentence imposed was well within the statutory limit for the crime, and the matters considered and labeled by the court as "aggravating" factors were proper and relevant for consideration for purposes of sentencing. G.S. 15A-1340.1; G.S. 15A-1340.3.

APPEAL by defendant from *Friday, Judge.* Judgment entered 9 December 1981 in Superior Court, CLEVELAND County. Heard in the Court of Appeals 8 November 1982.

Defendant was tried upon an indictment charging him with having committed an assault with a deadly weapon with intent to kill, inflicting serious injury on or about 20 June 1981. Defendant was convicted by jury of assault with a deadly weapon inflicting serious injury, and sentenced to four years imprisonment. From this judgment, defendant appeals.

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

Appellate Defender Adam Stein, by Assistant Appellate Defender Nora B. Henry, for defendant appellant.

JOHNSON, Judge.

Defendant contends the trial court erred in (1) failing to conduct a jury instruction conference as required by Rule 21, (2) instructing the jury on defendant's failure to testify and (3) imposing an improper sentence.

The trial judge failed to conduct a jury instruction conference and the defendant failed to request one. Then the trial judge, without a request from defendant, gave the following disputed charge:

> Now ladies and gentlemen, . . . the Court will instruct you further, the defendant, Raymond Morris, has not gone on the witness stand and testified during this trial. Under the law, when a person is placed upon trial in a criminal case, such defendant may or may not go upon the witness stand to testify in his own behalf, as he may elect or as his counsel may advise. The Court, therefore, charges you that a failure to go upon the witness stand is not to be considered as evidence of any kind in this case, for the burden of proof is on the State, as the Court has heretofore instructed you, to satisfy you from the evidence beyond a reasonable doubt of the defendant's guilt.

At the conclusion of the jury instruction and prior to the jury commencing its deliberations, the trial judge inquired of the attorneys, "all right now, anything further from either the State or the defendant?" In response, defense counsel requested and was allowed to approach the bench where a bench conference ensued. As a result of this bench conference, the court corrected an earlier misstatement of the evidence.

[1] By his first assignment of error, defendant argues that it is mandatory under Rule 21 of the General Rules of Practice for Superior and District Courts that a jury instruction conference be conducted and that the court's failure to conduct the conference denied defendant the opportunity to object to any portion of the

charge at trial. By his second assignment of error, defendant argues that it was error for the court to instruct on defendant's failure to testify and that the instruction as given was defective because it did not inform the jury that "defendant's failure to testify shall not create any presumption against him." We note that defendant did not object to the disputed charge.

Defendant's first and second assignments of error are controlled by this Court's decision in *State v. Bennett*, 59 N.C. App. 418, 297 S.E. 2d 138 (1982). In *Bennett* the following pertinent facts appeared: the trial judge failed to conduct a jury instruction conference as required by Rule 21 of the Rules of Practice; the defendant did not request an instruction conference; without a request from defendant, the trial judge gave an identical instruction as given in this case on the defendant's failure to testify; at the conclusion of the jury instruction and prior to the jury commencing its deliberations, the court inquired of counsel for the State and defense if there was anything further to which defendant's counsel stated "nothing for the defense;" and the defendant failed to object to the disputed charge.

This Court stated that the provision of Rule 21 which requires the trial judge to conduct a jury instruction conference conflicts with G.S. 15A-1231(b).[1] The Court then concluded:

1. Rule 21 provides: *Jury Instruction Conference.* At the close of the evidence (or at such earlier time as the judge may reasonably direct) in every jury trial, civil and criminal, in the superior and district courts, the trial judge shall conduct a conference on instructions with the attorneys of record (or party, if not represented by counsel). Such conference shall be out of the presence of the jury, and shall be held for the purpose of discussing the proposed instructions to be given to the jury. An opportunity must be given to the attorneys (or party, if not represented by counsel) to request an additional instructions or to object to any of those instructions proposed by the judge . . . At the conclusion of the charge and before the jury begins its deliberations, and out of the hearing, or upon request, out of the presence of the jury, counsel shall be given the opportunity to object on the record to any portion of the charge, or omission therefrom, stating distinctly that to which he objects and the grounds of his objection.

G.S. 15A-1231(b) provides: On request of either party, the judge must, before the arguments to the jury, hold a recorded conference on instructions out of the presence of the jury. At the conference the judge must inform the parties of the offenses, lesser included offenses, and affirmative defenses on which he will charge the jury and must inform them of what, if any, parts of tendered instructions will be given. A party is also entitled to be informed, upon request, whether the judge intends to include other particular instructions in his charge to the jury. The failure

> [G.S. 15A-1231(b)] clearly contemplates that defendant was required to request an instruction conference as a prerequisite for assigning error to the trial court's failure to conduct one. Pursuant to the provisions of G.S. 7A-34, Rule of Practice 21 must give way to the provisions of the statute. Defendant not having requested an instruction conference, he cannot assert as error the trial court's failure to conduct one, nor did this conduct of the trial court excuse defendant's failure to enter a contemporaneous objection to the disputed instruction.

59 N.C. App. at 423-24, 297 S.E. 2d at 141.[2]

[2] As to defendant's contention that he was not given an opportunity to object outside the hearing of the jury, the Court stated:

> [T]he trial court's inquiry was sufficient to provide defendant an opportunity to approach the court and object outside the hearing of the jury and therefore constituted substantial compliance with that portion of Rule 21 which requires an opportunity to object outside the hearing of the jury.

Id. at 424, 297 S.E. 2d at 142.

The *Bennett* court concluded that the defendant's failure to object to the disputed charge during the opportunity provided resulted in his failure to properly preserve the assignment of error for appeal, as required by Rule 10(b)(2).[3] This case is indistinguishable from *Bennett* and defendant has failed to preserve his two assignments of error regarding the trial court's jury instruction.

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of the judge to comply fully with the provisions of this subsection does not constitute grounds for appeal unless his failure, not corrected prior to the end of the trial, materially prejudiced the case of the defendant.

2. G.S. 7A-34 provides: The Supreme Court is hereby authorized to prescribe rules of practice and procedure for the superior and district courts supplementary to, and not inconsistent with, acts of the General Assembly.

3. Rule 10(b)(2) provides: No party may assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection; provided, that opportunity was given to the party to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

[3] Defendant next contends his sentence is null and void and that he is entitled to a new sentencing hearing. Defendant argues that the court considered improper matters in sentencing him and erroneously sentenced him pursuant to the Fair Sentencing Act which was inapplicable to defendant's case because the offense for which defendant was convicted occurred prior to the effective date of the Act. The Fair Sentencing Act specifically provides that the act ". . . shall apply to the sentencing of all persons convicted of felonies . . . that occur on or after July 1, 1981." G.S. 15A-1340.1.

The offense for which defendant was convicted occurred on or about 20 June 1981. Upon sentencing defendant, the court found the following aggravating circumstances and imposed a sentence of four years: (1) defendant was previously convicted and served time for second degree murder; (2) the victim was unarmed, in the presence and vicinity of a small child and on his own premises at the time of the assault; and (3) defendant used a deadly weapon, inflicted serious bodily injury and fled the scene of the crime.

Defendant is correct in his contention that the Fair Sentencing Act was not applicable to his case; however, this does not warrant a new sentencing hearing. The maximum punishment allowed under the statute applicable to defendant's case at the time was ten years. G.S. 14-32(b) provides, "[a]ny person who assaults another person with a deadly weapon and inflicts serious injury is guilty of a felony punishable by a fine, imprisonment for not more than 10 years, or both such fine and imprisonment." There was no presumptive sentence applicable to defendant's case and the trial court was at liberty to impose a maximum sentence of ten years without making any findings. The four year sentence imposed was well within the statutory limit and is presumed to be valid and regular unless the record discloses that the court considered irrelevant and improper matters in determining the severity of sentence. *State v. Swinney*, 271 N.C. 130, 155 S.E. 2d 545 (1967); *State v. Stewart*, 4 N.C. App. 249, 166 S.E. 2d 458 (1969); *State v. Harris*, 27 N.C. App. 385, 219 S.E. 2d 306 (1975).

This Court has held that in determining the sentence to be imposed, the trial judge may consider such matters as the age, character, education, environment, habits, mentality, propensities

and record of the defendant. *State v. Stewart, supra* at 251, 166 S.E. 2d at 460. In addition to considering the defendant's record, the trial judge in the present case considered several facts and circumstances of the crime for which defendant was convicted and was to be sentenced. G.S. 15A-1340.3 provides:

> The primary purposes of sentencing a person convicted of a crime are to impose a punishment commensurate with the injury the offense has caused, taking into account factors that may diminish or increase the offender's culpability; to protect the public by restraining offenders; to assist the offender toward rehabilitation and restoration to the community as a lawful citizen; and to provide a general deterrent to criminal behavior.

In sentencing defendant the trial judge was not required to ignore the facts and evidence of the case. The matters considered and labeled by the court as "aggravating" factors were proper and relevant for consideration for purposes of sentencing. The defendant has failed to show that the trial judge considered an improper or irrelevant matter in sentencing him.

In defendant's trial we find

No error.

Judges ARNOLD and HILL concur.

STATE OF NORTH CAROLINA v. GARY WAYNE TEAGUE

No. 8215SC674

(Filed 15 February 1983)

1. Criminal Law § 138— Fair Sentencing Act—failure to make finding as to mitigating factors—no abuse of discretion

It was not error for the trial judge to fail to find as mitigating factors (1) that defendant submitted to arrest without incident, (2) that defendant's acts were a result of his being unable to rapidly adapt to society outside prison walls, (3) that a lengthy prison term without treatment would be of no benefit to a homosexual, and (4) that, if not incarcerated, defendant would have available a stable and supportive family environment. G.S. 15A-1340.4.

2. Criminal Law § 138.7— sentencing hearing—prior convictions—sufficient to support sentence in excess of presumptive term

The trial court properly considered as an aggravating factor that defendant had prior convictions for criminal offenses punishable by more than 60 days confinement, and defendant failed to show there was an abuse of discretion in the trial judge's balancing of the aggravating and mitigating factors in determining defendant's sentence.

APPEAL by defendant from *Martin, Judge*. Judgment entered 18 February 1982 in ORANGE County Superior Court. Heard in the Court of Appeals 12 January 1983.

Defendant, Gary Wayne Teague, was convicted of attempting, on 14 September 1981, to commit a crime against nature, a Class H felony for which the presumptive sentence is three years and the maximum sentence is ten years.

The evidence at trial tended to show, in part, the following. Defendant is 32 years of age. He and a male acquaintance aged 16 years went to defendant's residence and smoked some marijuana. The two went to defendant's bedroom and defendant eventually attempted to force his acquaintance to perform oral sex, forcibly removing the victim's pants and hitting him with a wooden paddle. Another acquaintance of defendant's called the police who arrived at defendant's residence while defendant was still assaulting the victim. The officers knocked on the bedroom door and defendant asked them to wait a second, telling his victim to get dressed and to pretend that nothing had happened. Defendant, after getting partially dressed, emerged from his bedroom and surrendered himself to the officers.

A sentencing hearing was held where the following pertinent evidence was presented. The State presented certified copies of court documents showing that defendant had two prior convictions for felonious crime against nature and one prior felony conviction for taking indecent liberties with a child. Defendant's father testified on behalf of defendant, stating that his family was stable and supportive of defendant, that he would try to help defendant acquire a job, and that he knew of no instance where defendant had hurt or injured anyone. Defendant's father also testified that he became aware of the fact that defendant was a homosexual in 1968 when defendant was convicted of crime against nature and sent to prison. He testified that from 1967 to

April of 1981 defendant had been in prison except between 1974 and 1977; that during the three years he was not in prison defendant was unable to hold a job for very long; and that defendant had sought mental health assistance in Burlington for a short time. Addressing the trial judge, defendant expressed a desire to undergo treatment for homosexuality.

The trial judge found as an aggravating factor that defendant has prior convictions for criminal offenses punishable by more than 60 days, listing in his judgment defendant's prior convictions. The court found no factors in mitigation and, finding that the factor in aggravation outweighed the factors in mitigation, sentenced defendant to ten years in prison, the maximum sentence. The trial court ordered that, upon his admission to the Department of Corrections, defendant be given a diagnostic study and rendered such treatment as is available while in confinement. From the judgment of the trial court, imposing a sentence longer than the presumptive sentence, defendant appealed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Tiare B. Smiley, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Nora B. Henry, for defendant.

WELLS, Judge.

The questions defendant raises on this appeal pertain to sentencing. When a convicted felon is given a sentence in excess of the presumptive sentence, he may appeal as a matter of right, and the only question before the appellate court on such an appeal is whether the sentence is supported by evidence introduced at trial and the sentencing hearing. G.S. 15A-1444(a1). Under our scheme of presumptive sentencing, as it applies to the present case, the trial judge must impose the statutorily set presumptive sentence unless he properly makes written findings of aggravating or mitigating factors and then finds that one set of factors outweighs the other. *See* G.S. 15A-1340.4. As long as they are not essential to the establishment of elements of the offense, all circumstances that are both transactionally related to the offense and reasonably related to the purposes of sentencing *must* be considered by the sentencing judge. *State v. Melton*, 307 N.C. 370, 298 S.E. 2d 673 (1983), *citing* G.S. 15A-1340.4(a). The trial

judge *may* consider aggravating and mitigating factors supported by evidence not used to prove an essential element as long as those factors are reasonably related to the purposes of sentencing. G.S. 15A-1340.4(a). The factors found must be supported by a preponderance of the evidence. G.S. 15A-1340.4(a). The balancing of the properly found factors in aggravation and mitigation is left to the sound discretion of the trial judge. *State v. Melton, supra.*

[1] At the sentencing hearing, defendant's attorney urged the judge to consider that defendant submitted to arrest without incident, that defendant's acts were a result of his being unable to rapidly adapt to society outside prison walls, that a lengthy prison term without treatment would be of no benefit to a homosexual, and that, if not incarcerated, defendant would have available a stable and supportive family environment. By his first assignment of error, defendant contends that the trial judge erred in failing to find these four "mitigating factors." While we believe that each of these asserted "factors" could, under the proper circumstances, support the finding of factors in mitigation, on the facts of the present case we do not find it to be error for the trial judge to fail to find mitigating factors based on the evidence in this case. Stated differently, we hold that the trial judge could have properly rejected each of the submitted "factors" because he found them to be either not reasonably related to the purposes of sentencing, *see State v. Melton, supra,* not transactionally related to the offense, *see id.*, or not proven by a preponderance of the evidence, *see State v. Davis*, 58 N.C. App. 330, 293 S.E. 2d 658, *disc. rev. denied*, 306 N.C. 745, 295 S.E. 2d 482 (1982). Additionally, we note that the trial judge did order that defendant be given whatever treatment was available while incarcerated.

[2] By his second assignment of error, defendant contends that the aggravating factor found (*i.e.* that defendant has prior convictions for criminal offenses punishable by more than 60 days confinement) is insufficient to support the imposition of a sentence in excess of the presumptive term. This contention is without merit. Pursuant to G.S. 15A-1340.4, the trial judge *must* consider whether the defendant has prior convictions for criminal offenses punishable by more than 60 days confinement. The evidence of defendant's prior convictions was in a form which is preferred by statute: a certified copy of the court record. *See* G.S. 15A-1340.4

(e); *and State v. Massey*, 59 N.C. App. 704, 298 S.E. 2d 63 (1982) (stating that G.S. 15A-1340.4(e) does not preclude the State from using reliable methods of proof other than those enumerated by the statute for proving prior convictions). The balancing of the aggravating and mitigating factors is left to the discretion of the trial judge. *Melton, supra.* Defendant has not shown that there was an abuse of discretion. Therefore, this assignment of error is overruled.

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

Affirmed.

Chief Judge VAUGHN and Judge BRASWELL concur.

MARTHA E. EDWARDS, BRANTLEY REALTY v. DIANE C. LATHAM AND NORTH CAROLINA REAL ESTATE LICENSING BOARD

No. 8210SC113

(Filed 15 February 1983)

Brokers and Factors § 8— revocation of real estate license—decision supported by evidence

The North Carolina Real Estate Licensing Board did not err in finding that petitioner's activities as a real estate agent constituted five separate violations of the Real Estate Licensing Law, and the trial court did not err in affirming the Board's conclusion where petitioner failed to contact the seller of land with regard to a purchaser's offer, where petitioner falsely told the purchaser that the seller had refused her offer, and where, when the purchaser agreed to a compromise offer, petitioner discovered the land contained more acreage than originally thought and falsely told the purchaser that the seller would require an additional $5,000. The trial court could find that two or more sections of the Licensing Act could be violated by one act of petitioner and the Board acted within its power in revoking petitioner's license based upon any one of the violations it found. G.S. 93A-6(a)(1), (4), (8), (10) and (15).

APPEAL by petitioner from *Cornelius, Judge.* Judgment entered 13 November 1981 in WAKE County Superior Court. Heard in the Court of Appeals 17 November 1982.

This is an appeal from a superior court judgment which affirmed the North Carolina Real Estate Licensing Board's decision to revoke Martha Edwards' real estate broker's license.

Attorney General Edmisten, by Assistant Attorney General Harry H. Harkins, Jr., for respondent appellee, Real Estate Licensing Board.

Petree, Stockton, Robinson, Vaughn, Glaze and Maready, by James H. Kelly, Jr. and Michael L. Robinson, for petitioner appellant.

BECTON, Judge.

I

Martha Edwards, petitioner, is a licensed real estate broker affiliated with Brantley Realty and Insurance Company in Mocksville, North Carolina. On 9 January 1980, Diane Latham, respondent, filed a complaint against Ms. Edwards with the North Carolina Real Estate Licensing Board (Board). The ensuing investigation revealed alleged misconduct by Ms. Edwards arising out of a land trade agreement between Ms. Edwards and Jerry Eller, a third party vendor.

Mrs. Latham alleged, and the Board found as facts, *inter alia*, (i) that Ms. Edwards, with whom Eller had listed his land for sale, failed to contact "Mr. Eller with regard to Mrs. Latham's $20,000 offer" to purchase Eller's land; (ii) that Ms. Edwards falsely told Mrs. Latham that Eller had refused her offer of $20,000, but would take $22,500 for the land; and (iii) that after Mrs. Latham agreed to pay $22,500 for the land, Ms. Edwards discovered that the tract of land contained 20.07 acres (not sixteen acres) and then falsely told Mrs. Latham that Eller would not sell the tract for $22,500 but would require an additional $5,000 since the tract contained more land than was contemplated. Based on these findings, the Board concluded, and the trial court affirmed the Board's conclusions, that Ms. Edwards' activities violated the Real Estate Licensing Law in the following particulars: (i) making substantial and willful misrepresentations in contravention of N.C. Gen. Stat. § 93A-6(a)(1) (1981) (three counts); (ii) being unworthy or incompetent to act as a real estate broker or salesman in such a manner as to safeguard the interests of the public in contravention of G.S. § 93A-6(a)(8); and (iii) improper, fraudulent or dishonest dealing, in violation of G.S. § 93A-6(a)(10).

II

Two issues are raised on appeal: whether the trial court erred in affirming the Board's decision of revocation which was based on the five separate violations of the Real Estate Licensing Law when Ms. Edwards allegedly committed less than five acts of misconduct; and whether certain evidence was erroneously excluded. Based on our review of the record and the applicable law, we find no error in the trial.

III

The Board has the power, pursuant to statute, to suspend or revoke real estate licenses whenever it deems a licensee guilty of any one or more of fifteen (15) enumerated offenses. G.S. § 93A-6(a). Ms. Edwards was found guilty of violating three separate provisions of the real estate licensing law, which the Board termed "improper and dishonest dealing, being unworthy to act as a real estate broker, and making willful and substantial misrepresentations" (three counts). Although Ms. Edwards was found to have made three substantial and willful misrepresentations, she does not, in her brief, contest those findings on appeal, and those findings are conclusive on appeal. *Cox v. Real Estate Licensing Board*, 47 N.C. App. 135, 266 S.E. 2d 851 (1980), *disc. review denied*, 301 N.C. 87, 273 S.E. 2d 296 (1980); *see also*, Rule 28A, North Carolina Rules of Appellate Procedure.

IV

Ms. Edwards, relying on *Parrish v. Real Estate Licensing Board*, 41 N.C. App. 102, 254 S.E. 2d 268 (1979), essentially argues that if the representations she made to Mrs. Latham about Eller's rejection of the $20,000 offer were false, "which is denied, the misrepresentation constituted only a violation of G.S. 93A-6(a)(1) (substantial and willful misrepresentation), was only one act, and did not constitute violation of G.S. 93A-6(a)(8) (being unworthy to act as a real estate broker in such a manner as to safeguard public interest) or G.S. 93A-6(a)(10) (engaging in improper and dishonest dealing)."

First, Ms. Edwards' reliance on *Parrish* is misplaced. *Parrish* concerns the requirements for, and adequacy of, the notice given to a licensee prior to a disciplinary hearing. The Board's decision was vacated on remand because of failure to serve adequate

notice to the licensee. We opined then, and reiterate here, that given adequate and specific findings and notice, two or more sections can be violated by one act. *Cf., Real Estate Licensing Board v. Gallman*, 52 N.C. App. 118, 277 S.E. 2d 853 (1981) (involving the sufficiency of the findings of fact to support the revocation, on multiple grounds, of a real estate broker's license).

The Board in this case, in its Notice of Hearing, specifically apprised Ms. Edwards that G.S. 93A-6(a)(1), (4), (8), (10) and (15) were the provisions by which her actions were to be reviewed; the *Parrish* requirements were thereby met. Further, the Board explicitly found and concluded, *inter alia*, that:

> (2) Respondent is deemed guilty of violating G.S. 93A-6(a)(10) by engaging in improper and dishonest dealing, by failing to disclose or present Mrs. Latham's original offer of $20,000 to Mr. Eller and by falsely representing to Mrs. Latham that Mr. Eller later refused to sell her all of the land on the southeast (left) side of Society Church Road at the contemplated price.
>
> (3) [Ms. Edwards] is deemed guilty of violating G.S. 93A-6(a)(8) as being unworthy to act as a real estate broker in such manner as to safeguard the public interest, in that she failed to disclose or present Mrs. Latham's original offer of $20,000 to Mr. Eller and by falsely representing to Mrs. Latham that Mr. Eller later refused to sell her all of the land on the southeast (left) side of Society Church Road at the contemplated price.

Second, the Board acted within its power, and it properly revoked Ms. Edwards' license based on its finding that each of the false statements to Mrs. Latham was a substantial and willful misrepresentation. That finding alone is sufficient to sustain the revocation. In any event, we hold that findings of willful failure to disclose a suitable offer to a seller, and willful misrepresentations to the purchaser that the seller refused that same offer are sufficient to support the conclusion that multiple violations of the Real Estate Licensing Law had occurred.

V

Ms. Edwards also argues that the statements she allegedly made to Mrs. Latham that Mr. Eller would not sell the 20.075

acres on the left side of Society Church Road property for $22,500 and would require an additional $5,000 because the acreage was 20.075 as opposed to 16 acres, do not constitute two substantial and willful misrepresentations. In our view, Ms. Edwards' statements constitute two misrepresentations. In any event, as we stated earlier, one misrepresentation provided the Board with a sufficient basis to revoke Ms. Edwards' license.

VI

We have examined petitioner's remaining argument and find it to be without merit. Accordingly, the judgment of the trial court is

Affirmed.

Judges HEDRICK and WEBB concur.

JOEL HAGER AND WIFE, BERNICE HAGER v. A. V. CRAWFORD AND AL CRAWFORD D/B/A A. V. CRAWFORD & SON ELECTRIC CO., AND LENNOX INDUSTRIES, INC., A TEXAS CORPORATION

No. 8219SC211

(Filed 15 February 1983)

Unfair Competition § 1— action for unfair trade practices—summary judgment for defendants

In an action against the sellers and manufacturer of a heat pump to recover damages for alleged unfair and deceptive trade practices in misrepresenting the ability of the sellers properly to install the heat pump in plaintiffs' residence, summary judgment was properly entered in favor of all defendants where the plaintiffs' own materials showed that defendant sellers made no representations to plaintiffs as to their ability to install the heat pump but told plaintiffs that they had never wired a heat pump before, and where the plaintiffs' materials showed that defendant manufacturer made no representations to plaintiffs, express or implied, concerning the qualifications of the sellers to install and service heat pump equipment.

APPEAL by plaintiffs from *Rousseau, Judge*. Judgment entered 15 October 1981 in Superior Court, ROWAN County. Heard in the Court of Appeals 13 January 1983.

Plaintiffs, dissatisfied with the performance of the Lennox heat pump which had been installed in their residence at their request, filed suit against A. V. Crawford and Al Crawford d/b/a A. V. Crawford & Son Electric Co., the installers of the heat pump system, and Lennox Industries, Inc., the manufacturer and distributor of the heat pump system, alleging that defendants had engaged in unfair and deceptive trade practices in violation of G.S. 75-1.1. In particular plaintiffs alleged that defendants misrepresented the ability of the Crawfords to properly install the Lennox heat pump system and that these misrepresentations constituted unfair and deceptive trade practices.

Defendants moved for partial summary judgment as to plaintiffs' G.S. 75-1.1 allegations. After reviewing the depositions of plaintiffs, Mr. and Mrs. Hager, of defendant Lennox's employees, and of the two Crawfords, the trial court granted the partial summary judgment motions. Plaintiffs appealed from the trial court's grant of partial summary judgment.

Ketner and Rankin, by David B. Post, for plaintiff-appellants.

Davis and Corriher, by Robert M. Davis, for defendant-appellees A. V. Crawford and Al Crawford.

Kluttz, Hamlin, Reamer, Blankenship & Kluttz by Richard R. Reamer, for defendant-appellee Lennox Industries, Inc.

EAGLES, Judge.

Plaintiffs assign as error the trial court's summary judgment for defendants as to their second and sixth claims for relief. Plaintiffs contend that there were issues of material fact as to whether the defendants engaged in misrepresentation or unfair and deceptive acts or practices in violation of Chapter 75 of the North Carolina General Statutes. Having carefully reviewed the record, we find that the trial court properly granted partial summary judgment as to plaintiffs' Chapter 75 claims for relief, since there were no issues of material fact for the jury.

Plaintiffs' second claim for relief states

> 16. In all dealings with plaintiffs, Crawfords have made representations to plaintiffs that they were professionally qualified, trained, and certified to install and serve Lennox heat pump systems.

17. On information and belief, Crawfords had no prior experience or formal training in the installation of Lennox heat pump systems or any other heat pump systems at the time they installed the plaintiffs' heat pump.

18. Crawfords made the said representations to plaintiffs to induce plaintiffs to purchase a heat pump from Crawfords, and in reliance thereon plaintiffs purchased the said heat pump.

19. Said misrepresentations of Crawfords as hereinabove alleged constitute unfair and deceptive acts and practices in or affecting commerce within the meaning of North Carolina General Statute Sec. 75-1.1.

Plaintiffs have presented an insurmountable bar to recovery under this claim for relief. Plaintiff Joel Hager, when deposed, stated that Al Crawford had informed him "that he had never wired a heat pump." Hager further stated that "I believe I knew that this was their first heat pump installation." There is no evidence in the record suggesting that the Crawfords made any representations as to their ability to install a heat pump. On the contrary, plaintiff Joel Hager testified that they "never made any representations to me about the proficiency of their work. Neither of the Crawfords made any representations to me about their qualifications. They never promised me that the heat pump would operate correctly, but they didn't say anything to the contrary either." Plaintiffs' own statements show that the Crawfords did not engage in any unfair or deceptive practices. Therefore we find no error in the trial court's granting defendants Crawfords' motion for partial summary judgment as to plaintiffs' allegations in their second claim for relief.

Plaintiffs' sixth claim for relief states

43. The implied representations made by Lennox to the public, including plaintiffs herein, that Crawfords were properly trained to install and service Lennox heat pumps, when Lennox had or should have had knowledge that potential purchasers would rely on such representations to their detriment and that Crawfords were, in fact, not adequately trained and educated in such matters were false, misleading and deceptive.

44. Said acts and representations of Lennox as hereinabove alleged constitute unfair and deceptive acts and practices in or affecting commerce within the meaning of North Carolina General Statute Sec. 75.1.1

Similarly, there is no evidence before us that defendant Lennox made any representations to plaintiffs, express or implied, concerning the qualifications of the Crawfords to install and service heat pump equipment. On the contrary, plaintiff Joe Hager stated that "Lennox never told me that Crawford was an authorized heat pump dealer." Plaintiff Bernice Hager stated that "[n]either of the Crawfords made any sales pitch to me about heat pumps. Neither did anyone from Lennox Industries." As above, we find that plaintiffs' statements concerning their dealings with defendant Lennox eliminate any material issue of fact as to the allegations of unfair and deceptive trade practices and misrepresentation.

The Supreme Court has recently defined "unfair methods of competition," stating that this phrase includes the concept of deception. *Johnson v. Insurance Company*, 300 N.C. 247, 266 S.E. 2d 610 (1980). "A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Id.* at 263, 266 S.E. 2d at 621. The record in this case is devoid of any evidence of activity which would fit into these guidelines.

For these reasons, the trial court's order is

Affirmed.

Judges HEDRICK and JOHNSON concur.

THE NORTHWESTERN BANK, ELKIN, N. C. v. CLIFFORD MORRISON AND WIFE, GLADYS C. MORRISON

No. 8217DC279

(Filed 15 February 1983)

1. **Rules of Civil Procedure § 41; Trial § 3.1— denial of motion to set aside default judgment—hearing motion in absence of defendants' attorney—denial of motion for continuance—no abuse of discretion**

The trial judge did not commit prejudicial error in hearing a motion to set aside a default judgment in the absence of defendants' attorney where the evidence tended to show that the court calendar informed the parties that the motion was to be heard on 18 January; neither defendants nor their counsel were present; the court rescheduled the matter for 19 January; the attorney for defendants was not present at the afternoon session, although defendants were present; there was a conflict as to whether or not the attorney for defendants asked for a continuance; however, it was apparent none was granted; and in spite of a directive by the trial judge to be present at the afternoon session, defendants' attorney failed to appear.

2. **Courts § 14.1; Rules of Civil Procedure § 55.1— pending motion to transfer case—refusal to set aside judgment—no error**

Under G.S. 7A-258(c), the trial judge did not err in refusing to set aside a default judgment when there was a pending motion to transfer the case to superior court since defendants did not move to transfer their case within 30 days after being served with a pleading.

APPEAL by defendants from *Martin, Judge.* Judgment entered 19 January 1982 in District Court, SURRY County. Heard in the Court of Appeals 20 January 1983.

This is a suit on a debt due plaintiff under notes which allegedly were in default. Defendants appeal from an order of the trial court denying their motion to set aside a default judgment.

Randleman, Randleman & Randleman, by R. Kirk Randleman, for plaintiff-appellee.

Franklin Smith for defendant-appellants.

HILL, Judge.

The trial judge made findings of fact showing substantially the following:

A summons and complaint demanding $66,255.77 plus interest and reasonable attorney fees of $9,938.36 were served on defend-

ants on 29 August 1981. Defendants failed to file an answer within the appropriate time. On 9 October 1981, an affidavit and motion for entry of default was filed, and entry of default was entered by the Clerk of Superior Court of Surry County. On the same day, judgment was entered in favor of the plaintiff.

On 13 October 1981, defendants through their attorney filed a motion to set aside the default judgment which was properly calendared for the civil term of district court of Surry County commencing 18 January 1982. When the case was called on 18 January 1982, defendants did not answer, and plaintiff through its attorney was present and ready to proceed. The matter was rescheduled for 19 January 1982, when defendants and plaintiff through their counsel were present. Counsel for defendants was present for the morning session but not for the afternoon session of court. Counsel for defendants did not request a continuance, but informed the court that he would not be present at the afternoon session. Although the judge told counsel for defendants to be present at the afternoon session, counsel for defendants failed to appear.

The case was properly called on 19 January 1982. Defendants and counsel for plaintiff were present. Both defendants were given an opportunity by the court to introduce evidence regarding the merits of the motion to set aside but declined to do so, indicating they wished to rely on their attorney.

Based on the foregoing and pursuant to Rule 41(b) of the North Carolina Rules of Civil Procedure, the trial judge concluded the motion was not justified, and dismissed with prejudice the motion to set aside the judgment.

Defendants through their counsel filed an affidavit challenging the findings of fact stating that counsel had informed the trial judge that he had to be in Alleghany County District Court at 2:00 p.m. on 19 January 1982, and further that he had requested a continuance until the following day. Defendants' attorney offered evidence tending to show he had been in district court in Alleghany County at the time of trial. Counsel also submitted an affidavit from the court reporter showing that defendants' counsel had asked for a continuance because he had to be in Alleghany County that day.

Defendants bring forth three assignments of error, but we conclude the matter is dispositive on the issue of whether the trial judge committed prejudicial error in hearing the motion to set aside in the absence of defendants' attorney. We affirm the decision of the trial court.

[1] The defendants had their day in court. The court calendar informed the parties that the motion was to be heard on 18 January 1981. Neither defendants nor their counsel were present. The court rescheduled the matter for 19 January 1981. The attorney for the defendants was not present at the afternoon session, although defendants were present. Whether or not the attorney for defendants asked for a continuance, it is apparent none was granted by the trial judge. In spite of a directive by the trial judge to be present at the afternoon session, defendants' attorney failed to appear. Rather, he went to a district court in an adjoining county. Defendants apparently knew the case would be tried, for they remained in the courtroom during the time of trial.

Findings of fact made by the trial judge upon a motion to set aside a judgment by default are binding on appeal if supported by any competent evidence. *Moore v. Deal*, 239 N.C. 224, 79 S.E. 2d 507 (1954). It is our opinion, and we so hold, that in the instant case there is competent evidence to support the findings of fact. We now examine the question whether the findings of fact support the conclusion.

Knowing defendants' attorney was not present, did the trial judge err in proceeding on the motion? Clearly, this was a matter within his discretion, and he did not abuse his discretion. The trial judge is responsible for operating the court in a judicious manner. It is apparent the attorney failed to heed the order of the judge to attend court at the appointed time.

Ordinarily, a client is not charged with the inexcusable neglect of his attorney, provided the client has exercised proper care. *Norton v. Sawyer*, 30 N.C. App. 420, 227 S.E. 2d 148, *disc. rev. denied*, 291 N.C. 176, 229 S.E. 2d 689 (1976). Nevertheless, the trial judge's action was substantiated by the facts before him. He had on his own motion continued the case once for the benefit of defendants. He had directed defendants' attorney to be present. He gave defendants an opportunity to present evidence. According to his findings of fact:

> [B]oth defendants did not desire to offer any evidence on their motion. And further that no evidence was introduced as to the merits of the motion of the defendants although both defendants were given an opportunity by the Court to do so . . . .

Opposing parties have some rights in the trial of a lawsuit. Here, plaintiff waited a reasonable period after the time for answering the complaint had expired before proceeding to judgment by default. Plaintiff was present in court when the case was called for trial and on the day to which the case was continued. Plaintiff's rights and time along with that of plaintiff's attorneys are of equal importance with that of defendants.

[2] Defendants' argument that the court erred in refusing to set aside the judgment when there was pending a motion to transfer the case to the superior court is without merit. G.S. 7A-258(c) provides:

> A motion to transfer by any party other than the plaintiff must be filed within 30 days after the moving party is served with a copy of the pleading which justifies transfer . . . .

Defendant appellants were served with copies of the complaint on 29 August 1981. The motion to transfer to superior court was filed 13 January 1982. G.S. 7A-257 provides: "Failure of a party to move for transfer within the time prescribed is a waiver of any objection to the division, except that there shall be no waiver of the jurisdiction of the superior court division in the probate of wills and administration of decedents' estates . . . ."

This assignment is overruled.

The order of the trial court is

Affirmed.

Judges ARNOLD and WHICHARD concur.

STATE OF NORTH CAROLINA v. TONY ANTHONY QUICK

No. 8210SC709

(Filed 15 February 1983)

Robbery § 4.3— robbery with a firearm—identification of instrument as firearm sufficiently positive

In a prosecution for robbery with a firearm, the identification of the instrument used as a firearm was sufficiently positive to be submitted to the jury where a witness testified that defendant pulled out "what appeared to me to be a sawed-off shotgun," and where the woman behind the cash register stated that the defendant and another man told her "not to hit the drawer or they would *shoot* me." G.S. 14-87.

APPEAL by defendant from *Battle, Judge.* Judgment entered 15 February 1982 in the Superior Court of WAKE County. Heard in the Court of Appeals 17 January 1983.

Attorney General Rufus L. Edmisten by Associate Attorney Floyd M. Lewis for the State.

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

BRASWELL, Judge.

The indictment charged the offense of robbery with a firearm, and alleged the weapon to be a shotgun. The verdict was "guilty of robbery with a firearm." The sole question presented for review is whether the trial court erred in denying the defendant's motion to dismiss at the close of all the evidence. Defendant contends that "the state failed to show that the instruments displayed by the alleged robbers were in fact firearms."

On 22 July 1981, two men, one of whom was later identified as the defendant Quick, entered The Showroom, a women's clothing store in Cameron Village in Raleigh. Under a threat of being shot by the men, Susan King, Assistant Manager, gave money from the cash register to the intruders.

Testimony in the record shows that while the men were at the cash register each of them pulled out an instrument that "appeared to be sawed off shotguns." While testifying Ms. King said: "They told me not to hit the drawer or they would *shoot* me."

(Emphasis added.) She also testified that "[t]hey each pulled out their guns soon as I opened the drawer," and that those guns were pointed at her.

A customer in The Showroom who saw the incident, Ms. Pamela Pait, testified that she saw the defendant "pull out what appeared to me to be a sawed-off shotgun," and point it "at the girl behind the register."

The defendant and his witnesses testified to an alibi.

In his brief the defendant contends that the quality of the evidence of the offense charged was insufficient to support a finding by the jury beyond a reasonable doubt that the defendant actually had a firearm and actually endangered life at the time of the taking. Defendant further contends that it is not enough that the State show that the victims "thought" or "believed" the instruments might be firearms and that there was no "positive" identification of the alleged robbery instruments as firearms.

The standard for determining the sufficiency of the evidence to overcome a motion to dismiss at the close of the case was clearly enunciated in *State v. Wright*, 302 N.C. 122, 126, 273 S.E. 2d 699, 703 (1981).[1] This test requires the presence of substantial evidence on every element of the crime. Robbery with a firearm requires as one of its elements that the robbery be accomplished by the use or threatened use of a firearm. G.S. 14-87.

The rationale of our Supreme Court concerning the appearance of firearms, so well stated in *State v. Thompson*, 297 N.C. 285, 254 S.E. 2d 526 (1979), has been reaffirmed in the subsequent decision in *State v. Rivens*, 299 N.C. 385, 261 S.E. 2d 867 (1980). The *Thompson* holding, *supra* at 288 and 289, 254 S.E. 2d at 528, states:

> "Whether an instrument is a dangerous weapon or a firearm can only be judged by the victim of a robbery from

1. "The evidence is sufficient to sustain a guilty verdict if substantial evidence was presented on every element of the offense charged. 'Substantial evidence' is defined as that amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion. (Citations omitted.) In ruling upon defendant's motions challenging the sufficiency of the evidence, the trial court is required to interpret the evidence in the light most favorable to the State, drawing all reasonable inferences therefrom in the State's favor. (Citations omitted.)"

its appearance and the manner of its use. We cannot perceive how the victims in [the] instant case could have determined with certainty that the firearm was real unless defendant had actually fired a shot. We would not intimate, however, that a robbery victim should force the issue merely to determine the true character of the weapon. Thus, when a witness testified that he was robbed by use of a firearm or other dangerous weapon, his admission on cross-examination that he could not positively say it was a gun or dangerous weapon is without probative value.

We conclude that when the State offers evidence in an armed robbery case that the robbery was attempted or accomplished by the use or threatened use of what *appeared* to the victim to be a firearm or other dangerous weapon, evidence elicited on cross-examination that the witness or witnesses could not positively testify that the instrument used was in fact a firearm or dangerous weapon is not of sufficient probative value to warrant submission of the lesser included offense of common law robbery. When a person perpetrates a robbery by brandishing an instrument which appears to be a firearm, or other dangerous weapon, in the absence of any evidence to the contrary, the law will presume the instrument to be what his conduct represents it to be—a firearm or other dangerous weapon."

See also, State v. Porter, 303 N.C. 680, 281 S.E. 2d 377 (1981).

In the case before us, we hold that Ms. King was not bound to test the character of the projectile which would emanate from the barrel of what appeared to her to be a sawed-off shotgun before handing over the money from the cash drawer. When she was told that she would be shot if she hit the drawer, Ms. King was not required to wait and see if the trigger would be pulled if she disobeyed the life-threatening command. The contentions of the defendant are found to be without merit. The quality of the evidence was sufficient to overcome the motion to dismiss. The identification of the instrument as a firearm was sufficiently positive to be submitted to the jury.

We find no error.

Chief Judge VAUGHN and Judge WELLS concur.

STATE OF NORTH CAROLINA v. WILLIAM THOMAS CYRUS

No. 822SC775

(Filed 15 February 1983)

Constitutional Law § 68; Witnesses § 10— out-of-state witness—denial of motion to secure attendance

The trial court did not abuse its discretion or violate defendant's right to compulsory process in the denial of defendant's motion to secure the attendance of a material out-of-state witness pursuant to G.S. 15A-813 where, on 4 March, defendant's cases were peremptorily set for trial on 15 March because the witness, a resident of Texas, could be present at that time; defense counsel talked with the presiding judge about an order to secure the attendance of the witness at trial but decided not to obtain such an order; defendant informed his attorney on 11 March that the witness would not be coming to testify; defendant did not file his motion until the morning of 15 March; and defendant knew well before his cases were calendared for trial that the witness had marital problems that might prevent him from coming to North Carolina, that there were outstanding warrants against the witness in North Carolina, and that the witness might have trouble getting away from work at the time the cases were set for trial.

APPEAL by defendant from *Small, Judge.* Judgment entered 15 March 1982 in Superior Court, BEAUFORT County. Heard in the Court of Appeals 21 January 1983.

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

Wayland J. Sermons, Jr., for defendant appellant.

BECTON, Judge.

In appealing from judgments imposing concurrent 18-month prison sentences for driving under the influence, third offense, and driving while license permanently revoked, defendant, William Cyrus, presents one argument: "Whether the trial court erred in denying Defendant's Motion to Secure the Attendance of a Material Witness, pursuant to N.C. Gen. Stat. § 15A-813."

I

On 4 March 1982, counsel for defendant, after conferring with the district attorney and the presiding judge, requested that defendant's cases be peremptorily set for trial. Defendant's counsel asked that the cases be called at 10:00 a.m. on 15 March

1982 because a material witness, Rudy Newsome, a resident of Houston, Texas, could be present at that time. The District Attorney agreed to "switch the calendar around [and to get the] two troopers [to court] to testify in this case, all at the request of the defendant. . . ."

On 4 March 1982, defense counsel also conferred with the presiding judge about an order to secure the attendance of Rudy Newsome pursuant to G.S. § 15A-813, but "decided not to go through it because [he was] acting on the assumption that everything was indeed in order with [the] witness." On 11 March 1982, the defendant informed his attorney that Newsome would not be coming to testify. The following day, Friday, 12 March 1982, at approximately 2:00 p.m., defense counsel informed the District Attorney of that fact. On the morning of 15 March 1982, the defendant filed his motion to secure the attendance of a material witness. Based on the preceding facts and the analysis which follows, we find no error in the trial court's denial of that motion.

II

The Uniform Act to Secure Attendance of a Witness from without a State in Criminal Proceedings, N.C. Gen. Stat. § 15A-811 (1978), *et seq.*, gives the trial court the means to compel a non-resident witness to attend and testify at criminal proceedings in this State. *State v. Tindall*, 294 N.C. 689, 242 S.E. 2d 806 (1978). Our Supreme Court has identified three questions which are presented for review when a party attempts to invoke the Act's procedures: (1) whether the defendant has made an adequate showing that the prospective witness' testimony is material; (2) whether the defendant has adequately designated the witness' location; and (3) whether the trial judge's discretion to grant the motion was exercised in accord with the Sixth Amendment's guarantee that the accused be afforded compulsory process for obtaining witnesses in his favor. *Id.* at 700, 242 S.E. 2d at 812.

In this case, the trial court made every effort to accommodate the defendant and his attorney to have the witness available for the trial. The presiding judge and defense counsel even talked about an order to secure the attendance of the witness at trial. Defendant knew that the witness might not show

up. The record suggests that defendant knew well before the case was calendared for trial that Newsome had marital problems that might prevent his coming back to North Carolina; that there were outstanding warrants against Newsome in North Carolina; and that Newsome might have trouble getting away from work during what was, for him, a very busy season.

It is true that a trial judge must not exercise his discretion to issue a material witness order in a manner inconsistent with the Sixth Amendment. *See, State v. Tindall.* It is also true that the right to compulsory process is a fundamental right and that neither our statute nor the Constitution prescribes time limits within which to exercise that right. It is equally true, however, that rights can be waived. The statute was designed in part to ensure the presence of witnesses like Rudy Newsome. As our Supreme Court said in *State v. Graves*, 251 N.C. 550, 558, 112 S.E. 2d 85, 92 (1960):

> We do not suggest that an accused may be less than diligent in his own behalf in preparing for trial. He may not place the burden on the officers of the law and the court to see that he procures the attendance of witnesses and makes preparation for his defense. But the officers and the court have a duty to see that he has opportunity for so doing.

Nothing about the Uniform Act to Secure Attendance of a Witness from without a State in Criminal Proceedings changes that statement. Under the Act, the officers and the court have a duty to see that defendant has an opportunity for securing material witnesses. They are placed under no burden to demand that he do so.

On the record presented, the trial court's refusal to secure the attendance of the material witness was not an abuse of discretion and did not deny the defendant his right to compulsory process. For those reasons, we find

No error.

Judges WEBB and PHILLIPS concur.

STATE OF NORTH CAROLINA v. HENRIETTA FUNDERBURK

No. 8220SC669

(Filed 15 February 1983)

Robbery § 4.3— robbery with a dangerous weapon—sufficiency of evidence that weapon dangerous

In a prosecution for robbery with a dangerous weapon, the trial judge did not err in submitting armed robbery to the jury even assuming the evidence showed that the gun used in the robbery would not fire since the pistol was used as a club during the robbery and since a weapon used does not have to be a firearm to be a life-threatening weapon.

APPEAL by defendant from *Mills, Judge*. Judgment entered 9 February 1982 in Superior Court, UNION County. Heard in the Court of Appeals 12 January 1983.

The defendant was tried for aiding and abetting armed robbery. The State's evidence showed that on 23 November 1981 the defendant carried Jackie Meadows and Jackie Meadows' brother, Terry Meadows, in the defendant's automobile to a laundromat in Monroe. Jackie and Terry got out of the automobile and Jackie entered the laundromat and robbed Lelia Funderburk. Lelia Funderburk testified that Jackie Meadows pointed a pistol "right here between my eyes." Jackie then hit Lelia Funderburk with the pistol on her cheekbone, took her purse and ran. Lelia Funderburk had a black eye as a result of being struck.

The pistol used in the robbery was introduced into evidence, and Lelia Funderburk described it as a "B.B. type pistol—air pistol." Jackie Meadows testified for the State that the pistol was furnished by the defendant and it was "supposed to be a 44 Magnum, what she say." Jackie Meadows testified further that there were not any bullets for the gun. Lieutenant Bobby Kilgore of the Monroe Police Department testified that he recovered the pistol from the defendant on 28 November 1981. He described it as an air pistol and said he could not get it to fire. The defendant testified in her own behalf and said it was a toy pistol.

Defendant was convicted of robbery with a dangerous weapon. She was sentenced to 14 years in prison from which sentence she appealed.

Attorney General Edmisten, by Assistant Attorney General Robert R. Reilly, for the State.

Appellate Defender Adam Stein, by Assistant Appellate Defender Lorinzo L. Joyner, for defendant appellant.

WEBB, Judge.

Defendant's only contention on appeal is that there was not sufficient evidence that a dangerous weapon was used to submit a charge of armed robbery to the jury. G.S. 14-87 provides in part:

> "(a) Any person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another . . . shall be guilty of a Class D felony."

The defendant argues, relying on *State v. Alston*, 305 N.C. 647, 290 S.E. 2d 614 (1982), that all the evidence shows that the pistol used in the robbery would not fire and could not, as a matter of law, be held to be a dangerous weapon. Assuming the evidence showed the gun would not fire, we believe Judge Mills properly submitted armed robbery to the jury. *Alston* merely requires, in cases like this one, that the jury be instructed on common law robbery. The weapon used did not have to be a firearm to be a life-threatening weapon. It was a metal object and Jackie Meadows struck Lelia Funderburk with it, giving her a black eye. In *State v. Price*, 280 N.C. 154, 184 S.E. 2d 866 (1971) our Supreme Court held that a blackjack could be a dangerous weapon. In that case the victim was struck by a blackjack but was not so seriously injured that he could not repel the robber. We believe a pistol used as a club could be as dangerous as a blackjack.

Judge Mills instructed the jury "in determining whether an air pistol was dangerous to the life of Lelia Funderburk, you would consider the nature of the pistol, and the manner in which Jackie Meadows used it or threatened to use it." We believe this part of the charge correctly instructed the jury as to how they were to consider the pistol as a possible dangerous weapon. For cases from other jurisdictions which hold that a pistol used as a

club may be a dangerous weapon, see *People v. Ward*, 84 Cal. App. 2d 357, 190 P. 2d 972 (1948); *People v. Trice*, 127 Ill. App. 2d 310, 262 N.E. 2d 276 (1970); *Boyles v. State*, 46 Wis. 2d 473, 175 N.W. 2d 277 (1970).

No error.

Judges BECTON and PHILLIPS concur.

STATE OF NORTH CAROLINA v. HENRY P. FARMER

No. 8218SC660

(Filed 15 February 1983)

Criminal Law § 138— sentencing—aggravating factor—prior convictions—insufficient evidence—necessity for findings as to representation by counsel

The evidence did not support the trial court's finding as an aggravating factor in imposing sentence that defendant had prior convictions punishable by more than 60 days where neither the State, the trial court, nor defense counsel knew for certain in which state defendant had been convicted or if defendant's prior convictions were punishable by more than 60 days imprisonment. Furthermore, a prior conviction could not properly be considered as an aggravating circumstance without findings by the trial court as to whether defendant was indigent at the prior proceedings and, if so, whether defendant was represented by counsel. G.S. 15A-1340.4(e).

APPEAL by defendant from *Davis, Judge*. Judgment entered 15 February 1982 in Superior Court, GUILFORD County. Heard in the Court of Appeals 12 January 1983.

Defendant pled guilty to, and was convicted of, one count of felonious child abuse, pursuant to N.C. Gen. Stat. § 14-318.4 (1981). That offense is a Class I felony, punishable by a presumptive term of two (2) years and a maximum term of five (5) years imprisonment. N.C. Gen. Stat. § 15A-1340.4(f)(7) and N.C. Gen. Stat. § 14-1.1(a)(9) (1981).

At the sentencing hearing, the trial court found one factor in mitigation and one factor in aggravation, and further found that the aggravating factor outweighed the mitigating factor. As a consequence, the five-year sentence was imposed. Defendant took

exception to the finding of the factor in aggravation and appealed to this Court.

Attorney General Edmisten, by Assistant Attorney General William B. Ray, for the State.

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

BECTON, Judge.

The dispositive issue on this appeal is whether there was a sufficient evidentiary basis for the trial court's finding that defendant had prior convictions punishable by more than sixty (60) days imprisonment. The trial court used that finding as a factor in aggravation of defendant's sentence. We hold, for the following reasons, that there was not a proper evidentiary basis for that finding.

G.S. § 15A-1340.4(e) provides, in pertinent part:

> (e) A prior conviction may be proved by stipulation of the parties or by the original or a certified copy of the court record of the prior conviction. The original or certified copy of the court record, bearing the same name as that by which the defendant is charged, shall be prima facie evidence that the defendant named therein is the same as the defendant before the court, and shall be prima facie evidence of the facts set out therein. *No prior conviction which occurred while the defendant was indigent may be considered in sentencing unless the defendant was represented by counsel or waived counsel with respect to that prior conviction.* [Emphasis added.]

In this case, a State's witness testified: "[Defendant] was convicted for petty larceny, in West Virginia, where he served . . . approximately 18 days." Defense counsel, in response to the trial court's later inquiry, stated: "[Defendant] was convicted of petty larceny in either Virginia, or West Virginia, and received a 30-day sentence" and was convicted of driving under the influence of intoxicants. We are troubled by the suggestion in the record that neither the State, the trial court, nor defense counsel, knew for

certain in which state defendant had been convicted or if defendant had prior convictions punishable by more than sixty (60) days imprisonment. More important, however, the trial court failed to make a finding concerning whether defendant was indigent at the prior proceedings, and if so, whether he was represented by counsel. In light of the clear mandate of G.S. § 15A-1340.4(e), such a finding was required before the prior conviction(s) could properly be considered. We therefore state the rule governing the use of prior convictions under G.S. § 1340.4, *et seq.*: A prior conviction is not automatically a factor to be used "to aggravate" or to enhance a defendant's sentence. A prior conviction which occurred while the defendant was indigent cannot be used unless defendant was represented by counsel or waived counsel in the earlier proceeding.

Accordingly, we vacate the sentence imposed by the trial court and remand for proceedings not inconsistent with this opinion.

Vacated and remanded.

Judges WEBB and PHILLIPS concur.

FIRST UNION NATIONAL BANK v. DONNA D. WILSON, NED DOUGLAS AND TED DOUGLAS

No. 8226DC253

(Filed 15 February 1983)

1. Appeal and Error § 24; Rules of Civil Procedure § 55— failure to file timely answer—entry of default—failure to set forth exceptions and assignments of error on appeal

Where defendants failed to properly set forth their exceptions and assignments of error concerning the dismissal of their appeal, the only question before the appellate court was the propriety of a judgment of default entered against defendant, and where defendants' answer was not filed until two days after the entry of default for failure to answer in a timely fashion, the entry of default was proper.

2. Rules of Civil Procedure § 55— entry of default—defendants properly apprised of proceedings

The defendants were properly apprised of the proceeding during which a default judgment against them was entered where defendants' attorney was notified of the hearing by mail; a notice of hearing was posted in the local newspaper; and where defendants waived any objections to notice by entering a general appearance at the hearing.

APPEAL by defendants from *Saunders, Judge.* Judgment entered 9 November 1981 in District Court, MECKLENBURG County. Heard in the Court of Appeals 19 January 1983.

This action concerns the default of defendant Donna Wilson on a note, said note being evidence of a debt owed on a used car loan. Defendants Ned and Ted Douglas executed an agreement to unconditionally guarantee the debt owed by Donna Wilson.

Plaintiff filed suit for recovery of the outstanding balance from the Douglases. The Douglases moved for, and were granted, an extension of time in which to file an answer, but failed to do so within the time allotted. As a result, plaintiff moved for, and was granted, an entry of default against the Douglases. Two days later, the Douglases filed an Answer, and sixty (60) days after the entry of default, they filed notice of appeal.

Plaintiff then moved for entry of a judgment of default and filed a motion to dismiss the appeal. Both motions were granted, and a judgment was entered ordering same. The Douglases appeal from that judgment to this Court.

Don Davis for defendant appellants.

Clontz & Clontz, by William Walt Pettit, for plaintiff appellee.

BECTON, Judge.

[1] We observe first that the Douglases failed properly to set forth their exceptions and assignments of error concerning the dismissal of their appeal as required by Rule 10 of the North Carolina Rules of Appellate Procedure, and that the Clerk's entry of default was interlocutory and thus not subject to review here. *Crotts v. Pawn Shop*, 16 N.C. App. 392, 192 S.E. 2d 55 (1972), *cert. denied*, 282 N.C. 425, 192 S.E. 2d 835 (1972). Therefore, the only

question before us is the propriety of the judgment of default entered against the Douglases.

> When default is entered due to defendant's failure to answer, the substantive allegations raised by plaintiff's complaint are no longer in issue, and for the purposes of entry of default and default judgment are deemed admitted.

Bell v. Martin, 299 N.C. 715, 721, 264 S.E. 2d 101, 105 (1980), *petition for reh. denied*, 300 N.C. 380 (1980). It is undisputed that the Clerk granted plaintiff's motion for an entry of default because defendants failed to answer in a timely fashion. The Answer was not filed until two days after the entry of default. Clearly, the entry of default was proper. Rather than appeal the entry of default, defendants' remedy was a motion to set aside the default. *Bell v. Martin.* This they did not do. The trial court, therefore, properly entered the judgment of default against defendants.

[2] Defendants next argue that they were not properly apprised of the proceeding during which the default judgment was entered. We find no merit in that contention. Defendants' attorney, Ted Douglas, was notified of the hearing by mail; a notice of hearing was posted in The Mecklenburg Times, as per the rules of practice for the 26th Judicial District; and defendants waived any objections as to notice by entering a general appearance at that hearing. *Collins v. Highway Commission*, 237 N.C. 277, 74 S.E. 2d 709 (1953).

We have examined defendants' other contentions and find them to be without merit. For the foregoing reasons, the judgment of the trial court is

Affirmed.

Judges WEBB and PHILLIPS concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 15 FEBRUARY 1983

BRADLEY v. BRADLEY No. 8210DC98	Wake (79CVD6195)	Affirmed
HOLLADAY PAINT & CARPET CO. v. ARDEN PAINT CO. No. 8228DC139	Buncombe (80CVD1937)	Reversed & Remanded
STATE v. ALLMAN No. 8218SC701	Guilford (81CRS16283)	No Error
STATE v. GARRETT No. 824SC593	Onslow (81CRS4839)	No Error
STATE v. McQUEEN No. 8212SC737	Cumberland (81CRS30561)	No Error
STATE v. MOORE No. 8223SC774	Wilkes (82CRS391)	Affirmed
STATE v. MURPHY No. 825SC716	New Hanover (81CRS20626)	No Error
STATE v. PITTMAN No. 824SC430	Sampson (80CRS14204)	New Trial
STATE v. PRICE No. 8227SC765	Gaston (81CRS20701)	No Error
STATE v. SISK No. 8226SC748	Mecklenburg (81CRS82599) (81CRS82605)	No Error
STATE v. SULLIVAN No. 8211SC473	Johnston (81CRS9534) (81CRS9535)	No Error
STATE v. WALLACE No. 827SC643	Edgecombe (81CRS5922)	No Error

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

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TOPICS COVERED IN THIS INDEX

ABDUCTION

§ 1. Abduction of Children

Where the appellate court previously held that a contract between plaintiff and defendant father, by which defendant father contracted away his common law right to custody of his minor child by executing an agreement giving custody to plaintiff mother but reserving his right to institute a custody action, was valid, the previous holding became the law of the case. *La Grenade v. Gordon*, 650.

ACCOUNTS

§ 2. Accounts Stated

The trial court erred in denying the femme defendant's motions for directed verdict and for judgment notwithstanding the jury verdict for plaintiff on an account stated. *Zickgraf Hardwood Co. v. Seay*, 128.

In an action by plaintiff to collect the unpaid balance in defendant's commodity futures account, the trial court did not err in granting plaintiff's motion for summary judgment on its claim for an account stated. *Paine, Webber, Jackson & Curtis, Inc. v. Stanley*, 511.

ACTIONS

§ 8. Distinctions Between Actions on Contract and in Tort

Defendant failed to forecast any evidence of a genuine material fact to support his counterclaim for negligent breach of contract. *Paine, Webber, Jackson & Curtis, Inc. v. Stanley*, 511.

ADMINISTRATIVE LAW

§ 4. Procedure, Hearings and Orders of Administrative Boards and Agencies

An appeal from a superior court order determining the scope of review for an administrative hearing involving a contested hazardous waste treatment facility was premature. *Blackwelder v. Dept. of Human Resources*, 331.

ADVERSE POSSESSION

§ 19. Period Necessary to Ripen Title, and Time From Which Statute Runs

In an action instituted by the State to remove a cloud on title to certain land, one group of defendants failed to show adverse possession under color of title against the State. *S. v. Taylor*, 673.

§ 24. Competency and Relevancy of Evidence

Testimony as to whether defendant's employees believed a written easement existed when they entered upon plaintiff's land to maintain telephone lines was not admissible to show that defendant's entry was not under a claim of right. *Pinner v. Southern Bell*, 257.

§ 25.2. Particular Cases: Evidence Insufficient

In an action instituted by the State to remove a cloud on title to certain land, one group of defendants failed to prove adverse possession under color of title against the trustee. *S. v. Taylor*, 673.

In an action by the State to remove a cloud on title to certain lands, a group of defendants failed to make a case of simple adverse possession without color of title under known and visible boundaries. *Ibid.*

APPEAL AND ERROR

§ 6.2. Finality as Bearing on Appealability; Premature Appeals

An appeal from a superior court order determining the scope of review for an administrative hearing involving a contested hazardous waste treatment facility was premature. *Blackwelder v. Dept. of Human Resources*, 331.

An order requiring defendant to answer interrogatories and submit to oral deposition concerning his financial net worth was interlocutory and non-appealable. *Casey v. Grice*, 273.

Orders denying a motion to disqualify plaintiffs' attorneys and authorizing receivers to settle tax claims against the corporate defendants were immediately appealable. *Lowder v. Mills, Inc.*, 275.

Denial of a motion to dismiss for failure to state a claim is not appealable. *Wright v. Fiber Industries, Inc.*, 486.

§ 24. Necessity for Objections, Exceptions, and Assignments of Error

Where defendants failed properly to set forth their exceptions and assignments of error concerning the dismissal of their appeal, the only question before the appellate court was the propriety of a judgment of default entered against defendant. *First Union National Bank v. Wilson*, 781.

§ 26. Exceptions and Assignments of Error to Judgment or to Signing of Judgment

Although the record on appeal disclosed that the petitioners failed to make any assignment of error or grouping of exceptions, the appeal itself was an exception to the judgment and the court's underlying conclusion of law. *West v. Slick*, 345.

§ 45. Form and Contents of Brief

Where the entry of summary judgment was assigned as error, but the only question presented in an appellant's brief for review was whether a liability insurance policy covered a fatal accident which was the subject of the action, under Rule 28(a) of the Rules of Appellate Procedure, the appeal must be dismissed in that the appellate court's review is limited to questions presented by the appellant's brief. *McManus v. Gambill*, 600.

§ 68. Law of the Case

In a stockholders' derivative action where the same arguments were brought forward in a companion case and ruled on in a prior opinion by the appellate court, under the law of the case, all the factual questions ruled upon in the prior decision ruled the case before the court. *Lowder v. All Star Mills, Inc.*, 699.

§ 68.2. Decisions as to Sufficiency of Evidence

In an action brought to recover actual and punitive damages allegedly resulting from the abduction of plaintiff's infant son, the trial court erred in entering a directed verdict for defendant at the close of plaintiff's evidence where the appellate court had previously found the trial court erred in dismissing plaintiff's action for failure to state a claim. *La Grenade v. Gordon*, 650.

§ 68.5. Decisions Relating to Issues

Where the appellate court previously held that a contract between plaintiff and defendant father, by which defendant father contracted away his common law right to custody of his minor child by executing an agreement giving custody to plaintiff mother but reserving his right to institute a custody action, was valid, the previous holding became the law of the case. *La Grenade v. Gordon*, 650.

ARBITRATION AND AWARD

§ 1. Arbitration Agreements

The evidence was sufficient to support the conclusion that substantial interstate activity was contemplated by the parties to a partnership agreement so that the agreement was covered by the Federal Arbitration Act. *In re Cohoon*, 226.

A dispute between partners as to the manner of dissolution of the partnership was a dispute "arising out of or in connection with" the partnership agreement and was thus subject to arbitration as provided in the agreement. *Ibid.*

§ 7. Conclusiveness of Award and Award as Bar to Action

Even if an arbitrator made a mistake of law in failing to reduce by one-half an amount awarded to one partner in the dissolution of a partnership as settlement of expenses charged to the partnership by the second partner, the courts have no power to correct such mistake. *In re Cohoon*, 226.

An arbitrator could properly apply an inflation factor based upon the average increase in the Consumer Price Index for the pertinent period to an amount awarded to one partner upon dissolution of the partnership. *Ibid.*

ARREST AND BAIL

§ 6.2. Jury Instructions and Sufficiency of Evidence

The trial court properly refused to instruct the jury that defendant's arrest was unlawful and he thus had a right to use reasonable force. *S. v. Sampley*, 493.

§ 9. Right to Bail Generally

Bail of $1 million for a defendant charged with various offenses relating to the shipment of heroin from Thailand for distribution in North Carolina was not unreasonable because defendant was found to be indigent and entitled to appointed counsel or because defendant was subject to federal incarceration at the time. *S. v. Overton*, 1.

ASSAULT AND BATTERY

§ 13. Competency of Evidence

The trial court properly failed to permit the prosecuting witness's wife to testify that her husband had broken one of her ribs. *S. v. Kidd*, 140.

§ 15.2. Assault with a Deadly Weapon with Intent to Kill or Inflicting Serious Bodily Injury Generally

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, the trial court did not err in its instructions to the jury by stating that "a pistol or revolver is a deadly weapon." *S. v. Pettiford*, 92.

§ 15.3. Assault with a Deadly Weapon with Intent to Kill or Inflicting Serious Bodily Injury: Definition of "Intent to Kill" and "Serious Injury"

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, the trial court did not err in instructing the jury that "a bullet wound to the head with the bullet lodging in the head is a serious injury." *S. v. Pettiford*, 92.

§ 15.7. Defense of Self, Property, or Others: Instruction Not Required

The trial court properly refused to apply the law of self-defense to evidence of the assault on a prosecuting witness. *S. v. Kidd*, 140.

ATTORNEYS AT LAW

§ 3. Scope and Duration of Attorney's Authority Generally

The trial court did not abuse its discretion in denying defendant's motion to disqualify plaintiffs' attorneys because they had represented the individual defendant in a criminal action involving matters related to this civil action. *Lowder v. Mills, Inc.*, 275.

The trial court erred in its appointment of plaintiffs' attorneys as counsel for the receivers for the corporate defendants. *Ibid.*

§ 4. Testimony by Attorney

In a prosecution for conspiracy to traffic cocaine, the trial judge erred in refusing to allow defendants' attorneys to withdraw after a State's witness testified that the attorneys were involved in the illegal drug operation. *S. v. McGee*, 658.

§ 5.1. Liability for Malpractice

In an action in which plaintiff alleged negligence on the part of defendant attorney in failing to discover a lien on properties held by plaintiff as collateral for a loan with defendants' client, plaintiff's lessee, the trial court did not err in entering an involuntary dismissal against the plaintiff on the grounds of contributory negligence. *United Leasing Corp. v. Miller*, 40.

Plaintiffs failed to show actionable negligence on the part of an attorney in representing plaintiffs in a transaction concerning an improperly drawn release. *Blue Ridge Sportcycle Co. v. Schroader*, 578.

The trial court did not abuse its discretion in dismissing plaintiff's action, pursuant to G.S. 1A-1, Rule 41(b), for failure to comply with the requirement of G.S. 1A-1, Rule 8(a)(2) that the complaint not state the demand for monetary relief. *Jones v. Boyce*, 585.

AUTOMOBILES AND OTHER VEHICLES

§ 21.1. Application of Doctrine of Sudden Emergency to Party Who Creates or Contributes to Emergency

Defendant was not entitled to invoke the doctrine of sudden emergency where the evidence showed that his negligence created in whole or in part the emergency he contends confronted him. *Hairston v. Alexander Tank and Equip. Co.*, 320.

§ 41.1. Duty of Motorist with Respect to Children on Public Streets or Highways

In an action instituted by minor plaintiff to recover for personal injuries which she, as a pedestrian, sustained when struck by an automobile operated by defendant, the trial court properly granted a directed verdict for defendant. *Parker v. McCall*, 401.

§ 63.2. Striking Children; Children on or About Roads

In an action to recover for injuries sustained by the minor plaintiffs when the bicycle they were riding was struck by defendant's vehicle, plaintiffs' evidence was sufficient to be submitted to the jury on the issue of defendant's negligence in failing to keep a proper lookout. *Wallace v. Evans*, 145.

§ 87.4. Intervening Negligence Generally

In an action to recover for the wrongful death of plaintiff's intestate who was killed while standing behind his new car after the left rear wheel came off, the negligence of defendant car dealer in failing to tighten the lug bolts on the left rear wheel was insulated by the negligence of defendant truck driver in failing to keep a

BURGLARY AND UNLAWFUL BREAKINGS

§ 5.5. Sufficiency of Evidence of Breaking and Entering Generally

In a prosecution for breaking or entering with intent to commit larceny, it was not incumbent upon the State to prove the occupancy of the building or the ownership of the property which defendant intended to steal. *S. v. Young*, 705.

CONSPIRACY

§ 2. Actions for Civil Conspiracy

In an action brought to recover actual and punitive damages allegedly resulting from the abduction of plaintiff's infant son, the trial judge erred in limiting the admissibility of a statement by one of the defendants since it was a declaration of a co-conspirator made during and in furtherance of a conspiracy to abduct plaintiff's child. *La Grenade v. Gordon*, 650.

§ 5. Relevancy and Competency of Evidence

The trial court did not err in permitting witnesses for the State to testify about "dope" and "heroin" without the State first laying a foundation supporting the witnesses' identification of the substance. *S. v. Overton*, 1.

§ 7. Instructions

The evidence did not require the trial court to instruct the jury that defendant's mere possession of the proceeds of her husband's crimes was not sufficient to establish an agreement between them to commit the crimes. *S. v. Overton*, 1.

§ 8. Verdict and Judgment

Defendant was not prejudiced by a verdict finding him guilty of conspiracy to manufacture, possess with intent to sell and deliver or sell and deliver heroin because of the presence of the disjunctive. *S. v. Overton*, 1.

CONSTITUTIONAL LAW

§ 4. Standing to Raise Constitutional Question

Respondent had no standing to challenge the constitutionality of involuntary commitment statutes providing that the State would be represented at involuntary commitment hearings held at one of the four regional psychiatric centers and permitting the trial judge to question witnesses at the hearing. *In re Jackson*, 581.

§ 17. Personal and Civil Rights Generally

The trial court properly entered summary judgment as to minor plaintiffs' claims concerning the alleged denial of their rights to or access to counsel of their choice while in a mental institution. *Susan B. v. Planavsky*, 77.

§ 30. Discovery; Access to Evidence and Other Fruits of Investigation

In a prosecution for felonious trafficking in drugs through possession of 2,000 or more but less than 10,000 pounds of marijuana, the trial court did not err in denying defendant's motion to suppress evidence relating to 121 of 123 bales of marijuana found in defendant's residence which were destroyed. *S. v. Johnson*, 369.

§ 31. Affording to Accused the Basic Essentials for Defense

The trial court did not err in revoking an order providing for the appointment of an interpreter at State expense for a defendant who was a Thai national. *S. v. Overton*, 1.

CORPORATIONS

§ 14. Liability of Officers and Agents to Corporation for Neglect of Duties, Mismanagement, or Wrongful Depletion of Assets

Where defendant, the general manager and an officer and director of plaintiff corporation, was directed to purchase the stock of named shareholders for plaintiff, defendant's purchase of the stock for his own benefit constituted a breach of his statutory fiduciary duty as an officer and director under G.S. 55-35, a breach of his duty under his contract of employment as general manager, and a breach of his fiduciary duty as an agent of plaintiff corporation to carry out the directive of the board of directors. *Onslow Wholesale Plumbing v. Fisher*, 55.

§ 25. Contracts and Notes

The trial court properly granted defendant's motion for judgment notwithstanding the verdict because defendant Railway neither expressly nor by implication assumed the obligation to pay plaintiff's medical expenses incurred for injuries resulting from an accident while working with a railroad in which Railway purchased some of the bankrupt company's assets. *Harvey v. Norfolk Southern Railway*, 554.

COURTS

§ 9. Jurisdiction to Review Rulings of Another Superior Court Judge Generally

Where defendants failed to answer within the time allowed by G.S. 1A-1, Rule 12(a)(1) and an entry of default was entered against defendant pursuant to G.S. 1A-1, Rule 55, it was error for one superior court judge to set aside the "judgment" of another superior court judge which had denied defendants' motion to set aside the clerk's entry of default. *Bailey v. Gooding*, 459.

§ 14.1. Transfer and Removal of Causes

Under G.S. 7A-258(c), the trial judge did not err in refusing to set aside a default judgment when there was a pending motion to transfer the case to superior court since defendants did not move to transfer their case within 30 days after being served with a pleading. *Northwestern Bank v. Morrison*, 767.

§ 21.5. Tort Actions

In an action to recover actual and punitive damages allegedly resulting from the abduction of plaintiff's infant son, North Carolina tort law applied to the case. *La Grenade v. Gordon*, 650.

CRIMINAL LAW

§ 7.1. Illustrative Cases of Entrapment

In a prosecution for conspiracy to traffic cocaine, the defense of entrapment had no application to defendants' cases. *S. v. McGee*, 658.

§ 9.1. Principals in the First or Second Degree; Presence at Scene

The trial court committed prejudicial error in giving the jury instructions which permitted the jurors to find a defendant guilty as a principal to a crime at which he was not actually or constructively present because he participated in a conspiracy to commit the crime. *S. v. Overton*, 1.

§ 14. Commission of the Offense Within the State

The North Carolina courts had jurisdiction to try defendant for conspiracy to manufacture, possess and sell heroin, notwithstanding defendant was acquitted of

the substantive offenses involving heroin which occurred in North Carolina and the State's evidence tended to show that defendant entered the conspiracy while living in Thailand, where other conspirators committed overt acts in furtherance of the conspiracy within this State. *S. v. Overton*, 1.

§ 26.5. Former Jeopardy; Same Acts or Transactions Violating Different Statutes

The double jeopardy statute of the Controlled Substances Act, G.S. 90-97, was not violated by the State's prosecution of defendant for conspiracy to manufacture, to possess with intent to sell or deliver, or to sell or deliver heroin after defendant had pled guilty in a federal court to conspiracy to import heroin in violation of 21 U.S.C. § 963. *S. v. Overton*, 1.

Conviction of defendants under G.S. 90-95(a) for possessing and manufacturing marijuana and under G.S. 90-95(h)(1) for trafficking by possessing and manufacturing marijuana violated defendants' rights against double jeopardy, and the convictions under G.S. 90-95(a) must be vacated. *S. v. Sanderson*, 604.

§ 26.8. Plea of Former Jeopardy; Nolle Prosequi or Mistrial

In a prosecution for felonious trafficking in drugs, the trial court erred in failing to make findings of fact and entering them into the record before declaring a mistrial. *S. v. Johnson*, 369.

§ 33.3. Evidence as to Collateral Matters

In an involuntary manslaughter case arising out of defendant's shooting of another hunter, the court erred in admitting testimony that defendant did not have a hunting license at the time he shot the victim and that defendant shot a deer at night some time after the victim's death. *S. v. Hall*, 450.

§ 33.4. Evidence Tending to Excite Prejudice or Sympathy

Testimony concerning the reaction of the victim's wife when she was told of the victim's death and defendant's failure to contact the victim's wife after the death was irrelevant in an involuntary manslaughter case. *S. v. Hall*, 450.

§ 34.4. Admissibility of Evidence of Other Offenses

In a prosecution of defendants for the involuntary manslaughter of their 25-day-old son, evidence that defendants' other child suffered from Battered Child Syndrome was admissible to prove the crime charged. *S. v. Byrd*, 624.

§ 35. Evidence that Offense Was Committed by Another

The trial court improperly excluded the testimony of two officers which tended to show that the person who defendant contended committed the murder he was charged with found the gun and delivered the weapon to the officers after being instructed to do so. *S. v. Hamlette*, 306.

The trial court erred in allowing a detective and a lieutenant to testify that in the course of their investigations they were unable to establish that the person who defendant had said shot the victim had taken any part in the killing of the victim. *Ibid.*

§ 42.6. Chain of Custody or Possession

The State established a sufficient chain of custody of a car to permit the admission of documents found in the trunk of the car 15 days after the car was seized. *S. v. Samuel*, 406.

§ 43.1. Photographs or Sketches of Defendant; "Mug Shots"

Two police department "mug shot" photographs of defendant were properly admitted to illustrate testimony relating to defendant's identity. *S. v. Young*, 705.

CRIMINAL LAW — Continued

§ 45. Experimental Evidence

The trial court erred in admitting into evidence and permitting the jury to view a videotape of a hypnosis session of a State's witness. *S. v. Peoples*, 479.

§ 50. Expert and Opinion Testimony in General; What Constitutes Opinion Testimony

The trial court did not err in permitting the owner of a truck to testify that the post-impact value of his truck was $400 after the prosecutor asked him four times about the value of the truck after the impact. *S. v. Casey*, 414.

A witness was properly allowed to testify that he turned certain guns over to defendant and another police officer because he didn't have enough money to pay a fine and he knew charges against him would be dropped if he gave up the weapons. *S. v. Stanley*, 568.

§ 50.2. Opinion of Nonexpert

An insurance company employee was properly permitted to testify as to whether he would have paid defendant's insurance claim had he known of the discrepancies in the information submitted to his company. *S. v. Samuel*, 406.

§ 66.17. Sufficiency of Evidence of Independent Origin of In-Court Identification in Cases Involving Other Pretrial Identification Procedures

A robbery victim's in-court identification of defendant was not rendered incompetent by a prior one-on-one confrontation when officers inadvertently allowed the victim to view defendant in a hall at the law enforcement center. *S. v. Peoples*, 479.

§ 69. Telephone Conversations

In a prosecution for second degree murder where the victim was shot while speaking on the telephone in a telephone booth, and where an investigating officer testified that he picked up the receiver and discovered that someone was on the line, that he identified himself and the other person then identified herself, the trial court correctly sustained the State's objection as to the other person's identity. *S. v. Hamlette*, 306.

§ 73.4. Statements as Part of Res Gestae; Spontaneous Utterances

In a prosecution for second degree murder, the trial court correctly admitted into evidence as part of the *res gestae* certain statements by the victim to police officers shortly after he was shot. *S. v. Hamlette*, 306.

§ 75.14. Defendant's Mental Capacity to Confess or Waive Rights; Generally

The trial court's findings supported its conclusion that an illiterate defendant's in-custody statement was admissible in evidence. *S. v. Hargrove*, 174.

§ 83. Competency of Husband or Wife to Testify For or Against Spouse

Evidence of statements made by one spouse implicating the other spouse is admissible against the other where the spouses were co-conspirators. *S. v. Overton*, 1.

§ 86.1. Impeachment of Defendant

Cross-examination of defendant about his failure to subpoena a person from whom he testified that he bought stolen property was admissible for the purpose of impeaching defendant's testimony. *S. v. Young*, 705.

CRIMINAL LAW — Continued

§ 86.4. Impeachment by Prior Arrests, Indictments, and Accusations of Crime

Cross-examination of defendant as to whether he had previously pled guilty to felonious larceny after three counts of larceny were reduced to one count had the effect of asking defendant whether he had been indicted for other crimes and was improper. *S. v. Woodrup*, 205.

§ 86.8. State's Witnesses

In a prosecution for second degree burglary where the only evidence against the defendant was the testimony of the State's witness, the failure of the prosecution to provide defendant with advance notice of the grant of immunity given the witness resulted in manifest prejudice to the defendant requiring a new trial. *S. v. Morgan*, 614.

§ 87. Direct Examination of Witnesses Generally

The trial court did not err in the admission of testimony by a witness who had previously been hypnotized by a police officer. *S. v. Peoples*, 479.

§ 87.1. Leading Questions

The trial court did not err in allowing the prosecutor to lead a State's witness in eliciting testimony concerning the legal significance of an insurance release form. *S. v. Samuel*, 406.

§ 87.4. Redirect Examination

The trial court had discretion to permit counsel to introduce on redirect examination relevant evidence which could have been, but was not, brought out on direct examination. *S. v. Locklear*, 428.

An officer's testimony concerning a description of an assailant given him by a witness to a shooting was admissible on redirect examination to explain testimony brought out on cross-examination. *S. v. James*, 529.

§ 88.2. Questions and Conduct Impermissible on Cross-Examination

The trial court did not err in restricting defendant's cross-examination of three of the State's witnesses. *S. v. Kidd*, 140.

§ 91. Nature and Time of Trial; Speedy Trial

Where the charges against defendant were dismissed once due to the unavailability of a prosecuting witness at the probable cause hearing, the period for computation of the time within which defendant's trial must have been commenced began to run from the last of certain listed events relating to the new charges rather than the original charges. *S. v. Koberlein*, 356.

Where charges against defendant were dismissed once and then brought again, the last relevant sequence with regard to speedy trial purposes was when the new indictment was returned and not the post-indictment arrest. *Ibid.*

Where defendant was arrested on certain charges and, on the day set for a probable cause hearing, the State took a voluntary dismissal, and where the defendant was later indicted for the same offenses, for purposes of the Speedy Trial Act, the time should have been measured from the date the defendant was indicted. *S. v. Simpson*, 436.

The time between the filing of a motion for a change of venue on 30 May 1979 and its disposition on 19 December 1979 was properly excluded in computing the statutory speedy trial period. *S. v. Overton*, 1.

CRIMINAL LAW — Continued

§ 91.4. Continuance to Obtain New Counsel

The denial of defendant's motion for a continuance to obtain counsel made at the time of trial did not deprive defendant of his constitutional right to the effective assistance of counsel of his choice. *S. v. Sampley*, 493.

§ 92.1. Consolidation of Charges Held Proper; Same Offense

The consolidation of the same charges against defendant and two codefendants did not deny defendant a fair trial because some of the evidence admitted against the codefendants may not have been admissible against defendant. *S. v. Sanderson*, 604.

§ 92.2. Consolidation Held Proper; Related Offenses

There was no error in the consolidation of two counts of felonious possession with intent to sell or deliver marijuana. *S. v. Blackwood*, 150.

Offenses charged against sixteen defendants for conspiracy to manufacture, possess and sell heroin and for the manufacture, possession and sale of heroin could properly be joined for trial. *S. v. Overton*, 1.

§ 92.5. Severance

Severance of the trials of numerous defendants charged with conspiracy to commit narcotics offenses and with narcotics offenses was not necessary to provide each defendant with a fair trial because of the mass of evidence presented relating to the activities of the other defendants. *S. v. Overton*, 1.

The trial court did not abuse its discretion in denying defendants' motion to sever their trials made on the ground that the consolidated trial prevented one defendant from having the second defendant testify in his behalf. *S. v. Myrick*, 362.

In a prosecution for conspiracy to traffic cocaine, the trial court erred in failing to sever one defendant's trial from that of the other defendant. *S. v. McGee*, 658.

§ 99. Conduct of the Court

Defendant was not entitled to a new trial because the trial judge commented upon a not guilty verdict in the trial of another defendant and three of those jurors were empaneled as jurors in defendant's trial. *S. v. Neal*, 350.

§ 99.5. Questions, Remarks, and Other Conduct of Court in Connection with Colloquies with Counsel; Admonition of Counsel

The trial court erred in refusing to make a record of numerous parts of defendant's trial and by threatening to incarcerate defendant's counsel for requesting the trial court to do so. *S. v. Rudd*, 425.

§ 99.7. Explanations, Instructions, and Admonitions to Witnesses

In view of a series of inaudible answers and declinations to respond, it was not an abuse of discretion for the court, out of the jury's presence, to instruct a witness to "speak up" and to warn that contempt proceedings might emanate. *S. v. Locklear*, 524.

The court's instructions on the consequences of perjury combined with its suggestion that the witness was hesitating to tell the truth because defendant was present did not constitute reversible error. *Ibid.*

§ 99.9. Examination of Witnesses by the Court; Particular Questions Held Proper

The trial judge did not express an opinion on the evidence in asking a breaking or entering and larceny victim to state her opinion as to the value of her stolen

CRIMINAL LAW — Continued

CRIMINAL LAW — Continued

§ 117.4. Charge on Credibility of State's Witnesses, Accomplices, Accessories, and Codefendants

Where a witness had an agreement with the district attorney that if she testified the charges against her would be dropped, the agreement was pursuant to G.S. 15A-1054 and not pursuant to G.S. 15A-1052. *S. v. Hicks*, 718.

§ 128.2. Discretionary Power of Trial Court to Set Aside Verdict and Order Mistrial

The trial court did not err in denying defendants' motion for a mistrial when one juror pricked her finger on a hypodermic needle when exhibits were passed to the jury, and the injured juror was replaced with an alternate before the jury began deliberations. *S. v. Myrick*, 362.

§ 134.4. Place of Imprisonment; Commitment for Diagnostic Study; Youthful Offenders

Marking the box beside the statement "that the defendant will not benefit from being sentenced as a youthful offender" on the sentencing form constituted a sufficient "no benefit" finding. *S. v. Abee*, 99.

§ 138. Severity of Sentence and Determination Thereof

In imposing a sentence for second degree sexual offense, the trial court properly found as an aggravating factor that the offense was "especially heinous, atrocious or cruel," but the trial court erred in considering as aggravating factors that repeated acts of fellatio occurred and that defendant inserted his finger into the victim's rectum. *S. v. Abee*, 99.

The fact that the number of mitigating factors found by the trial court was greater than the aggravating factors did not preclude the trial court from entering a sentence exceeding the statutory presumption. *Ibid.*

The trial court erred in the sentencing phase of defendant's trial by finding aggravating factors that were not supported by the evidence and by making findings which were contradictory. *S. v. Blackwood*, 150.

In imposing a sentence for felonious breaking or entering and felonious larceny, the trial court erred in finding as aggravating factors that the offenses were for pecuniary gain and they involved an attempted taking of property of great monetary value. *S. v. Thompson*, 679.

A prior conviction could not properly be considered as an aggravating circumstance without findings by the trial court as to whether defendant was indigent and represented by counsel. *Ibid.; S. v. Farmer*, 779.

Defendant was not entitled to a new sentencing hearing because the trial court found three aggravating circumstances in imposing a sentence for an offense which occurred prior to the effective date of the Fair Sentencing Act. *S. v. Morris*, 750.

It was not error for the trial judge to fail to find as mitigating factors (1) that defendant submitted to arrest without incident, (2) that defendant's acts were the result of his being unable to rapidly adapt to society outside of prison walls, (3) that a lengthy prison term without treatment would be of no benefit to a homosexual, and (4) that, if not incarcerated, defendant would have available a stable and supportive family environment. *S. v. Teague*, 755.

The trial court properly considered as an aggravating factor that defendant had prior convictions for criminal offenses punishable by more than 60 days confinement. *Ibid.*

DEEDS — Continued

§ 19.6. When Restrictions Will Be Declared Unenforceable

There was no fundamental change in a development so as to render a residential restrictive covenant unenforceable against the operation of a convenience store on property in the development. *Williamson v. Pope*, 539.

§ 20.7. Enforcement Proceedings

Where plaintiffs brought an action to prevent issuance of a building permit to defendant Realty Co. for the construction of twenty-six townhouse units within the subdivision in which they lived claiming that such construction would violate restrictive covenants applicable to the entire subdivision, the trial court erred in granting defendants' motion to dismiss on the ground that plaintiffs had failed to state a claim for relief. *Andresen v. Eastern Realty Co.*, 418.

EASEMENTS

§ 6.1. Burden of Proof; Presumptions and Evidence

In order to create an easement or public highway, the evidence must disclose that travel is confined to a definite and specific line. *West v. Slick*, 345.

ELECTRICITY

§ 2.3. Competition Between Suppliers After 1965

The trial court erred in granting defendants' motion to dismiss in an action which plaintiffs instituted to seek a temporary restraining order and preliminary and permanent injunctions to prohibit defendants from furnishing electric service to their subdivision. *Lumbee River Electric Corp. v. City of Fayetteville*, 534.

EMINENT DOMAIN

§ 13. Actions by Owner for Compensation or Damages

In an inverse condemnation action, there was no error in the court's award of $5,000 in attorney fees to plaintiff's attorney. *Cody v. Dept. of Transportation*, 724.

ESCAPE

§ 1. Generally

The defense of duress will be available to prisoners who have escaped where defendants meet five requirements, including a requirement that the prisoner immediately report to the proper authorities when he obtains a position of safety from the immediate threat. *S. v. Watts*, 191.

ESTOPPEL

§ 4.7. Equitable Estoppel; Sufficiency of Evidence

The trial court correctly refused to hold that an administratrix was estopped as a matter of law from challenging an earlier administrator's settlement with defendant. *Bowling v. Combs*, 234.

EVIDENCE

§ 11.5. Persons Disqualified by Statute in Transactions with Decedent

A beneficiary of a purported will was precluded by G.S. 8-51 from testifying as to her transactions with deceased. *In re Bethune*, 384.

EVIDENCE — Continued

FRAUD

HEALTH

§ 3. Health Ordinances and Regulations

G.S. 130-160(a) required defendant to maintain a sanitary system of sewage disposal at his place of business, and G.S. 130-203 made it a misdemeanor for him to fail to do so. *S. v. Kellum*, 210.

The trial court properly denied defendant's motion to dismiss a prosecution for failure to provide a sanitary system of sewage disposal at his place of business. *Ibid.*

Knowledge of a defect or a failure to correct it after being requested to do so are not elements of the misdemeanor of failing to provide a sanitary system of sewage disposal for a place of business. *Ibid.*

There is no requirement of willfulness for anyone who violates the provisions of G.S. 130-160 by failing to provide a sanitary sewage disposal system. *Ibid.*

HIGHWAYS AND CARTWAYS

§ 2.1. Restrictions Against Advertisements Along Highways

The superior court properly found that a decision of the Department of Transportation which had concluded that the petitioner had destroyed the vegetation near an outdoor sign it maintained was not supported by the evidence. *National Advertising Co. v. Bradshaw*, 745.

§ 11.2. Actions to Enjoin Obstructions

In order to create an easement or public highway, the evidence must disclose that travel is confined to a definite and specific line. *West v. Slick*, 345.

HOMICIDE

§ 1.1. Whether Injuries Inflicted Cause Death

The year and a day rule applies only to murder cases and not to the crime of manslaughter. *S. v. Hefler*, 466.

§ 15. Relevancy and Competency of Evidence in General

In an involuntary manslaughter case arising out of defendant's shooting of another hunter, the court erred in admitting testimony that defendant did not have a hunting license at the time he shot the victim and that defendant shot a deer at night some time after the victim's death. *S. v. Hall*, 450.

§ 16.1. Sufficiency and Competency of Evidence; Limitation of Statements to Res Gestae

The fact that a victim indicated some hope of recovery on a date after having previously given a statement qualifying as his dying declaration, did not preclude the earlier statement from qualifying as a dying declaration. *S. v. Hamlette*, 306.

§ 21.7. Sufficiency of Evidence of Guilt of Second Degree Murder

The State's evidence was sufficient for the jury in a prosecution for second degree murder. *S. v. James*, 529.

§ 21.9. Sufficiency of Evidence of Guilt of Manslaughter

The evidence was sufficient for the jury to find that defendant's accidental shooting of another deer hunter constituted culpable negligence so as to support his conviction of involuntary manslaughter. *S. v. Hall*, 529.

INSURANCE — Continued

§ 12. Insurable Interest in Life of Another

A "key man" life insurance policy was void where officers of the corporate beneficiary had obtained a temporary restraining order barring any participation by the insured in the affairs of the corporation prior to the time the policy became effective. *Manhattan Life Ins. Co. v. Miller Machine Co.*, 155.

§ 67.3. Accident Insurance Actions; Instructions

In an action in which plaintiff sought to recover under an insurance policy for disability and medical benefits arising from injuries sustained when he stepped barefooted from a boat, the trial judge erred in submitting to the jury questions which confused the material issues which were raised by the evidence. *Wooten v. Nationwide Mutual Ins. Co.*, 268.

§ 104. Actions Against Insured

In a tort action, defense counsel's remark: "Can you imagine what a low jury verdict would do to that family?" implied that defendant would have to pay the verdict herself because she was uninsured and was improper. *Watson v. White*, 106.

INTEREST

§ 1. Items Drawing Interest in General

The trial court erred in permitting the jury to award prejudgment interest on compensatory damages for fraud. *Lazenby v. Godwin*, 504.

JUDGES

§ 5. Disqualification of Judges

A trial judge properly found that no grounds existed for recusal of another judge who called the attorneys for plaintiff and defendants into his chambers and advised them concerning settlement possibilities. *Roper v. Thomas*, 64.

The trial judge acted properly in ruling on 19 motions before referring defendants' motion for recusal to another judge for a hearing. *Lowder v. Mills, Inc.*, 275.

Under G.S. 1A-1, Rule 43(a) a trial judge's decision to hear a motion for another judge's recusal only on affidavits did not reveal an abuse of discretion. *Lowder v. All Star Mills, Inc.*, 699.

A trial judge properly ruled that another judge should not have recused himself in a stockholders' derivative action. *Ibid.*

JUDGMENTS

§ 37.4. Preclusion or Relitigation of Judgments in Particular Proceedings

Where plaintiff filed a complaint seeking alimony, child support, and custody of the children on the same day judgment was entered in an action for divorce from bed and board brought by her husband, the trial court did not err in granting summary judgment in favor of her husband and ruling that res judicata applied to her suit. *Wood v. Wood*, 178.

LABORERS' AND MATERIALMEN'S LIENS

§ 8. Enforcement of Lien Generally

The filing of a proof of claim of lien for labor and materials in a federal bankruptcy court did not constitute the commencement of an action to enforce the lien within the meaning of G.S. 44A-13(a). *RDC, Inc. v. Brookleigh Builders*, 375.

LANDLORD AND TENANT

§ 6. Construction and Operation of Leases Generally

Defendant lessee was not entitled to rescission of a lease on the ground that plaintiff lessors failed to give it reasonable assistance in obtaining certain licenses and permits for a hospital as required by the lease. *Tucker v. Charter Medical Corp.*, 665.

The purpose of a lease was not frustrated so as to entitle defendant lessee to rescind the lease because the lessee was denied site approval by the city for construction of a building which would have been in the path of a proposed connection street across the leased property. *Ibid.*

The city council's rejection of a lessee's site plan for an office building on the leased property because the proposed building would lie in the path of a proposed connection street did not constitute a constructive condemnation so as to give the lessee the option under the lease to reduce the rent proportionately. *Ibid.*

§ 19.1. Actions for Rent; Defenses; Recovery of Back Payment

Plaintiff lessors did not encourage or acquiesce in action by the city council approving a connection road across leasehold property so as to constitute a breach of the covenant of quiet enjoyment, constructive eviction, or tortious interference with the leasehold. *Tucker v. Charter Medical Corp.*, 665.

LARCENY

§ 7.1. Proof of Intent

The evidence was sufficient for the jury to find a lack of consent on the part of the victim to defendant's taking of her television set and that defendant intended to deprive the victim permanently of the television set. *S. v. Lowe*, 549.

§ 7.3. Ownership of Property Stolen

There was no fatal variance between a larceny indictment alleging ownership of the stolen property in a husband and evidence that the stolen items were owned by his wife and were in joint possession of the husband and wife. *S. v. Young*, 705.

§ 8. Instructions Generally

The trial court in a larceny prosecution did not err in instructing that "cutting the speaker wires and moving parts of the stereo system from one room to another would be a taking." *S. v. Locklear*, 428.

§ 9. Verdict

Where the indictment charged that the value of stolen property was more than $400 and the only evidence of value was that the stolen property was worth $800, the jury could properly return a verdict finding defendant guilty of felonious larceny without making a special finding in its verdict that the property was worth more than $400. *S. v. Lowe*, 549.

MASTER AND SERVANT

§ 10.2. Actions for Wrongful Discharge

The trial court erred in dismissing plaintiff's claim for damages due to retaliatory discharge from his employment. *Wright v. Fiber Industries, Inc.*, 486.

§ 12. Interference with Employee's Obtaining Other Employment after Termination of Employment

The trial court erred in dismissing plaintiff's claim in which he alleged that defendants blacklisted him. *Wright v. Fiber Industries, Inc.*, 486.

MASTER AND SERVANT — Continued

§ 55.1. Injuries Compensable; Generally

In a workers' compensation proceeding, the Industrial Commission erred in finding that plaintiff suffered a compensable injury when he suffered electrical burns. *Diaz v. United States Textile Corp.*, 712.

Plaintiff electrician was not injured by "accident" when he suffered electrical burns upon hitting with his bare hand a wet board which was resting on a wire which had at least 3,000 volts of electricity running through it. *Ibid.*

§ 65.2. Back Injuries Sustained While Lifting Objects

A workers' compensation case is remanded for additional findings as to whether plaintiff cafeteria worker was injured in an accident when she experienced a pain in her back while helping the janitor and the cafeteria manager empty a trash can into a dumpster. *Lefler v. Lexington City Schools*, 194.

§ 67.1. Other Injuries or Disabilities

The Industrial Commission properly awarded compensation for permanent partial disability of plaintiff's back and her leg although there was evidence that problems with her leg were related to her back injury. *Holder v. Neuse Plastic Co.*, 588.

§ 68. Occupational Diseases

Plaintiff's earning capacity was reduced as a result of byssinosis contracted while working for defendant, and plaintiff was thus disabled from byssinosis. *Donnell v. Cone Mills Corp.*, 338.

The Industrial Commission erred in concluding that plaintiff timely filed his claim for workers' compensation in 1979 where plaintiff's condition was not diagnosed until December of 1979 but plaintiff was informed by competent medical authority of the nature and work related cause of his disease in 1970. *Payne v. Cone Mills Corp.*, 692.

§ 81. Construction of Policy as to Coverage; Insurer's Liability Generally

While the evidence supported the determination by the Industrial Commission that no employer-employee relationship existed between plaintiff cable TV installer and a company insured by defendant at the time plaintiff was injured while making a cable TV installation, the Commission should have made findings as to whether defendant insurer was estopped to deny workers' compensation insurance coverage for plaintiff. *Bowen v. Cra-Mac Cable Services*, 241.

§ 99. Costs and Attorneys' Fees

The Industrial Commission did not err in striking an award of an attorney's fee for plaintiff under G.S. 97-88.1 since the claim was defended on a reasonable ground. *Donnell v. Cone Mills Corp*, 338.

§ 108.1. Right to Unemployment Compensation; Effect of Misconduct

Findings of the Employment Security Commission supported the conclusion that claimant's discharge was occasioned by misconduct connected with his work. *In re Butler v. J. P. Stevens*, 563.

An employee's alteration of her production records, resulting in overpayment to the employee, constituted willful or wanton disregard of the employer's interest and supported the conclusion that claimant's discharge was occasioned by "misconduct connected with [her] work." *In re Williams v. SCM Proctor Silex*, 572.

MORTGAGES AND DEEDS OF TRUST

§ 15. Transfer of Property Mortgaged or of Equity of Redemption; Rights of Transferee

An installment contract for the sale of real property subject to a deed of trust constituted a "conveyance" which triggered the operation of a due-on-sale clause in the note and deed of trust. *In re Foreclosure of Taylor*, 134.

MUNICIPAL CORPORATIONS

§ 2.1. Compliance with Statutory Requirements in General

There is no requirement that a second public hearing be held on an amended annexation proposal, when that amendment is adopted to achieve compliance with G.S. 160A-135, pursuant to the authority granted in G.S. 160A-37(e). *Gregory v. Town of Plymouth*, 431.

§ 2.6. Extension of Utilities to Annexed Territory

The amended proposal to an annexation ordinance provided for fire protection services on substantially the same basis and in the same manner as such services were provided within the rest of the municipality prior to annexation. *Gregory v. Town of Plymouth*, 431.

§ 12. Liability as Determined by Nature of Functions; Governmental or Proprietary Functions

The operation of an ABC store by a city ABC Board is a proprietary function. *Waters v. Biesecker*, 253.

§ 12.2. Procedural Matters

Former G.S. 1-539.15 which required a claimant to give notice of his tort claim to a city within six months did not apply where defendant was a local ABC Board and not the city. *Waters v. Biesecker*, 253.

§ 30.3. Validity of Ordinances Generally

The trial court erred in entering summary judgment for defendant county concerning a zoning change involving plaintiffs' property. *Rose v. Guilford Co.*, 170.

NARCOTICS

§ 1.3. Elements and Essentials of Statutory Offenses Relating to Narcotics

Conspiracy to possess heroin is a lesser included offense of conspiracy to possess heroin with intent to sell or deliver. *S. v. Overton*, 1.

Defendants could properly be convicted of both trafficking in marijuana by possession and trafficking by manufacturing. *S. v. Sanderson*, 604.

§ 2. Indictment

An indictment alleging a conspiracy beginning in 1969 and continuing until 1978 to possess, sell and deliver and manufacture heroin "in violation of the Controlled Substances Act" did not fail to state a criminal offense because the Controlled Substances Act was not effective until 1 January 1972. *S. v. Overton*, 1.

There was no fatal variance between an indictment alleging a conspiracy to possess, sell, and manufacture heroin from some time in 1969 until 28 March 1978 and evidence showing that defendant took an active part in the conspiracy in 1974 and at various times thereafter. *Ibid.*

NARCOTICS — Continued

§ 3.1. Competency and Relevancy of Evidence Generally

The trial court did not err in permitting witnesses for the State to testify about "dope" and "heroin" without the State first laying a foundation supporting the witnesses' identification of the substance. *S. v. Overton*, 1.

The admission of a detective's testimony that defendant had a tattoo of the word "cancer" on her hand and a photograph of defendant's arm which showed the tattoo was not prejudicial to defendants. *S. v. Myrick*, 362.

An officer was properly permitted to testify that he saw what appeared to him to be marijuana plants growing in a field. *S. v. Sanderson*, 604.

§ 3.3. Competency and Relevancy of Opinion Testimony

A chemist's speculative opinion testimony as to the number of talwin tablets which had been dissolved to form the residue in spoons found in defendants' residence was not prejudicial error. *S. v. Myrick*, 362.

§ 4. Sufficiency of Evidence and Nonsuit; Cases where Evidence was Sufficient

The State's evidence was sufficient for the jury on issues of guilt of each of three defendants of conspiracy between 1969 and 1978 to manufacture, possess with intent to sell and deliver, and sell and deliver heroin shipped from Thailand to North Carolina. *S. v. Overton*, 1.

The State's evidence was sufficient to support conviction of defendant for manufacturing marijuana and for trafficking by manufacturing marijuana found growing in cornfields on land leased or owned by defendant. *S. v. Sanderson*, 604.

§ 4.3. Sufficiency of Evidence of Constructive Possession

The State's evidence was sufficient to permit the jury to find that defendant had constructive possession of narcotics found in an automobile parked within the curtilage of defendant's home. *S. v. Courtright*, 247.

§ 5. Verdict and Punishment

Defendant was not prejudiced by a verdict finding him guilty of conspiracy to manufacture, possess with intent to sell and deliver or sell and deliver heroin because of the presence of the disjunctive. *S. v. Overton*, 1.

Conviction of defendants under G.S. 90-95(a) for possessing and manufacturing marijuana and under G.S. 90-95(h)(1) for trafficking by possessing and manufacturing marijuana violated defendants' rights against double jeopardy, and the convictions under G.S. 90-95(a) must be vacated. *S. v. Sanderson*, 604.

NEGLIGENCE

§ 34. Sufficiency of Evidence to Require Submission of Issue of Contributory Negligence to the Jury

The trial court did not err in denying defendant's motion for a directed verdict in a negligence action. *Watson v. White*, 106.

§ 38. Instruction on Contributory Negligence

In a tort action in which plaintiff alleged defendant negligently hit him while he was crossing the street and defendant alleged that plaintiff was contributorily negligent, the trial court erred in failing to instruct on the doctrine of last clear chance. *Watson v. White*, 106.

The trial court erred in instructing the jury that it could find that decedent was contributorily negligent by failing promptly to seek medical attention after the

PHYSICIANS, SURGEONS AND ALLIED PROFESSIONS

§ 5. Licensing and Regulation of Dentists

The State Board of Dental Examiners erred in phrasing findings and conclusions in terms of a standard of practice observed in North Carolina. *In re Dailey v. Board of Dental Examiners*, 441.

Certain findings and conclusions of the North Carolina Board of Dental Examiners, made pursuant to a hearing conducted to determine whether disciplinary sanctions should be imposed upon plaintiff, were not supported by the evidence. *Ibid.*

PLEADINGS

§ 9.1. Extension of Time to File Answer

Defendant's failure to file answer was the result of excusable neglect, and the trial court should have granted defendant an extension of time to file answer after the time for filing had expired, where defendant's insurer failed to obtain counsel to defend the suit against defendant. *Byrd v. Mortenson*, 85.

§ 17. Nature, Purpose, and Necessity of Reply

In a negligence action in which defendants' answer raised the affirmative defense of release, plaintiff was not required to file a reply alleging that the release was obtained by fraud in order to seek avoidance of the release on that ground. *Brown v. Lanier*, 575.

§ 37. Issues Raised by the Pleadings

The trial judge erred in refusing to submit plaintiff's proposed instructions to the jury concerning the effect of defendant's admissions in the pleadings. *Watson v. White*, 106.

PRINCIPAL AND AGENT

§ 1. Principal and Agent Generally

The fact that the femme defendant indirectly received and enjoyed the benefit of her husband's contract with the plaintiff via maintenance and support was insufficient to establish a business relationship and agreement between the defendants. *Zickgraf Hardwood Co. v. Seay*, 128.

§ 4. Proof of Agency Generally

In an action to recover a deposit made on an unsuccessful loan commitment application, the trial judge erred in entering judgment notwithstanding the verdict for defendant since plaintiffs presented enough evidence of an agency relationship between them and defendant to withstand a directed verdict motion. *Colony Associates v. Fred L. Clapp & Co.*, 634.

§ 5. Scope of Authority

In an action to recover a deposit made on an unsuccessful loan commitment application, defendant agent was liable to plaintiff principals for the acts of its subagent. *Colony Associates v. Fred L. Clapp & Co.*, 634.

PROCESS

§ 1.1. Form and Requisites of Process

Service of process was defective where plaintiff failed to comply with the mandatory requirements of G.S. 1A-1, Rule 4(j)(1) for service of process on a sole pro-

RECEIVING STOLEN GOODS

§ 2. Indictment

In prosecutions for possession of stolen goods, it is not required that the indictment allege the property allegedly possessed by defendant was "stolen property." *S. v. Malloy*, 218.

§ 5.1. Particular Cases; Evidence Sufficient

The State's evidence was sufficient for the jury to find that defendant possessed stolen property with knowledge or reasonable grounds to believe that the property had been feloniously stolen. *S. v. Haskins*, 199.

§ 5.2. Particular Cases; Evidence Insufficient

The evidence was sufficient on the element of "possession" in a prosecution for possession of stolen goods. *S. v. Malloy*, 218.

ROBBERY

§ 4.1. Variance Between Indictment and Proof

There was no fatal variance between an armed robbery indictment alleging a corporate ownership of silver taken in the robbery and evidence which failed to establish such corporate ownership. *S. v. Peoples*, 479.

§ 4.3. Armed Robbery Cases Where Evidence Held Sufficient

The trial judge did not err in submitting robbery with a dangerous weapon to the jury even assuming the evidence showed that the gun used in the robbery would not fire where the gun was used as a club. *S. v. Funderburk*, 777.

In a prosecution for robbery with a firearm, the identification of the instrument used as a firearm was sufficiently positive to be submitted to the jury. *S. v. Quick*, 771.

§ 5.2. Instructions Relating to Armed Robbery

In a prosecution for armed robbery, the trial court sufficiently applied the law to the evidence in the jury instructions. *S. v. Miller*, 208.

RULES OF CIVIL PROCEDURE

§ 4. Process

Service of process was defective where plaintiff failed to comply with the mandatory requirements of G.S. 1A-1, Rule 4(j)(1) for service of process on a sole proprietorship and attempted service instead on defendant as an association under G.S. 1A-1, Rule 4(j)(8). *Park v. Sleepy Creek Turkeys*, 545.

§ 6. Time to File Answer

Defendant's failure to file answer was the result of excusable neglect, and the trial court should have granted defendant an extension of time to file answer after the time for filing had expired, where defendant's insurer failed to obtain counsel to defend the suit against defendant. *Byrd v. Mortenson*, 85.

§ 8.1. Complaint

The trial court did not abuse its discretion in dismissing plaintiff's malpractice action pursuant to G.S. 1A-1, Rule 41(b) for failure to comply with the requirement of G.S. 1A-1, Rule 8(a)(2) that the complaint not state the demand for monetary relief. *Jones v. Boyce*, 585.

RULES OF CIVIL PROCEDURE — Continued

§ 8.2. Answer

The trial judge erred in refusing to submit plaintiff's proposed instructions to the jury concerning the effect of defendant's admissions in the pleadings. *Watson v. White*, 106.

§ 14. Third-Party Practice

The trial court did not err in denying the third party defendant's motion for directed verdict at the close of defendant's evidence since plaintiffs had to establish their claim against defendant before defendant as third party plaintiff could ascertain the extent of any claim for indemnification. *Cody v. Dept. of Transportation*, 724.

§ 15. Amended and Supplemental Pleadings Generally

In an action by a limited partner against the general partners to recover the amount of his investments in a limited partnership, the trial court did not err in finding plaintiff's amendments to his complaint related back and were not barred by the statute of limitations. *Roper v. Thomas*, 64.

§ 15.1. Discretion of Court to Grant Amendment to Pleadings

In an action for attorney malpractice brought by a third party not in privity with defendant, the trial court did not abuse its discretion by denying plaintiff's motion to amend its complaint to include a second claim for relief in contract based upon a third party beneficiary theory. *United Leasing Corp. v. Miller*, 40.

The trial court did not abuse its discretion in an action by a limited partner against the general partners by allowing plaintiff to amend his complaint. *Roper v. Thomas*, 64.

§ 15.2. Amendments to Pleadings to Conform to the Evidence or Proof

The trial court did not abuse its discretion in the denial of plaintiff's motion to amend his complaint to conform to the evidence. *James v. Board of Education*, 642.

§ 41. Dismissal of Actions Generally

The trial judge did not commit prejudicial error in hearing a motion to set aside a default judgment in the absence of defendants' attorney. *Northwestern Bank v. Morrison*, 767.

§ 42. Consolidation; Separate Trials

In order for the trial court to sever the negligence issue from the damages issue, it should enter findings and conclusions establishing that severance is appropriate "in furtherance of convenience or to avoid prejudice." *Wallace v. Evans*, 145.

The trial court properly severed alternate claims for a prescriptive easement and an easement by eminent domain. *Pinner v. Southern Bell*, 257.

§ 43. Evidence

Under G.S. 1A-1, Rule 43(a) a trial judge's decision to hear a motion for another judge's recusal only on affidavits did not reveal an abuse of discretion. *Lowder v. All Star Mills, Inc.*, 699.

§ 50. Motions for Directed Verdicts and Judgments Notwithstanding Verdicts Generally

Where the appellate court found that j.n.o.v. was improperly entered by the trial court, it reversed and remanded the case for a new trial rather than

reinstating the jury's verdict since an erroneous jury instruction on damages was given. *Colony Associates v. Fred L. Clapp & Co.*, 634.

§ 51.1. Recapitulation of Evidence in Instructions to Jury

The trial court's failure to review any evidence and thus apply the law to the evidence was prejudicial error. *Deep Run Milling Co. v. Williams*, 160.

§ 52. Findings by Court Generally

The trial court was not required to make findings of fact as requested by defendants in an order denying a motion to vacate a receivership since the order was interlocutory and not appealable. *Lowder v. Mills, Inc.*, 275.

§ 55. Default Judgment

Where defendants failed to answer within the time allowed by G.S. 1A-1, Rule 12(a)(1) and an entry of default was entered against defendant pursuant to G.S. 1A-1, Rule 55, it was error for one superior court judge to set aside the "judgment" of another superior court judge which had denied defendants' motion to set aside the clerk's entry of default. *Bailey v. Gooding*, 459.

The trial judge did not abuse his discretion in failing to find good cause to set aside the clerk's entry of default. *Ibid.*

Where defendants failed to properly set forth their exceptions and assignments of error concerning the dismissal of their appeal, the only question before the appellate court was the propriety of a judgment of default entered against defendant. *First Union National Bank v. Wilson*, 781.

The defendants were properly apprised of the proceedings during which a default judgment against them was entered. *Ibid.*

§ 55.1. Setting Aside Default Judgment

The trial court in a medical malpractice action abused its discretion in refusing to set aside an entry of default against defendant where defendant immediately contacted his insurer when he learned of the suit but the insurer failed to obtain counsel to defend the suit. *Byrd v. Mortenson*, 85.

Under G.S. 7A-258(c), the trial judge did not err in refusing to set aside a default judgment when there was a pending motion to transfer the case to superior court since defendants did not move to transfer their case within 30 days after being served with a pleading. *Northwestern Bank v. Morrison*, 767.

Where a trial judge refused to set aside an entry of default and used standards pursuant to G.S. 1A-1, Rule 60(b) instead of the standards pursuant to G.S. 1A-1, Rule 55(d), the error was harmless. *Bailey v. Gooding*, 459.

§ 56. Summary Judgment

A statement in an affidavit was conclusory and could not be considered in ruling on a motion for summary judgment. *Tucker v. Charter Medical Corp.*, 665.

§ 56.1. Timeliness of Motion for Summary Judgment

The trial court did not abuse its discretion in ruling on a motion for summary judgment while discovery procedures were pending. *Manhattan Life Ins. Co. v. Miller Machine Co.*, 155.

§ 56.3. Necessity for and Sufficiency of Supporting Material

The trial court properly ruled that plaintiffs' affidavits, which were filed on the day of the summary judgment hearing, were inadmissible. *Rose v. Guilford Co.*, 170.

SEARCHES AND SEIZURES — Continued

The trial court erred in concluding that a search under a warrant was illegal where defendants presented no evidence to rebut the presumption of the validity of the warrant. *S. v. Dorsey*, 595.

§ 23. Cases Where Evidence of Probable Cause Sufficient

An affidavit in support of a search warrant was sufficient to establish probable cause for the issuance of the warrant to search a residence for cocaine. *S. v. Byrd*, 740.

§ 24. Cases Where Evidence of Probable Cause Sufficient; Information from Informer

An affidavit underlying a search warrant showed probable cause sufficient to justify its issuance. *S. v. Weatherford*, 196.

An affidavit for a search warrant based upon information from a confidential informant was sufficient to show probable cause for issuance of the warrant to search a mobile home for narcotics although it failed to allege that controlled substances were seen or purchased at the mobile home by the informant. *S. v. Myrick*, 362.

§ 39. Execution of Search Warrant; Places Which May be Searched

Where defendant's automobile was parked so that it projected some seven inches into the yard of a dwelling described in a search warrant, and the keys thereto were found inside the dwelling, the automobile was within the curtilage of the dwelling and could properly be searched pursuant to the warrant. *S. v. Courtright*, 247.

§ 43. Motions to Suppress Evidence

The trial court did not err in refusing to hear defendant's oral motion at trial to suppress certain evidence. *S. v. Blackwood*, 150.

The trial court properly refused to grant defendant's written pretrial motion to suppress items taken pursuant to a search warrant where defendant's affidavit did not support the motion. *Ibid.*

§ 44. Voir Dire Hearing Generally

Where a search warrant was invalid on its face for lack of facts to show probable cause, it could be made valid by voir dire testimony and a contemporary, unattached memorandum. *S. v. Hicks, S. v. Jones & S. v. Cooper*, 116.

§ 47. Admissibility and Competency of Evidence

The trial court did not err in admitting a magistrate's handwritten notes which contained additional information recorded by the magistrate as received under oath from an affiant. *S. v. Hicks, S. v. Jones & S. v. Cooper*, 116.

STATE

§ 2. State Lands

The statutory presumption created by G.S. 146-97 that, where the State is a party to a suit for any land, the title to the land shall be deemed to be in the State until otherwise shown, is constitutional. *S. v. Taylor*, 673.

STATUTES

§ 3. Vague and Indefinite Statutes

G.S. 130-160 which requires maintenance of a sanitary sewage disposal system is not unconstitutionally vague. *S. v. Kellum*, 210.

TAXATION

§ 22.1. Property of Religious, Charitable, and Educational Institutions

The North Carolina Property Tax Commission, sitting as the State Board of Equalization and Review, properly found that a residential retirement center was not eligible for the charitable purposes exemption from *ad valorem* property taxes. *In re Chapel Hill Residential Retirement Center*, 294.

§ 25.10. State Board of Equalization and Review

The North Carolina Property Tax Commission erred in making certain findings and conclusions which were not supported by the evidence; however, the errors shown were not prejudicial. *In re Chapel Hill Residential Retirement Center*, 294.

TORTS

§ 7.2. Avoidance of Release; Effect of Fraud, Duress, or Mistake

In a negligence action in which defendants' answer raised the affirmative defense of release, plaintiff was not required to file a reply alleging that the release was obtained by fraud in order to seek avoidance of the release on that ground. *Brown v. Lanier*, 575.

TRIAL

§ 3.1. Motions for Continuance; Discretion of Judge

The trial judge did not commit prejudicial error in hearing a motion to set aside a default judgment in the absence of defendants' attorney. *Northwestern Bank v. Morrison*, 767.

§ 3.2. Particular Grounds for Continuance

The trial court did not abuse its discretion in denying defendant's motion for a continuance of a summary judgment hearing because defendant was informed three days before the scheduled hearing that the assigned judge would disqualify himself. *Tucker v. Charter Medical Corp.*, 665.

§ 11. Argument and Conduct of Counsel

In a tort action, defense counsel's remark: "Can you imagine what a low jury verdict would do to that family?" implied that defendant would have to pay the verdict herself because she was uninsured and was improper. *Watson v. White*, 106.

§ 11.3. Order of Argument

The order of jury arguments is determined by the trial court. *Pinner v. Southern Bell*, 257.

§ 14. Order of Proof

The trial court properly severed alternate claims for a prescriptive easement and an easement by eminent domain. *Pinner v. Southern Bell*, 257.

§ 39. Additional Instructions and Redeliberation of Jury

The trial court did not err in failing to dismiss the case and in permitting the jury to deliberate further when the jury returned to the courtroom and reported

that "with the evidence presented on both sides, there was no decision made." *County of Lenoir ex rel. Dudley v. Dawson*, 122.

It is error for the judge in a civil case to instruct the jury that a mistrial for failure of the jury to reach a verdict will mean that another jury will have to be selected to hear the case again and that more of the court's time will be required to hear the case again. *Ibid.*

§ 40. Sufficiency of Issues

The third-party defendant was not prejudiced, if there was error, in the trial court's failing to determine the issues other than damages in an inverse condemnation case prior to trial. *Cody v. Dept. of Transportation*, 724.

§ 52.1. Setting Aside Verdict for Excessive or Inadequate Award

The trial court did not err in refusing to set aside the verdict for plaintiff as being excessive after the court entered a judgment n.o.v. for one of the two defendants found by the jury to be negligent and thus liable to plaintiff for damages. *Hairston v. Alexander Tank and Equip. Co.*, 320.

UNFAIR COMPETITION

§ 1. Unfair Trade Practices

Summary judgment was properly entered in favor of all defendants in an action against the sellers and manufacturer of a heat pump to recover damages for alleged unfair and deceptive trade practices in misrepresenting the ability of the sellers properly to install the heat pump. *Hager v. Crawford*, 763.

UTILITIES COMMISSION

§ 20. Regulation of Telegraph and Telephone Companies

The Utilities Commission did not err in including the expenses and revenues associated with and derived from yellow page directory advertising in the revenues and expenses of a telephone company before determining what increase should be granted the telephone company. *State ex rel. Utilities Comm. v. Central Telephone Co.*, 393.

WEAPONS AND FIREARMS

§ 3. Pointing, Aiming or Discharging Weapon

In a prosecution for discharging a firearm into occupied property, the evidence was sufficient for the jury to find that defendant knew or had reasonable grounds to believe that the house was occupied at the time of the shooting. *S. v. Hicks*, 718.

WILLS

§ 23. Instructions in Caveat Proceeding

The trial court in a caveat proceeding properly refused to give the jury a peremptory instruction that it should find that the writing in question was the will of the purported testator if the jurors believed the witnesses as to the execution of the will. *In re Bethune*, 384.

WILLS — Continued

§ 33.1. Words of Limitation or Purchase

The Rule in Shelley's Case applied to a devise of land to "Percy Davenport for the period of his lifetime. . . . At the death of Percy Davenport I devise said land to the lawful issue of his body in fee simple forever." *Pugh v. Davenport*, 397.

§ 73. Actions to Construe Wills

Plaintiffs' complaint was insufficient to present a claim justiciable under the Declaratory Judgment Act as to the interpretation of two allegedly ambiguous articles of a will. *Hicks v. Hicks*, 517.

WITNESSES

§ 1. Competency of Witness

The trial court erred in admitting into evidence and permitting the jury to view a videotape of a hypnosis session of a State's witness. *S. v. Peoples*, 479.

§ 1.1. Mental Capacity

The trial court did not err in concluding that a witness who was under the care of a psychiatrist was competent to testify. *S. v. Overton*, 1.

§ 7.1. Direct Examination

The trial court did not err in the admission of testimony by a witness who had previously been hypnotized by a police officer. *S. v. Peoples*, 479.

§ 10. Attendance, Production of Documents, and Compensation

The trial court did not err in denying defendant's motion to depose a co-conspirator who was confined in a New Jersey prison at the time of trial. *S. v. Overton*, 1.

The trial court did not violate defendant's right to compulsory process in the denial of defendant's motion to secure the attendance of a material out-of-state witness which was made on the day defendant's case had been peremptorily set for trial. *S. v. Cyrus*, 774.

WORD AND PHRASE INDEX

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