NORTH CAROLINA COURT OF APPEALS REPORTS

VOLUME 44

20 NOVEMBER 1979

5 FEBRUARY 1980

RALEIGH
1980

CITE THIS VOLUME

44 N.C. App.

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THE COURT OF APPEALS
OF
NORTH CAROLINA

Chief Judge

NAOMI E. MORRIS

Judges

FRANK M. PARKER
R. A. HEDRICK
EARL W. VAUGHN
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GERALD ARNOLD
JOHN WEBB
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1. Retired 31 July 1980.
2. Resigned 30 May 1980.
3. Appointed 31 July 1980 to succeed J. W. Jackson who retired 1 June 1980.

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1. Retired 31 July 1980.
2. Appointed 2 July 1980 to succeed B. Gordon Gentry who retired 30 April 1980.
3. Appointed Superior Court Judge, 29th District, 31 July 1980.

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OF

NORTH CAROLINA

AT

RALEIGH

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No. 793SC168

(Filed 20 November 1979)

Electricity § 5— negligence in maintenance of power lines—genuine issue of fact

The evidence on motion for summary judgment presented a genuine issue as to defendant town's negligence in the maintenance of its electric power lines and did not disclose contributory negligence by plaintiff as a matter of law where it showed that defendant town operated an electric distribution system for profit; plaintiff, while working on the roof of a building, raised a 10-foot downspout; the downspout came in contact with defendant's high voltage wires (7200 volts) which crossed over the roof, and plaintiff received serious injuries; defendant town had adopted the National Electrical Code as an ordinance, and the Electrical Code required that electrical conductors be insulated and that there be a minimum clearance for conductors carrying more than 600 volts; the wires over the building where plaintiff was working had become uninsulated in spots; and the wires may have been below the minimum clearance required by the Electrical Code.

APPEAL by Roy Letchworth, plaintiff, and Town of Ayden, Third Party Plaintiff, from *Smith (Donald), Judge*. Judgment entered 30 November 1978 in Superior Court, PITT County. Heard in the Court of Appeals 18 October 1979.

R. L. Turnage, Jr., and Corabob Smith Turnage owned a building in the Town of Ayden which was leased to Sumrell Fur-

niture Company. The Turnages contracted with Bateman Roofing and Electrical Contractors to repair the roof and gutters on the building. Plaintiff was an employee of Bateman Roofing and Supply and had been on the Turnage job with two other laborers for a day and a half when the incident which gave rise to this action occurred.

The Town of Ayden owned and operated an electric distribution system for profit. At all times hereinafter there was in effect within the town an ordinance denominated Ordinance 1971-72-22 which included *inter alia* the North Carolina Electrical Code adopting by reference the National Electrical Code. Section 310-2 of the National Electrical Code, as adopted, requires that conductors of electric current be insulated. The Code further requires a clearance of some minimum height for conductors carrying more than 600 volts.

As a part of its electric distribution system, the Town of Ayden owned and operated high voltage lines (7200 volts) on poles along the north side of an alley adjacent to the building and across the roof of the building owned by the Turnages. The wires were insulated but bare in spots—naked as described by one witness. Testimony varied somewhat concerning the height of the lines over the building. Plaintiff's complaint alleges that the distance of the wire from the roof of the building was deceptive. One of plaintiff's co-workers testified by deposition that the wires were three or four feet above the roof. Another co-worker stated that an average man could touch the wires while standing on the building. There was further testimony by deposition as to a "bunch of wires on a pole" and the presence of two to four or five wires. The plaintiff referred to a telephone pole being "up there."

On 3 September 1975, during the course of work on the roof, plaintiff raised a 10-foot downspout. The downspout came in contact with the uninsulated or poorly insulated wires, which caused the high voltage electric current to pass through plaintiff's body and resulted in his 100% disability.

The defendant Town of Ayden answered the plaintiff's complaint with a general denial, pleaded plaintiff's contributory negligence as a bar, and made the Turnages as owners of the building third party defendants, asking for contribution and indemnification.

Motion for summary judgment was made by the Town of Ayden and the Turnages and allowed by the court. Plaintiff appealed the order allowing summary judgment against the plaintiff and for the Town of Ayden. The Town of Ayden appealed the order allowing summary judgment for the Turnages.

Fred W. Harrison, for plaintiff appellant.

Gaylord, Singleton & McNally, by Louis W. Gaylord, Jr., for defendant appellant, Town of Ayden.

Lewis, Lewis & Lewis, by John B. Lewis, Jr., and White, Allen, Hooten, Hodges & Hines, by Thomas J. White, for R. L. Turnage, Jr., and Corabob Smith Turnage.

HILL, Judge.

Did the court err in granting summary judgment in both instances in this case?

Only when there exists no genuine issue as to a material fact should a motion for summary judgment be allowed. G.S. 1A-1, Rule 56(c). Summary judgment for a defendant, in a negligence action, is proper when the uncontradicted evidence shows the absence of negligence on the part of the defendant, or where contributory negligence on the part of the plaintiff as a matter of law is established by uncontradicted evidence, or where it is established that the purported negligence of the defendant was not the proximate cause of the plaintiff's injury. *Hale v. Power Co.*, 40 N.C. App. 202, 252 S.E. 2d 265 (1979); *Bogle v. Power Co.*, 27 N.C. App. 318, 219 S.E. 2d 308 (1975), *cert. denied* 289 N.C. 296, 222 S.E. 2d 695 (1976).

Summary judgment provides a drastic remedy and should be used cautiously so that no one will be deprived of a trial or the chance to present evidence on a genuine disputed issue of fact. The moving party has the burden of establishing clearly the lack of a triable issue; and his papers are carefully scrutinized while those of the opposing party are indulgently regarded.

The court properly granted the motion for summary judgment in favor of the defendants, R. L. Turnage, Jr., and wife, Corabob Smith Turnage.

There is evidence that the Town of Ayden was negligent. The wires were uninsulated—bare in spots.

Our courts have held that a supplier of electricity owes the highest degree of care to the public. *Hale v. Power Co., supra, citing Small v. Southern Public Utilities Co.*, 200 N.C. 719, 158 S.E. 385 (1931). "The danger is great, and care and watchfulness must be commensurate to it." *Haynes v. The Raleigh Gas Co.*, 114 N.C. 203, 211, 19 S.E. 344, 346 (1894). The standard is always the rule of the prudent man, so what conduct constitutes reasonable care varies in the presence of different conditions. *Small v. Southern Public Utilities Co., supra.*

It is not negligence per se to use uninsulated wires. The rule as stated in *Mintz v. Murphy*, 235 N.C. 304, 69 S.E. 2d 849 (1952), provides that the duty of providing insulation should be limited to those points or places where there is reason to apprehend that persons may come in contact with the wires.

The Town of Ayden had adopted the National Electrical Code as an ordinance. The Code requires that electrical conductors be insulated and that there be a minimum clearance for conductors carrying more than 600 volts. The power company recognized this and installed insulated wires initially. However, the wires had become bare in spots, and the evidence indicates that they may have been below the minimum clearance.

Certainly, roofs have to be inspected, maintained and repaired, requiring the presence of people. The variance in the height of the wires above the roof along with the degree of "bareness" of the wires could have a bearing on the degree of care which must be exerted by an employee on the roof.

Was the plaintiff contributorily negligent? What degree of care did the plaintiff take in avoiding the wires? Did his precautions to avoid the wires meet the rule of the prudent man? The complaint alleges that the distance of the wires from the roof was deceptive because of their location.

It is well settled that when a person is aware of an electric wire and knows that it might be or is highly dangerous, he has a legal duty to avoid coming in contact with it. *Floyd v. Nash*, 268 N.C. 547, 151 S.E. 2d 1 (1966); *Alford v. Washington*, 244 N.C. 132, 92 S.E. 2d 788 (1956). This does not mean, however, that a person

is guilty of contributory negligence as a matter of law if he contacts a known electrical wire regardless of the circumstances and regardless of any precautions he may have taken to avoid the mishap. *Williams v. Power & Light Co.*, 296 N.C. 400, 250 S.E. 2d 255 (1979).

The plaintiff testified in deposition that he remembered raising a 10-foot downspout and that was all he remembered. The other witnesses did not see the accident—only the downspout in contact with the wires and the plaintiff.

We conclude that defendant Town failed to carry its burden of showing the absence of negligence, or that defendant was contributorily negligent as a matter of law, as it was required to do in order to prevail on its motion for summary judgment. At trial, of course, the burden will shift and plaintiff will have the burden of showing that his injury was proximately caused by the negligence of defendant. Summary judgment in favor of defendant Town was not appropriate, and it must be reversed.

Summary Judgment in favor of defendant Town is reversed.

Summary Judgment in favor of third party defendants Turnage is affirmed.

Judges VAUGHN and ERWIN concur.

HIGH POINT SPRINKLER COMPANY, PLAINTIFF v. DOCKERY CORPORATION, DEFENDANT v. THE CARDINAL CORPORATION, THIRD-PARTY DEFENDANT

No. 7918DC235

(Filed 20 November 1979)

Contracts § 16— design of sprinkler system—approval as condition of contract—condition not met

There was no contract between the parties for the design and installation of a sprinkler system upon which plaintiff could recover where the written "contract" in question contained a condition specifying that any plans for the design of an automatic sprinkler system had to be approved by Insurance Services Office before work could proceed thereon, no contract came into being between the parties unless and until this condition was met, and the condition was not met.

APPEAL by plaintiff from *Alexander (Elreta M.), Judge.* Judgment entered 8 December 1978 in District Court, GUILFORD County. Heard in the Court of Appeals on 25 October 1979.

Plaintiff High Point Sprinkler Company brought this action against the defendant Dockery Corporation alleging that it entered into a contract with Dockery on 17 October 1975 and, at Dockery's direction, commenced performance shortly thereafter by drawing design plans for an automatic sprinkler system to be installed by plaintiff pursuant to the contract terms. However, in December 1975, the defendant "informed Plaintiff that said contract was cancelled," and plaintiff ceased work thereunder. Plaintiff claims that Dockery owes it $1,644.00 for work performed prior to cancellation of the contract, and $1,581.82 for profits it would have earned had the contract not been cancelled.

Defendant Dockery, answering, asserted that plaintiff had failed to comply with the "obligations" imposed upon it by the terms of the "Proposal" under which it submitted design plans and, therefore, was barred from any recovery. Dockery also filed a third-party claim against The Cardinal Corporation, owner of the property in which the sprinkler system was to have been installed, maintaining that it was entitled to indemnification from Cardinal in the event of a recovery by plaintiff. Cardinal failed to answer, and subsequently, the matter was tried without a jury before Judge Alexander who, at the end of the plaintiff's evidence, made findings of fact and conclusions of law, and thereupon granted the defendant Dockery's motion to dismiss. Plaintiff appealed.

Turner, Enochs, Foster & Burnley, by Wendell H. Ott, for plaintiff appellant.

Block, Meyland & Lloyd, by A. L. Meyland, for defendant appellee.

HEDRICK, Judge.

The record before us is devoid of any evidence presented at the hearing before Judge Alexander. Thus, we quote *in toto* the facts as found by her for the purpose of showing the events which gave rise to this controversy.

1. Defendant, pursuant to a contract with the third-party defendant Cardinal Corporation, was the general contractor responsible for building the Cardinal Golf Club.

2. John Ward, plaintiff's sales manager, interviewed Kenneth Baker, defendant's Vice-President for construction, at defendant's place of business in early October, 1975, for the purpose of obtaining information necessary for the preparation of a bid by plaintiff, as subcontractor, to be submitted to defendant, the general contractor. The bid in question was for the design, fabrication and installation of an automatic sprinkler fire protection system at the Cardinal Golf Club.

3. Mr. Baker referred Mr. Ward to agents of the Cardinal Corporation for instructions and information essential to the submission of the bid to be prepared by plaintiff, conveying to Mr. Ward the fact that said bid was to be prepared consistent with such instructions and information.

4. Upon instructions of defendant's Vice President, Mr. Ward visited the project site and received the requisite instructions and information from agents of the Cardinal Corporation.

5. Included in the instructions received by Mr. Ward was a directive that the bid to be prepared must use an existing irrigation system to supply water for the sprinkler system.

6. Mr. Ward expressed reservations and raised questions about the suitability of the irrigation system for a water supply source, but was advised by agents of ghe [sic] Cardinal Corporation that the irrigation system had already been checked and approved by the appropriate insurance carriers, that alternative water supply sources would be too expensive, and that competitive bidders had similarly been instructed to use the irrigation system for water supply.

7. Plaintiff subsequently prepared and submitted the bid to defendant in accordance with and consistent with the instructions received, in the amount of $17,400.00.00 [sic], by letter dated October 9, 1975. *The bid contained a provision*

that the design criteria for the sprinkler system was to meet with the approval of Insurance Services Office (ISO) and provided that "(w)e propose to supply the new system from the irrigation system approximately 100 feet from the building, as directed by the Cardinal Corporation."

8. Defendant, with full knowledge that plaintiff's bid was based upon instructions received from Cardinal Corporation agents as per defendant's directions, and with full knowledge that plaintiff had been directed to use the irrigation system water supply, accepted plaintiff's bid on October 17, 1975, thus forming a contract between plaintiff and defendant.

9. Upon defendant's specific direction, plaintiff thereupon commenced performance of said contract by purchasing requisite permits and by completing the required engineering design work.

10. Upon completion of the engineering design work, plaintiff submitted the proposed design to ISO for review and approval. ISO concluded that the plans were not acceptable because of the proposed use of the irrigation system for water supply.

11. Plaintiff, defendant and Cardinal Corporation conferred about the problems posed by ISO rejection of the irrigation water supply. Plaintiff advised defendant and Cardinal Corporation that the irrigation system could be accepted by ISO as a water source with the addition of certain water tanks and pumps to the system as designed by the plaintiff, and gave an estimate as to the additional amount of money required to resolve this problem.

12. Cardinal Corporation, after evaluating the additional cost in relation to the lower insurance premiums that would be available with a sprinkler system, concluded that its economic best interest would be served by abandoning its plan to have a fire protection system.

13. Defendant subsequently instructed Plaintiff to cease its performance under the contract between plaintiff and defendant.

14. Plaintiff submitted to defendant a demand for $1,644.00 on December 30, 1975, said amount representing the

design work performed by plaintiff. Defendant has failed and refused to pay same.

15. Plaintiff did not intend to warrant that the irrigation water supply would be approved by ISO.

16. Sprinkler system for fire protection purposes is an integrated system and includes a water supply.

[Our emphasis.]

Upon motion of the defendant Dockery, plaintiff's claim was dismissed pursuant to Rule 41(b) of the North Carolina Rules of Civil Procedure, G.S. § 1A-1, which provides in pertinent part as follows:

> After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, . . . may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief.

By its sole assignment of error, plaintiff argues on appeal that, contrary to the court's conclusions, the unchallenged findings of fact set out above plainly demonstrate that it, the plaintiff, is entitled to relief. Plaintiff asserts two theories upon which it maintains it can recover: the doctrine of "partial performance" or, alternatively, that of "faulty specifications." We disagree, and find it unnecessary to discuss the legal principles associated with either doctrine since we think, and so hold, that the findings clearly preclude any recovery by plaintiff.

The set of facts involved in this case demonstrates beyond peradventure that plaintiff is not entitled to recover anything of this defendant for the simple reason that the written "contract" contained a condition specifying that any plans for the design of an automatic sprinkler system had to be approved by Insurance Services Office (ISO) before work could proceed thereon. Regardless of the finding by Judge Alexander that a contract existed between plaintiff and defendant Dockery, we are of the opinion that no contract came into being between these parties unless and until this condition was met. Neither party could exact performance of the other before ISO approval had been obtained. *See* 3 Strong's N.C. Index 3d, *Contracts* § 16 (1976); 3A Corbin, *Con-*

tracts §§ 626, 627, 631 (1960). In other words, the existence of legal relations between these parties was dependent upon the happening of the stated contingency.

The record affirmatively discloses that the plaintiff was aware of the condition imposed upon its undertaking. No question of waiver is presented. Since the condition was not met, it follows that plaintiff has no grounds in law or fact under which it can assert a right to relief. The action of the trial court in dismissing plaintiff's claim was, therefore, proper and is hereby

Affirmed.

Judges CLARK and MARTIN (Harry C.) concur.

JOHN A. E. McCLAVE, EXECUTOR OF THE ESTATE OF IRENE G. McCLAVE v. VITTORIO E. CRESCIMANNO

No. 7920SC236

(Filed 20 November 1979)

1. **Automobiles § 45— striking pedestrian—inadmissibility of coat—failure to show connection with pedestrian**

The trial court in a wrongful death action did not err in refusing to allow plaintiff to pass a coat among the jurors for their examination where there was no showing that deceased churchgoer was wearing the coat at the time she was struck by defendant's vehicle; nor did the court err in excluding testimony as to the number of people in the church that day and excluding evidence concerning the habitual manner deceased followed in getting to church.

2. **Trial § 10— court's admonishing of counsel—no error**

The trial court did not err in directing counsel for both plaintiff and defendant throughout the trial to "move on" with the case.

3. **Evidence § 15— think or believe or reckon—testimony not incompetent**

Use of expressions "I think," "I believe," and "I reckon" does not render the testimony incompetent.

APPEAL by plaintiff from *McConnell, Judge.* Judgment entered 24 October 1978 in Superior Court, MOORE County. Heard in the Court of Appeals 25 October 1979.

In plaintiff's action for wrongful death, the jury found defendant did not negligently cause the death of Irene G. McClave. Plaintiff appeals from the judgment entered on the jury's verdict denying plaintiff's claim.

Plaintiff alleged Irene G. McClave died on 14 November 1976, when struck by the automobile operated by defendant on Ashe Street, in Southern Pines. Plaintiff alleges defendant was negligent in failing to sound his horn to warn Mrs. McClave, who was a pedestrian, in failing to yield the right-of-way to her when she was within a marked crosswalk and in failing to stop before entering a marked crosswalk.

Defendant in his answer denied any negligence on his part and alleged Mrs. McClave was negligent in reversing her path of travel and walking or falling directly into the path of his car, after she had safely crossed the street.

Plaintiff's evidence tended to show that Saint Anthony's Church is located at the southwest corner of the intersection of Ashe and Vermont Streets. Ashe Street runs north and south and Vermont east and west. Traffic on Ashe is required to stop before entering Vermont, there being a stop sign at the intersection controlling traffic on Ashe. There is a brick walkway leading from the entrance of the church to the west curb of Ashe Street. A sidewalk runs parallel with the south curb of Vermont about 19'6" from it. There are no marked crosswalks in the area of the church or intersection. Defendant told the investigating officer that he had come out of church and gotten into his car; his car was on the "right-hand side" of Ashe against the curb; another vehicle was in front of and facing his car; he cranked his car and while he was backing up, the other vehicle pulled out; "he started forward and the woman was there and he went across the street and struck another vehicle and came to rest."

Witnesses for plaintiff testified they saw a car move forward in a quick motion and feet flip in the air. Then the car "lurched" across the street and into another car. Defendant was the driver of the car. No one heard the car horn blow. Defendant's vehicle was dragging Mrs. McClave underneath it. Defendant stated three or four times that his brakes were not working and that he did not mean to hit the woman.

Plaintiff called the defendant as an adverse witness and he testified he was seventy-five years old and had been licensed to drive since about 1969. He had been to mass at Saint Anthony's on 14 November 1976, left the church and walked to his car parked on the right side of Ashe Street, facing north towards Vermont Avenue. The distance from the front of his car to the edge of the sidewalk (leading east from Ashe Street) was about twenty feet. He saw two ladies on the left side of his car waiting for the car parked in front of his to move. They were in the middle of the road. After the car in front of him moved away, the two ladies on his left passed in front of him and the second lady (Mrs. McClave) put her "steps" on the curb in safety. Seeing she was in safety, he moved his car forward; the lady slipped or fell backwards into his car. He then tried to push the brake with his left foot but hit the accelerator, speeded up and collided with the parked car across the street. He did not sound his horn or give any directional signal, as he was going straight ahead toward the stop sign.

Plaintiff further produced evidence that Mrs. McClave's death resulted from her being struck by the automobile and evidence of damages.

Thigpen, Evans & Shelton, by John B. Evans, for plaintiff appellant.

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

MARTIN (Harry C.), Judge.

[1] Plaintiff first argues the trial judge erred in not allowing plaintiff to pass a coat among the jurors for their examination. Although defendant's counsel stipulated the bag of clothing in the custody of the officer could be introduced into evidence, when the witness testified he did not see the coat on Mrs. McClave, defendant's counsel moved to strike it. The court denied the motion but would not allow the coat to be passed to the jury, advising counsel for plaintiff he would have to get "somebody to identify she was wearing it." Plaintiff's counsel failed to do so. Without a showing that Mrs. McClave was wearing or carrying the coat at the time in question, it would not be relevant evidence. A party offering evidence must show its relevancy, materiality and com-

petency. 75 Am. Jur. 2d Trial § 128 (1974). The assignment is overruled.

The trial court did not err in refusing to admit evidence of the number of people in the church. This evidence was irrelevant. The court allowed testimony that there were 40, 50 or 60 pedestrians at the intersection. Later the court struck testimony about pedestrians at the intersection, but it is unclear exactly what testimony was removed from the jury.

Plaintiff tendered testimony concerning the habitual manner Mrs. McClave followed in getting to church. It indicated her husband usually drove her and parked the car on the north side of Vermont Avenue. Mrs. McClave used the same route upon leaving the church and returning to the parked car. However, Mr. McClave testified that on 14 November 1976 he did not drive her to the church. Neither did the witness Louise Rotroff, who testified as to the usual way Mrs. McClave got to church, attend church on the day of the accident. Plaintiff's evidence shows Mrs. McClave did not use her usual method of going to church on the day of the accident. The exclusion of the evidence was not error.

[2] Plaintiff argues the court committed prejudicial error by making several remarks during the trial. We do not agree. The court throughout the trial directed counsel for both plaintiff and defendant to "move on" with the case. Plaintiff's attorney made no effort to correct any alleged mistakes of the trial court in stating the evidence and contentions. He made no objection at the time and failure to so do constitutes a waiver of any such objections. *State v. Hewett*, 295 N.C. 640, 247 S.E. 2d 886 (1978); *State v. Hartley*, 39 N.C. App. 70, 249 S.E. 2d 453 (1978), *dis. rev. denied*, 296 N.C. 738, 254 S.E. 2d 179 (1979).

While a party can impeach an adverse witness, he cannot do so by arguing with the witness. A fair example of plaintiff's attempt at impeachment follows:

> Then, as you were checking for oncoming traffic and pulling away from the curb, there's no way you could have seen the lady in front of you.

Plaintiff's questions were not impeaching in form and the trial court did not err in sustaining defendant's objections to them.

Plaintiff contends the court erred in refusing to allow questions whether Mrs. McClave appeared to defendant to be alive before the accident. All the evidence shows Mrs. McClave was alive prior to the accident. There was no prejudicial error in not allowing the defendant to testify how she appeared to him.

[3] Plaintiff objects to the refusal of the court to strike defendant's testimony that "he believes" Mrs. McClave fell backwards into his car. Use of the expressions "I think," "I believe," "I reckon" does not render the testimony incompetent. *State v. Haney*, 263 N.C. 816, 140 S.E. 2d 544 (1965); *State v. Ham*, 224 N.C. 128, 29 S.E. 2d 449 (1944); 1 Stansbury's N.C. Evidence (Brandis rev. 1973), § 122; McCormick on Evidence (2d ed. 1972) § 10. There was no error in the ruling of the court.

The court acted within its discretion when it allowed defendant's attorney to use leading questions in examining defendant. The questions did not involve the merits of the case and we find no abuse of discretion. *Howell v. Solomon*, 167 N.C. 588, 83 S.E. 609 (1914); 1 Stansbury's N.C. Evidence (Brandis rev. 1973), § 31.

Plaintiff objects to portions of the charge, particularly the court's instructions on the duty of a motorist to a pedestrian in an unmarked crosswalk. We find no prejudicial error in the jury instructions.

Plaintiff also assigns error to the court's rulings on certain evidence with respect to damages. The jury found the defendant was not negligent and did not reach the damage issue; therefore, we refrain from discussing these assignments.

The able trial judge had a difficult case to try, involving the defendant Count Crescimanno, a seventy-five-year-old Italian, testifying through an interpreter. We find no prejudicial error.

No error.

Judges HEDRICK and CLARK concur.

GERALD L. HASTY v. ROBERT H. BELLAMY, INDIVIDUALLY, THOMAS H. BATCHELOR, INDIVIDUALLY, AND FRED A. PARKER, BOBBY H. GRIFFIN, SANDY DESKINS, JANE THOMAS, ROBERT J. SMITH, G. DICK PIERCE, FRANKLIN ELLIOTT, AS MEMBERS OF THE MONROE CITY BOARD OF EDUCATION AND THE MONROE CITY BOARD OF EDUCATION, A PUBLIC BODY

No. 7920SC8

(Filed 20 November 1979)

1. **Schools § 13.2— failure to renew teacher's contract—no action for damages against superintendent and principal**

Plaintiff stated no claim for relief against a school superintendent and a school principal in an action to recover damages arising from the failure to renew plaintiff's contract as a teacher since the power to hire teachers rests in the school board. G.S. 115-21.

2. **Schools § 13.1— failure to rehire teacher—recommendation of superintendent and principal—action not arbitrary or capricious**

A school board's failure to renew the contract of a probationary teacher based on the recommendation of the superintendent and the principal would not make the board's action arbitrary, capricious or for personal reasons in violation of G.S. 115-142(m)(2).

3. **Schools § 13.1— failure to rehire teacher—refusal to sign letter of conditional employment—arbitrary and capricious action**

A school board could be found by the trier of fact to have acted arbitrarily and capriciously in violation of G.S. 115-142(m)(2) in failing to rehire plaintiff, a probationary teacher who would have become a career teacher upon the renewal of his contract, solely because plaintiff refused to sign a letter of conditional employment which would have had no practical effect because a provision subjecting plaintiff to dismissal for inadequate performance added nothing to the ground for dismissal provided by G.S. 115-142(e)(1)a, and any provisions of the letter contravening G.S. 115-142 would be void.

APPEAL by plaintiff from *Herring, Judge*. Order entered 17 August 1978 in Superior Court, UNION County. Heard in the Court of Appeals 19 September 1979.

Plaintiff alleges that during the school years 1975-76 through 1977-78, he was employed by the Monroe City Board of Education as a teacher and head football coach. Defendant Bellamy was principal of Monroe High School and defendant Batchelor was Superintendent of Schools. Plaintiff alleges that he discovered that Bellamy was charging personal items to the high school, and that in the fall of 1977 Bellamy made the statement that he would "'get rid of Hasty.'" Bellamy allegedly placed criticisms of the

plaintiff in plaintiff's personnel file at that time, but later withdrew certain of the allegations.

In April 1978 Bellamy allegedly recommended that plaintiff be rehired for his fourth year with the Monroe schools, on the condition that he sign the following statement:

> I have read and fully understand the deficiencies noted in this evaluation and the preliminary evaluation of November 2, 1977, (indicating the same deficiencies).
>
> I have reviewed the deficiencies and been allowed to comment on those with which I disagree both orally and in writing. I understand that even though I may disagree with the evaluation as to the deficiencies noted, the areas of concern set forth are reasonable and related to my position and are reasonable and proper expectations of performance.
>
> I am fully aware that failure to substantially improve my performance in regard to the deficiencies noted in the evaluation will result in:
>
> 1. Immediate dismissal if progress is not noted within a reasonable time, or
>
> 2. Termination at the end of the school year.
>
> I understand that Administrative Staff of Monroe City Board of Education shall continue its evaluation and observation of my progress, especially in those areas noted to be deficient. Such observations and/or evaluations may be formal or informal, at such times and in such quantity as the administration shall deem reasonable and sufficient to determine progress in the areas of deficiency.
>
> I have just been told and understand that my conditional employment will extend not just for the school year 1978-1979 but thereafter for such reasonable period of time as insures that the correction of deficiencies has become permanent and not purely temporary corrections during the first years following my conditional employment. The Administration will recommend to the Board the removal of conditional employment status when my performance merits such.
>
> Throughout the discussions between Mr. Bellamy and me, and further by copy of this report, I am informed that

nothing herein is deemed a waiver of any rights accruing to either the Monroe City Board of Education or to myself and all such rights as well as all responsibilities are preserved and continued.

The above received duly noted and the conditions are accepted. The _____ day of _____, 1978.

This plaintiff refused to do. Bellamy and Batchelor recommended that plaintiff not be rehired, and the Board of Education voted not to renew plaintiff's contract. Plaintiff alleges that the termination of his employment violated G.S. 115-142, and he seeks reinstatement, back pay, and damages.

Defendants moved to dismiss for failure of the complaint to state a claim upon which relief could be granted. Their motions were granted, and plaintiff appeals.

Joe P. McCollum, Jr., for plaintiff appellant.

Robert L. Huffman for defendant appellee Robert H. Bellamy.

Dawkins, Glass and Lee, by Koy E. Dawkins, for defendant appellees Thomas H. Batchelor, Fred A. Parker, Bobby H. Griffin, Sandy Deskins, Jane Thomas, Robert J. Smith, G. Dick Pierce and Franklin Elliott as members of the Monroe City Board of Education, and the Monroe City Board of Education.

ARNOLD, Judge.

Plaintiff had taught in the Monroe schools for three years at the time the board of education voted not to renew his contract. Thus, he was a probationary teacher, see G.S. 115-142(a)(6) and (c)(2), and his rights are set out in G.S. 115-142(m). G.S. 115-142(m)(2) provides that "[t]he board, upon recommendation of the superintendent, may refuse to renew the contract of any probationary teacher . . . for any cause it deems sufficient; provided, however, that the cause may not be arbitrary, capricious, discriminatory or for personal or political reasons." Plaintiff alleges that the defendants' action in terminating his employment was "arbitrary, capricious and for personal reasons."

[1] Since the power to hire teachers rests in the school board, G.S. 115-21; *Johnson v. Gray*, 263 N.C. 507, 139 S.E. 2d 551 (1965),

and not in the principal or superintendent, plaintiff has failed to make out a cause of action against the individual defendants, and their motions to dismiss were properly granted. The sole remaining issue is whether the action of defendant board of education could have violated G.S. 115-142(m)(2).

[2] From plaintiff's complaint, two possibilities appear: (1) the board failed to renew plaintiff's contract because he refused to sign the letter of condition, or (2) the board failed to renew plaintiff's contract because the principal and superintendent recommended that he not be rehired. If the latter were proved to be the case, no violation of G.S. 115-142(m)(2) would be established, since the superintendent is entitled to make such recommendations, see G.S. 115-21; G.S. 115-142(m)(2); *Taylor v. Crisp*, 286 N.C. 488, 212 S.E. 2d 381 (1975), and we do not find that the failure to renew plaintiff's contract based on the principal's recommendation would make the board's action arbitrary, capricious, or for personal reasons, in violation of the statute. If the plaintiff were able to prove (1) above, however, we would reach a different result.

[3] If plaintiff's contract had been renewed, he would have become a career teacher. G.S. 115-142(c)(2). Then, his employment could have been terminated only for certain specified reasons, see G.S. 115-142(e)(1), and such a dismissal could have taken place only upon the superintendent's recommendation, notice, and the opportunity for a hearing. G.S. 115-142(h). Although some language in the letter of condition indicated that by signing it plaintiff was waiving some of these rights, the letter also stated expressly that "nothing herein is deemed a waiver of any rights accruing to either the Monroe City Board of Education or to myself." Any provisions of the letter which contravened G.S. 115-142 would have been void, and the remaining provisions, stating in essence that plaintiff was subject to dismissal for inadequate performance, added nothing to the ground for dismissal provided for by G.S. 115-142(e)(1)a. Plaintiff's agreeing to sign the letter, therefore, would have had no practical effect.

The real question before us, then, is, "If plaintiff could prove at trial that the board failed to rehire him solely because he refused to sign a letter which would have had no effect had he signed it, could the trier of fact find that the board's action was

arbitrary and capricious and therefore in violation of G.S. 115-142 (m)(2)?" We believe that the answer is Yes. Although the first clause of G.S. 115-142(m)(2) indicates that the board may refuse to rehire a probationary teacher "for any cause it deems sufficient," the second clause makes clear that some causes are unacceptably arbitrary and capricious. We believe that a failure to rehire based solely on a teacher's refusal to sign a document which to a layman might easily appear damaging and which in fact has no practical effect may be such a cause. Plaintiff has stated a claim against the board sufficient to withstand a motion to dismiss, and he is entitled to pursue his claim.

Affirmed in part and reversed in part.

Judges WEBB and WELLS concur.

STATE OF NORTH CAROLINA v. MICHAEL WAYNE GAULDIN

No. 7918SC564

(Filed 20 November 1979)

Searches and Seizures §§ 11, 34— search of luggage in car—automobile search and plain view exceptions inapplicable

The automobile search exception did not apply to justify the warrantless search of a suitcase removed from defendants' car subsequent to their arrest when both the car and suitcase were under police control since the exigency of mobility was no longer present at the time of the search. Nor was the search of the suitcase justified under the plain view or "plain smell" exception because an officer, while standing outside the car, was able to detect a strong odor of marijuana emanating from the rear portion of the car where the suitcase was located.

APPEAL by defendant from *Kivett, Judge*. Order entered 27 December 1978 in Superior Court, GUILFORD County. Heard in the Court of Appeals 26 October 1979.

Defendant was indicted for possession of marijuana. At the hearing on his motion to suppress, the State presented evidence that officers of the Greensboro police received a tip from a reliable informant that defendant and one Gilbert Dunbar were traveling south on Highway 29 in a red Chevette with Virginia

license plates, and were transporting a large quantity of marijuana in a suitcase. The police stopped a vehicle matching the informant's description, and as Detective Cobbler approached the car from the rear he detected a strong odor of marijuana. Defendant and Dunbar, the occupants of the car, were placed under arrest. The officers could see a suitcase lying in the rear of the hatchback Chevette, and when they opened the unlocked suitcase they found inside it twenty-five pounds of marijuana.

Defendant presented no evidence. The court found facts and ruled that the marijuana was admissible. Defendant then entered a plea of guilty and was sentenced to 1-5 years. From the court's ruling on his motion to suppress, defendant appeals.

Attorney General Edmisten, by Assistant Attorney General Richard L. Griffin, for the State.

A. Wayne Harrison for defendant appellant.

ARNOLD, Judge.

The sole issue on this appeal is whether the warrantless search of the suitcase was unlawful, making inadmissible the marijuana found inside. In determining this issue, we begin from the premise set out in *Katz v. United States*, 389 U.S. 347, 357, 19 L.Ed. 2d 576, 585, 88 S.Ct. 507, 514 (1967), and reaffirmed in *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55, 29 L.Ed. 2d 564, 576, 91 S.Ct. 2022, 2032 (1971), that "searches conducted . . . without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." These exceptions are "jealously and carefully drawn" and are made only when the exigencies of the situation make such a course imperative. *Id.* The State argues that in the present case the automobile search exception and the plain view exception apply.

The Supreme Court in *Coolidge v. New Hampshire, supra,* emphasized that the automobile search exception applies only where it is impracticable to secure a warrant because the vehicle can be moved easily out of the jurisdiction. "The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." *Id.* at 461-62, 29 L.Ed.

2d 580, 91 S.Ct. 2035. In the present case, no exigency remained at the time of the search. After the red Chevette was stopped by the police, Detective Cobbler "asked [defendant and his companion] for their identification and at that time placed them under arrest." The warrantless search of the suitcase removed from the car took place subsequent to the arrest, when both the car and the suitcase were under police control.

Moreover, in the recent cases of *United States v. Chadwick*, 433 U.S. 1, 53 L.Ed. 2d 538, 97 S.Ct. 2476 (1977), and *Arkansas v. Sanders*, --- U.S. ---, 61 L.Ed. 2d 235, 99 S.Ct. --- (1979), the court dealt with the specific situation of warrantless searches of luggage taken from vehicles, and determined that the automobile search exception did not apply. In both those cases the searches were made after the luggage was under police control, and the court held that the luggage, thus removed from the exigency of mobility, was no more subject to warrantless search than was luggage which had been seized from some place other than a vehicle. We do not find the *Chadwick* and *Sanders* cases to be distinguishable from the present case, and accordingly we hold that the automobile search exception does not apply to justify the warrantless search of the suitcase.

The State next makes the ingenious argument that the suitcase here was subject to the plain view exception, renamed the "plain smell" exception here by the State, because it gave off a strong odor of marijuana which Detective Cobbler was able to smell from outside the car. The State cites to us a number of "plain smell" federal cases, but we find that in all of those cases the searches either fall within the automobile search exception, with the smell of the contraband furnishing probable cause, *e.g. United States v. Martinez-Miramontes*, 494 F. 2d 808 (9th Cir. 1974); *United States v. Troise*, 483 F. 2d 615 (5th Cir.), *cert. denied* 414 U.S. 1066, 38 L.Ed. 2d 471, 94 S.Ct. 574 (1973); *United States v. Barron*, 472 F. 2d 1215 (9th Cir. 1973) (per curiam), were based upon other exigencies, *e.g. United States v. Ogden*, 485 F. 2d 536 (9th Cir. 1973); *Hernandez v. United States*, 353 F. 2d 624 (9th Cir. 1965), or would now be impermissible under the rulings in *Chadwick* and *Sanders*. *E.g. United States v. Bowman*, 487 F. 2d 1229 (10th Cir. 1973). We do not find that the plain view exception applies in this case. The Supreme Court indicated in *Coolidge v. New Hampshire*, *supra* at 466, 29 L.Ed. 2d 583, 91 S.Ct. 2038,

that the plain view exception "is legitimate only where it is immediately apparent to the police that they have evidence before them; the 'plain view' doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges." The warrant requirement serves the purposes of assuring that there is no intrusion by way of search and seizure without a prior determination by a magistrate of necessity, and that those searches deemed necessary should be as limited as possible. *Id.* The plain view exception is applicable only when it does not conflict with this second objective by expanding the scope of the search, *id.*, and a "plain smell" exception could not avoid conflicting with that objective, since the sense of smell, unlike eyesight, does not always pinpoint what is being sensed and where the material is located.

In the instant case, Detective Cobbler walked by defendant's vehicle and detected a strong odor of marijuana coming from "the rear portion" of the car. A further search, not justified by the plain view exception, would have been necessary to determine whether the odor was emanating from the suitcase, some part of the car itself, or elsewhere. Upon careful deliberation on these facts, we believe that the strong odor of marijuana furnished probable cause, but nothing more.

We are aware of the practical problems faced by police officers who have to make decisions involving the search of a vehicle once the vehicle has been stopped lawfully. However, as we have previously noted, the warrantless search of the suitcase here occurred after the arrest, after the vehicle and the suitcase were both under control of the officers; thus it would not have been impractical to obtain a warrant, for which there was ample probable cause, to search the suitcase.

Since we find that the exceptions which might justify this warrantless search do not apply, the search of defendant's suitcase was *per se* unreasonable under the Fourth Amendment, *Coolidge v. New Hampshire*, *supra*, and the contents of the suitcase should have been suppressed. The court's ruling upon defendant's motion is

Reversed.

Judges WEBB and WELLS concur.

CHARLES R. HALL v. R. HAYWOOD LASSITER D/B/A HIGH POINT CONCRETE PRODUCTS AND RICHARD LASSITER

No. 7918SC94

(Filed 20 November 1979)

1. **Rules of Civil Procedure § 4— summons delivered to place of business—improper service**

Delivery of summons to a person who was the son of one defendant and brother of the other at defendants' place of business instead of defendants' respective residences was not in compliance with G.S. 1A-1, Rule 4(j)(1), and jurisdiction over defendants was not thereby obtained.

2. **Rules of Civil Procedure §§ 4, 41— improper service—action voluntarily dismissed—new action barred by statute of limitations**

Where plaintiff suffered an injury on 24 July 1974 and commenced an action by filing a complaint on 23 June 1977, but defendants were not properly served with summons, the action was discontinued pursuant to G.S. 1A-1, Rule 4(e) well before plaintiff voluntarily attempted to dismiss the action pursuant to Rule 41(a)(1), and the action was barred by the statute of limitations before plaintiff instituted the new action on 1 August 1978.

APPEAL by plaintiff from *Collier, Judge*. Judgment entered 2 January 1979 in Superior Court, GUILFORD County. Heard in the Court of Appeals 27 September 1979.

The case arises out of a car and truck collision which occurred on 24 July 1974 in High Point. Plaintiff's car collided with a truck driven by defendant, Richard Lassiter, who was acting within the scope and course of his employment with a sole proprietorship, High Point Concrete Products, owned and operated by his father and the owner of the truck, defendant R. Haywood Lassiter. Plaintiff commenced an action against defendants by filing a complaint on 23 June 1977. Plaintiff mailed a copy of the summons and complaint to defendants' insurer on the same day. The Randolph County Sheriff received the original summons and copies of the summonses and complaints the next day. The summonses greeted each defendant by name and indicated each address as

"c/o High Point Concrete Products
RFD 3
High Point, North Carolina
(434-1815)."

On 28 June 1977, a Randolph County deputy sheriff left copies of the summonses and complaints with Douglas Lassiter at the place of the then incorporated business of High Point Concrete Products. Neither defendant resided at this address. Douglas Lassiter is the son of defendant, R. Haywood Lassiter and brother of defendant, Richard Lassiter. All three were employees of High Point Concrete Products, Inc. Defendants received copies of the summonses and complaints on 28 or 29 June 1977. The insurer received copies in the regular course of the mail on or about 27 June 1977 and employed counsel to defend the action. The returns of service filled in by the deputy sheriff were both to the effect.

> "On [named individual defendant] on the 28 day of June, 1977, at the following place: Rt. #3, High Point, NC (fill in address where copy was delivered or left) By: X leaving copies with Doug Lassiter who is a person of suitable age and discretion and who resides in the defendant's dwelling house or usual place of abode."

Plaintiff received a copy of this return. This was the only attempt at service in the action and no alias or pluries summons was issued.

Defendants filed answer in which they defended on the merits and moved to dismiss for lack of personal jurisdiction because they had not been properly served. On 1 August 1978, plaintiff filed a paper, purportedly pursuant to Rule 41(a)(1) of the North Carolina Rules of Civil Procedure, entitled a "Stipulation of Dismissal" but signed only by plaintiff's counsel. A new action on the same claim was filed the same day. Defendants answered asserting the defense of the three year statute of limitations on tort claims since 1 August 1978, was more than three years from 24 July 1974, the day the cause of action arose. The trial judge granted summary judgment for defendants on this ground. Plaintiff appeals.

Haworth, Riggs, Kuhn, Haworth and Miller, by John Haworth, for plaintiff appellant.

Nichols, Caffrey, Hill, Evans and Murrelle, by William L. Stocks, for defendant appellees.

VAUGHN, Judge.

[1] Plaintiff concedes that the summons was not served in compliance with Rule 4(j)(1)a of the Rules of Civil Procedure "[b]y delivering a copy of the summons and of the complaint to him or by leaving copies thereof at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion residing there. . . ." Plaintiff, nevertheless, suggests that under the philosophy expressed in *Wiles v. Construction Co.*, 295 N.C. 81, 243 S.E. 2d 756 (1978), actual notice of the suit cures deficiencies in service of process in the absence of a showing that defendant's opportunity to defend was hampered. In *Wiles*, the Supreme Court, overruling a long line of its cases, held that where the direction of the summons is to the corporation's registered agent rather than the corporation, and the corporate defendant is named in the complaint and the caption of the summons, the service is not defective even though the summons is not directed to the defendant as required by Rule 4(b). We first note that the defect in *Wiles* was in the form of the summons and not in the manner in which it was served. Notwithstanding the broad language used by the Court, we do not believe it intended, by judicial decree, completely to abolish the clearly stated statutory requirements for the service of process in favor of some nebulous concept of actual notice.

We conclude that the delivery of the papers to Douglas Lassiter at defendants' place of business instead of defendants' respective residences was not in compliance with the rule, and that jurisdiction over defendants was not thereby obtained. *Guthrie v. Ray*, 293 N.C. 67, 235 S.E. 2d 146 (1977); *Cole v. Cole*, 37 N.C. App. 737, 247 S.E. 2d 16 (1978); Annot., 32 A.L.R. 3d 112, 172-74 (1970).

[2] The decision in this case, therefore, depends on when the action that was commenced on 23 June 1977 came to an end. Plaintiff contends it was voluntarily dismissed on 1 August 1978 without prejudice to file a new action based on the same claim within one year of the dismissal. *See* G.S. 1A-1, Rule 41(a)(1). Defendants contend the action, filed 23 June 1977, terminated ninety days after the date summons was issued because of defective service and failure of plaintiff to get either endorsement by the clerk or issuance of alias or pluries summons. *See* G.S. 1A-1, Rule 4(c), (d), (e), (j).

The paper entitled "Stipulation of Dismissal" filed by plaintiff on 1 August 1978 was not a "stipulation" as it was not "signed by all parties who have appeared in the action." Rule 41(a)(1). Only counsel for plaintiff signed the paper. It is, therefore, more properly a "notice of dismissal." Rule 41(a)(1). Only counsel for plaintiff signed the paper. It is, therefore, more properly a "notice of dismissal." Rule 41(a)(1) (emphasis added) provides in part:

> "If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice *under this subsection*, a new action based on the same claim may be commenced within one year after such dismissal. . . ."

In *Ready Mix Concrete v. Sales Corp.*, 36 N.C. App. 778, 245 S.E. 2d 234 (1978), plaintiff obtained a default judgment in a contract claim arising on 11 August 1973, which was later set aside because the original summons in the action was defective. Alias summons was then issued on 6 October 1976. Defendant moved for dismissal and for summary judgment because the three year statute of limitations on contract actions had run. In reversing the trial judge's denial of defendant's motion, the Court noted that the action was properly commenced within the period of limitations pursuant to Rule 3 *but* it was discontinued pursuant to Rule 4(e) by the failure to serve defendant properly. Plaintiff in that case thus commenced the action on 6 October 1976, well beyond the statutorily prescribed three year period. The Court also held the trial court could not have by order pursuant to Rule 41(a)(2) dismissed the action without prejudice and allowed plaintiff a reasonable time to file his claim. "Rule 41 does not authorize a party to take a dismissal of a previous action barred by the statute of limitations and then refile the action in order to avoid the statute of limitations." 36 N.C. App. at 782, 245 S.E. 2d at 236-37.

Because of improper service, under Rule 4(j)(1)a, there was no service on defendants "within 30 days after the date of the issuance of summons" as required by Rule 4(c) and no extension "within 90 days after the issuance of summons" for later service pursuant to Rule 4(d).

> "When there is neither endorsement by the clerk nor issuance of alias or pluries summons within the time specified in Rule 4(d), the action is discontinued as to any defendant

not theretofore served with summons within the time allowed." Rule 4(e).

Defendants were not served properly and the action of 23 June 1977 was discontinued pursuant to Rule 4(e) well before plaintiff voluntarily attempted to dismiss the action pursuant to Rule 41(a)(1). *Sink v. Easter*, 284 N.C. 555, 202 S.E. 2d 138 (1974); *Lackey v. Cook*, 40 N.C. App. 522, 253 S.E. 2d 335 (1979). The action was barred by the statute of limitations before plaintiff instituted the new action on 1 August 1978.

For the reasons stated, the judgment is affirmed.

Affirmed.

Judges ERWIN and HILL concur.

STATE OF NORTH CAROLINA v. LEWIS COLLINS

No. 7925SC463

(Filed 20 November 1979)

1. **Incest § 1— intercourse with stepchild—sufficiency of evidence**

In a prosecution of defendant for incest, evidence was sufficient to be submitted to the jury where it tended to show that defendant had sexual intercourse with his stepchild, a person within the proscription of G.S. 14-178, and that defendant knew the person was related to him.

2. **Criminal Law § 21; Constitutional Law § 28— delay in bringing defendant before magistrate—no prejudice**

Defendant was not prejudiced by a delay of twenty days in bringing him before a district court judge and having counsel appointed for him, since defendant had the advice of counsel from 25 August up until and through the trial which began on 20 November; defendant made no showing that, because of the delay, he was unable to locate witnesses who would testify to the character and to the actions of his stepdaughter; and defendant's right not to testify and his right to call witnesses were explained to him, and defendant did call witnesses in his behalf.

3. **Incest § 1; Rape § 12— incest—statutory rape not lesser offense**

Statutory rape is not a lesser included offense of incest. G.S. 14-178; G.S. 14-26.

State v. Collins

APPEAL by defendant from *Ervin, Judge.* Judgment entered 27 November 1978 in Superior Court, CALDWELL County. Heard in the Court of Appeals 25 September 1979.

Defendant was charged with taking indecent liberties with a child in violation of G.S. 14-202.1 and incest in violation of G.S. 14-178. On defendant's motion at the close of State's evidence, the indecent liberties charge was dismissed. The jury returned a verdict of guilty of the statutory crime of incest, and judgment imposing a prison sentence was entered. Defendant appeals.

Attorney General Edmisten, by Associate Attorney Christopher P. Brewer, for the State.

Beal and Beal, by Robert J. Robbins, Jr., for defendant appellant.

VAUGHN, Judge.

[1] Defendant questions the sufficiency of the evidence as a matter of law to convict him of the crime of incest. The trial court did not err in refusing to direct a verdict in defendant's favor for the evidence, when taken in the light most favorable to the State, is sufficient to take to the jury. The evidence shows that Brenda Sue Taylor, age fifteen, is the stepdaughter of defendant who was married to her mother on 20 December 1973. Brenda Sue attended and witnessed the wedding. She lived with her mother and stepfather. On Saturday, 4 March 1978, Brenda Sue awoke, dressed and went into her parents' bedroom to watch television between 7:00 and 7:30 a.m. She found her mother, stepfather and younger sister already watching television. Her stepfather told her younger sister to go feed her pet goat. He told her mother to go fix breakfast. After the others had left the room, he got up naked from the bed and walked to the door and closed it. He pulled Brenda Sue's pants off and had sexual intercourse with her on the bed. Brenda Sue's younger sister on returning to the house from feeding her pet goat passed the bedroom window and observed her stepfather and sister engaged in intercourse. Defendant had been having sexual intercourse with Brenda Sue since she was eleven years old. Testimony by Brenda Sue and her younger sister to this effect was corroborated by a school counselor and a social worker to whom the offense and other abuses in the home were first reported. This was sufficient proof

of a violation of G.S. 14-178 to take to a jury. The State's evidence established that defendant had sexual intercourse with his stepchild, a person within the proscription of the statute, and that defendant knew the person was related to him. The three elements of the crime of incest were sufficiently established as a matter of law. *State v. Vincent*, 278 N.C. 63, 178 S.E. 2d 608 (1971).

Defendant asserts the element of sexual intercourse was not proven. Brenda Sue testified defendant pushed her down on the bed and had intercourse with her. She described sexual intercourse as "a man putting his private parts into a girl's private parts." The weight to be given her testimony was for the jury.

We need only point out one further matter on this issue of sufficiency of the evidence. Because the marriage certificate for defendant and the mother of the girl with whom he allegedly had intercourse was not introduced, defendant contends the *best evidence* was not before the trial court. The contents or terms of the marriage certificate are not in question. The best evidence rule is inapplicable to this case. *See* 2 Stansbury, N.C. Evidence § 191 (Brandis rev. 1973).

[2] Defendant contends the trial court should have quashed the warrant because he was not given a first appearance before a district court judge within ninety-six hours after being taken into custody in violation of G.S. 15A-601. The record shows defendant was taken into custody on 5 August 1978 and counsel was appointed 25 August. The record contains several references to testimony at an earlier hearing but no indication of a first appearance hearing. Even assuming no first appearance hearing or a failure to meet the necessary time requirements for such a hearing, G.S. 15A-601 does not prescribe mandatory procedures affecting the validity of a trial in the absence of showing some prejudice to the defendant in the violation of the statutory requirements. *State v. Selph*, 33 N.C. App. 157, 234 S.E. 2d 453 (1977); *State v. Burgess*, 33 N.C. App. 76, 234 S.E. 2d 40 (1977). In considering whether a criminal defendant is denied his constitutional rights of due process, assistance of counsel and confrontation of one's accusers and the witnesses against him, no set length of time is guaranteed or required. Each case should be considered individually. *See State v. McFadden*, 292 N.C. 609, 234 S.E. 2d 742 (1977).

Defendant hypothesizes that he was prejudiced in not having counsel timely appointed, in investigating the criminal allegations against him and in securing witnesses and evidence. Defendant had advice of counsel from 25 August up until and through the trial which began on 20 November 1978, and we consider this sufficient and timely assistance of counsel. Defendant's main allegation of prejudice is in being unable to locate witnesses who would testify to the character and to the actions of defendant's stepdaughter. Defendant, nevertheless, called his stepdaughter's principal, the wife of a friend who was also a family friend, two children of the community and a neighborhood acquaintance of the family as witnesses, all of whom testified about the character and actions of both of defendant's stepdaughters. Defendant gave no indication by name or description of anyone who knew more. Further, the trial judge conducted a *voir dire* examination of defendant about his understanding of his right not to testify along with the consequences if he did and his right to call witnesses in his own behalf. On the right to call witnesses, defendant provided only one name, which was that of an acquaintance who could testify to defendant's whereabouts on the day in question. Defendant did call several witnesses who testified to his whereabouts and his being separate and apart from his stepchild for most of the day. Although the apparent delay of twenty days in bringing defendant before a district court judge and having counsel appointed is not to be applauded, we find no prejudice to this defendant.

[3] The charge to the jury permitted a finding of guilty of incest or not guilty. The defendant contends this was error and that the jury should have been instructed on lesser included offenses supported by the evidence. Defendant argues the crime of statutory rape set out in G.S. 14-26 is a lesser included offense. Although both crimes are felonies, incest carries a maximum sentence of fifteen years while statutory rape for a male carries a maximum sentence of ten years. G.S. 14-2, 14-26, 14-178. Statutory rape, however, is not a lesser included offense of incest. The gravamen of the crime of incest is intercourse between parties within the degree of relationship set out in the statute. Criminal incest does not involve the issues of age and virginity that are set out in G.S. 14-26, the statute defining the crime.

Finally, defendant contends the trial judge in his instruction to the jury violated G.S. 1-180 in giving less weight to the contentions of defendant's witnesses. This statute was repealed effective 1 July 1978 and has no application to this trial held in November, 1978. Nonetheless, an examination of the jury instruction in the light of G.S. 15A-1222 and 15A-1232, the successors to former G.S. 1-180, fails to disclose prejudicial error.

No error.

Judges ERWIN and HILL concur.

STATE OF NORTH CAROLINA v. KIRKWOOD PRESTON KING

No. 7929SC542

(Filed 20 November 1979)

Searches and Seizures § 24— sufficiency of affidavit to obtain search warrant— staleness of information

An officer's affidavit was sufficient to support a finding of probable cause for the issuance of a warrant to search defendant's residence for controlled substances on 24 August 1978 where it contained allegations that (1) a confidential informant, who in the last two months had given reliable information for a felony arrest, told the officer on 17 July 1978 that the informant was present in defendant's house in early July 1978 when a named person bought controlled substances from defendant; (2) two persons told the officer they were present on 29 July 1978 when a "drug user" called defendant and discussed a sale of Valium and speed; (3) on 3 August 1978 another person told the officer that he and the "drug user" went to defendant's house on 12 July where he smoked marijuana defendant gave him and bought Valium tablets from defendant; and (4) within the last two weeks the officer had seen a great many cars come to defendant's premises and stay a short while, since the allegations of the affidavit established probable cause "on 12 July" and "in early July," and the allegations, when considered together, indicated a pattern of drug sales by defendant extending over some weeks and continuing into the two weeks prior to issuance of the warrant.

APPEAL by defendant from *Ferrell, Judge*. Judgment entered 25 January 1979 in Superior Court, POLK County. Heard in the Court of Appeals 19 October 1979.

Defendant was indicted for possession of cocaine with intent to sell and deliver. Prior to trial defendant moved to suppress evidence obtained pursuant to a search warrant, and after a hearing this motion was denied.

At trial, officers who participated in the search of defendant's residence testified that they found there and seized a box containing "a spoon on a necklace that had green corroded looking substance on it," a small plastic bag with a small amount of white powder in it, a "screen type thing," and "a small book—a Little Webster"; a small brownish plastic bottle containing a white powder substance; a Penn Tennis Ball cannister inside a glass fruit jar in a hollowed out stump in the backyard, the cannister containing "some small cellophane packs containing a powder, a crystalline material," and some rice at the bottom of the can; and a scale with a pan missing from it. The white powder in the objects seized was found by State Bureau of Investigation chemists to be cocaine.

Defendant presented no evidence. He was found guilty of possession of cocaine with intent to sell and deliver and sentenced to five to seven years. He appeals.

Attorney General Edmisten, by Special Deputy Attorney General Charles J. Murray, for the State.

Ladson F. Hart for defendant appellant.

ARNOLD, Judge.

The sole issue on this appeal is whether the court erred in allowing into evidence the objects seized in the search of defendant's residence. Defendant argues that they were inadmissible because the application underlying the search warrant was insufficient, both for failure to provide information to establish the reliability and credibility of the informants and for the staleness of the information it contained.

Deputy Sheriff Rickman's application of 24 August 1978 for a warrant to search defendant's residence contained the following allegations to establish probable cause: (1) A confidential informant, who had in the last two months given reliable information leading to a felony arrest, told Rickman on 17 July 1978 that the informant had been present at defendant's house in early July

1978 when a Gary Leatherwood bought controlled substances from defendant. (2) (a) On 29 July 1978, Mike and Gail Lawson told Rickman that David Hunnicutt, "a drug user," had told them he knew a fellow named Kirk who lived in Saluda, North Carolina, and who had 50 pounds of marijuana for sale in his house. (b) The Lawsons were present on 29 July when Hunnicutt called defendant and discussed a sale of Valium and speed. (3) (a) On 3 August 1978 Tommy Guin told Rickman that on 12 July 1978 he and Hunnicutt went to defendant's house, where he smoked marijuana defendant gave him and bought Valium tablets from defendant. (b) Hunnicutt wanted to buy 30 Valium tablets but didn't have the money. (4) Within the last two weeks, Rickman and other officers had seen a great many cars come to defendant's premises and stay a short while. (5) (a) Within the hour before Rickman applied for the search warrant, he saw many cars parked near defendant's residence and heard music coming from inside. (b) Rickman had received "confidential and reliable" information that defendant had drug parties at these premises.

The United States Supreme Court indicated in *Aguilar v. Texas*, 378 U.S. 108, 114-15, 12 L.Ed. 2d 723, 729, 84 S.Ct. 1509, 1514 (1964), that an affidavit supporting an application for a search warrant must inform the magistrate of "some of the underlying circumstances from which the informant concluded that the [contraband was] where he claimed [it was], and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, [cite omitted] was 'credible' or his information 'reliable.' " The court referred to the affidavit found sufficient in *Jones v. United States*, 362 U.S. 257, 4 L.Ed. 2d 697, 80 S.Ct. 725 (1960), as an example. Defendant in the present case argues that none of the elements of Rickman's application meets the *Aguilar* test.

The information in allegation (1) of the application is sufficient to establish probable cause, at least in "early July 1978." (The "staleness" issue will be discussed later.) The informant personally observed the criminal activity, see *United States v. Harris*, 403 U.S. 573, 579, 29 L.Ed. 2d 723, 731, 91 S.Ct. 2075, 2079-80 (1971), and he had furnished reliable information to Rickman in the past. *See Jones v. United States, supra* at 271, 4 L.Ed. 2d at 708, 80 S.Ct. at 736. Allegation (3)(a) is also found sufficient, at least on 12 July, since it relates underlying circumstances

discovered by the informant's personal observation, and since the information about drug buys from defendant was against the informant's penal interest. G.S. 90-92(a)7; G.S. 90-95(a)(3) and (d)(2); Physician's Desk Reference 1416 (32d ed. 1978); see *United States v. Harris, supra* at 583-84, 29 L.Ed. 2d 734, 91 S.Ct. 2082. The sufficiency of allegation 2(b), standing alone, might be questionable, but even if insufficient it may be considered in the magistrate's determination. *Spinelli v. United States*, 393 U.S. 410, 21 L.Ed. 2d 637, 89 S.Ct. 584 (1969).

The test for "staleness" of information underlying a search warrant is whether the facts indicate probable cause at the time the warrant issues. *Sgro v. United States*, 287 U.S. 206, 77 L.Ed. 260, 53 S.Ct. 138 (1932). While allegations (1) and (3), describing as they do defendant's activities "in early July" and "on 12 July" might not support the issuance of a warrant on 24 August, when allegations (1), (2)(b), and (3) are considered together, they indicate on defendant's part a pattern of drug sales extending over some weeks and dealing with various controlled substances. Allegation (4), considered in conjunction with this pattern, allows the reasonable inference that the drug sales continued into the two weeks prior to the issuance of the warrant. The United States Supreme Court in *United States v. Harris, supra*, upheld a warrant where the application indicated that an informant had purchased illicit whiskey from defendant at his residence "within the past two weeks," saying "here the informant's admission that over a long period and currently he had been buying illicit liquor on certain premises, itself and without more, implicated that property and furnished probable cause to search." *Id.* at 584, 29 L.Ed. 2d 734, 91 S.Ct. 2082. Although the information in allegation (4) in the present case is not as specific as that in *Harris*, the *Harris* reasoning applies to the case now before us. We hold that Rickman's application provided adequate support for the magistrate's finding of probable cause, and that in the admission into evidence of the fruits of the search there was

No error.

Judges WEBB and WELLS concur.

FULTON REAVES LUPO, AND W. R. TURNER v. EDWARD L. POWELL, COMMISSIONER OF THE NORTH CAROLINA DIVISION OF MOTOR VEHICLES, AND NATIONWIDE MUTUAL INSURANCE COMPANY

No. 7910SC169

(Filed 20 November 1979)

1. **Insurance § 100— insurer's duty to defend action—sufficiency of complaint to state cause of action**

The trial court erred in dismissing plaintiff's complaint against defendant insurance company for failure to state a claim upon which relief could be granted where the complaint alleged that plaintiff had a validly existing insurance contract with defendant, that plaintiff gave defendant notice of a pending claim for which defendant denied coverage, and that the denial of coverage constituted a breach of defendant's contract to defend plaintiff and satisfy a judgment of liability.

2. **Automobiles § 2.7; Insurance § 80— Financial Responsibility Act—drivers' licenses properly suspended**

The trial court properly affirmed the order of the Commissioner of Motor Vehicles suspending plaintiffs' licenses under G.S. 20-279.13 for failure to pay a judgment, and there was no merit to plaintiffs' contention that a single-axle trailer was not a motor vehicle within the meaning of the Act.

APPEAL by plaintiffs from *Godwin, Judge*. Orders and judgment entered 7 November 1978 in Superior Court, WAKE County. Heard in the Court of Appeals 18 October 1979.

This action comes to us on appeal by plaintiffs from the dismissal of the action against defendant, Nationwide Mutual Insurance Company, pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Plaintiffs also appeal from a judgment of the trial court sitting without a jury in favor of defendant, Commissioner of Motor Vehicles. The judgment affirmed an order of the Commissioner suspending plaintiffs' licenses pursuant to the Motor Vehicle Safety and Financial Responsibility Act of 1953, as amended. G.S. 20-279.1 *et seq.*

Charles A. Parlato, for plaintiff appellants.

Attorney General Edmisten, by Assistant Attorney General William B. Ray, for defendant appellee, Commissioner of the North Carolina Division of Motor Vehicles.

Smith, Anderson, Blount, Dorsett, Mitchell and Jernigan, by Nigle B. Barrow, Jr., for defendant appellee, Nationwide.

VAUGHN, Judge.

[1] We first consider whether the court erred when it dismissed plaintiffs' action against Nationwide pursuant to Rule 12(b)(6) on the grounds that the complaint failed to state a claim upon which relief can be granted. The complaint is, in pertinent part, as follows.

> "4. On . . . June 26, 1974 a civil action was instituted against the plaintiff . . . for recovery of . . . damage incurred by James Taylor Hampton allegedly arising out of the negligence of the plaintiff. Hampton alleged . . . that the plaintiff was the owner of a single axle trailer which purportedly had been negligently moved onto a public road in Wake County, North Carolina on September 16, 1971. As a result of said alleged negligence the vehicle driven by James Taylor Hampton on September 16, 1971 collided with the said trailer allegedly causing personal property damage to the Hampton vehicle. . . .
>
> 5. Said trailer on September 16, 1971 was being utilized by the plaintiff herein in his business as a construction contractor and builder.
>
> 6. During the period from September 11, 1972 to October 7, 1972 the plaintiff had a validly existing Comprehensive General Liability Policy of Insurance with the defendant, Nationwide Mutual Insurance Company, covering all liability claims arising out of the plaintiff's said business activities.
>
> 7. Approximately thirteen or fourteen months prior to the institution of suit by Hampton on June 26, 1974 the plaintiff informed defendant Nationwide Mutual Insurance Company of the pending Hampton claim against the plaintiff.
>
> 8. On or about May 24, 1973 the plaintiff was informed by letter from an agent . . . of defendant Nationwide . . . that such general liability policy of insurance did not cover the Hampton claim against the plaintiff.
>
> 9. Said denial of coverage by defendant Nationwide . . . was wrongful and willful and constituted a breach of contract by defendant Nationwide . . . to defend the plaintiff and to satisfy any judgment against him within the insurance limits of said policy.

10. Upon trial of the Hampton claim judgment was entered against the plaintiff. . . . The plaintiff herein was not represented by counsel at the time of the trial of the Hampton claim."

We conclude that the complaint was sufficient to state a cause of action against defendant Nationwide. It was "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). Our Rules of Civil Procedure no longer require "fact pleading." "Notice pleading" is all that is now required. *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970).

> "Under the 'notice theory of pleading' a statement of claim is adequate if it gives sufficient notice of the claim asserted 'to enable the adverse party to answer and prepare for trial, to allow for the adjudication of the doctrine of *res judicata*, and to show the type of case brought. . . .' 'Mere vagueness or lack of detail is not ground for a motion to dismiss.' Such a deficiency 'should be attacked by a motion for a more definite statement.'" *Id.* at 102, 176 S.E. 2d at 165. (Citations omitted.)

The complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiffs are not entitled to relief under any state of facts which could be proved in support of the claim. If the complaint amounts to what was formerly called a "defective statement" of a good cause of action, a motion to dismiss under Rule 12(b)(6) should not be allowed. Other provisions of Rule 12, the rules governing discovery and the motion for summary judgment provide adequate procedure to obtain details not set out in the complaint. *Id.*

It is alleged in the complaint that plaintiff Lupo had a "validly existing" insurance contract with defendant and that plaintiff gave defendant notice of a pending claim for which defendant denied coverage. Plaintiff further alleged that this denial of coverage constituted a breach of defendant's contract to defend plaintiff and satisfy a judgment of liability. These and the other allegations were sufficient to survive the motion to dismiss. Although it should not be regarded as a model of pleading, it is sufficiently particular to give defendant notice of a valid claim.

Even if it is said to be a defective statement of a good cause of action, we note that plaintiff moved to amend his complaint to allege that he complied with all conditions precedent to the contract. The trial court denied the motion. "[L]eave [to amend] shall be freely given when justice so requires." G.S. 1A-1, Rule 15(a). "[A]mendments should always be freely allowed unless some material prejudice is demonstrated, for it is the essence of the Rules of Civil Procedure that decisions be had on the merits and not avoided on the basis of mere technicalities." *Mangum v. Surles*, 281 N.C. 91, 98-99, 187 S.E. 2d 697, 702 (1972). The proposed amendment, while not necessary for the stating of a claim sufficient to withstand a Rule 12(b)(6) motion, would have satisfied all technical objections offered in the trial court and should have been allowed.

Because the claim against defendant Nationwide was dismissed for failure to state a claim, we do not reach the merits of its argument that the policy, which has been included in the record on appeal, does not cover the situation or the vehicle involved. The policy was not incorporated in the pleading and was not considered by the trial judge in his granting of the Rule 12(b)(6) motion. The question of whether the single-axle trailer was a piece of "mobile equipment" included in the policy coverage and not an excluded "automobile" was not before the court on the motion to dismiss and, consequently, is not before us.

[2] The judgment affirming the order of the Commissioner suspending plaintiffs' licenses under the mandate of G.S. 20-279.13 is affirmed. Plaintiffs' argument that the single-axle trailer is not a motor vehicle within the meaning of the act is without merit. For purposes of the Act, "Motor Vehicle" is defined as

> "Every vehicle which is self-propelled and *every vehicle designed to run upon the highways which is pulled by a self-propelled vehicle*. . . ." G.S. 20-4.01(23) (emphasis added).

The judgment in favor of the Commissioner of Motor Vehicles is affirmed.

The order allowing Nationwide Mutual Insurance Company's motion to dismiss and denying plaintiffs' motion to amend is reversed.

Judges ERWIN and HILL concur.

ROY FAULK, PLAINTIFF v. WAYNE GUY DELLINGER, DEFENDANT AND THIRD PARTY PLAINTIFF v. ROY TILLEY, THIRD PARTY DEFENDANT

No. 7922SC26

(Filed 20 November 1979)

Animals § 3— ownership of cow which caused accident—summary judgment improper

A genuine issue of material fact existed as to whether third party defendant was the owner of a cow which caused an automobile-motorcycle accident where there was evidence on motion for summary judgment tending to show that the accident was caused by a black angus cow; third party defendant owned the land on both sides of the road for some distance in each direction from the point of the accident and used the land for pastures; third party defendant had a herd of black angus in his pastures which was the only herd of black cows in the neighborhood; the cow which caused the accident disappeared from view behind the home of the third party defendant; the fences were in disrepair near the scene of the accident to the extent that a cow could have escaped onto the highway; and there was no decrease in the size of the herd on the day after the accident.

APPEAL by third party plaintiff from *Hairston, Judge*. Judgment entered 6 November 1978 in Superior Court, IREDELL County. Heard in the Court of Appeals 20 September 1979.

This case is before us on the granting of summary judgment in favor of third party defendant, Tilley. The facts of the case taken from the pleadings and affidavits reveal the following.

The case arose out of an accident on U.S. Highway 115 north of Statesville on 20 July 1977 around 9:30 p.m. Third party plaintiff, Dellinger, was headed south towards Statesville in a 1967 Triumph. He observed in his headlight beams what appeared to be a fresh tar patch in the road. As he drew nearer, the apparent tar patch moved and disclosed a set of eyes. Third party plaintiff found himself fast approaching the rear of a full-grown, black angus cow in the middle of the road. Having no time to brake, Dellinger attempted to pass to the right or west side of the cow. The cow then turned and came toward Dellinger who then swerved left crossing the center line. The car went completely off the east shoulder of the highway. Dellinger avoided the cow. His car, in a sideways slide, came partially back on the road. The rear wheels hit a hole causing the car to flip over on its side and then its top. The car came to a stop partially in the northbound lane of

the highway. Dellinger was thrown from the car. Hearing the sound of a northbound motorcycle, Dellinger crawled into the east shoulder ditch.

Roy Faulk, headed north on the highway on his motorcycle, crested a hill and came upon the wrecked car in his lane. Traveling too fast to stop in time, he slid into the car. Faulk sued Dellinger for his injuries and damages. Dellinger brought in third party defendant, Tilley, who was the alleged owner of the cow. It was upon this issue of ownership that the judge granted summary judgment. The drivers of two cars following Dellinger also saw the cow come suddenly in front of Dellinger into the middle of the road. The cow crossed from the west side of the highway to the east. Following the accident, the cow went up the east bank of the road and disappeared behind a white frame house. The white frame house was Tilley's home. Tilley owned the land on both sides of the road at the point of the accident. Both sides contained fenced-in pasture in which Tilley kept a herd of black angus cattle. The fences were in need of repair and had places where a cow could have passed through. Tilley, according to Dellinger's affidavit, was the only person in a radius of two miles on either side of the road who owned cows except for one man who owned a single milk cow which was not black.

Tilley's motion for summary judgment was accompanied by affidavits of his farm employee and his son. Tilley's employee had checked the fences and counted the cows before the accident. The employee checked the fences prior to the accident and found nothing wrong. He checked the fences the morning after the wreck and found them still in good shape. He had also counted the herd and found the same number of cows. Tilley's son said he checked the cattle and the fences the morning after the accident and found the proper number of cows and nothing wrong with the fences. Both the son and employee said there were cows owned by five other people pastured in the same general area.

Farthing and Cheshire, by H. Clinton Cheshire, for third party plaintiff appellant.

Homesley, Jones, Gaines and Dixon, by T. C. Homesley, Jr., and Edmund L. Gaines, for third party defendant appellee.

VAUGHN, Judge.

The sole question is whether it was proper to grant summary judgment for third party defendant, Tilley. If the pleadings and affidavits show there is no genuine issue as to the material fact of ownership of the cow by Tilley, then as a matter of law he is entitled to summary judgment. G.S. 1A-1, Rule 56(c). Contrary to the burden at trial, the burden at this stage is on Tilley as movant to establish the lack of a triable issue. *Singleton v. Stewart*, 280 N.C. 460, 186 S.E. 2d 400 (1972); *Tolbert v. Tea Company*, 22 N.C. App. 491, 206 S.E. 2d 816 (1974). We conclude that he has not met this burden. It was error to grant summary judgment for Tilley. The pleadings and affidavits present a triable issue of fact on whether Tilley owned the cow which caused the wreck.

Looking at the record in a light most favorable to the party opposing the motion, the issue of ownership is a fact for the jury to determine and not a matter of law for the trial judge to rule on. It is not the purpose of summary judgment to conduct trials by affidavit.

The record discloses that Tilley owns land on both sides of the road for some distance in each direction from the point of the accident. The land is in pasture on both sides of the road except for the ground on which his home is situated. It is behind his home that the cow disappeared from view of the eyewitnesses. He had a herd of black angus in his pastures and a black cow allegedly caused the accident in question. The cow was observed crossing west to east and at all times not in the public right-of-way, which runs north to south, it was moving upon and further within land owned by Tilley. Tilley has the only herd of black cows in the neighborhood. The fences were in disrepair near the scene of the accident to the extent that a cow could have escaped out onto the highway. There was no decrease or increase in the size of the herd on the day before the accident and the day after the accident.

Tilley takes issue with Dellinger's affidavit in opposition to the motion for summary judgment which says, "*To the best of my knowledge*, Mr. Tilley is the only one who owns cows within a radius of two miles on either side of the point in the road where the accident occurred, with the exception of one man who owns a single milk cow and this cow is not black in color." (Emphasis add-

ed.) "Supporting and opposing affidavits shall be made on *personal knowledge*, shall set forth facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." G.S. 1A-1, Rule 56(e) (Emphasis added). Tilley asserts that by couching the statement in the affidavit by the phrase "to the best of my knowledge" Dellinger has presented facts not made upon personal knowledge and therefore improper for consideration in opposition to the motion for summary judgment.

What an affiant thinks are facts, unless it is a situation proper for opinion evidence, is not information made on personal knowledge proper for consideration on a summary judgment motion. *Nasco Equipment Co. v. Mason*, 291 N.C. 145, 229 S.E. 2d 278 (1976); *Peterson v. Winn-Dixie*, 14 N.C. App. 29, 187 S.E. 2d 487 (1972). However, in the case at hand, we do not have a situation of manufactured fact but merely a self-imposed limitation to the affiant's personal knowledge which is all the rule requires. In any event, if this affidavit is disregarded, Tilley's affidavits in support of his motion still would not carry his burden of showing that no genuine issue of material fact existed about whether he, the movant, was owner of the black cow involved in the accident. *See Whitaker v. Earnhardt*, 289 N.C. 260, 221 S.E. 2d 316 (1976); *Ammons v. Kellogg*, 137 Miss. 551, 102 So. 562 (1925); 4 Am. Jur. 2d, Animals § 123.

The judgment allowing third party defendant Tilley's motion for summary judgment is

Reversed.

Judges ERWIN and HILL concur.

ANN V. RHOADES v. CHARLES B. RHOADES

No. 7921DC276

(Filed 20 November 1979)

Divorce and Alimony § 24.10— child support—obligation until both children reached 18

A paragraph of the parties' separation agreement providing that defendant should pay to plaintiff $350 per month as child support, "said payments to continue until the two minor children reach the age of eighteen years," required defendant to make the payments until both children reached eighteen.

APPEAL by defendant from *Alexander (Abner), Judge.* Judgment entered 2 Feburary 1979 in District Court, FORSYTH County. Heard in the Court of Appeals 17 October 1979.

Plaintiff brings this action seeking enforcement of a separation agreement executed by plaintiff and defendant. The parties had two minor children when they signed the agreement on 20 November 1973: Jane, born 14 September 1960, and Charles, born 18 August 1963.

The separation agreement contains the following:

> 9. The parties hereto agree that Husband shall pay to the Wife the sum of $350.00 per month as child support for the two minor children of the marriage; said payments to continue until the two minor children reach the age of eighteen (18) years.

About 4 September 1978 defendant told plaintiff he was reducing the $350 monthly support payment to $175 because Jane would be eighteen years old on 14 September 1978. Since that time, defendant has paid $175 per month as child support.

Plaintiff asks the court to order defendant to pay $350 per month as child support until the youngest child reaches the age of eighteen and to pay all arrearage since September 1978.

Defendant answered, denying the execution of the separation agreement but admitting he had reduced the support payments to $175 per month as alleged by plaintiff. He denies plaintiff is entitled to any relief.

Plaintiff moved for summary judgment. In response to the motion, defendant, by affidavit, admitted the execution of the separation agreement and filed a copy of it. From the entry of summary judgment, defendant appeals.

Craige, Brawley, Liipfert & Ross, by C. Thomas Ross, for plaintiff appellee.

Morrow, Fraser and Reavis, by John F. Morrow, for defendant appellant.

MARTIN (Harry C.), Judge.

This appeal presents for our interpretation paragraph 9 of the separation agreement, set out above. The agreement gave plaintiff the "full custody and control of the two minor children" with defendant having visitation rights. Plaintiff also received sole title to the homeplace owned by the parties. It thus appears the parties intended plaintiff to have the responsibility of rearing the children and supervising their health, welfare and education. Insofar as the defendant was concerned, his duty was to pay the monthly support and refrain from interfering with the health, welfare and education of the children.

With this background, we turn to the interpretation of the paragraph in question. If the contested provision is not ambiguous, its construction is a matter of law for the court. *Kent Corporation v. Winston-Salem*, 272 N.C. 395, 158 S.E. 2d 563 (1968). "If there be no dispute in respect of the terms of the contract, and they are plain and unambiguous, there is no room for construction. The contract is to be interpreted as written." *Jones v. Realty Co.*, 226 N.C. 303, 305, 37 S.E. 2d 906, 907 (1946); *Sales Co. v. Plywood Distributors*, 13 N.C. App. 429, 185 S.E. 2d 737 (1972).

There are reasons of logic, as well as of law, why the written unambiguous language of a contract is to be relied upon rather than the parties' interpretation of it. It is true that Cicero in his eloquent defense of the poet Archias denied the superiority of the written memorial, or record, over the spoken word, upon the ground that the witness is subjected to an oath and cross-examination and other safeguards against falsehood, while the record has no such test to assure its accuracy. But the law has never accepted this argument, relying upon the safer rule prefer-

ring written over unwritten evidence. Even the best intentioned memory fades with the passage of time.

Nor can this rule be evaded by substituting the intention or understanding of one of the parties for the agreement of both.

> It is not the understanding, but the agreement, of the parties that controls, unless that understanding is in some way expressed in the agreement. Even if the defendant had clearly shown that it so understood the agreement, it will not do, as the court proceeds, not upon the understanding of one of the parties, but upon the agreement of both. No principle is better settled.

Lumber Co. v. Lumber Co., 137 N.C. 431, 436, 49 S.E. 946, 948 (1905).

Paragraph 9 of the agreement clearly states that defendant shall pay to the plaintiff $350 per month as child support for the two minor children of the marriage. The parties did not allocate any definite part of the $350 for each child, leaving the use of the money in the discretion of plaintiff, who had the responsibility for the health, welfare and education of the children. The parties further clearly state that the payments shall continue until the two minor children reach the age of eighteen years. The agreement does not contain any provision to reduce the support payments when one of the children reaches eighteen years of age. A parent can by contract bind himself to support his children after they are emancipated or reach their majority. *Church v. Hancock*, 261 N.C. 764, 136 S.E. 2d 81 (1964); *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). *See Mullen v. Sawyer*, 277 N.C. 623, 178 S.E. 2d 425 (1971).

We are of the opinion and so hold that the language of paragraph 9 of the separation agreement executed by the parties is plain and unambiguous and its effect is a question of law for the Court. We further hold it constitutes an absolute obligation requiring defendant to pay $350 per month to plaintiff as child support for the two children of the parties, the support payments to continue until both children attain the age of eighteen years.

The trial court correctly determined there is no genuine issue of material fact. Summary judgment for plaintiff was proper.

Affirmed.

Judges HEDRICK and CLARK concur.

FRANCES D. WATTS v. JOHN HOWARD WATTS

No. 7928DC50

(Filed 20 November 1979)

1. **Divorce and Alimony § 11— defendant's calling of plaintiff by derogatory names—supporting allegations**

In an action for divorce from bed and board, evidence that defendant called plaintiff by derogatory names was supported by plaintiff's allegations of coldness, lack of affection and other indignities.

2. **Divorce and Alimony § 11— time spent by defendant with another woman—indignities**

In an action for divorce from bed and board, plaintiff's evidence that defendant husband spent considerable time with another woman was admissible for the purpose of proving the alleged indignities suffered by plaintiff at defendant's hands.

3. **Divorce and Alimony § 17.3— amount of alimony—sufficiency of findings**

The trial court made sufficient findings to support its award of alimony of $210 per month to plaintiff wife. G.S. 50-16.5(a).

APPEAL by defendant from *Styles, Judge.* Judgment entered 1 August 1978 in District Court, BUNCOMBE County. Heard in the Court of Appeals 16 October 1979.

Plaintiff filed a verified complaint on 10 August 1977 seeking divorce, permanent alimony and alimony *pendente lite* from defendant. Her allegations were to the effect that defendant had abandoned her, had committed adultery, had wilfully failed to provide necessary subsistence according to his means and conditions since their separation on 20 July 1977 and had offered such indignities as to render her condition intolerable and life burdensome because he had been cold and unaffectionate toward her for several years. She further alleged defendant ordered her to leave the family homeplace and told her he did not want to see her again and that defendant had spent very little of his free time with her and had refused to explain long periods of absence.

Defendant counterclaimed for divorce from bed and board alleging that he had been abandoned by the plaintiff.

Plaintiff testified, in pertintent part, that for several years prior to the separation in July, 1977, defendant was not affectionate at all toward her and abused her by calling her derogatory names. She also testified that defendant spent very little time at home when he was free from work.

She testified that on 19 July 1977, he stated he was going to play cards. Plaintiff testified that she and her daughter followed defendant on that occasion to the home of Mamie Singleton. When defendant returned home the next morning there was a confrontation during which the defendant told plaintiff to get out of their home and stay out. Plaintiff's married daughter, Phyllis Ingle, testified that she had visited her parents' home three or four times a week and observed that her father spent very little time at home. She observed that defendant did not show the plaintiff any affection and ordered her to do chores for him. Mrs. Ingle also testified defendant called plaintiff derogatory names. She had seen the defendant in the company of Mamie Singleton on several occasions and she had accompanied her mother on the night of 19 July 1977, when defendant was followed to the Singleton residence. Plaintiff offered testimony from four additional witnesses which tended to supply similar evidence. Defendant did not offer any evidence.

The jury found defendant did wilfully abandon plaintiff without just cause or provocation; that defendant, without provocation, offered indignities to plaintiff which rendered her condition intolerable and her life burdensome; and that plaintiff did not wilfully abandon defendant without just cause or provocation. Additional evidence was presented concerning the financial obligations and incomes of each of the parties. A final judgment was entered on 1 August 1978 granting plaintiff a divorce from bed and board from defendant and awarding her permanent alimony in the amount of $210.00 per month. Defendant appeals.

Lloyd M. Sigman, for plaintiff appellee.

George W. Moore, for defendant appellant.

VAUGHN, Judge.

[1] Defendant assigns error in the admission of evidence, over objection, that defendant called plaintiff by derogatory names. He argues the evidence was not supported by the pleadings. Rule 8(a) of the N.C. Rules of Civil Procedure requires that a claim for relief contain "[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 . . . ." Plaintiff alleged personal indignities and that "defendant has been cold and unaffectionate toward plaintiff." This is reasonable notice of the basis of plaintiff's claim. The evidence of name calling conforms to the allegation of coldness, lack of affection and other indignities. *See Manning v. Manning*, 20 N.C. App. 149, 201 S.E. 2d 46 (1973). Also, the same evidence of name calling was admitted without objection at other points in the trial. Any benefit to the objection elsewhere is, therefore, waived. 1 Stansbury, N.C. Evidence § 30 (Brandis rev. 1973).

[2] Defendant also argues that the trial judge erred by allowing plaintiff to present evidence that defendant spent considerable time with another woman. Plaintiff's complaint is based on the grounds of indignities, abandonment and adultery. Adultery, however, was not submitted to the jury as an issue in the case. It is, of course, true that in an action for divorce a spouse is not a competent witness to give evidence on the adultery of the other spouse. G.S. 8-56; G.S. 50-10; *Wright v. Wright*, 281 N.C. 159, 188 S.E. 2d 317 (1972). An examination of the testimony of plaintiff wife does not reveal any incompetent evidence of adultery by defendant husband. In fact where the testimony bordered on circumstantial evidence of adultery, the trial judge either allowed the objection and instructed the jury to disregard the evidence or cautioned plaintiff's counsel to limit his questioning and not delve into the forbidden topic. The evidence that was admitted to the effect that plaintiff had seen defendant with another woman was admissible for purposes of proving the alleged indignities suffered by her at defendant's hands. *Briggs v. Briggs*, 21 N.C. App. 674, 205 S.E. 2d 547 (1974).

[3] Defendant's final assignment of error raises the issue of whether sufficient findings of fact were made to support the amount of the alimony award. "Alimony shall be in such amount

as the circumstances render necessary, having due regard to the estates, earnings, earning capacity, condition, accustomed standard of living of the parties, and other facts of the particular case." G.S. 50-16.5(a). The trial judge's determination of amount will not be disturbed absent a clear abuse of discretion. *Eudy v. Eudy*, 288 N.C. 71, 215 S.E. 2d 782 (1975). The findings of fact in this judgment clearly indicate the factors set out in G.S. 50-16.5(a) were considered. The trial judge's findings include the following:

> "(4) Plaintiff is 49 years old, has an 8th grade education, no job training or significant job experience, she has been a housewife throughout the marriage. The parties married one another in 1947, and had four children. All are now legally emancipated.
>
> * * *
>
> (6) Defendant works full time at American Enka where he has a net take-home pay of approximately $140.00 per week. He is able bodied and he has been working at Enka for 24 years.
>
> (7) The plaintiff's only source of income is to work as a babysitter for her daughter in return for free rent. Plaintiff has expenses for utilities, groceries, and clothing. She is in good health at the present time. She does not own a car nor have a driver's license."

These findings and others are sufficient compliance with *Eudy v. Eudy, supra.* No abuse of discretion has been shown. The judgment is, in all respects, affirmed.

Affirmed.

Judges ERWIN and HILL concur.

EUGENE BIBB BAUGH, JR. v. JUANELLE CLEMENTS BAUGH

No. 7918DC324

(Filed 20 November 1979)

Divorce and Alimony § 21.5— alimony—consent judgment—no enforcement by contempt

Since alimony was not a part of any judgment, original or amended by the trial court, there was nothing to enforce by contempt; rather, the separation agreement and stipulation of the parties never achieved more status than approval and sanction by the court, and a contract between husband and wife whereby he agrees to pay specified sums for her support may not be enforced by contempt proceedings even though the agreement has the sanction and approval of the court.

APPEAL by defendant from *Washington, Judge.* Order entered 2 January 1979 in District Court, GUILFORD County. Heard in the Court of Appeals 18 October 1979.

Plaintiff brought an action for absolute divorce in March 1973 based on a one-year separation. Defendant answered and counterclaimed. In the counterclaim, defendant asserted that plaintiff had abandoned her. Defendant sought alimony, both *pendente lite* and permanent, child support and a transfer to her of the jointly held home. Alimony *pendente lite* was awarded 14 March 1974.

On 24 April 1974, the parties entered into a deed of separation which purported to settle all claims of the parties against each other. The deed stated that it should be incorporated into the future divorce decree and survive the decree.

On 26 June 1974, the parties filed a stipulation which, among other things, noted that the parties had compromised their differences and had incorporated that compromise into the deed of separation. Thereafter, on the same day, Judge Alexander filed a judgment granting plaintiff an absolute divorce from defendant. No incorporation of the stipulation or deed was made.

Plaintiff failed to make alimony payments as provided in the deed, and on 13 May 1975, defendant filed a motion praying that plaintiff be held in contempt for failure to pay alimony. Plaintiff answered, and negotiations between the parties ensued.

On 9 July 1975, an amended judgment by consent was entered by Judge Walter Clark. The amended judgment provided:

1. A new schedule for payment of alimony in lieu of that set forth in paragraph 7 of the stipulation.
2. That the payment of alimony would be enforceable by appropriate contempt proceedings.
3. That defendant would withdraw her motion of 13 May 1975.

For a second time, it appeared that the parties had successfully compromised their differences and agreed upon a consent judgment. However, on 26 April 1978, plaintiff filed a motion in the cause seeking a declaration that the deed was unenforceable by contempt and that the consent order of 9 July 1975 was improperly of record and unenforceable by contempt under any circumstances. Defendant countered on 4 May 1978 in a motion to the court requesting that plaintiff be held in contempt for failure to comply with the court's order concerning the payment of alimony.

On 2 January 1979, Judge Washington found facts and made conclusions of law providing that the deed and stipulation are civil in nature and not enforceable by contempt; that the judgment by consent is void. The court thereupon allowed plaintiff's motion for a declaratory judgment to that effect.

Defendant appealed.

Max D. Ballinger, for plaintiff appellee.

Adams, Kleemeier, Hagan, Hannah & Fouts, by Walter L. Hannah, for defendant appellant.

HILL, Judge.

Defendant made twenty-one exceptions in this cause, condensing them into three questions on appeal. We believe the following issue encompasses the questions before the Court:

> Are the deed and stipulation incorporated into the judgment granting absolute divorce and adopted by the court as its own determination of the rights and obligations of the parties?

Bunn v. Bunn, 262 N.C. 67, 136 S.E. 2d 240 (1964), discussed in detail the two kinds of consent judgment which provide for payment to the wife.

> In one, the court merely approves or sanctions the payments which the husband has agreed to make for the wife's support and sets them out in a judgment against him. Such a judgment constitutes nothing more than a contract between the parties made with the approval of the court. Since the court itself does not in such case order the payments, the amount specified therein is not technically alimony. In the other, the court adopts the agreement of the parties as its own determination of their respective rights and obligations and orders the husband to pay the specified amounts as alimony. *Bunn*, at p. 69.

Bunn indicates further that a contract-judgment of the first type is enforceable only as an ordinary contract. It may not be enforced by contempt proceedings. A judgment of the second type is an order of the court, may be modified by the court at any time, and is enforceable by contempt.

A careful examination of the record reflects that nowhere in either the original judgment entered on 26 June 1974, or the amended consent judgment entered on 9 July 1975, does there appear an order by the court compelling the husband to pay alimony. The amended consent judgment amends the stipulation to provide for payment of different monthly installments and states that the same shall be paid into the office of the clerk of court and be enforceable by appropriate contempt proceedings. However, the parties were already divorced at this time, and there could be no alimony per se at the time of entry of the amended judgment by consent.

Although an order granting alimony may be modified, when a party has secured an absolute divorce, it is beyond the power of the court thereafter to enter a new order for alimony. *See* G.S. 50-16.9(a); *Mitchell v. Mitchell*, 270 N.C. 253, 154 S.E. 2d 71 (1967). The original stipulation is not a judgment and never became one, subject to enforcement as a part of any judgment.

In like manner the separation agreement must stand alone. It was not incorporated into any judgment so as to become a part thereof.

Since alimony is not a part of any judgment, original or amended, there is nothing to enforce by contempt. *Holden v. Holden, infra.*

We must conclude that the separation agreement and stipulation never achieved more status than approval and sanction by the court.

A contract between husband and wife whereby he agrees to pay specified sums for her support may not be enforced by contempt proceedings even though the agreement has the sanction and approval of the court. *Holden v. Holden,* 245 N.C. 1, 95 S.E. 2d 118 (1956); *Stanley v. Stanley,* 226 N.C. 129, 37 S.E. 2d 118 (1946); *Brown v. Brown,* 224 N.C. 556, 31 S.E. 2d 529 (1944); *Britt v. Britt,* 36 N.C. App. 705, 245 S.E. 2d 381 (1978).

The decision of Judge Washington in this cause is

Affirmed.

Judges VAUGHN and ERWIN concur.

STATE OF NORTH CAROLINA v. OLIVIA TRUZY

No. 798SC452

(Filed 20 November 1979)

1. **Arrest and Bail § 6.1— arrest under warrant valid on its face—failure to state crime—no right to resist arrest**

An individual does not have the right to resist an arrest by a police officer pursuant to a warrant issued by a magistrate which in all respects appears regular on its face but which fails to state a crime.

2. **Criminal Law § 146.1— appellate review without objection at trial**

The statute providing for appellate review without objection at trial of errors based on the ground that "the criminal pleading charged acts which, at the time they were committed, did not constitute a violation of criminal law," G.S. 15A-1446(d)(3), applies only to appeals by defendants and not to appeals by the State.

APPEAL by defendant from *Bruce, Judge.* Judgment entered 22 November 1978 in Superior Court, WAYNE County. Heard in the Court of Appeals 20 September 1979.

Defendant was arrested on 28 May 1978 for maintaining a public nuisance, "to wit: loud speakers that are attached to a tape player or some other musical machine that disturbs the entire neighborhood until late at night, in violation of . . . Common Law." On the following day defendant was served with an arrest warrant for unlawfully resisting arrest by public officers "by kicking with feet, scratching with hands and attempting to hit [County Deputy Sheriff] F. S. Greenfield in the privates [*sic*] parts of his body."

The original record reveals that the first warrant was issued by Magistrate Norbert B. Wilson and that the second warrant was issued by W. H. Greenfield (not "F. S." Greenfield, the name of the arresting officer, as indicated in the printed record).

The Appellant pled not guilty to both warrants at her trial in District Court on 1 September 1978 before Judge Arnold R. Jones. Defendant was found guilty of both public nuisance and resisting arrest.

Defendant appealed to Superior Court and the cases were tried in the one-week Superior Court Criminal Session in Wayne County which began 20 November 1978. On 22 November 1978 the presiding judge allowed a motion to quash the warrant charging the appellant with the offense of a public nuisance on the ground that the warrant failed to state a criminal offense. The State made no objection, exception or motion to this ruling in the trial division.

The second charge of resisting arrest was tried before a jury and the jury returned a verdict of guilty.

Attorney General Edmisten by Assistant Attorney General Daniel F. McLawhorn for the State.

E. C. Thompson III for the defendant.

CLARK, Judge.

[1] Only one issue has been properly raised in this appeal: whether an individual has the right to resist an arrest by a police officer with a warrant which has been issued by a magistrate, which in all respects appears regular on its face, but which fails to state a crime. The answer is "no."

Police officers are not members of the judicial branch. It is the duty of the courts, not the police, to determine whether an action is taken within the bounds of the law, and it is precisely for this reason that warrants for searches or arrests must be issued by an independent judicial officer. *State v. McGowan*, 243 N.C. 431, 432-33, 90 S.E. 2d 703 (1956). Once such a warrant has been issued it is the duty of the arrested person to comply with the warrant until other processes of our elaborate and protective judicial system can be invoked. Even though a warrant issued by a magistrate which appears regular on its face may not in fact state a crime, the determination of whether a crime was in fact charged is to be made by our courts, not private violence. It is unlawful for individuals outside the judicial process to forcibly resist a police officer who, without illegal entry and without excessive force, attempts to make an arrest pursuant to a warrant issued by an independent judicial officer. It would indeed be bad public policy to jeopardize the safety of police officers because they cannot determine the strict legal sufficiency of each warrant they must execute. *State v. Wright*, 1 N.C. App. 479, 488, 162 S.E. 2d 56, *aff'd on other grounds*, 274 N.C. 380, 163 S.E. 2d 897 (1968).

We are unable to consider other contentions by defendant because no narrative summary of the evidence, as required by N.C.R. App. P. 9(b)(3)(v) and 9(c)(1), has been provided by defendant's counsel. We note that the instructions of the trial court, which included a summary of the evidence offered by defendant, are not evidence and do not suffice to serve as a substitute for the narrative summary required by the rules.

[2] The State requests that this Court consider, pursuant to N.C. Gen. Stat. § 15A-1446(d)(3), whether the trial court erred in quashing the common law public nuisance charge. This section provides for appellate review, without objection at trial, of errors based upon a "criminal pleading [which] charged acts, which at the time they were committed, did not constitute a violation of criminal law." We hold that this subsection applies only to appeals by *defendants* who have been convicted of acts which do not constitute a crime. Quite simply, if the State believed that an act "did not constitute a violation of the criminal law," the State should have dismissed the case.

The general rule, as set forth in N.C. Gen. Stat. § 15A-1446(a) is that "error may not be asserted upon appellate review unless the error has been brought to the attention of the trial court by appropriate and timely objection or motion . . . ." No objection was made by the State to the trial court on this issue and we therefore hold that the general rule of N.C. Gen. Stat. § 15A-1446(a) applies.

Affirmed.

Judges HEDRICK and MARTIN (Harry C.) concur.

DEPARTMENT OF TRANSPORTATION v. JULIA C. ROGERS

No. 7910SC190

(Filed 20 November 1979)

Eminent Domain § 6.5— value of land—witness's opinion—admissibility

An attorney and real estate developer who was familiar with land values in the county, who had for several years been familiar with the area in which appellee's property was located, and who had walked over one tract of appellee's land and observed the other from the edge of the tract could properly give his opinion as to value in a condemnation proceeding, and the fact that he was not as familiar with the property as he could have been and had not observed it at the time of taking went to the weight of his testimony and not to its admissibility.

APPEAL by plaintiff from *Godwin, Judge.* Judgment entered 4 October 1978 in Superior Court, WAKE County. Heard in the Court of Appeals 19 October 1979.

In this cause two separate cases for the condemnation of defendant's land were consolidated for trial in one action. The only issue in each case was the amount of compensation. The defendant called two witnesses to testify as to her damages. One of them was H. A. Sandman, who testified he is a licensed attorney and a developer of residential and commercial real estate who has developed at least five residential subdivisions in Wake County. He testified he had been familiar with the section in which the property is located for several years and had been on both tracts of defendant's land approximately three or four weeks prior to

the trial. He testified in proper form as to the damage to both tracts. On cross-examination, he testified he did not walk over one of the tracts but viewed it from its edge. He testified he based his knowledge as to the topography of the land on the information given him by the defendant's attorney and the assumption it "looked about like it did where I saw it up front." The parcel was approximately 2,000 feet deep. Highway construction had begun when he was on the property with the trees having been felled and the grading done. He testified he did not know what the property looked like before the construction was begun but assumed the property under construction looked like what was left. The plaintiff made a motion to strike the testimony of Mr. Sandman, which motion was denied. The plaintiff appealed from the judgment.

Attorney General Edmisten, by Assistant Attorney General R. W. Newsom III, for the State.

Satisky and Silverstein, by Howard P. Satisky, for defendant appellee.

WEBB, Judge.

Plaintiff brings forward one assignment of error. It contends the testimony of H. A. Sandman should have been stricken because he did not have adequate knowledge of the area taken to testify. Defendant cites textbook authority and cases from this and other jurisdictions for the rule that in order to give an opinion as to value, a witness must be acquainted with the value of the land in controversy and must be familiar with the land or have examined it at the approximate time of taking. *See Robbins v. Trading Post, Inc.*, 251 N.C. 663, 111 S.E. 2d 884 (1960); *Highway Commission v. Privett*, 246 N.C. 501, 99 S.E. 2d 61 (1957); *Highway Commission v. Matthis*, 2 N.C. App. 233, 163 S.E. 2d 35 (1968); *Blair v. Pennsylvania Turnpike Commission*, 152 Pa. Super. Ct. 555, 33 A. 2d 490 (1943); *Wilson v. Southern Ry.*, 65 S.C. 421, 43 S.E. 964 (1903); *Hall v. Seaboard Air Line Ry. Co.*, 126 S.C. 330, 119 S.E. 910 (1923), and 5 Nichols, Eminent Domain, § 18.42(1) (3d ed. 1975). We do not argue with the rule as stated by appellant. We hold that Mr. Sandman's testimony that he had walked over one tract and had observed the other from the edge of the tract is evidence that he was familiar with the property

and could give his opinion as to value. The fact that he was not as familiar with the property as he could have been and had not observed it at the time of the taking goes to the weight given his testimony by the jury. There was no evidence that his assumption as to the condition of the land at the time of the taking was incorrect.

Robbins v. Trading Post, Inc., supra, relied on by the appellant, was an action against a building contractor for breach of contract for the construction of a house. The contract provided the house "shall be exactly like house built on Endsley Ave. house #13." Plaintiff's witness testified the house would have been worth from $9,000.00 to $9,500.00 had it been constructed according to contract. On cross-examination, he said he had never seen the Endsley house and knew nothing about it. The Supreme Court held it was error not to strike his testimony. In the case sub judice the witness testified he had seen the property in question. This distinguished the two cases. In *Highway Commission v. Matthis, supra,* this Court held it was not error to exclude the opinion testimony of a witness as to the value of land immediately prior to the taking when the witness lived 78 miles from the land taken; the date of the taking was three years prior to the time the witness saw the land; the highway construction was complete when the witness first saw the property, and the record did not disclose what changes had occurred in the surrounding property since the date of the taking. In the case sub judice, the witness was very familiar with land values in Wake County; he had for several years been familiar with the area in which appellee's property was located. We hold these facts distinguish *Matthis* from the case sub judice.

No error.

Judges ARNOLD and WELLS concur.

STATE OF NORTH CAROLINA v. ROBERT LEE SPELLER

No. 792SC528

(Filed 20 November 1979)

1. **Burglary and Unlawful Breakings § 1.2— entry into store—concealment in area not open to public—voidness of consent to entry**

Defendant's act of concealing himself in a store area not open to the public well beyond the closing of business hours for the store for the purpose of participating in a theft voided consent by the store owner to his entry into the store and rendered him subject to prosecution for felonious entry.

2. **Larceny § 7.8— taking guns from case and placing in box—taking and asportation**

Evidence that thieves took guns from a gun case and placed them in a box behind the case was sufficient evidence of a taking and asportation to support a conviction of larceny.

APPEAL by defendant from *Fountain, Judge.* Judgments entered 5 April 1979 in Superior Court, MARTIN County. Heard in the Court of Appeals 18 October 1979.

Defendant was tried on charges of felonious breaking or entering, felonious larceny and being an habitual felon. He was found guilty on all charges and sentenced to prison.

The State presented the following evidence at trial. Shortly after midnight, on 16 March 1979, a police officer responded to an alarm in the Giant Discount Store in Williamston. He checked all windows and doors on the first floor and found them secure. The store manager was called to open the store. A gun display case on the first floor had been broken open. Officers searched the upper story of the building, which was not a public area, and found defendant hiding under some boards. Nineteen handguns missing from the display case, two walkie-talkies and a pair of binoculars were found in a cardboard box hidden behind the case. The merchandise was valued at $2,918.89.

Defendant testified that he and two other persons were looking for some handguns. They entered the Giant Discount Store, and, while the other two kept the clerk busy, defendant went upstairs and concealed himself in the storage area. Later, pursuant to plan, the other two knocked at the rear door. Defendant told them to come to the roof. A skylight was opened and the two

came in and went to the first floor. Defendant stationed himself on the roof. When the police officers arrived, defendant stayed on the roof for a while. When an officer crawled onto the roof of an adjacent store building, defendant crawled back into the store. He was there discovered by the officers. He did not know how the other two got out.

Attorney General Edmisten, by Associate Attorney Benjamin G. Alford, for the State.

Griffin and Martin, by Clarence W. Griffin, for defendant appellant.

VAUGHN, Judge.

[1] Defendant contends that his entry was lawful and that, therefore, he cannot be convicted of felonious breaking or entering. Felonious entry is a statutory crime. G.S. 14-54(a). "[A] person cannot be convicted of felonious entry into a store or place of business during normal business hours through a door open to the public because there has not been an unauthorized or unpermitted entry." *State v. Boone*, 39 N.C. App. 218, 219, 249, S.E. 2d 817, 819 (1978), *modified and affirmed*, 297 N.C. 652, 256 S.E. 2d 683 (1979). Defendant entered the building during normal business hours. Thereafter, however, without the consent of the owner, he went into an area not open to the public and there secreted himself. He remained concealed until well beyond the closing of business hours for the store for the purpose of participating in a theft. These acts voided any consent to the entry. Going into an area not open to the public and remaining hidden there past closing hours made the entry through the front door open for business unlawful. *See State v. Boone*, 297 N.C. 652, 659, n. 3, 256 S.E. 2d 683, 687 n. 3 (1979).

[2] Defendant also contends the larceny charge should not have reached the jury because, he argues, the State failed to show a taking of the goods. The handguns were removed from a locked case and placed in a cardboard box which was found hidden behind the gun case. In *State v. Carswell*, 296 N.C. 101, 249 S.E. 2d 427 (1978), a defendant and a companion took an air conditioning unit from a motel window and moved it to the floor four to six inches towards the door. The court held this sufficient evidence of a taking and asportation to support a conviction of larceny. Quot-

ing from 4 W. Blackstone, Commentaries *231, the Court said " '[a] bare removal from the place in which he found the goods, though the thief does not quite make off with them, is a sufficient asportation or carrying away.' " *Id.* at 103, 249 S.E. 2d at 428. In this case, the thieves took the guns from the gun case and placed them in a box behind the case. During that interval, the guns were under the control of the thieves and severed from the possession of the owner. The crime of larceny was thereby completed. We find no error in defendant's trial.

No error.

Judges ERWIN and HILL concur.

STATE OF NORTH CAROLINA v. DENNIS L. ODEN

No. 792SC551

(Filed 20 November 1979)

1. **Criminal Law § 91.7— absence of witness—denial of motion for continuance**

The trial court did not err in the denial of defendant's motion for continuance because of the absence of a defense witness where the motion was made after the case was called for trial, defendant had not subpoenaed the witness, and defendant did not advise the court what he hoped to prove by the witness.

2. **Criminal Law § 89.2— testimony as to types of guns reported stolen—admissibility for corroboration**

An officer's testimony as to what types of guns were reported and listed as stolen was competent to corroborate the testimony of the owner of the guns and was properly admitted over defendant's general objection.

3. **Indictment and Warrant § 17.2— breaking and entering and larceny—variance in date of crimes not fatal**

There was no fatal variance between an indictment charging felonious breaking and entering and larceny on 13 March 1978 and evidence tending to show that defendant committed the crimes on 22 March 1978 since time was not of the essence in the offenses charged, evidence of an alibi was presented for both dates, and there was no apparent reliance or prejudicial error in the defect in dates.

APPEAL by defendant from *Fountain, Judge.* Judgment entered 9 March 1979 in Superior Court, BEAUFORT County. Heard in the Court of Appeals 25 October 1979.

Defendant was tried under an indictment which charged that on or about 13 March 1978, he committed the crimes of felonious breaking or entering and felonious larceny. The jury returned guilty verdicts in both cases.

The State's evidence tends to show the following. The home of Gilbert Alligood in Washington, North Carolina, was broken into on 13 March and on 22 March 1978. On 22 March, certain guns were stolen between 7:50 a.m. and 3:30 p.m. About 6:00 p.m. on that day, defendant sold the stolen guns to a Havelock, North Carolina gunsmith for $150.00. The market value of the guns was placed at $1400.00. The other men were with defendant at the time he sold the guns. The receipt was made out to defendant.

Defendant offered evidence that he was home at the time of the break-in and theft of which he was charged. On 22 March, he met Sam Keyes and another person about 4:30 p.m. They rode to Havelock and stopped by a gunsmith shop to sell some guns. Defendant knew nothing of the guns until then. He was never informed that they were stolen. When the guns were sold, the gunsmith asked for identification. Of the three, only defendant was carrying any and, for that reason, his name was on the sales slip.

Attorney General Edmisten, by Special Deputy Attorney General John R. B. Matthis and Associate Attorney James C. Gulick, for the State.

Carter, Archie and Grimes, by Sid Hassell, Jr., for defendant appellant.

VAUGHN, Judge.

[1] Defendant's first assignment of error is based on the denial of his motion for a continuance due to the unavailability of a defense witness. The assignment of error is without merit. The motion was made after the case was called for trial. Although the indictment had been pending for almost a year, defendant had not caused a subpoena to be issued for the alleged witness. Moreover, he did not advise the court of what he hoped to prove by the potential witness.

[2] Defendant's second assignment of error is based upon a general objection to certain testimony by the State's first

witness, police officer Danny Respass. Respass testified about what type of guns were reported and listed as stolen. In his brief, defendant contends the general objection should have been sustained on hearsay grounds, *i.e.* that the testimony of Officer Respass about the missing items depends upon the out-of-court assertion of Alligood that they were stolen and that the testimony was offered to prove that the named items were missing. The testimony was admissible to corroborate the testimony of Alligood. Since the testimony was competent for that purpose, it was not error to overrule defendant's general objection. *See* 1 Stansbury, N.C. Evidence §§ 50, 79 (Brandis rev. 1973).

[3] As his third assignment of error, defendant argues that the case should have been dismissed because of the variance between the date of the crime for which State's evidence was offered and the date of the crime as stated in the indictment. The bill of indictment alleged a felonious breaking and entering and larceny "on or about the 13th day of March 1978" while the evidence tended to prove defendant committed the crimes on 22 March 1978. The variance does not void the judgment in this case. Time is not of essence in the offenses charged. A statute of limitations is not involved. Defendant has not demonstrated any harm in the variance of the dates. He was not deprived of an opportunity to present an alibi defense. Evidence was received giving defendant an alibi for both dates. There was no apparent reliance nor prejudicial error in this defect in dates. G.S. 15-155; *State v. Locklear*, 33 N.C. App. 647, 236 S.E. 2d 376, *cert. den.*, 293 N.C. 363, 237 S.E. 2d 851 (1977).

We have examined defendant's other assignments of error and conclude that prejudicial error has not been shown.

No error.

Judges ERWIN and HILL concur.

IRISH R. ARTIS, PLAINTIFF EMPLOYEE v. N. C. BAPTIST HOSPITALS, INCORPORATED, EMPLOYER, ST. PAUL FIRE & MARINE INSURANCE, CARRIER DEFENDANTS

No. 7910IC197

(Filed 20 November 1979)

Master and Servant § 65.2— workmen's compensation—nurse turning patient—back injury—no accident

Plaintiff's injury suffered during the course of her employment was not the result of an accident within the meaning of the Workmen's Compensation Act where the evidence tended to show that the injury occurred while plaintiff nurse was helping her co-workers turn an unconscious obese patient in bed, and that such activity was a normal part of plaintiff's work.

APPEAL by plaintiff from order of North Carolina Industrial Commission entered 14 November 1978. Heard in the Court of Appeals on 23 October 1979.

Plaintiff is a nurse employed by defendant Baptist Hospital in Winston-Salem. On 25 September 1977, while assisting two other nurses, plaintiff injured her back.

Plaintiff had been called by one of her co-workers to assist the nurse and one other nurse in turning an unconscious patient who weighed 300 pounds. Care had to be exercised in turning the patient as she had just undergone a lumbar puncture. Plaintiff began lifting the middle portion of the patient, but during the process felt a catch in her back and could not straighten up. Subsequently, plaintiff was taken to the emergency room.

On 4 October 1977, plaintiff was examined by Dr. Anthony Gristina. The doctor diagnosed interscapular myositis and recommended a course of treatment. Between 24 October 1977 and 14 February 1978, plaintiff returned to work on a gradually increasing basis. By 19 April 1978, Dr. Gristina felt that plaintiff was doing well working four days a week, but that she tended to have some recurrences on a five day schedule.

In an opinion filed on 14 November 1978, the Industrial Commission adopted the earlier findings of fact and conclusions of law of Deputy Commissioner Shuping; concluded that plaintiff's injury, although sustained during the normal course of employment, was not the result of an accident as that term is contemplated by

G.S. 97-2(6); and that, therefore, plaintiff was not entitled to compensation; that plaintiff had reached maximum recovery by 14 February 1978, and had no permanent disability.

Plaintiff appealed.

W. Warren Sparrow and George A. Bedsworth, for plaintiff appellant.

Hutchins, Tyndall, Bell, Davis & Pitt, by Walter W. Pitt, Jr., for defendant appellees.

HILL, Judge.

The Workmen's Compensation Act does not provide compensation for an injury, but only for an injury suffered by accident. *See* G.S. 97-2(6).

> A . . . back injury suffered by an employee does not arise by accident if the employee at the time was merely carrying out his usual and customary duties in the usual way. (Citation omitted.) Injury arising out of lifting objects in the ordinary course of an employee's business is not caused by accident where such activity is performed in the ordinary manner, free from confining or otherwise exceptional conditions and surroundings. (Citation omitted.) *Russell v. Yarns, Inc.*, 18 N.C. App. 249, 250, 196 S.E. 2d 571 (1973).

Plaintiff asserts that her injury resulted from exceptional circumstances; that the extreme weight of the patient, the patient's condition, the smallness of the room, and the position of the bed and life support equipment all combined to create exceptional surroundings. Furthermore, plaintiff asserts that her normal work routine had been interrupted when she responded to her co-worker's call for assistance.

We find plaintiff's arguments unpersuasive. The patient, although obese, did not present an exceptional condition to plaintiff—she was assisted by two of her co-workers. Turning patients was part of plaintiff's job, and there is no evidence that the hospital room and its condition were any different than plaintiff was used to working in. Plaintiff was not called away from her job, but instead was helping one of her co-workers as would normally be expected.

Several North Carolina cases have dealt with similar circumstances and are controlling here.

In *Garmon v. Tridair Industries, Inc.*, 14 N.C. App. 574, 188 S.E. 2d 523 (1972), claimant's duties included assembling hydraulic pipes and putting them on steel frames. While lifting one of the 150-pound frames over some cables, claimant suffered a back injury. Recovery was denied. The Industrial Commission found that claimant was performing his usual and customary duties at the time of the injury. This Court affirmed.

In *Beamon v. Grocery*, 27 N.C. App. 553, 219 S.E. 2d 508 (1975), claimant was employed as a grocery store checker whose duties included bagging groceries. While lifting a 20-pound bag of charcoal, claimant suffered a back injury. The Commission denied an award of compensation, and the Court upheld the ruling.

In *Curtis v. Mechanical Systems*, 36 N.C. App. 621, 244 S.E. 2d 690 (1978), claimant suffered a hernia while lifting a heat pump onto a hand truck. Claimant was part of a three-man crew employed to install the pumps at a construction site, but in this instance had lifted a 350-pound unit by himself. The Commission ruled that there was no injury by accident and the Court affirmed.

For the reasons stated above, the opinion and award of the Industrial Commission is

Affirmed.

Judges VAUGHN and ERWIN concur.

JUANITA J. PHILLIPS v. TEXFI INDUSTRIES, INC.

No. 797SC189

(Filed 20 November 1979)

1. Appeal and Error § 36.1— failure to serve case on appeal in apt time—dismissal of appeal

Appeal is dismissed for failure of appellant to comply with the Rules of Appellate Procedure where appellant failed to serve the proposed record on

appeal within 30 days after the appeal was taken as required by Appellate Rule 11(b), and an order thereafter entered allowing appellant additional time to serve the case on appeal was not made pursuant to a written motion and after notice and hearing as required by Appellate Rules 11(b) and 27(c).

2. Negligence § 57.11— fall on ice in parking lot—failure to show negligence—summary judgment

In an action to recover for injuries received by plaintiff when she slipped on a sheet of ice on defendant's property, summary judgment was properly entered for defendant where plaintiff's materials showed that she parked in defendant's parking lot at 10:00 a.m., got out of her car and walked around the car, stepped over a curb and fell on a sheet of ice, the sheet of ice was two or three feet wide and ran for six feet along the curb, the weather was clear and the sun was shining, and plaintiff could see the ice, since plaintiff gave no forecast of any evidence of negligence on the part of defendant.

APPEAL by plaintiff from *Brown, Judge.* Judgment entered 28 November 1978 in Superior Court, NASH County. Heard in the Court of Appeals 19 October 1979.

Plaintiff brings this action to recover for injuries she received when she slipped on a sheet of ice on defendant's property. Plaintiff testified on deposition that her husband is employed by defendant, and on 5 January 1976 she went to defendant's plant to take her husband the keys he needed for his locker there. At defendant's plant she pulled up in front of the guard house, got out and stepped over the curb, and fell on a sheet of ice. The guard house is located inside a parking lot, and plaintiff had driven into the parking lot at times to pick up or let out her husband, but she had never gotten out of the car there before. When plaintiff stopped her car on this occasion she had to walk around it to get to the guard house. The patch of ice upon which she fell was two or three feet wide and six feet long, and she did not see it until she was putting her foot down on it.

Defendant moved for summary judgment, which was granted. Plaintiff appeals.

Malone, Johnson, DeJarmon and Spaulding, by T. Mdodana Ringer, Jr., for plaintiff appellant.

Battle, Winslow, Scott & Wiley, by Samuel S. Woodley, for defendant appellee.

ARNOLD, Judge.

[1] As defendant points out, plaintiff has failed to comply with Rule 11(b) of the Rules of Appellate Procedure, which requires that appellant file with the clerk of superior court and serve on the appellee a proposed record on appeal within 30 days after appeal is taken. Plaintiff gave notice of appeal on 28 November 1978. On 10 January 1979, more than 30 days later, an order was signed allowing plaintiff 75 days within which to serve the case on appeal. Under Rule 11(f), extensions of the 30 day period in 11(b) may be allowed "in accordance with the provisions of Rule 27(c)." Rule 27(c), as amended effective 1 January 1979, expressly provides that "motions to extend the time for serving the proposed record on appeal made after the expiration of any time previously allowed for such service must be in writing and with notice to all other parties and may be allowed only after all other parties have had opportunity to be heard." Here it does not appear that the motion was made in writing, or that there was any notice or hearing. We have determined that for failure to comply with the Rules of Appellate Procedure, plaintiff's appeal should be dismissed.

[2] Moreover, we note that plaintiff's argument that defendant was not entitled to summary judgment could not prevail. The parties on a motion for summary judgment give a forecast of evidence. *See Caldwell v. Deese*, 288 N.C. 375, 218 S.E. 2d 379 (1975). Defendant, moving for summary judgment, relied upon plaintiff's deposition and the affidavits of three of defendant's employees. The affidavits related to plaintiff's status upon the premises, not to the issue of defendant's negligence, and plaintiff's deposition revealed no evidence of negligence on defendant's part. Plaintiff's testimony on deposition was that she parked in defendant's parking lot, got out of her car and walked around the car, stepped over a curb and fell on a sheet of ice. The patch of ice was two or three feet wide and ran for six feet along the curb. Plaintiff testified that she could see the ice; it was 10 a.m., the weather was clear and the sun was shining. Opposing defendant's motion for summary judgment, plaintiff presented affidavits which related only to her status. She gave no forecast of any evidence of defendant's negligence. Accordingly, summary judgment for defendant was proper. *See Caldwell v. Deese, supra*, cf. *Jacobson v. J. C. Penney Co., Inc.*, 40 N.C. App. 551, 253 S.E.

2d 293 (1979); *McArver v. Pound & Moore, Inc.*, 17 N.C. App. 87, 193 S.E. 2d 360 (1972), *cert. denied* 283 N.C. 106, 194 S.E. 2d 633 (1973).

Appeal dismissed.

Judges WEBB and WELLS concur.

STATE OF NORTH CAROLINA v. STANLEY LEE CAMPBELL

No. 7921SC545

(Filed 20 November 1979)

Burglary and Unlawful Breakings § 5.8; Larceny § 7.13— breaking and entering apartment—insufficiency of evidence

In a prosecution for breaking and entering an apartment and larceny therefrom, evidence was insufficient to be submitted to the jury where it tended to show that a truck entered the apartment parking lot on three occasions and that two males, including defendant, were seen in the truck, but the evidence did not place defendant in the apartment or with any property that was stolen therefrom, and defendant was never seen entering or coming out of the apartment.

APPEAL by defendant from *Graham, Judge.* Judgment entered 21 March 1979 in Superior Court, FORSYTH County. Heard in the Court of Appeals 23 October 1979.

Defendant was tried for felonious breaking and entering and larceny from the demonstration or model apartment for the Monticello Apartments complex in Winston-Salem. The jury returned a verdict of not guilty to the larceny charge and a verdict of guilty to the breaking or entering charge. From this conviction and active prison sentence, defendant appeals.

Attorney General Edmisten, by Special Deputy Attorney General John R. B. Matthis and Assistant Attorney General Acie L. Ward, for the State.

Eubanks, Walden and Mackintosh, by Bruce A. Mackintosh, for defendant appellant.

VAUGHN, Judge.

Defendant assigns as error the denial of his motions for dismissal at the close of the State's evidence and at the close of all the evidence. The crucial question is whether there is evidence to show that defendant broke into or entered the apartment. The evidence in the light most favorable to the State is, in summary, as follows.

Beatrice M. Dean was living in the apartment just above the model apartment in the Monticello Apartments. She saw a truck later identified as belonging to defendant's father come into the complex three times. The first time she saw it, it was loaded with furniture. She observed only a black female arranging furniture in the trunk of a small sports car that was behind the truck. She did not see any of the people who were in the truck or the apartment on any of the three occasions.

Gary Goins, the apartments manager, was called by Ms. Dean about 11:00 p.m. He went to the model apartment and found the front door open and some of the furniture missing. He and one of the owners decided to wait and see if the thieves would return. They were there when the truck arrived the second time. Before they could call the police and get to the model apartment, the truck left. Mr. Goins saw two males in the truck. Mr. Goins was also present when the truck appeared the third time. A police car also arrived. It was seen by someone inside the model apartment who closed the front door. The officer and Doug Owens went up to the model apartment and opened the door. Goins then noticed a window screen protruding out and saw two male figures running along the side of the building. Goins gave chase but lost the two. When he stopped the chase and came back to the parking lot, defendant was in the back of the patrol car.

Doug Owens, an owner of the apartments, was called by the manager, Goins, and told of the break-in. As he was coming to the apartments to meet the police and Goins, he met a light-colored Jeep truck containing two males. He was present when the truck came to the complex the second time. After the second visit, Owens got in his car and waited. When the truck appeared the third time, Owens saw defendant and another male get out of the truck. He did not see either person go into the apartment. When a patrol car arrived, he and a police officer went up to the door of

the apartment. He waited outside while the officer searched the place and found no one there. They went back to the truck and defendant walked up. Owens identified him as the person who got out of the driver's side of the truck. The officer then arrested defendant. Defendant walked up to the truck a few minutes after Goins gave chase to the two men.

T. L. Lemmons, a Winston-Salem police officer, was called to the scene and talked to Owens at 11:21 p.m. Owens told him of the break-in and that they were going to wait to see if anyone returned. Officer Lemmons was called to the scene again at approximately 1:00 a.m. When he arrived, Goins and Owens informed him that two men were inside the apartment. When he went up to the apartment, he did not see anyone else around the area. He found no one in the apartment. He and Owens were returning to the truck when defendant walked up to it. Owens identified him as the man who got out of the truck and walked towards the model apartment. Officer Lemmons then arrested defendant.

That part of defendant's evidence, which does not conflict with that offered by the State, tends to show the following. Audry Thomas, a friend of defendant, spent most of the evening at a club with defendant. She heard a third person plead with defendant to let him borrow the truck belonging to defendant's father. Defendant consented. Later, the third person returned to the club and convinced defendant to leave with him. Defendant testified that he was at a club with a friend on the evening of the break-in. Early in the evening a third person whom he knew as Pool convinced him to allow him to use his truck. Later, this person returned and convinced him to go with him to Monticello Apartments. At no time was defendant made aware that anyone was breaking into an apartment or stealing furniture. He drove Pool to the apartments. He was directed to another part of the building to find a friend of Pool. No one answered the door so he went back outside and saw the police officer by his truck.

The evidence does not place defendant in the apartment or with any property that was stolen therefrom. The only time defendant is placed on the scene is the third time the truck came to the complex. He is never seen entering or coming out of the apartment. The evidence is sufficient only to raise a suspicion

that defendant participated in the break-in. Defendant's motion to dismiss should have been granted. *State v. Poole*, 285 N.C. 108, 203 S.E. 2d 786 (1974).

Reversed.

Judges ERWIN and HILL concur.

STATE OF NORTH CAROLINA v. JAMES MILTON ALSTON

No. 797SC498

(Filed 20 November 1979)

1. **Criminal Law § 105.1— motion for nonsuit—renewal of motion**

Defendant waived his motion for nonsuit made at the close of the State's evidence by presenting evidence and failing to renew his motion, but pursuant to G.S. 15A-1227(d) and G.S. 15A-1446(d)(5), defendant could have requested review of the sufficiency of all the evidence without regard to whether the proper motion or exception had been made during trial.

2. **Homicide § 21.7— second degree murder—sufficiency of evidence**

Evidence was sufficient for the jury in a second degree murder case where it tended to show that defendant accused deceased of being romantically involved with his wife; defendant twice assaulted deceased; and defendant then entered deceased's house and shot him in the head.

3. **Homicide § 28.2— self-defense—use of force—apparent necessity—jury instructions proper**

The trial court's instructions on self-defense in a second degree murder prosecution properly explained to the jury that defendant could use more force than was actually necessary if he believed it to be necessary and had a reasonable ground for the belief.

APPEAL by defendant from *Rouse, Judge.* Judgment entered 25 January 1979 in Superior Court, NASH County. Heard in the Court of Appeals 16 October 1979.

Defendant was indicted for first degree murder in the 22 September 1978 slaying of Thomas Mitchell. Defendant appeals from a guilty verdict of murder in the second degree.

The State's evidence tended to show the following. On the day of the killing, defendant accused Mitchell of romantic rela-

tions with his wife. Defendant called Mitchell out of his home and a fight ensued after defendant grabbed Mitchell and slapped him. Defendant and Mitchell were separated by friends. Defendant left Mitchell's home but later returned and another fight ensued. In this fight, Mitchell hit defendant with a wrench, cutting defendant's head. Mitchell went back into his home, and defendant went to his car to get a cloth to wipe the blood from his eyes and face. Defendant took a shotgun from his car trunk and returned to Mitchell's home. He entered the house and searched for Mitchell finding him in a back bedroom. Defendant opened the door, raised the gun and said, "Ah, slick, you're a dead . . . now" as he pulled the trigger. The shot struck Mitchell's left cheek and passed into the brain, destroying vital centers. The officers first on the scene found deceased in a kneeling position in the farthest corner from the door with a large puddle of blood beneath him. A wrench was found between his legs.

Defendant testified at trial that deceased was coming at him with a wrench. The gun which he had for his protection "just went off." His confession to the officers at the scene, however, was to the effect that he pointed the shotgun at deceased and shot him as he backed up in the corner.

Attorney General Edmisten, by Associate Attorney Lucien Capone III, for the State.

J. Henry Banks, for defendant appellant.

VAUGHN, Judge.

[1] Defendant assigns error in the denial of his motion for nonsuit at the close of the State's evidence. Defendant presented evidence following the denial of his motion and did not renew the motion. "If the defendant introduces evidence, he thereby waives any motion for dismissal or judgment as in case of nonsuit which he may have made prior to the introduction of his evidence and cannot urge such prior motion as ground for appeal." G.S. 15-173; *State v. Rhyne*, 39 N.C. App. 319, 250 S.E. 2d 102 (1979).

Pursuant to G.S. 15A-1227(d) and G.S. 15A-1446(d)(5), defendant could have requested review of the sufficiency of all of the evidence without regard to whether the proper motion or exception had been made during trial. On our own motion, we have

reviewed the sufficiency of all the evidence to take the case to the jury.

[2] Defendant was convicted of second-degree murder which is the unlawful killing of a human being with malice but without premeditation and deliberation.

> "The intentional use of a deadly weapon proximately causing death gives rise to presumptions that (1) the killing was unlawful, and (2) the killing was done with malice. This is second-degree murder." *State v. Bush,* 289 N.C. 159, 170, 221 S.E. 2d 333, 340, *death sentence vacated,* 429 U.S. 809, 50 L.Ed. 2d 69, 97 S.Ct. 45 (1976); *see also State v. Rummage,* 280 N.C. 51, 185 S.E. 2d 221 (1971).

Malice on the part of defendant is established in the case by inference from the use of a deadly weapon and by the surrounding circumstances including the two earlier assaults and the accusations concerning deceased's romantic relationship with defendant's wife. We hold the State presented sufficient evidence of the essential elements of second-degree murder to take the case to the jury.

[3] Defendant's only other assignment of error is in the trial judge's instruction to the jury on the law of self-defense. The trial judge instructed:

> "Now, a killing would be excused entirely on the grounds of self-defense, if: First, it *appeared to the defendant and he believed it to be necessary* to shoot Mitchell in order to save himself from death or great bodily harm, and, second, the circumstances as they *appeared to the defendant* at the time were sufficient to create such a belief in the mind of a person of ordinary firmness. It is for you the jury to determine the reasonableness of the defendant's belief from the circumstances as they *appeared to him* at the time." (Emphasis added.)

This properly instructs the jury that "one may fight in self-defense and may use more force than is actually necessary to prevent death or great bodily harm, if he believes it to be necessary and has a reasonable ground for the belief." *State v. Francis,* 252 N.C. 57, 59, 112 S.E. 2d 756, 758 (1960); *see also State v. Hearns,* 9 N.C. App. 42, 175 S.E. 2d 376 (1970).

No error.

Judges ERWIN and HILL concur.

STATE OF NORTH CAROLINA EX REL. COMMISSIONER OF INSURANCE v. NORTH CAROLINA RATE BUREAU, CENTRAL MUTUAL INSURANCE COMPANY, GREAT AMERICAN INSURANCE COMPANY, IOWA NATIONAL MUTUAL INSURANCE COMPANY, STATE CAPITAL INSURANCE COMPANY, AND UNITED STATES FIRE INSURANCE COMPANY

IN THE MATTER OF A FILING DATED JUNE 30, 1978, BY THE NORTH CAROLINA RATE BUREAU FOR A PREMIUM LEVEL REVISION ON THE HOMEOWNER'S PROGRAM, DOCKET NO. 281

No. 7910INS58

(Filed 20 November 1979)

Insurance § 116— homeowners insurance—erroneous disapproval of rate filing

Order of the Commissioner of Insurance disapproving an entire rate filing for homeowners insurance is vacated and set aside.

Judge ERWIN dissents

APPEAL by the North Carolina Rate Bureau and named companies from an order of the Commissioner of Insurance issued 21 September 1978. Heard in the Court of Appeals 25 September 1979.

This case arises out of a filing made on 30 June 1978 by the North Carolina Rate Bureau on its own behalf and on behalf of its member companies writing homeowners insurance in North Carolina. The filing provided for a 9.1 percent average increase in homeowners insurance rates and provided for a change in various relativities for classifications. Hearings were conducted by the Commissioner of Insurance on 30 August 1978. An order disapproving the entire filing was issued by the Commissioner on 21 September 1978.

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

Young, Moore, Henderson & Alvis, by Charles H. Young and William M. Trott, for defendant appellants.

VAUGHN, Judge.

The dissent in this case makes it reasonably certain that the final disposition of the appeal will be determined by the Supreme Court. We will not, therefore, attempt to recapitulate the evidence or set out a detailed statement of the reasoning that leads us to the conclusion that the order is so affected by errors of law that it must be vacated. The errors of law include the following:

(1) The Commissioner's conclusions that the data submitted had not been "audited" and that it, therefore, is not reliable cannot be sustained in the light of all of the evidence offered in connection with that question in this case.

(2) The portion of his order respecting investment income is erroneous in that, among other things, it does not relate to actual investment income but to some theoretical income that might have been realized if the funds had been invested according to the notions of the Commissioner. Specifically, the order recites: "76. That it is the hypothetical figure—What the risk avoiding insurer could have earned, rather than actual investment results—that should be used in the rate making process."

(3) The Commissioner's determination that the Rate Bureau failed to offer substantial evidence in support of the filing is erroneous and not supported by the record.

(4) The findings and conclusions of the Commissioner are unsupported by material and substantial evidence in view of the entire record.

(5) When the order is considered in the light of the whole record and applicable statutes, it exceeds the statutory authority of the Commissioner.

For the reasons stated, the order is vacated and set aside. The rates established by the 30 June 1978 filing remain in effect. Upon final judicial determination of this appeal the sums placed in escrow by each member shall be released and returned to that member.

Vacated.

Judge HILL concurs.

Judge ERWIN dissents.

STATE OF NORTH CAROLINA v. DONNIE RAY TATUM

No. 798SC575

(Filed 20 November 1979)

Criminal Law §§ 157, 166— brief—record on appeal—omission of necessary parts

Defendant's appeal was subject to dismissal for failure to refer to assignments of error and exceptions immediately following each question presented in his brief and for failure to include the bill of indictment in the record on appeal.

APPEAL by defendant from *Barefoot, Judge.* Judgment entered 10 April 1979 in Superior Court, WAYNE County. Heard in the Court of Appeals 13 November 1979.

Defendant was convicted of armed robbery and judgment imposing a prison sentence of not less than fifty nor more than sixty years was entered.

Attorney General Edmisten, by Assistant Attorney General Thomas F. Moffitt, for the State.

Donald M. Wright, for defendant appellant.

VAUGHN, Judge.

We note at the outset that defendant is represented by court-appointed counsel. The Rules of Appellate Procedure, however, must be observed by attorneys who are paid at public expense as well as by those who are privately retained.

Rule 28(b)(3) of the Rules of Appellate Procedure clearly provides that immediately following each question presented in appellant's brief there shall be

"a reference to the assignments of error and exceptions pertinent to the question, identified by their numbers and by the

pages of the printed record on appeal at which they appear. Exceptions in the record not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned."

The brief filed by appellant ignores the foregoing requirement of the Rules of Appellate Procedure.

Rule 9(b)(3)(iii) requires that the record on appeal in criminal cases shall include "copies of all warrants, informations, presentments, and indictments upon which the case has been tried in any court . . . ." The record on appeal served on the District Attorney in this armed robbery case did not contain a bill of indictment. It contained only a deputy clerk's arrest warrant. The District Attorney, nevertheless, stipulated that "the foregoing has been settled as and is hereby constituted the Case on Appeal . . . ." As so "settled," the record on appeal was docketed in this Court without a bill of indictment. The defect in the record was not the subject of any comment in the brief of the Attorney General. If defendant was tried only on the arrest warrant, we would have to arrest judgment. N.C. Const. art. I, § 22. On our own initiative this Court determined that defendant was indeed tried on a proper bill of indictment and has caused a true copy of that indictment to be filed in this Court.

The appeal is subject to dismissal. We have, however, considered the assignments of error defendant attempts to assert. Even if properly presented, they could not disclose prejudicial error.

Appeal dismissed.

Judges WEBB and MARTIN (Harry C.) concur.

REBECCA M. BOONE v. WILLIAM H. BOONE

No. 7914DC441

(Filed 20 November 1979)

Divorce and Alimony § 5— divorce based on year's separation—recrimination not defense

Recrimination in the form of abandonment is unavailable as a defense in actions for divorce based on a year's separation brought after 31 July 1977 even though the alleged abandonment occurred prior to that date. G.S. 50-6.

APPEAL by defendant from *Read, Judge.* Order entered 13 March 1979 in District Court, DURHAM County. Heard in the Court of Appeals 13 November 1979.

Alexander H. Barnes, for plaintiff appellee.

Newsom, Graham, Hedrick, Murray, Bryson & Kennon, by Josiah S. Murray III, and Lewis A. Cheek, for defendant appellant.

VAUGHN, Judge.

Plaintiff started this action on 30 August 1978 seeking divorce from defendant on the ground of one year's separation. On 31 October 1978, after obtaining an order extending time to answer, defendant answered and pled as an affirmative defense and bar to plaintiff's claim for absolute divorce that plaintiff had willfully and wrongfully abandoned defendant on 8 July 1977. Plaintiff's motion to strike this affirmative defense pursuant to Rule 12(f) of the North Carolina Rules of Civil Procedure was granted. Defendant appeals the trial court's granting of this motion.

The wrongful and willful abandonment pled by defendant, as well as adultery, is a type of recriminatory defense that until recently could defeat an action for divorce based on a year's separation. *Harrington v. Harrington,* 286 N.C. 260, 210 S.E. 2d 190 (1974). The 1977 General Assembly through two amendments to G.S. 50-6 changed this on any action for divorce brought after 31 July 1977. *See* 1977 N.C. Sess. Laws c. 817 and 1977 N.C. Sess. Laws c. 1190. Recrimination cannot be asserted as a defense in actions for absolute divorce based on a year's separation brought after that date. Since plaintiff's action was begun on 30 August

1978, the defense of recrimination in the form of abandonment was not available to defendant even though the alleged abandonment occurred prior to the effective date of the statute. *Edwards v. Edwards*, 43 N.C. App. 296, 259 S.E. 2d 11 (1979); *Gerringer v. Gerringer*, 42 N.C. App. 580, 257 S.E. 2d 98 (1979); *Smith v. Smith*, 42 N.C. App. 246, 256 S.E. 2d 282 (1979).

The trial judge properly struck the abandonment defense. His order is

Affirmed.

Judges WEBB and MARTIN (Harry C.) concur.

GARY WRIGHT AND SHIRLEY M. WRIGHT v. ASHEVILLE POOL AND GUNITE COMPANY D/B/A ASHEVILLE SOLAR SYSTEMS

No. 7828DC1150

(Filed 20 November 1979)

APPEAL by plaintiffs from *Styles, Judge.* Judgment entered 25 July 1978 in District Court, BUNCOMBE County. Heard in the Court of Appeals 19 September 1979.

Jones and Parker, by Lawrence T. Jones, for plaintiff appellants.

Shuford, Frue & Best, by Ronald K. Payne, for defendant appellee.

VAUGHN, Judge.

The appeal is subject to dismissal for failure to comply with the Rules of Appellate Procedure. Appellants failed to comply with Rule 9(b)(1)(ix) which requires that the record on appeal shall contain "a copy of the notice of appeal, or of the appeal entry showing appeal taken orally, and of all other appeal entries relative to the perfecting of appeal." We have, nevertheless, elected to consider the case on its merits.

On 25 July 1978, the trial judge granted defendant's motion for directed verdict made at the close of plaintiffs' evidence.

Plaintiffs do not bring forward the evidence and make no complaint about the judgment dismissing the action. The only exceptions brought forward relate to the denial of their pretrial motions for summary judgment. The exceptions fail to disclose prejudicial error. "Denial of a motion for summary judgment does not determine the merits of the case. It merely means that the case proceeds to trial." *Oil Co. v. Smith*, 34 N.C. App. 324, 325, 237 S.E. 2d 882, 883 (1977).

There are no assignments of error directed to any part of the trial which resulted in judgment against the appellants. The judgment is affirmed.

Affirmed.

Judges ERWIN and HILL concur.

BOARD OF TRANSPORTATION v. TERMINAL WAREHOUSE CORPORATION; PILOT FREIGHT CARRIERS, INC., LESSEE

No. 7828SC1015

(Filed 4 December 1979)

1. **Eminent Domain § 2.2— action to condemn portion of property—dead-ending of highway not compensable**

In an action to condemn a small portion of defendant's property, the trial court did not err in refusing to instruct the jury that the dead-ending of a former U.S. highway abutting the front of defendant's property is a compensable damage item and in instructing the jury that the defendant is not entitled to compensation for any circuity of travel resulting from the dead-ending of the highway and that mere inconvenience caused by having to travel a circuitous route to and from the landowner's property does not constitute a taking, since the fact that a portion of defendant's property was taken does not render compensable those elements of damages which are ordinarily not compensable but are *damnum absque injuria.*

2. **Eminent Domain § 2.6; Waters and Watercourses § 1— highway condemnation action—change in surface water drainage—reasonable use rule**

In an action to condemn a portion of defendant's property for use in a highway construction project, the trial court properly instructed the jury that the "reasonable use" rule governed the rights and liabilities of the parties with respect to changes in drainage of surface waters resulting from plaintiff's construction of the highway project.

Judge MARTIN (Robert M.) concurring in part and dissenting in part.

APPEAL by defendant, Terminal Warehouse Corporation, from *Lewis, Judge*. Judgment entered 25 August 1978 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 21 August 1979.

This is a proceeding to condemn a .16 acre strip of land from a 2.85 acre tract owned by the defendant Terminal Warehouse Corporation and leased by it to Pilot Freight Carriers, Inc. The land was condemned as part of a project to relocate U.S. Highway 74 and to construct a portion of Interstate Highway 40 and its connectors near Asheville in Buncombe County. The only questions presented concern the elements which should properly be considered in determining the compensation to be paid the landowner.

Prior to the taking, U.S. Highway 74 was a two-lane paved highway which, in the area of the property taken, ran generally in a north-south direction and served as a major artery for traffic between Asheville and Charlotte. The 2.85 acre tract was a rectangular parcel of land having a frontage of 296 feet along the east margin of the highway and extending eastward from the highway to a depth of approximately 422 feet. Legal access to the highway was available along the entire 296 feet of frontage. A large brick and masonry building on the property served as a trucking terminal warehouse. Two gravel driveways leading from the highway, one on the north and the other on the south side of the building, afforded access for trucks to the loading docks on either side of the warehouse building and to the gravel parking area in the rear.

The .16 acre tract taken was a narrow triangular strip lying along the southern boundary of the 2.85 acre tract, fronting 38.84 feet on the east margin of U.S. Highway 74 and running back to a point at the southeast corner of defendant's property. All of the property taken was south of the southernmost gravel drive serving the warehouse building and a substantial portion of the condemned strip was covered by the stream bed of Gashes Creek, which flowed eastwardly across the southern portion of the 2.85 acre tract.

As part of the project for which defendant's property was taken, U.S. Highway 74 was relocated a substantial distance to the west so that since completion of the project one must travel

approximately one mile by connector road to reach relocated U.S. Highway 74 from defendant's property. The former U.S. Highway 74 on which defendant's property abuts is now a secondary road which terminates at a dead end opposite the southeast corner of defendant's remaining lot. At that point the road is completely blocked by an 80-foot high rock and earth fill which furnishes the roadbed for one of the connector roads to Interstate Highway 40. The secondary road (former U.S. Highway 74) remains open in front of and northward from defendant's property and provides access therefrom both to the relocated U.S. Highway 74 and to east and west connector roads to Interstate 40.

In connection with the Interstate 40 project, plaintiff developed and improved 105 acres (all of which was presumably acquired from other landowners) out of the total of 3950 acres contained in the watershed of Gashes Creek upstream from defendant's property. The .16 acre tract taken in this proceeding was used by plaintiff principally for a partial relocation of Gashes Creek. Prior to the taking this stream flowed eastward onto and across the southern portion of the 2.85 acre tract after passing under former U.S. Highway 74 through a triple eight-by-eight foot concrete box culvert. At that time the stream entered the 2.85 acre tract from the west and flowed eastward on a course roughly parallel with and slightly north of its southern boundary line until it approached the eastern or rear portion of the tract, where it turned northward, eventually to flow into the Swannanoa River some distance downstream from defendant's property. On completion of the project for which the .16 acre tract was taken, the course of Gashes Creek was changed so that, instead of flowing onto the tract from the west after passing under old U.S. Highway 74, it now flows northward onto the tract after passing through a large concrete box culvert running under Interstate 40 and its connector roads. At the mouth of this culvert and on the .16 acre tract, a curved concrete retaining wall was erected to divert the flow of the creek as it emerges from the culvert so as to turn the waters eastward into the old stream bed of the creek. A smaller 42" corrugated iron culvert collects waters draining from the massive fill and from the surface of Interstate Highway 40 and its connectors and discharges these waters into the creek at a point immediately below the mouth of the culvert.

At the trial before a jury to determine compensation, defendant landowner presented evidence to show that at times of heavy rainfall occurring since construction of the project, water from Gashes Creek comes over the top of the concrete retaining wall which plaintiff erected at the mouth of the culvert and flows upon defendant's remaining land, hindering its use as a trucking terminal. Defendant's expert witness attributed this to the increased flow of water in Gashes Creek resulting from the more rapid runoff from the surface of Interstate 40 and its connectors, to the more rapid flow caused by the increased slope of the new culvert under Interstate 40, and to the change in direction of the stream as it approaches defendant's property. In rebuttal, plaintiff presented an expert witness who testified that the concrete retaining wall which plaintiff erected at the mouth of the culvert now affords defendant greater protection from water damage than existed prior to construction of the project and that, although the volume of water in Gashes Creek had been increased by the project, this was not the cause of any flooding upon defendant's property. In the opinion of plaintiff's expert such flooding as had occurred on defendant's property during periods of heavy rainfall was not caused by construction of the project upstream from defendant's land but by the backing up of water caused by an inadequate culvert on another landowner's property downstream from defendant's land.

Defendant's appraisers testified concerning their opinions as to the fair market value of defendant's entire 2.85 acre tract immediately prior to the taking as compared with the fair market value of the remainder after the taking and placed the diminution in value at figures between $32,300.00 and $50,000.00. These witnesses testified that in arriving at their opinions as to fair market value of the remainder after the taking they took into account, among other matters, the effect on market value of such factors as the change in status of the highway from a U.S. Highway to a secondary road, the dead-ending of the road, the circuity of travel caused thereby, and the flooding on the property caused by construction of the project. Plaintiff's appraiser testified that in his opinion the difference in fair market value of the entire 2.85 acre tract as compared with the value of the 2.69 acres remaining after the taking was $1,120.00.

The court submitted three issues to the jury, which answered them as follows:

1. What sum are the defendants, Terminal Warehouse Corporation, Pilot Freight Carriers, Inc., Lessee, entitled to recover as just compensation for the appropriation of a portion of their property for highway purposes on the 13th day of October, 1969?

ANSWER: $2000.00

2. Did the Board of Transportation unreasonably interfere with the flow of surface water, thereby causing damage to the property of the defendant, Terminal Warehouse?

ANSWER: No

3. What amount, if any, is the landowner, Terminal Warehouse, entitled to recover from the Board of Transportation for the unreasonable interference with the flow of surface water?

ANSWER: _____

From judgment in accord with the verdict, defendant landowner appeals.

Attorney General Edmisten by Senior Deputy Attorney General R. Bruce White, Jr., and Assistant Attorney General Frank P. Graham for petitioner appellee.

Bennett, Kelly & Cagle, P.A. by Harold K. Bennett for defendant appellant.

PARKER, Judge.

[1] Appellant assigns error to the court's refusal to instruct the jury as requested by it "[t]hat substantial interference with the property owner's access to U.S. Highway 74 was compensable" and "that the dead-ending of what formerly was U.S. 74 is a compensable damage item." Instead of giving the requested instructions, the court instructed the jury that the landowner was not entitled to compensation for any circuity of travel resulting from the dead-ending of the highway and that mere inconvenience

caused by having to travel a circuitous route to and from the landowner's property does not constitute a taking. We find no error in the refusal to give the requested instructions or in the instructions which were given in this case.

So long as he is still afforded reasonable access to the street or highway on which his property abuts, the landowner is not entitled to compensation because the dead-ending of that street or highway by action of the public authorities leaves his property on a *cul-de-sac*. *Wofford v. Highway Commission*, 263 N.C. 677, 140 S.E. 2d 376, cert. denied, 382 U.S. 822 (1965); *Snow v. Highway Commission*, 262 N.C. 169, 136 S.E. 2d 678 (1964). The landowner has no right to have the flow of traffic pass his property undiminished or to insist that it continue to flow in both directions, *Moses v. Highway Commission*, 261 N.C. 316, 134 S.E. 2d 664, cert. denied 379 U.S. 930 (1964), and the mere inconvenience resulting from circuity of travel required to get to and from his property is not compensable but is *damnum absque injuria*. The rationale behind this rule was explained in *Wofford v. Highway Commission, supra*, as follows:

> The landowner has an easement consisting of the right of reasonable access to the particular highway on which his land abuts. He has no constitutional right to have anyone pass by his premises at all; highways are built and maintained for public necessity, convenience and safety in travel and not for the enhancement of property along the route. An abutting landowner is not entitled to compensation because of circuity of travel to and from his property; such inconvenience is held to be no different in kind, but merely in degree, from that sustained by the general public, and is *damnum absque injuria* . . .
>
> * * *
>
> . . . Where a *cul-de-sac* is created, or the movement of traffic has been limited to one direction, the landowner's right to use the street is no more restricted than is that of other citizens making use thereof, and the landowner has no constitutional right to have others pass his premises. *Barnes v. Highway Commission*, 257 N.C. 507, 126 S.E. 2d 732. The restriction upon the landowner and the restriction upon the

> public generally, in the use of the street for travel, is no different in kind, but merely in degree. A property owner is not entitled to compensation for mere circuity of travel. Absolute equality of convenience cannot be achieved, and those who purchase and occupy property in the proximity of public roads or streets do so with notice that they may be changed as demanded by the public interest.

263 N.C. at 680-81, 140 S.E. 2d at 379-80.

Appellant recognizes these principles but contends that they should not apply in a case such as is here presented where there has been an actual taking of a portion of the landowner's property. The measure of damages where only a part of a tract of land is taken for highway purposes is prescribed by statute, G.S. 136-112(1), as follows: "where only a part of a tract is taken, the measure of damages for said taking shall be the difference between the fair market value of the entire tract immediately prior to said taking and the fair market value of the remainder immediately after said taking, with consideration being given to any special or general benefits resulting from the utilization of the part taken for highway purposes." In applying this rule, "[t]he fair market value of the remainder immediately after the taking contemplates the project in its completed state and any damage to the remainder due to the user to which the part appropriated may, or probably will, be put." *Board of Transportation v. Brown*, 34 N.C. App. 266, 268, 237 S.E. 2d 854, 855 (1977), aff'd, 296 N.C. 250, 249 S.E. 2d 803 (1978). Proper application of these rules does not make compensable elements of damages to the landowner's remaining property which would not be compensable in the absence of any taking and which do not flow directly from the use to which the land taken is put. Such damages, if any, are shared by other property owners in the vicinity and occur without reference to whether any portion of the landowner's property has been condemned. In short, they do not result from the taking of a portion of the landowner's property. *See, Light Company v. Creasman*, 262 N.C. 390, 137 S.E. 2d 497 (1964); Annot., 59 A.L.R. 3d 488 (1974).

This precise question was addressed by the Supreme Court of Ohio in *Richley v. Jones*, 38 Ohio St. 2d 64, 310 N.E. 2d 236 (1974), in which it was held that the fact of taking does not make

compensable elements of damages which would otherwise be *damnum absque injuria.* In overruling decisions of the lower courts which had allowed compensation for such elements of damages where there had been a partial taking, the Supreme Court of Ohio reasoned as follows:

> The problem arises when there is a partial appropriation and the owner is allowed to present evidence of the impaired condition of the land because of the appropriation. In such cases, some lower courts in the state have allowed evidence to be heard that would ordinarily pertain only to consequential damages, on the theory that such damages have become severance damages. *See, e.g., In re Appropriation for Hwy. Purposes* (1966), 6 Ohio App. 2d 6, 215 N.E. 2d 612.
>
> The anomaly is well presented in *Columbus v. Farm Bureau Cooperative Assn.* (1971), 27 Ohio App. 2d 197, 200, 273 N.E. 2d 888, 890: "Thus, the issue before this court is whether damages consequential to the construction of an improvement, which would be *damnum absque injuria,* in the absence of the taking of any of a property owner's property, become compensable damages to the residue where a portion of the property of such property owner is taken for the improvement."
>
> The problem then revolves around our theory of just compensation. We usually define "market value" as the amount of money that a purchaser willing, but not obliged, to buy the property would pay to an owner willing, but not obliged, to sell, taking into consideration the reasonable uses to which the land may be put. But the landowner cannot profit because the state is exercising its power of eminent domain. The landowner is entitled to no special damages because he is compelled to part with his title.
>
> * * *
>
> The holdings in the lower courts in this cause have the effect of giving the landowner special damages. A neighbor who might have similar problems with traffic flow because of the construction of the median strip, but who has had no land taken by the state in connection with the project, will receive no recompense for whatever is done to his land. He has suf-

> fered an "inconvenience shared in common with the general public," which is *damnum absque injuria.*
>
> Here, appellees have suffered that same "inconvenience," differing possibly in degree but not in kind. The fact that this loss is coincident with an appropriation of land in no way changes the noncompensable character of the damage.

38 Ohio St. 2d at 69-70, 310 N.E. 2d at 240.

In the present case the small portion of defendant's property which was taken was located along the southern boundary of defendant's tract. No part of the .16 acre tract taken had even been used in connection with operation of the trucking terminal and much of it was covered by the stream bed of Gashes Creek. Thus, the use of defendant's remaining property as a trucking terminal was in no way impaired by the severance therefrom of the small strip taken. Access from defendant's remaining property to the abutting road as it now exists is exactly the same as it was before the taking. The record discloses that other tracts of land northward along the road from defendant's property are occupied by other trucking terminals. These tracts have been affected by the closing of the road south from defendant's property and by the relocation of U.S. Highway 74 in exactly the same way as has defendant's remaining tract. We see no sound reason why defendant should be entitled to compensation for elements of damages which, under *Wofford v. Highway Commission, supra,* would be denied to defendant's neighbors.

Defendant's reliance on the decision of this court in *Highway Comm. v. Yarborough,* 6 N.C. App. 294, 170 S.E. 2d 159 (1969), as support for the proposition that it is entitled to compensation for substantial interference with its easement of access, is misplaced. In that case the evidence disclosed that the highest and best use of the property was residential and that, as result of a deprivation of all direct access to the abutting highway, a new street would have to be constructed to open the area to residential development. The interference with the easement of access was direct, immediate, and unique to the condemnee. Here, there has been no interference with defendant's easement of access to the abutting road which, although not now a U.S. Highway, is still maintained as a secondary road running north from the property and which provides means of access to relocated Highway 74 at a

distance of approximately one mile from defendant's property. Under these circumstances defendant's access to Highway 74 has not been taken, and the trial court was correct when in effect it so instructed the jury. *See Highway Commission v. Nuckles*, 271 N.C. 1, 155 S.E. 2d 772 (1967).

[2] Defendant appellant also assigns error to the instructions given by the court as to the law governing the rights and liabilities of the parties with respect to changes in drainage of surface waters resulting from plaintiff's construction of the Interstate 40 project. In this connection the court instructed the jury in accordance with the "reasonable use rule" adopted by our Supreme Court in *Pendergrast v. Aiken*, 293 N.C. 201, 236 S.E. 2d 787 (1977). In assigning error to these instructions, appellant does not contend that the court erred in failing to state the "reasonable use rule" correctly. Rather, the appellant contends that the court erred in applying the rule at all in this case. Appellant argues that although the "reasonable use rule" applies when a private landowner is charged with wrongfully diverting the flow of surface waters to his neighbor's detriment, it should have no application in a case in which the state (or presumably any other body having the power of eminent domain) is so charged. In such a case, appellant contends, any damage caused by action of the body having the power of eminent domain constitutes a taking in the constitutional sense for which just compensation must be paid. We do not agree with appellant's contention that it was error to apply the "reasonable use rule" in this case.

In its opinion in *Pendergrast v. Aiken, supra*, our Supreme Court was careful to point out that adoption of the "reasonable use rule" was a clarification rather than an innovation in the law of this state. The Court noted that "[i]n the past, modifications in drainage water law have been piecemeal as required by time and circumstance" and that the Court's action in adopting the reasonable use rule "simply recognizes that fact and approves a rule by which adjustments in the rights and duties of landowners may be made fairly and justly without disrupting the consistency of the law." 293 N.C. at 218, 236 S.E. 2d at 798. We find nothing in the opinion which indicates that the Court did not intend the rule to apply in cases in which a condemning authority is involved. On the contrary, the Court expressly pointed out that the reasonable use rule "can be applied effectively, fairly and consistently in any

factual setting, . . . and thus has the capacity to accommodate changing social needs without occasioning the unpredictable disruptions in the law associated with our civil law rule." 293 N.C. at 216, 236 S.E. 2d at 796. The changing social needs to which the Court referred frequently require the exercise of the power of eminent domain, and a number of the cases cited by the Court in the course of its analysis of the modifications which prior decisions in this state had already effected in the strict civil law rule arose out of disputes in which bodies having the power of eminent domain were involved. *See, e.g., Yowmans v. Hendersonville*, 175 N.C. 574, 96 S.E. 45 (1918); *Dunlap v. Light Co.*, 212 N.C. 814, 195 S.E. 43 (1938); *Midgett v. Highway Commission*, 260 N.C. 241, 132 S.E. 2d 599 (1963); *City of Kings Mountain v. Goforth*, 283 N.C. 316, 196 S.E. 2d 231 (1973). We note particularly that the Court in *Pendergrast*, after citing and quoting from *Dunlap v. Power Co. supra*, a case which involved a party having the power of eminent domain, pointed out that it had already "adopted a flexible rule of reasonable use with regard to the rights and duties of riparian owners where such a position was mandated by basic long-term change in the social and economic structure of society." 293 N.C. at 214, 236 S.E. 2d at 795. Finally, we note the following admonition from the opinion in *Pendergrast* which seems particularly applicable to a case involving a party having the power of eminent domain:

> We emphasize that, even should alteration of the water flow by the defendant be "reasonable" in the sense that the social utility arising from the alteration outweighs the harm to the plaintiff, defendant may nevertheless be liable for damages for a private nuisance "if the resulting interference with another's use and enjoyment of land is greater than it is reasonable to require the other to bear under the circumstances without compensation." *See* Restatement (Second) of Torts (Tent. Draft No. 17, 1971); Restatement (Second) of Torts §§ 826, 829A (Tent. Draft No. 18, 1972). The gravity of the harm may be found to be so significant that it requires compensation regardless of the utility of the conduct of the defendant.

293 N.C. at 217-18, 236 S.E. 2d at 797. The trial judge in the present case was careful to instruct the jury in accord with this admonition.

In holding that the trial court in the present case was correct in instructing the jury that the rights of the parties were governed by the reasonable use rule, we are not inadvertent to the expressions in some pre-*Pendergrast* cases in which our Supreme Court spoke in terms of the rights of upper and lower proprietors with regard to the control and use of surface waters as being property rights the invasion of which by a party having the power of eminent domain would amount to a taking, *see, e.g., City of Kings Mountain v. Goforth, supra,* at 325, 196 S.E. 2d at 238, nor do we overlook similar expressions in cases from other jurisdictions, *see,* Annot., 128 A.L.R. 1195, 1198 (1940). We do not, however, view these cases as determinative of the question now before us. As we view the matter, the question presented by the present case is not whether the landowner is entitled to be fairly compensated for damages caused by any invasion of its rights with respect to the flow of surface waters which may have been caused by plaintiff's construction of the Interstate 40 project, a point which may be readily conceded. Rather, the question presented by this appeal is what rule should be applied by the court and jury in determining whether, and to what extent, the landowner's rights have been invaded. In our opinion, and we so hold, the trial court was correct in instructing the jury to apply the reasonable use rule as enunciated in *Pendergrast* in making that determination.

The appellant has also brought forward assignments of error directed to the court's actions in admitting and excluding certain testimony. We have carefully considered these assignments of error and find no prejudicial error which warrants the granting of a new trial.

No error.

Judge WEBB concurs.

Judge MARTIN (Robert M.), concurs in part and dissents in part.

Judge MARTIN (Robert M.), dissenting.

I dissent from that portion of the majority's opinion which approves the trial court's instructions to the jury on the

"reasonable use rule." Plaintiff's evidence tended to show that there had been no change in the handling of surface waters as the result of the taking; that any water damage which occurred was not the result of the highway construction, but rather of the backing up of the Swannanoa River downstream or of the backing up of water from an inferior privately constructed culvert located on adjoining lands. The landowner's evidence, on the other hand, tended to show that the culverting was the cause of flooding and silting on the property remaining after the taking. The jury was instructed that the State would be liable for damages to the landowner for its handling of the surface waters only if its use was unreasonable, or even if reasonable, if the interference with the use of the remaining land was greater than it was reasonable for defendant-appellant to bear. While this is a correct statement of the law with respect to actions between private landowners, I would hold that the "reasonable use rule" of *Pendergrast v. Aiken*, 293 N.C. 201, 236 S.E. 2d 787 (1977) is inapplicable to condemnation actions in which the issue is the determination of damages rather than liability.

In determining the fair market value of the remaining land where there has been a partial taking, as appears in this case, the landowner is entitled to compensation for injuries accruing to the residue from the taking, which includes damage resulting from the condemnor's use of the appropriated portion. *Light Co. v. Creasman*, 262 N.C. 390, 137 S.E. 2d 497 (1964); *Board of Transportation v. Brown*, 34 N.C. App. 266, 237 S.E. 2d 854 (1977), aff'd *per curiam* 296 N.C. 250, 249 S.E. 2d 803 (1978). "The landowner who has a part of his tract taken has the burden of proving by competent evidence . . . how the use of the land taken results in damage to the remainder." *Brown, supra* at 269, 237 S.E. 2d at 856. In the present case, by instructing the jury that recovery was warranted only if the damage caused to the remaining property was the result of *unreasonable* use of the surface water, the trial court placed an undue burden on the landowner. The action in *Pendergrast*, relied upon by the majority, was between private landowners, and the Supreme Court analyzed the issue of liability in terms of the law of nuisance. "Analytically, a cause of action for unreasonable interference with the flow of surface water causing substantial damage is a private nuisance action, . . ." *Id.* at 216, 236 S.E. 2d at 796. Although not expressly so holding, the

court in *Pendergrast* implied that the "reasonable use" rule was henceforth to be applied to governmental authorities in inverse condemnation actions. Assuming *arguendo* that it is so applicable, it does not necessarily follow that it is applicable in formal condemnation proceedings. The essential inquiry in an inverse condemnation action is whether there has been a taking in fact, although formal condemnation proceedings have not been instituted. *Charlotte v. Spratt*, 263 N.C. 656, 140 S.E. 2d 341 (1965). That is, the jury must determine whether *liability* exists. In a formal condemnation action such as is involved here, the issue for determination by the jury is not liability, but rather, damages. Prior to the decision in *Pendergrast*, the law was clear that a condemnee was entitled to have the jury consider as an element of compensation water damage resulting from the taking of a portion of a tract of land and its use for the diversion of surface waters. *See, Highway Commission v. Phillips*, 267 N.C. 369, 148 S.E. 2d 282 (1966); *Highway Commission v. Yarborough*, 6 N.C. App. 294, 170 S.E. 2d 159 (1967). The proper inquiry for the jury here should not have been whether the State's use of the surface waters was so unreasonable as to constitute a taking, but rather, given the fact of a physical taking, whether the water damage was the *result* of the State's use of the land taken. *See Brown, supra.*

For the reasons stated, I would reverse the trial court and remand for new trial on the issue of the State's handling of the waters of Gashes Creek.

WACHOVIA BANK AND TRUST COMPANY, N.A., AND L. D. LONG, TRUSTEES UNDER THE WILL OF KATE G. BITTING REYNOLDS, DECEASED, PLAINTIFFS v. HELEN FARISH CAMPBELL CHAMBLESS, ANNETTE THOMAS YOUNG, ANNETTE YOUNG BROWN, WILLIAM E. YOUNG, JR., DONNA MARIE YOUNG, HELEN CAMPBELL BLACKMUN, VIRGINIA CHOCOLAS, MARCIE CHOCOLAS, JEFF CHOCOLAS, JULIA G. PATTERSON, BOBBY PATTERSON, HARRY A. CAMPBELL, JR., TERESA CAMPBELL JOHNSON, JOEY LEE JOHNSON, BENJIE JOE CAMPBELL, JODY LYN CAMPBELL, JEFFERY EUGENE CAMPBELL, TAMMEY GAIL CAMPBELL, JAMES F. CAMPBELL, REESE GRAHAM CAMPBELL, ROBERT W. CAMPBELL, DERECK BLAKE CAMPBELL, JAMES EDWARD FARISH, WILLIAM WHITAKER FARISH, WACHOVIA BANK AND TRUST COMPANY, N.A., TRUSTEE UNDER LIVING TRUST AGREEMENT DATED MARCH 22, 1967, WITH JAMES EDWARD FARISH FOR THE BENEFIT OF LOUISE C. FARISH, LOUISE C. FARISH, WACHOVIA BANK AND TRUST COMPANY, N.A., AND L. D. LONG, TRUSTEES UNDER SECTION FIVE OF THE WILL OF KATE G. BITTING REYNOLDS, DECEASED, RUFUS L. EDMISTEN, ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA, WILLIAM Z. WOOD, JR., GUARDIAN AD LITEM FOR MARCIE CHOCOLAS, JEFF CHOCOLAS, JOEY LEE JOHNSON, BENJIE JOE CAMPBELL, JEFFERY EUGENE CAMPBELL, TAMMEY GAIL CAMPBELL AND ALL OTHER NATURAL ISSUE OF HELEN FARISH CAMPBELL CHAMBLESS, BORN OR UNBORN, KNOWN OR UNKNOWN. DEFENDANTS.

No. 7821SC1016

(Filed 4 December 1979)

1. **Adoption § 5; Constitutional Law § 26— foreign adoption decree—full faith and credit**

Absent fraud in the procurement, where jurisdictional requirements were met, duly authenticated adoption decrees from Missouri were entitled to recognition by the courts of N.C. under the full faith and credit clause of the U.S. Constitution.

2. **Descent and Distribution § 5— right of adopted child to inherit**

G.S. 48-23 gives an adopted person the right to succeed to the estate of the adoptive parent upon intestacy and to take under the will of the adoptive parent if the parent so provides, and G.S. 48-23(3) applies to orders of adoption from other states as well as those under N.C. law.

3. **Wills § 48— adopted children as descendants**

The term "descendant," as used in the will in question, included the adopted children of testatrix' nephew.

4. **Wills § 48— adopted children as descendants—express limitation required for exclusion**

Absent an express limitation which specifically refers to the bloodline of the testator to the exclusion of adopted persons, the terms delineated in G.S. 48-23(3) will be deemed to include any adopted person; therefore, the adopted children of testatrix' nephew were included with those normally taking as

"descendants" under the will, since there was no expression of an intent to exclude adopted children within the terms of the will.

5. **Wills § 48— adopted children—adoption laws changed after will made**

There was no merit to appellants' contention that adopted children of testatrix' nephew should be excluded from taking under the will because, under the laws of adoption as they existed at the time of the drafting of the will in question, the adopted children would not have been allowed to take and that application of G.S. 48-23(3) would contradict the supposed knowledge and intent of the testatrix.

6. **Wills §§ 35.2, 48— interests given to "descendants"—contingent interest—adopted children as descendants**

Application of G.S. 48-23(3) to the terms of the will in the case did not unconstitutionally and artificially enlarge the class of beneficiaries entitled to take under the will, since the interests given to the "descendants" by the will were conditioned upon their surviving the income beneficiary under whom they were to take; this condition of survivorship made the remainder contingent; and the interests created by the will were therefore not unconstitutionally divested by inclusion of the adopted children.

APPEAL by defendants from *Lupton, Judge*. Judgment entered 18 September 1978 in Superior Court, FORSYTH County. Heard in the Court of Appeals 22 August 1979.

Plaintiffs seek declaratory judgment and instructions as to the proper construction of paragraph eight, section one of the Will of Kate G. Bitting Reynolds, deceased. Kate G. Bitting Reynolds died a resident of Forsyth County, North Carolina, on 23 September 1946, leaving a will dated 26 July 1934, which was duly admitted to probate by the Clerk of Superior Court of Forsyth County. In paragraph eight of section one of her will, Mrs. Reynolds made the following specific bequest in trust:

> "8. To my trustees Two Hundred and Twenty-Five Thousand Dollars ($225,000.) in trust to pay the net income therefrom in equal shares to Helen Farish Campbell, Katherine Farish and James T. Farish, children of my sister Lilly Bitting Farish, and/or the survivors and/or survivor of them, provided however that upon the death of any one of them leaving descendants surviving them such part of the principal from which such deceased was receiving the income shall be at that time distributed among such descendants per stirpes. Upon the death of the last survivor without leaving descendants the estate in the hands of the trustees shall be divided

per stirpes among the then living descendants of my said nieces and nephew named in this Paragraph Eight of Section One or if there be none, then the same shall fall into and become part of the residue of my estate."

The three income beneficiaries under paragraph eight, section one, of Mrs. Reynolds' will were Helen Farish Campbell (now Helen Farish Campbell Chambless), Katherine Farish, and James T. Farish. Upon the death of Mrs. Reynolds in 1946, the income beneficiaries shared equally in the net income of the trust. Katherine Farish died without issue in 1964, whereupon the two remaining income beneficiaries, Helen Farish Campbell Chambless and James T. Farish, shared equally the net income from the trust. James T. Farish died on 24 September 1977 without natural issue, but was survived by two sons adopted in Missouri, James Edward Farish and William Whitaker Farish. The adoptions were ordered by the Circuit Court of Jackson County, Missouri, Kansas City, Missouri, in Proceedings Nos. A10935 and A11747, which Decrees of Adoption are filed in the Office of the Court Administrator.

On 22 March 1967, James E. Farish, pursuant to a Living Trust Agreement naming Wachovia Bank and Trust Company as Trustee (succeeded by Wachovia Bank and Trust Company, N.A.), established an irrevocable living trust, the principal asset of which is described as follows:

"Assignment by Grantor of one-third (33⅓%) of his interest in that portion of the testamentary trust under Section 1, paragraph 8 of the will of Kate B. Reynolds presently held by Wachovia Bank and Trust Company as Trustee thereunder, for the benefit of James T. Farish, and designated on the Trustee's Records as Account No. 5253."

Under the terms of the trust in Mrs. Reynolds' will, upon the death of one of the income beneficiaries "leaving descendants surviving them", the trustee is directed to pay "such part of the principal from which such deceased was receiving the income", for distribution among "such descendants per stirpes" of the deceased income beneficiary.

Upon the death of James T. Farish, the trustees sought a declaratory judgment as to whether James Edward Farish and

William Whitaker Farish, the children adopted by James T. Farish under the adoption laws of Missouri, are "descendants" within the meaning of paragraph eight, section one of the will of Kate G. Bitting Reynolds. A guardian ad litem was appointed for all minor descendants of Helen Farish Campbell Chambless and for all unborn or unknown natural descendants of Helen Farish Campbell Chambless.

A hearing was held before the court without a jury in August of 1978, and judgment was entered 18 September 1978. In finding that under G.S. 48-23(3), the adopted children of James T. Farish are "descendants" within the meaning of paragraph eight, section one of the will of Kate G. Bitting Reynolds, the court stated:

> "The adopted children of James T. Farish are 'descendants' of James T. Farish within the meaning of the Section ONE 8. trust created under the will of Kate G. Bitting Reynolds, Deceased. From and after the entry of any final order of adoption entered in this state, or in any other state within these United States, whereby a child is adopted by any natural or adopted child or descendant of Helen Farish Campbell (Chambless), or of James T. Farish, such adopted person shall be deemed a descendant of such income beneficiary within the meaning of the SECTION ONE 8. trust created by Kate G. Bitting Reynolds under her will."

Accordingly, one half of the principal of the trust was retained with the net income therefrom to be paid to Helen Farish Campbell Chambless, with the other half of the principal of the trust to be paid to James Edward Farish and William W. Farish in equal shares. The share paid to James Edward Farish was, of course, subject to the Living Trust Agreement dated 22 March 1967. The trust income accrued after 24 September 1977 was similarly distributed.

From entry of judgment declaring the sons of James T. Farish, adopted pursuant to Missouri law, "descendants" under the will of Kate G. Bitting Reynolds, defendants appeal.

Womble, Carlyle, Sandridge & Rice, by W. P. Sandridge, Jr. and Francis C. Clark, for plaintiff appellees.

Harper and Wood, by J. Clifton Harper and William Z. Wood, Jr., for Campbell (Chambless) Heirs defendant appellants.

Biggs, Meadows, Batts, Etheridge and Winberry, by Frank P. Meadows, Jr., for James Edward Farish, William Whitaker Farish and Louise C. Farish defendant appellees.

MORRIS, Chief Judge.

[1] This action concerns the effect of an extrastate adoption on the law of testamentary disposition in North Carolina. We must first determine whether the Missouri adoption orders are entitled to full faith and credit in North Carolina.

Copies of the decrees, duly authenticated pursuant to Title 28, U.S.C. § 1738 (N.C. Gen. Stat., Appendix IV, Replacement Vol. 1970), were introduced into evidence. The trial court held that "[t]he adoptions of James Edward Farish in 1940 and William Whitaker Farish in 1941 were duly ordered by the Court having jurisdiction over the subject matter and the parties in the State of Missouri and such orders are entitled to full faith and credit by this state." We hold that the court correctly held that the duly authenticated adoption decrees from Missouri are entitled to recognition by the courts of North Carolina under the full faith and credit clause of the United States Constitution.

Adoption was unknown at common law, having evolved purely as a creature of statute. *See, e.g., Wilson v. Anderson*, 232 N.C. 212, 59 S.E. 2d 836 (1950). *See generally* Fairley, *Inheritance Rights Consequent to Adoptions*, 29 N.C.L. Rev. 227 (1951). As such, adoption is effected by court proceedings, which usually culminate in a court decree establishing the status of adoption. *See, e.g.*, G.S. 48-12 to 48-22 (Replacement Vol. 1976). The decree of adoption obtained by judicial proceedings is regarded as a judgment of the court, and is given the force and effect of any other judgment. *Wilson v. Anderson*, supra. Where a problem of recognition of adoption decrees by other jurisdictions exists, it is a conflict of laws problem. In conflict of laws terms, the adopting state has an interest in the validity of its court decree beyond its mere boundaries, whereas other states have a competing interest

in regulating the substance and procedure of adoptions which affect their states. Nevertheless, "[a]s a general rule, the status of adoption created under the law of a state . . . by a court having jurisdiction to create it will be recognized and given effect in another state unless the foreign adoption is inconsistent with, or repugnant to, the laws or policy of the other state. . . ." 2 C.J.S., *Adoption of Persons* § 144 (1972); 15A C.J.S., *Conflict of Laws* § 14(6) (1967). *See generally* Wurfel, *Recognition of Foreign Judgments*, 50 N.C.L. Rev. 21 (1971). This general recognition comes under either principles of comity or the full faith and credit requirement of the Federal Constitution, according to the view of the particular court and the circumstances of the case. *See* Annot., 87 A.L.R. 2d 1240 (1963); 2 Am. Jur. 2d, *Adoption* § 116 (1962).

In *In re Osbourne*, 205 N.C. 716, 172 S.E. 491 (1934), the North Carolina Supreme Court ruled that the status of adoption established in another state will be given full faith and credit in North Carolina. In that case, a Virginia adoption judgment was found to be properly entered and based on competent jurisdiction. The Court therefore concluded: "The child was adopted according to the law of Virginia and we must give under the U.S. Constitution, Article IV, section 1, 'full faith and credit'." 205 N.C. at 719, 172 S.E. at 492. For a discussion with respect to granting full faith and credit to foreign judgments, *see Thomas v. Frosty Morn Meats, Inc.*, 266 N.C. 523, 146 S.E. 2d 397 (1966).

The granting of full faith and credit may be defeated by showing want of jurisdiction either as to the subject matter or as to the person of defendant, or by showing fraud in its procurement. *Thomas v. Frosty Morn Meats, Inc., supra*; *In re Blalock*, 233 N.C. 493, 64 S.E. 2d 848 (1951); *Courtney v. Courtney*, 40 N.C. App. 291, 253 S.E. 2d 2 (1979). However, in the absence of such proof, the judgment will be presumed valid. *Dansby v. Insurance Co.*, 209 N.C. 127, 183 S.E. 521 (1936). Defendants have not presented any evidence to indicate that the Missouri court lacked the requisite jurisdiction or that the adoptions were procured by fraud as was the case in *Blalock, supra*, upon which appellants rely. On the contrary, we find that the Missouri jurisdictional requirements were met, and that the adoption decrees were properly entered in accordance with Missouri law. We find no support for defendants' contention that the Missouri decrees must meet

the requirements of G.S. 48-22, and this contention is rejected. We, therefore, conclude that the adoptions of James Edward Farish and William Whitaker Farish are entitled to full faith and credit, and thus given full force and effect in North Carolina.

[2] We next consider the effect of such status on the law regarding inheritance by adopted persons. In North Carolina the legal effects of a final order of adoption are enumerated in G.S. 48-23, which provides as follows:

> "§ 48-23. *Legal effect of final order.*—The following legal effects shall result from the entry of every final order of adoption:
>
> (1) The final order forthwith shall establish the relationship of parent and child between the petitioners and child, and from the date of the signing of the final order of adoption, the child shall be entitled to inherit real and personal property by, through, and from the adoptive parents in accordance with the statutes relating to intestate succession. An adopted child shall have the same legal status, including all legal rights and obligations of any kind whatsoever, as he would have had if he were born the legitimate child of the adoptive parent or parents at the date of the signing of the final order of adoption, except that the age of the child shall be computed from the date of his actual birth.
>
> . . .
>
> (3) From and after the entry of the final order of adoption, the words 'child,' 'grandchild,' 'heir,' 'issue,' 'descendant,' or an equivalent, or the plural forms thereof, or any other word of like import in any deed, grant, will or other written instrument shall be held to include any adopted person, unless the contrary plainly appears by the terms thereof, whether such instrument was executed before or after the entry of the final order of adoption and whether such instrument was executed before or after the enactment of this section."

Taken in conjunction with each other, these sections give an adopted person the right to succeed to the estate of the adoptive parent upon intestacy, and to take under the will of the adoptive

parent if the parent so provides. This result comes from a recognition of the absolute necessity, given the prevalence of adoptions in modern society, that adoption effect a complete substitution of families.

Clearly, if the children of James T. Farish had been adopted under the provisions of Chapter 48, they would take under the will of Kate G. Bitting Reynolds. *See Peele v. Finch*, 284 N.C. 375, 200 S.E. 2d 635 (1973); *Simpson v. Simpson*, 29 N.C. App. 14, 222 S.E. 2d 747 (1976); *Stoney v. MacDougall*, 28 N.C. App. 178, 220 S.E. 2d 368 (1975), *cert. denied*, 289 N.C. 302, 222 S.E. 2d 702 (1976). Defendants argue that, since the Farish adoptions were out-of-state and did not comply with G.S. 48-22, they do not fall under the provisions of G.S. 48-23(3), inasmuch as the latter statute applies only to North Carolina adoptions. We reject this argument and hold that section 48-23(3) applies to the orders of adoption from Missouri, as well as those under North Carolina law.

[3] We think practicality and common sense require that a forum state should not treat a child adopted in another state differently from one adopted locally when the incidents of the relationship are substantially the same in both states. *Goodrich, Conflicts of Law* § 147 (1964). Once recognized, the status acquired by a valid decree in one state will be given the same effect by the courts of another state in determining rights of inheritance as would be given if the status of adoption had been created by a valid decree of a court in the latter state. *See generally* Annot., 73 A.L.R. 964 (1931); 2 Am. Jur. 2d Adoptions § 114 (1962). *Restatement (Second) of Conflicts of Law*, § 290 (1971), provides:

> "An adoption rendered in a state having judicial jurisdiction . . . will usually be given the same effect in another state as is given by the other state to a decree of adoption rendered by its own courts."

It follows that the Missouri adoptions should be given effect as if they were entered pursuant to the requirements of Chapter 48. The language "final order of adoption" in G.S. 48-23, therefore, applies to the Farish adoptions. We thus agree with the trial court that although G.S. 48-23(3) was enacted as a part of the general adoption law of this State, the provisions of the statute are applicable not only to children adopted pursuant to orders entered

by the courts of this State, but are also applicable to children properly adopted under the laws of other states. The practicality of this result is obvious when we recognize that we live in a highly mobile society, that adoptions are being increasingly utilized for the creation of a family unit, and that adoptive parents and adopted children, in planning the disposition of their estate, are entitled to rely on the expectation of uniform treatment. Applying G.S. 48-23(3), we hold that the term "descendant", as used in the will of Kate G. Bitting Reynolds, includes the adopted children of James T. Farish.

Appellants argue that even if the adopted children of James T. Farish are deemed "descendants" under paragraph eight, section one of Mrs. Reynolds' will, those children do not share under the will because a contrary intent appears by the terms of the will. A "cardinal principle in the construction of a will is to give effect to the intent of the testator as it appears from the language used in the instrument itself, subject to the limits imposed by statute or decision." *Stoney v. MacDougall*, 31 N.C. App. 678, 681, 230 S.E. 2d 592, 593 (1976), *cert. denied*, 291 N.C. 716, 232 S.E. 2d 208 (1977). Section 48-23(3) provides that "descendant" includes any adopted person, "unless the contrary plainly appears by the terms thereof." In this regard, section 48-23(3) provides a "clear and certain rule of construction to be applied unless a contrary intent plainly appears from the terms of the instrument." *Stoney v. MacDougall*, supra, 31 N.C. at 681, 230 S.E. 2d at 594. In *Trust Co. v. Andrews*, 264 N.C. 531, 142 S.E. 2d 182 (1965), the Court dealt with this exclusionary language. The *Andrews* Court stated that "[t]he Legislature made it abundantly clear that the Act did not apply to instruments in which it clearly appeared testator did not intend for an adopted child to stand on the same footing with a blood relative." 264 N.C. at 537, 142 S.E. 2d at 187. The Court held that since the number of beneficiaries of the trust in question could be increased only if those children were *born* within a prescribed period after testator's death, section 48-23(3) was ineffective to include adopted persons under the terms of the trust. In the Court's words, "[b]irth is not synonymous with adoption." 264 N.C. at 538, 142 S.E. 2d at 187.

[4] However, the Court reached a different result in *Peele v. Finch*, 284 N.C. 375, 200 S.E. 2d 635 (1973). In that case, the Court faced the question of whether an adopted child whose adoption oc-

curred after the death of the testator, was "issue" of her adoptive parent within the meaning of the will in question. The Court found that by G.S. 48-23(3), the adopted child would take under a limitation to a "child", in that no contrary intent plainly appeared in the terms of the will or conveyance. The Court concluded as follows:

> "Nothing in the devise made by the will . . . throws any light whatever upon his intent with reference to this matter. Therefore, we are required by the statute to hold that the adopted child . . . is 'issue' . . . within the meaning of this will and takes thereunder. . . ." 284 N.C. at 383, 200 S.E. 2d at 641.

It is apparent, then, that absent an express limitation, such as in *Andrews*, which specifically refers to the bloodline of the testator to the exclusion of adopted persons, the terms delineated in G.S. 48-23(3) will be deemed to include any adopted person. *See Peele v. Finch, supra*; *Stoney v. MacDougall, supra*; *Simpson v. Simpson, supra.*

In the present case, we find no evidence that the testatrix intended to exclude adopted children from those normally taking as "descendants" under paragraph eight, section one of her will. Appellants insist that the will of Mrs. Reynolds places a great emphasis on the family bloodline, and, therefore, her intent was to exclude all adopted children from sharing in her estate. Although that intention may have existed in Mrs. Reynolds' mind at the time she made her will, we are unable to locate any expression of such an intent within the terms of the will of Kate G. Bitting Reynolds. Therefore, we are required under section 48-23(3) to include the adopted sons of James T. Farish in the class of "descendants" entitled to take upon the death of James T. Farish.

[5] In addition, appellants argue that, under the laws of adoption as they existed at the time of the drafting of Mrs. Reynolds' will, the adopted sons would not have been allowed to take, and, therefore, application of G.S. 48-23(3) would contradict the supposed knowledge of the testatrix as to the statute's limitations and her subsequent intent to that effect. This issue was recently raised in *Stoney v. MacDougall, supra*, wherein this Court concluded:

> "Appellant . . . argues that at the time the will was drafted and at testator's death, the word issue did not include adopted children, and therefore merely by its use at that time an intent contrary to the provisions of G.S. 48-23(3) plainly appears. . . . Were this argument to be adopted it would vitiate the effect of G.S. 48-23(3) on all instruments drafted before its enactment, contrary to the clearly expressed intent of the legislature." 31 N.C. App. at 681, 230 S.E. 2d at 593.

This contention is also rejected here.

[6] Finally, appellant argues that application of G.S. 48-23(3) to the terms of the will in this case unconstitutionally and artificially enlarges the class of beneficiaries entitled to take under the will. In this regard, we find the Court's interpretation of G.S. 48-23(3) in *Peele v. Finch, supra,* applicable:

> "We find no provision in either the State Constitution or the Federal Constitution which takes from the Legislature the power to do what the Legislature clearly undertook to do in the enactment of G.S. 48-23(3). At the time of the enactment of this statute, no brother or sister of Laura Brown Finch and no issue of a deceased brother or sister had any vested interest in the property in question, their rights at that time being contingent, as above noted. Retrospective statutes destroying or diminishing contingent interests in property do not, per se, deprive the holder thereof of property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States or Article I, § 19, of the Constitution of North Carolina, or violate any other constitutional limitation upon legislative power." 284 N.C. at 382, 200 S.E. 2d at 640.

In the case at bar, the interests given to the "descendants" by paragraph eight, section one of Mrs. Reynolds' will, were conditioned upon their surviving the income beneficiary under whom they were to take. This condition of survivorship made the remainder contingent, in that the "descendants" entitled to take could not be determined until the death of James T. Farish, the income beneficiary. "Where words of futurity are used or implied in making the gifts, or where the gift is dependent upon a future event, the gift is usually determined to be contingent." *G. Bogert,*

The Law of Trusts and Trustees § 182, pp. 413-14 (Rev. 2d Ed. 1979). In North Carolina, the general rule as to this question is as follows:

> "When under the language of the instrument there is uncertainty as to the person or persons who are to take, and the uncertainty is to be resolved in a particular way or according to conditions at a particular time in the future, the estate is contingent." 13 Strong's N.C. Index 3d, Wills § 35.2 (1978).

See White v. Alexander, 290 N.C. 75, 224 S.E. 2d 617 (1976); *Wachovia Bank and Trust Co. v. Schneider*, 235 N.C. 446, 70 S.E. 2d 578 (1952); *Wachovia Bank and Trust Co. v. Waddell*, 234 N.C. 34, 65 S.E. 2d 317 (1951); *First Security Trust Co. v. Henderson*, 225 N.C. 567, 35 S.E. 2d 694 (1945). *Cf. Purifoy v. Mercantile-Safe Deposit and Trust Co.*, 567 F. 2d 268 (4th Cir. 1977). (Statute creating presumption that terms "child", "heir", "issue", and "descendant" included adopted persons held not an unconstitutional retroactive divestiture of interests in view of fact that, under Maryland law, those interests did not absolutely vest until the death of life tenant.) Thus, the survivorship condition in Mrs. Reynolds' will gave the "descendants" of the income beneficiaries only a contingent interest.

The interests created by paragraph eight, section one of Mrs. Reynolds' will in favor of the "descendants" should they survive the income beneficiaries were not, under *Peele v. Finch*, unconstitutionally divested. Thus, we hold that G.S. 48-23(3) controls, and we reject defendants' argument in this respect.

Since we conclude that the trial court made no error in the application of G.S. 48-23(3) or in the administration of paragraph eight, section one of the will of Kate G. Bitting Reynolds, the judgment below is hereby

Affirmed.

Judges PARKER and MARTIN (Harry C.) concur.

FRED C. CLODFELTER, SR. v. R. L. BATES AND RUBY BATES, JIM PEACOCK AND LOUISE PEACOCK, NED BEEKER AND MARY BEEKER, WILLIAM McCORMICK AND BETTY SUE McCORMICK, BOBBY JOE CLODFELTER AND AMY CLODFELTER, AND FRED CLODFELTER CONSTRUCTION, INC., AND R. L. BATES, TRUSTEE

No. 7922SC287

(Filed 4 December 1979)

1. Attorneys at Law § 5.2— malpractice action—statute of limitations

An action against an attorney for negligence in advising plaintiff to transfer his property to his children to avoid his second wife's claim against him for alimony was barred by the statute of limitations where all actions of defendant attorney involving the transfer of plaintiff's property were beyond the four year limit of G.S. 1-15(c) for malpractice actions based on discovery of latent damage.

2. Contracts § 34— alleged interference with contract—summary judgment for defendant

Summary judgment was properly entered for defendant attorney in an action to recover damages for alleged interference with a contract by plaintiff's children to reconvey property to plaintiff where there was no evidence that defendant intentionally induced the children not to perform the alleged contract with plaintiff.

3. Fraud § 7— constructive fraud by attorney—insufficient evidence

The evidence on motion for summary judgment failed to present an issue as to constructive fraud by defendant attorney in failing to advise plaintiff of the danger in executing fee simple deeds to his children and then attempting to engraft parol trusts on the properties conveyed and in making outright transfers of personalty where it showed that the conveyances and transfers were made to avoid an alimony claim against plaintiff by his second wife, and that defendant informed plaintiff of the need for a reconveyance or retransfer in order for him to get his property back.

4. Fiduciaries § 1; Fraud § 10— parent and child—no presumption of fraud

The family relationship of parent and child is not a fiduciary one and does not raise a presumption of fraud or undue influence.

5. Trusts § 13— conveyances to children—alleged breach of contract to reconvey

Summary judgment was properly entered for defendants in plaintiff's action for breach of contract to reconvey property to him where the evidence showed that the subject of reconveyance was discussed by the parties but that defendants neither agreed to nor objected to a reconveyance. Furthermore, plaintiff's claim based on the conveyance of real property to defendants with retention of a life estate was barred by the statute of frauds, G.S. 22-2, and by the prohibition against engrafting a parol trust in favor of the grantor of a warranty deed.

APPEAL by plaintiff from *Hairston, Judge*. Judgment entered 3 November 1978 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 15 November 1979.

This is an action for damages and the recovery of property plaintiff had transferred to defendants. It was brought by a father against his children and their spouses and against the attorney, also a son-in-law, who advised the transfer. The case comes to us on the granting of summary judgment for all defendants following extensive discovery. From the depositions, interrogatories and requests for admissions found in a record of some 1287 pages and the exhibits, the material facts of the case are the following.

Plaintiff was sixty-seven years old at the time this action was commenced on 3 February 1977. Although he reached only the sixth grade in his formal schooling, he has been quite successful in his business endeavors, having made a profit in each endeavor save one in which he broke even. These endeavors included running a service station, a saw mill, a dairy farm and, beginning in 1951, a grading business. He also accumulated sizeable amounts of realty.

Plaintiff was married in 1931 to Minnie Biesecker, who died in 1965. All plaintiff's children were born of this marriage.

On 28 August 1968, plaintiff married Ruth Koontz. Defendant attorney Beeker had advised plaintiff to enter into a prenuptial agreement with Ruth Koontz about the rights of each in the property of the other and such a contract was made. Attorney Beeker did not prepare the agreement but instead had plaintiff see Hiram Ward, then a practicing attorney, who drafted the agreement. Problems soon arose in this second marriage which culminated in a separation and an action for alimony which was brought in August, 1971.

The second wife's attorney had been in contact with plaintiff by letter since September, 1970. Plaintiff brought the letters to attorney Beeker who advised him in late June, 1971 that an action for alimony would be brought. He further advised that there was no guarantee that the prenuptial agreement would bar the alimony claims. Plaintiff expressed a desire to "dodge" his wife's claims. Attorney Beeker suggested that this might be accomplished by plaintiff transferring all his assets to his children.

A meeting was held attended by plaintiff and some of his children and their spouses. It was agreed that plaintiff would equally divide and transfer his property, including land, cash and stock in the Fred Clodfelter Construction Company, Inc., to his children. R. L. Bates was to serve as trustee for some of the children and attorney Beeker was to prepare all the papers. The children present were told the purpose of the transfer but none promised to transfer the property back to plaintiff once his marital problems were solved. The children present understood they were to return the cash on request from plaintiff but that nothing was said about the other property. It was, however, plaintiff's understanding that the children would "sign it back" on request once he was divorced.

The following property transfers were accomplished on or about 1 July 1971. Plaintiff's real property was conveyed subject to his life estate to his four daughters outright and to a trust for his two sons. The effect of the deeds and the trust agreements was to give each child a one-sixth undivided interest in the real property subject to his life estate. Ruby Bates, Louise Peacock and Mary Beeker, daughters of plaintiff, each received outright $7,000.00 in cash and 537 shares of stock in Fred Clodfelter Construction Company, Inc. Plaintiff's other daughter and his two sons received identical amounts of cash and stock in trust. Plaintiff conveyed substantial portions of personal property to the incorporated grading business. Plaintiff gave attorney Beeker $10,000.00 of which $2,500.00 represented the fee for drafting the property transfer documents and for representing plaintiff in the alimony action. The remaining $7,500.00 was placed in trust to be used if needed should the divorce litigation become protracted. Plaintiff executed a will a few days after the property transfers were made willing his property to his children in the same proportions as those found in the inter vivos instruments.

Plaintiff began working as a salaried general manager of the Fred Clodfelter Construction Company, Inc., on 10 July 1971. Plaintiff had run the company as a sole proprietorship until it was incorporated in October, 1969 on the advice of attorney Beeker. The motivation for incorporation was a desire to hold certain property in a manner which would avoid any cloud on the title of the property due to the failure or refusal of his second wife to

sign a deed. The corporation was set up to own the property and thereby avoid the wife.

A voluntary dismissal was taken in the wife's action for alimony on 15 November 1972. An absolute divorce was entered on 21 May 1975 in a separate action brought by plaintiff with attorney Beeker representing plaintiff on a $217.00 fee. In January, 1973, at plaintiff's request, the three children who received outright transfers of personalty and the trustee for the other three returned to plaintiff the cash in the amount of $7,000.00 each had received. Attorney Beeker also returned the $7,500.00 held in his trust account at that time.

Plaintiff began seeing another lady in 1974 and they were engaged one year later in August, 1975. Six or eight months later, plaintiff requested the reconveyance of the property he had given his children. Plaintiff contacted attorney Beeker in April, 1976 about his children returning his equipment and realty. Attorney Beeker told him to go and talk to his children. At a meeting of the shareholders of the grading business which was attended by some of the children and their spouses on 13 April 1976, plaintiff demanded all his property be returned. Plaintiff did talk to some of them individually. Daughter Mary Beeker agreed to return the land if certain realty would pass to her son should she predecease her father. Freddie Clodfelter agreed to return the property. Louise Peacock at first agreed to return the property and then refused. Betty Sue McCormick and Bobby Clodfelter never agreed to return the property. Plaintiff never contacted R. L. or Ruby Bates about returning the property they held outright or that he held in trust. Attorney Beeker wrote plaintiff a letter on 11 May 1976 in which he said in part, "I have advised my wife, and some others, that if this re-conveyance (*sic*) to you of the corporate stock is made by each of the children to you (as you are requesting) then they could become responsible for that portion of the total gift taxes that may be due which of course in this instance would be a one-sixth interest." Attorney Beeker also wrote the Department of Motor Vehicles as counsel for the grading company to stop plaintiff from transferring vehicle titles from the corporation back to himself.

This action was brought on 3 February 1977, and summary judgment was entered for all defendants. Plaintiff appeals.

Billings, Burns and Wells, by Donald R. Billings and Rhoda B. Billings, for plaintiff appellant.

Womble, Carlyle, Sandridge and Rice, by H. Grady Barnhill, Jr., and W. G. Champion Mitchell, for defendant appellee, Ned Beeker.

Stoner, Bowers and Gray, by Bob W. Bowers, for defendant appellees, R. L. Bates, Ruby Bates, Mary Beeker, Louise Peacock, Jim Peacock, Bobby Joe Clodfelter, Amy Clodfelter, Betty Sue McCormick and William McCormick.

VAUGHN, Judge.

Summary judgment is proper 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 judgment as a matter of law. G.S. 1A-1, Rule 56(c). If a defendant moves for summary judgment, he assumes the burden of producing evidence of the necessary certitude which negatives plaintiff's claim. The burden of proof is reversed from what it would be if the case were at the trial stage. *Tolbert v. Tea Company*, 22 N.C. App. 491, 206 S.E. 2d 816 (1974). Defendants must show (1) there is no genuine issue as to any material fact and (2) the movant is entitled to judgment as a matter of law. *Singleton v. Stewart*, 280 N.C. 460, 186 S.E. 2d 400 (1972). If defendants clearly establish that there is no genuine issue as to the nonexistence of material facts which are necessary as an essential element of any cause of action against them, then they are entitled to summary judgment on that action.

Summary Judgment for Defendant Attorney Beeker.

Plaintiff's complaint against defendant attorney Beeker alleges claims for negligence (attorney malpractice), constructive fraud, interference with contract and breach of fiduciary duty. Plaintiff's own deposition contains evidence which refutes an essential element to each and every one of these claims. Summary judgment was proper for defendant attorney Beeker.

[1] We need not reach the merits of the attorney malpractice claim for it is barred by the statute of limitations. This claim for attorney malpractice is based upon the contract of defendant

Beeker with plaintiff to represent plaintiff in the defense of his second wife's action for alimony and his allegedly negligent advice to transfer his property to his children to avoid her claim against him for support. For actions filed on or after 1 January 1977, the statute of limitations for professional malpractice actions is found in G.S. 1-15(c) which provides, in part, that

> "a cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action: Provided that whenever there is . . . economic or monetary loss . . . which originates under circumstances making the injury, loss, defect or damage not readily apparent to the claimant at the time of its origin, and the injury, loss, defect or damage is discovered or should reasonably be discovered by the claimant two or more years after the occurrence of the last act of the defendant giving rise to the cause of action, suit must be commenced within one year from the date discovery is made: Provided nothing herein shall be construed to reduce the statute of limitation in any such case below three years. Provided further, that in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action. . . ."

This action was brought on 3 February 1977. In applying G.S. 1-15(c), we must find some action by defendant attorney Beeker after 3 February 1973 related to the transfer of property. The transfer of property to "dodge" a threatened action for alimony was advised by Beeker in the latter part of June, 1971 and the actual transfer of property occurred on 1 July 1971. It is at this point that Beeker allegedly injured plaintiff. Plaintiff's wife commenced an action for alimony on 6 August 1971 which was voluntarily dismissed on 15 November 1972. On 3 January 1973, defendant Beeker returned the $7,500.00 held in trust should the litigation become protracted and expensive thus keeping a $2,500.00 fee for handling the litigation and drafting the instruments transferring the property. The date of the transfer, the time of litigation and the time of payment are all beyond the four year limit for malpractice actions based on discovery of latent damage. Defendant did represent the Fred C. Clodfelter Construction Company, Inc. beyond this point and did represent plaintiff in

a separate action for absolute divorce from the second wife instituted in 1975 on which judgment was rendered for plaintiff on 21 May 1975. Plaintiff paid defendant Beeker $217.00 for representation in this matter. Plaintiff discovered in mid April, 1976 that his children would not reconvey the property defendant Beeker had advised he convey to them. Assuming the last allegedly negligent act was the return of trust monies on 3 January 1973, the latent discovery provision of G.S. 1-15(c) would allow plaintiff to bring an action on or before 3 January 1977 for attorney malpractice. His claim filed on 3 February 1977 is, therefore, barred.

[2] Plaintiff's complaint also states with sufficient particularity a second cause of action against attorney Beeker for interference with contract. To recover for such a cause of action, plaintiff must show (1) that a contract existed between plaintiff and a third person, (2) that defendant had knowledge of plaintiff's contract with a third person, (3) that defendant intentionally induced the third person not to perform his contract with plaintiff, (4) that in so doing defendant acted without justification and (5) that defendant's acts caused plaintiff actual damages. *Childress v. Abeles*, 240 N.C. 667, 84 S.E. 2d 176 (1954), *rehearing denied*, 242 N.C. 123, 86 S.E. 2d 916 (1955). Summary judgment was appropriate for defendant attorney Beeker because he has met his burden by demonstrating that there is no material issue of fact on the third element of the claim. Even assuming there was a contract to reconvey on the part of the children, there is no evidence that Beeker intentionally induced the children not to perform the alleged contract with their father. The individual defendants when asked upon deposition testified that Beeker never intervened nor interfered with any plans they had to reconvey to their father. Beeker himself denied such interference. Plaintiff admitted in his own deposition that he had no actual knowledge of any such interference. All plaintiff has offered is an assumption that Beeker did so because "Somebody done it." Beeker did advise his wife "and some others" of possible gift tax consequences on a reconveyance but did not expressly suggest they not so convey. Plaintiff has not provided competent evidence to the contrary beyond his mere allegations and summary judgment was appropriately granted. *Gudger v. Furniture, Inc.*, 30 N.C. App. 387, 226 S.E. 2d 835 (1976).

[3] Plaintiff also alleges a cause of action for constructive fraud against Beeker.

> "These essential elements must appear in order to establish actionable fraud: '(1) a false representation or concealment of a material fact; (2) reasonably calculated to deceive; (3) made with intent to deceive; (4) and which does in fact deceive; (5) to the hurt of the injured party'. . . . Where a relation of trust and confidence exists between the parties, 'there is a duty to disclose all material facts, and failure to do so constitutes fraud.' "

Vail v. Vail, 233 N.C. 109, 113-14, 63 S.E. 2d 202, 205-06 (1950) (citations omitted). Plaintiff argues that because of the attorney-client relationship, which is a relationship of trust and confidence, there is fraud because attorney Beeker did not inform plaintiff of the danger in executing fee simple deeds and then attempting to engraft a parol trust and in making outright transfers or gifts of personalty. Plaintiff on deposition testified that he does not believe that it was attorney Beeker's plan to intentionally cheat him out of his property or to intentionally give him improper advice. Plaintiff's deposition further reveals that it was his intention to defraud or "dodge" his second wife from any rights in his property and that it was for this purpose that the transfers to the children were made with Beeker's assistance. Plaintiff's understanding from Beeker was that the children would "sign it back" after the divorce or whenever he wanted it. The problem arose when they would not "sign it back." This evidence of plaintiff that attorney Beeker told him his children would have to "sign it back" is sufficient indication that Beeker did not fail to disclose the material facts plaintiff alleges were not disclosed. He apparently made plaintiff aware of the need for a reconveyance or retransfer in order to get his property back. He did not lead plaintiff to believe he would get the property back automatically once he was divorced. Summary judgment was proper. *See McLain v. Insurance Co.*, 224 N.C. 837, 32 S.E. 2d 592 (1945).

By the same token, no breach of fiduciary duty or conflict of interest is shown. The alimony action was dismissed in late 1972 and all retainers returned in early 1973. The divorce action was concluded in May, 1975 and a separate fee paid for those services. When plaintiff again came to defendant Beeker in the spring of

1976, seeking the return of his property, Beeker told him to contact the children about reconveyance. Beeker's subsequent activity was as counsel for the company. In May of 1976, Beeker advised plaintiff to seek the advice of counsel. There was no conflict of interest or breach of fiduciary duty. Beeker's legal representation of plaintiff was in two separate actions. Conflict of interest is not sufficiently pled nor is there any evidence offered by plaintiff to contradict or question the evidence of defendant Beeker that he was acting only as counsel for the company at the time a conflict of interest is alleged. *See Murphy v. Edwards and Warren*, 36 N.C. App. 653, 245 S.E. 2d 212, *cert. den.*, 295 N.C. 551, 248 S.E. 2d 728 (1978). Summary judgment on these claims was proper.

Summary Judgment for Defendant Children and their Spouses.

Plaintiff's complaint states causes of action against his children and their spouses for breach of fiduciary duty and breach of an agreement to reconvey. Summary judgment for various reasons was appropriate for all these defendants.

[4] The children and their spouses, particularly son-in-law R. L. Bates as trustee for three of the children, did not breach any fiduciary duty owed to plaintiff. The family relationship of parent and child is not a fiduciary one. It does not raise a presumption of fraud or undue influence. *Davis v. Davis*, 236 N.C. 208, 72 S.E. 2d 414 (1952). Plaintiff has presented no evidence that there was a fiduciary relationship with his children or their spouses except for Beeker whose fiduciary relationship as attorney has already been dealt with and Bates who was trustee for three of the children. Plaintiff testified that Bates did not participate in the drawing or setting up of the trusts. He simply performed his trust duties. He did not breach them.

[5] On plaintiff's claim that these defendants breached a contract to reconvey allegedly entered into at the meeting in late June of 1971 before the transfers were made, we first note that defendant Bill McCormick was not married to plaintiff's daughter, Betty, defendant Bobby Joe Clodfelter was a minor and was not married to defendant, Amy Clodfelter. Betty McCormick was not present at the meeting. There could be no agreement by these parties. The remaining defendants, R. L. Bates, Ruby Bates, Louise

Peacock, Jim Peacock and Mary Beeker who attended the June, 1971 meeting testified that the subject of reconveyance was discussed but they did not agree to it nor did they object. This is all that the evidence presents in a light most favorable to plaintiff. With this evidence, defendants have met their burden and shown that no contract to reconvey exists. Clearly, no agreement was reached. We further note that any claim plaintiff has based on the conveyance of his real property to his children retaining a life estate in himself is barred by the statute of frauds, G.S. 22-2, and the prohibition against engrafting a parol trust in favor of the grantor of a warranty deed. *Walker v. Walker*, 231 N.C. 54, 55 S.E. 2d 801 (1949).

Plaintiff has not alleged a claim of fraud on the part of his children and the evidence does not show any definite and specific representation by the children which is materially false or any intent to defraud plaintiff.

Summary judgment for all defendants was appropriate and properly ruled on and entered by the presiding superior court judge. We have examined plaintiff's arguments for other causes of action and find them not properly pled and baseless.

Affirmed.

Judges WEBB and MARTIN (Harry C.) concur.

JESSE H. JONES, JR. v. DEPARTMENT OF HUMAN RESOURCES

No. 7810SC801

(Filed 4 December 1979)

State § 12— employee wrongfully discharged—reimbursement denied—failure to return employee to status before discharge

Where the State Personnel Commission determined that petitioner was wrongfully discharged from his employment in that the charges against him were not proved and he was not given warnings prior to dismissal, was dismissed without notice, and was not given a statement of the reasons for his dismissal and written notice of his appeal rights, the Commission's actions in denying petitioner reimbursement for his net pecuniary loss from the date of his dismissal to his reinstatement, failing to restore to petitioner all sick, vaca-

tion and other leave, and failing to restore to petitioner all benefits of employment as if he had never been dismissed were arbitrary and inconsistent with the Commission's own findings, since the Commission, in failing to order reimbursement and restoration, did not return petitioner as nearly as possible to his status prior to the wrongful discharge.

Judges ARNOLD and ERWIN concur in the result.

APPEAL by respondent Department of Human Resources from *Bailey (James H. Pou), Judge.* Judgment entered 23 August 1978 in Superior Court, WAKE County. Heard in the Court of Appeals 24 May 1979.

Attorney General Edmisten, by Assistant Attorney Robert R. Reilly, for respondent appellant.

Hollowell, Silverstein, Rich and Brady, by Ben A. Rich, for petitioner appellee.

MARTIN (Robert M.), Judge.

Petitioner Jesse H. Jones was hired by the Department of Human Resources in the summer of 1976 as a boiler room operator, and he worked in that capacity at the Governor Morehead School in Raleigh until 3 December 1976. He was dismissed from his employment at that time, apparently because his job performance was not to the satisfaction of his supervisors. Petitioner appealed his dismissal through the departmental grievance machinery, ultimately bringing his dismissal before the State Personnel Commission for review. He contended that he had been dismissed without just cause. After receiving evidence, the State Personnel Commission's hearing officer made numerous findings of fact and additionally made the following conclusions and recommendations:

1. Petitioner has appealed alleging lack of just cause in his dismissal and failure to follow procedure and policy in effecting his dismissal. The State Personnel Commission, under the authority of North Carolina General Statutes § 126-37 has jurisdiction to hear and decide Petitioner's appeal.

2. State Personnel Policy clearly sets forth two classes of reasons for which a state employee may be dismissed. One class is personal conduct. STATE PERSONNEL POLICY

MANUAL, Disciplinary Action, Suspension, and Dismissal, p. 5-4. In its presentation Respondent has intimated that Petitioner was under the influence of alcohol on December 3, 1976. Respondent did not offer any concrete evidence to support this allegation, only conclusory statements and personal opinion. Respondent has failed to prove this allegation and did not have just cause to dismiss Petitioner on this alleged offense.

3. "In order to determine whether there is sufficient cause to dismiss an employee for cause relating to performance of duties, two (2) aspects of the circumstances leading to this dismissal must be considered. The first is the adequacy or inadequacy of the employee's job performance; the second is the warning process. The warning process is based upon a philosophy of mutual responsibility between the employing agency and the employee to provide the best services possible to the people of this State. Among the employer's responsibilities is to provide training of a quality and type which will enable the employee to perform the job adequately. Among the employee's responsibilities is to carry out his duties adequately. However, when the employer ascertains that the employee is not functioning adequately the dismissal policies promulgated by the Commission casts an additional responsibility upon the employer, and that responsibility is simply that the agency must tell the employee how his performance is not measuring up and must give him the opportunity to improve his performance so that he can do a creditable job." Recommendation of State Personnel Commission in *ROBERTS v DEPARTMENT OF LABOR*, June 23, 1976.

4. Respondent failed to give Petitioner sufficient advance warnings of his deficient performance before dismissing him. Respondent gave Petitioner oral warnings about several areas of his job performance. Although Respondent may have given Petitioner a written warning, this warning only reiterated the subjects of the previous oral warnings; such a warning does not constitute a progressive warning. Petitioner did not receive a final written warning. The lack of these warnings constitute a failure to notify Petitioner adequately of his shortcomings, and is a failure to comply even minimally with State Personnel Policy and Procedure. NORTH

CAROLINA STATE PERSONNEL POLICY MANUAL, Disciplinary Action, Suspension, and Dismissal, "Personal Conduct" pp. 5-2, 5-3.

5. Because of the lack of warnings prior to dismissal, there was insufficient cause to dismiss Mr. Jones on December 3, 1976.

6. Respondent violated State Personnel policy by dismissing Petitioner immediately for performance of duties, without giving Petitioner two weeks notice or two weeks pay in lieu of notice. NORTH CAROLINA STATE PERSONNEL POLICY MANUAL, Disciplinary Action, Suspension, and Dismissal, p. 5-3.

7. Finally, Respondent violated State Personnel Policy and State law by failing to give Petitioner both a statement of the reasons for his dismissal and for failing to give him written notice of his appeal rights when he was dismissed. NORTH CAROLINA STATE PERSONNEL POLICY MANUAL, Disciplinary Action, Suspension, and Dismissal, p. 5-3, North Carolina General Statutes, § 126-35.

Based on the above Findings of Fact and Conclusions, the hearing officer makes the following:

RECOMMENDATIONS:

1. That Respondent reinstate Petitioner to his former position; or, in the alternative, that Respondent offer Petitioner comparable employment in some agency other than the Governor Morehead School;

2. That Respondent reimburse Petitioner for his net pecuniary loss from December 3, 1976 to the date of his reinstatement or other employment;

3. That Respondent restore to petitioner all sick, vacation and other leave, to be computed as if Petitioner had not been dismissed;

4. That Respondent restore to Petitioner all benefits of employment as if Petitioner had never been dismissed;

5. That attorney for Petitioner submit an itemized list of attorney's fees incurred in representing Petitioner in his per-

sonnel appeal through the employee grievance system and before the State Personnel Commission or its hearing officer.

s / E. D. MAYNARD, III
Hearing Officer
February 27, 1978

The full Commission reviewed the action and recommendations of the hearing officer and affirmed his conclusions and findings of fact with respect to petitioner's having been wrongfully dismissed, but declined to give effect to the hearing officer's recommendations 2, 3 and 4 quoted above on the grounds that petitioner's prior job performance did not warrant such awards. Petitioner appealed to the Superior Court, which found that the full Commission had acted arbitrarily and capriciously in declining to give effect to some of the hearing officer's recommendations and reversed the order of the State Personnel Commission insofar as it failed to order reimbursement for net pecuniary loss from 3 December 1976 through 2 May 1978 (the date on which the full Commission ordered petitioner's reinstatement).

Petitioner was notified by letter dated 19 May 1978 and signed by the director of the Governor Morehead School that he had been reinstated effective 2 May 1978 but that his services were no longer required and that he was therefore terminated as of the date of the letter. Petitioner has been unable to secure permanent employment elsewhere since his dismissal.

The protections afforded State employees under the State Personnel Act create a reasonable expectation of continued employment and a property interest within the meaning of the due process clause. *See Faulkner v. North Carolina Department of Correction*, 428 F. Supp. 100 (W.D.N.C. 1977). Chapter 126 of the North Carolina General Statutes established a State personnel system. The State Personnel Commission was created by N.C. Gen. Stat. § 126-2. N.C. Gen. Stat. § 126-4 provides:

> Subject to the approval of the governor, the State Personnel Commission shall establish policies and rules governing each of the following:
>
> * * *

(9) The investigation of complaints and the hearing of appeals of applicants, employees and former employees and the issuing of such binding corrective orders or such other appropriate action concerning employment, promotion, demotion, transfer, discharge, and reinstatement in all cases as the Commission shall find justified.

N.C. Gen. Stat. § 126-35 provides:

> No permanent employee subject to the State Personnel Act shall be discharged, suspended, or reduced in pay or position, except for just cause. . . . The employee, if he is not satisfied with the final decision of the head of the department, . . . may appeal to the State Personnel Commission.

N.C. Gen. Stat. § 126-37 provides:

> The State Personnel Commission is hereby authorized to reinstate any employee to the position from which he has been removed, to order the employment, promotion, transfer, or salary adjustment of any individual to whom it has been wrongfully denied or to direct other suitable action to correct the abuse which may include the requirement of payment for any loss of salary which has resulted from the improperly discriminatory action of the appointing authority.

What principles may be derived from these statutes? Initially, the State Personnel Commission has jurisdiction to hear precisely the type of complaint presented by petitioner in the instant case. Next, no employee of any State agency who is subject to the provisions of the State Personnel Act may be discharged from or caused to suffer other detriment in his employment absent the existence of just cause for such action. Additionally, the requirements of due process must be observed in any procedures or actions whose ultimate result may be discharge of or other detriment to an employee. Finally, the State Personnel Commission is authorized to establish policies and promulgate rules governing all employment practices and procedures, subject to the approval of the Governor.

How are these principles applicable to the case before us? The petitioner was an employee of a State agency and was subject to the provisions of the State Personnel Act. The Commis-

sion's hearing officer, who properly found that he had jurisdiction over the parties and questions involved, found from competent evidence that the Department of Human Resources (via the Governor Morehead School) had failed to comply with the practices, procedures and regulations for discharging an employee as set out in the statutes and in the regulations issued by the State Personnel Commission. The hearing officer further found that the Department of Human Resources (via the Governor Morehead School) had failed to prove the charges against petitioner for which it sought to discharge him. Upon the record before us, then, we too may conclude that petitioner was not discharged for just cause, that petitioner did not receive the protections afforded him by due process and that the Department of Human Resources did *not* follow the rules and procedures established by the State Personnel Commission.

Petitioner, then, has suffered a wrong; both the hearing officer and the full Commission are in agreement on that point, and even the State has acceded to that point by failing to except to that conclusion and by not arguing the point in its brief. The question remaining for resolution is what remedy is the appropriate one for the wrong suffered? The hearing officer, who had the best opportunity to observe and analyze the witnesses and their testimony, recommended that petitioner be reinstated in the same or a similar position, that he be reimbursed for his net pecuniary loss and that all benefits and leave that would have accrued to him had he not been wrongfully discharged be restored to him, as well as his attorney's fees being paid. This recommendation gave effect to the intent, implicit in our State Personnel Act and other similar statutes, that when an employee is wrongfully discharged or disciplined and seeks a remedy for that wrong, he should be returned as nearly as possible to *statu quo*, so that he will have suffered no ultimate damage as a result of the wrongful acts of the employing State agency. Petitioner's analogies to labor and civil service cases, made in his brief, are apt and well-taken. *See, e.g., Watson v. United States*, 142 Ct. Cl. 749, 162 F. Supp. 755 (1958).

The full Commission, however, upon review of the hearing officer's recommendations, agreed as to the wrongfulness of petitioner's discharge but gave effect only to the recommendation for reinstatement to the same job held by petitioner and the award of

attorney's fees. We hold that this was arbitrary and inconsistent with the Commission's own findings and was therefore erroneous.

The State has argued with considerable vigor that the remedies available to the State Personnel Commission under N.C. Gen. Stat. § 126-37 for alleviating wrongful acts of employing agencies are purely discretionary with the Commission, and that its finding of wrongful discharge or other disciplinary action does not as a matter of law require that the employee be restored to where he otherwise would have been. The anomaly of this contention is readily apparent: petitioner, even though having suffered a wrongful discharge and having had a binding adjudication to that effect, is still not entitled to any remedy to restore to him what was wrongfully taken away. The hollow nature of the Commission's action is lucidly illustrated by the very facts of this case. Petitioner, having been once wrongfully discharged, was notified of his reinstatement and contemporaneous termination by the same letter. These actions of respondent (petitioner's supervisors at the Governor Morehead School) wholly violate both letter and spirit of the State Personnel Act. That the Act creates rights in subject employees, as heretofore noted, is unquestioned. N.C. Gen. Stat. § 126-35 explicitly states that "[n]o permanent employee . . . *shall be* discharged . . . except for just cause." This is mandatory language, forbidding the arbitrary discharge (or demotion, etc.) of employees protected by the State Personnel Act. (We note that this chapter has been amended subsequently to provide these protections only to employees who have been employed five years or more with the State.) N.C. Gen. Stat. § 126-37 lists a broad range of remedies which are available to the State Personnel Commission to remedy wrongs once they have been found to exist. If, as respondent argues, these remedies are merely discretionary with the Commission and the Commission is not under any obligation to order effective remedies for wrongs committed by State employers upon subject employees after having determined that such wrongs were in fact committed, then there is no reason at all for the Personnel Commission to exist, and its creation by the Legislature was no more than a meaningless gesture which conveys no benefits upon anyone and affords no protection to any State employee from unfair or discriminatory actions by any State employing agency.

In the instant case, it was found by the Commission without exception being taken that petitioner was wrongfully discharged without just cause in that the procedures established by the Personnel Commission (under the authority of the Governor and N.C. Gen. Stat. § 126-4) were not even minimally complied with in petitioner's discharge. Petitioner was then reinstated without back pay or benefits and contemporaneously terminated as of the date of his notice of reinstatement. Was it for this that he followed the departmental appeals procedures to their exhaustion? Was it to achieve this result that the Legislature created the State Personnel Commission? Respondent strains our credulity in pressing the affirmative of these propositions. We are unwilling to assume that the legislative intent in enacting the subject legislation was to create a hollow procedural facade which would serve to identify and adjudicate wrongful acts by State agency employing units and yet which would house no remedies of right to redress the employees who suffered thereby.

The provisions of the State Personnel Act before us for interpretation are essentially remedial in nature, in that they delineate rights of a group which has heretofore suffered some abuse and discrimination, and in that they provide specific safeguards and prohibitions against such abuse or discrimination as well as authorizing broad powers in the reviewing tribunal to correct any abuse or discrimination which is found to have occurred. Accordingly, the statute must be construed broadly rather than narrowly to achieve its purposes. *See, e.g., Wilmington Shipyard Inc. v. North Carolina State Highway Commission*, 6 N.C. App. 649, 171 S.E. 2d 222 (1970); *Burgess v. Brewing Co.*, 39 N.C. App. 481, 250 S.E. 2d 687, *rev'd on other grounds* 298 N.C. 520, 259 S.E. 2d 248 (1979); *also see* 3 *Sutherland's Statutes and Statutory Construction* 29, 32. A statute must be construed as written, *State v. Wiggins*, 272 N.C. 147, 158 S.E. 2d 37, *cert. denied* 390 U.S. 1028, 20 L.Ed. 2d 285, 88 S.Ct. 1418 (1967), and the mandatory language of N.C. Gen. Stat. § 126-35, as well as the apparent purpose of the statute, leads us to conclude that the remedies authorized by N.C. Gen. Stat. § 126-37 are not discretionary with the Commission to the extent that a remedy ordered by the Commission fails to return an employee to *statu quo* after a final adjudication that he has wrongfully suffered some detriment to his employment status as proscribed by N.C. Gen. Stat.

§ 126-35. *See North Carolina State Art Society v. Bridges*, 235 N.C. 125, 69 S.E. 2d 1 (1952). This construction does no violence to the legislative language, while a contrary construction would serve to defeat or severely impair the object of the statute. *See State v. Hart*, 287 N.C. 76, 213 S.E. 2d 291 (1975). We will not adopt a construction that results in palpable injustice when the language of the statute is susceptible to another reasonable construction which is just and is consonant with the purpose and intent of the act, *Little v. Stevens*, 267 N.C. 328, 148 S.E. 2d 201 (1966). The logic of the maxim "*Ubi jus, ibi remedium*" has substantial merit for and applicability to this situation.

In that petitioner has not filed any cross appeal from the Superior Court's judgment and has not excepted to actions not taken by the Superior Court, and has further indicated in argument that he seeks only the back pay and attorney's fees ordered by the trial court, we do not assume any greater jurisdiction than to consider those questions properly before us and order appropriate remedies. We therefore affirm the order of the Superior Court. We disregard certain findings of fact made by the court below, in that they had not been found by the Commission. No exception was taken to their not being found by the Commission and no request for their finding was made by petitioner, upon his petition for review. The Superior Court lacked statutory authority to make such findings within the proper scope of its review of an administrative proceeding. Those findings, however, are not pertinent to our disposition of this case and the result reached would not differ even if they had been properly made. For the reasons stated, the judgment of the Superior Court ordering the State Personnel Commission to order back pay from 3 December 1976 through 2 May 1978 to be paid to petitioner, and awarding petitioner attorney's fees, is affirmed.

Judges ARNOLD and ERWIN concur in the result.

Hotel Corp. v. Foreman's, Inc. and Hotel Corp. v. Foreman

ECONO-TRAVEL MOTOR HOTEL CORPORATION v. FOREMAN'S INC., T/A ALLSTATE BUILDING SUPPLY

AND

ECONO-TRAVEL MOTOR HOTEL CORPORATION v. CLAY B. FOREMAN, JR.

No. 791SC24

(Filed 4 December 1979)

1. **Mortgages and Deeds of Trust § 30— default on upset bid—deficiency—liability of individual defendant**

Plaintiff's evidence was sufficient for the jury on the issue of the individual defendant's liability for the deficiency caused by default on an upset bid at a foreclosure sale where the jury could find (1) that defendant filed the upset bid in his individual capacity rather than for the corporation on whose account the check for the bid was written; (2) that a bona fide attempt at tender of a deed was made to the individual defendant where a deed to the corporation, the apparent bidder, was sent by the trustee to defendant's attorney and was forwarded by the attorney to defendant, and defendant waived objection to the tender by failing to inform the trustee if the deed should have been made to him individually; (3) that defendant waived objection to the order confirming the sale to the corporation by failing to object to the order; and (4) that the upset bid has not been complied with.

2. **Rules of Civil Procedure § 32— use of deposition—showing of unavailability of witness**

Plaintiff made a sufficient showing that a witness was unavailable to testify to permit the introduction of the witness's deposition where plaintiff's counsel informed the trial court that the sheriff's office had been unable to locate the witness and a subpoena for her had been returned unserved. G.S. 1A-1, Rule 32(a)(4).

APPEAL by plaintiff from *Allsbrook, Judge.* Judgment entered 18 August 1978 in Superior Court, PASQUOTANK County. Heard in the Court of Appeals 15 October 1979.

Plaintiff is the holder of a note in the principal amount of $375,000, executed by a general partnership and representing a loan for the construction of a motel. The note was secured by a deed of trust on the motel property. On 16 May 1974, the note was in default and a substitute trustee was appointed to foreclose the deed of trust. At this time the motel had been constructed but not fully equipped for operation. A sale was conducted 17 June 1974, and Econo-Travel Motor Hotel Corporation (which had purchased the note in question from the original holder) was high

bidder at $355,392.00. An upset bid of $373,211.60 was filed 27 June 1974 by Clay B. Foreman, Jr., who deposited a check, drawn on the account of Allstate Building Supply, Division of Foreman's, Inc., for $17,819.60 with Naomi Chesson, Clerk of Superior Court for Pasquotank County. The receipt for the deposit was originally made out to Allstate, but subsequently had the inscription "should be in the name of Clay Foreman, Jr." placed upon it. Resale was conducted 18 July 1974, no further upset bids were filed, and sale to Allstate was confirmed by order dated 31 July 1974 in which the trustee was directed to deliver to Allstate "or its nominee" a deed for the premises upon receipt of the balance due of $355,392.00. The trustee tendered a proposed deed to Russell Twiford, attorney for both Clay B. Foreman, Jr., and Foreman's, Inc. Twiford forwarded the deed to Clay Foreman, Jr., with a letter dated 9 August 1974 which stated, in pertinent part:

> It was my understanding that you had placed the bid on this property in your individual name and not on behalf of the corporation and I feel this should be clarified immediately.

Neither Clay B. Foreman nor Foreman's, Inc., (either in its own name or by Allstate) made any further payment on the bid. The property was readvertised for sale 10 September 1974 and, after a series of resales and upsets, was ultimately sold for $315,050.00.

Econo-Travel brought suit, initially against Foreman's, Inc. and then, at a later date, against Clay B. Foreman, Jr., individually. Both defendants answered, denying that they made upset bids on the property. The matters were subsequently consolidated for trial. At trial, directed verdict was entered in favor of the individual defendant, Clay B. Foreman, Jr. Counsel for the defendant corporation (who also were counsel for the individual defendant) then called Clay B. Foreman, Jr. to the stand. He testified that he had made the bid in his own name and for his own purposes, stating that at no time was he acting on behalf of the corporate defendant. Plaintiff sought to introduce the deposition of Naomi Chesson (who was Clerk of Superior Court at the time the upset bid was made) in order to rebut the testimony of Clay B. Foreman, Jr. The trial court refused to admit it, on the grounds that plaintiff had not adequately shown that the witness whose deposition was to be used was actually unavailable. The jury

returned a verdict in favor of the corporate defendant. Plaintiff appeals from both judgments, assigning error.

Wilton F. Walker, Jr., and Robert E. Brown, for plaintiff appellant.

Twiford, Trimpi and Thompson, by C. Everett Thompson and John G. Trimpi, for Clay B. Foreman, Jr., defendant appellee.

Twiford, Trimpi and Thompson, by C. Everett Thompson and John G. Trimpi for Foreman's, Inc., defendant appellee.

MARTIN (Robert M.), Judge.

Plaintiff's appeal is subject to dismissal for failure to comply with the North Carolina Rules of Appellate Procedure. Rule 28(b)(3), N.C. Rules App. Proc. (pertaining to content of appellants' briefs) provides in pertinent part:

> Immediately following each question [set out and argued in the brief] shall be a reference to the assignments of error and exceptions pertinent to the question, identified by their numbers and by the pages of the printed record on appeal at which they appear. Exceptions in the record not set out in appellant's brief . . . will be taken as abandoned.

By application of this Rule, plaintiff has abandoned its entire appeal, as counsel for plaintiff have nowhere indicated in their brief which exceptions are pertinent to which question presented for argument. Furthermore, although counsel for plaintiff objected to the exclusion of the deposition of Naomi Chesson and have argued on appeal that the trial court's action in so excluding it was prejudicial, the deposition was not included in the record on appeal as is required if we are to determine if any error contended for was prejudicial. Although the serious questions presented by this case have persuaded us, in the interests of justice and in our discretion, as permitted by Rule 2, N.C. Rules App. Proc., to waive the numerous procedural errors present, we again emphasize to the practicing bar that the Rules of Appellate Procedure are mandatory upon all parties before this Court. A thorough understanding of the Rules is the *sine qua non* of competent representation of clients in the appellate courts.

The verdicts in this case are patently anomalous. In view of the evidence in the record, it is beyond contention that Clay B. Foreman, Jr., personally filed the upset bid with the Clerk of Superior Court. It is logically and manifestly apparent that in so acting, he was either acting in his individual capacity or as an agent for the corporation on whose account the check for the bid was drawn and to which the sale was confirmed. Yet, we are presented with verdicts which absolve of liability for the deficiency engendered by the default on the upset bid the only parties who could have been responsible. For the several reasons hereinafter stated, we reverse both judgments and remand the causes for new trial.

[1] Plaintiff first assigns as error the entry of the directed verdict in favor of the individual defendant, Clay B. Foreman, Jr. Counsel for the individual defendant based his motion for directed verdict upon four grounds. Two of these grounds are clearly inapplicable and are not argued by counsel for any of the parties on appeal. The remaining grounds were pertinent to whether plaintiff had made out a *prima facie* case as to each essential element of its claim for relief. Under N.C. Gen. Stat. §§ 45-21.30(c and d) and 45-21.29(h), liability for default upon an upset bid at a judicial sale is predicated upon four elements:

(1) The person against whom liability is asserted was the last and highest bidder at a sale or resale.

(2) The Clerk of Superior Court confirmed the sale to that person.

(3) There has been either a tender of a deed to that person or a good faith attempt to tender a deed.

(4) The person against whom liability is asserted has failed to comply with the bid he made.

As to the first element so stated, plaintiff, in its case against the individual defendant, adduced evidence which tended to show that Clay B. Foreman, Jr., was the person who filed the upset bid. This evidence consisted of two paper writings: the receipt upon which it had been written that the bid should be entered in Foreman's name individually, and the letter from Foreman's attorney in which the attorney unequivocally stated as a fact that Foreman had placed the upset bid and further stated the at-

torney's understanding that the bid had been placed in Foreman's individual capacity and not on behalf of the corporation. Although this is slender evidence and plaintiff's case could easily have been bolstered by calling Clay B. Foreman, Jr., as an adverse witness, we hold that on the instant facts this was sufficient evidence on this particular element to go to the jury. The evidence was admitted without objection and, when viewed in the light most favorable to plaintiff as is required on the motion for directed verdict, was sufficient to withstand defendant's motions.

As to the element of tender, the pertinent statute (N.C. Gen. Stat. § 45-21.30(c) does not require an actual tender of a deed to Clay B. Foreman, Jr., but rather "a bona fide attempt to tender such deed." In the context of real property transactions, the tender required of a vendor consists of two things. First, the vendor must be ready, willing and able to perform all of his obligations in return for concurrent performance of contractual obligations on the part of the party to whom tender is made. Second, the person to whom tender should appropriately be made must have sufficient notice that the person making the tender is in the required position. *See generally* 92 C.J.S. *Vendor and Purchaser* § 230(a). In the instant case, the trustee tendered a deed in the name of the purchaser who had at least apparently entered the bid. His actions were in good faith. Defendant Foreman received unequivocal notice of the trustee's readiness to comply with the bid by the letter written by Foreman's attorney to him enclosing the proposed deed. No contention has been made, either here or below, that the trustee would have been unable to revise the deed to reflect title in the individual rather than the corporation. We conclude, therefore, that the requirements of a *bona fide* attempt at tender have been met as to the individual defendant. If the tender was made by a proposed deed naming an incorrect party as grantee, it was the responsibility of Clay B. Foreman, Jr., so to inform the trustee. He has, by his conduct and silence, waived any objections he might otherwise have made to the tender. There was, therefore, sufficient evidence on this element to withstand defendant's motion for directed verdict.

As to confirmation of the sale by the Clerk of Superior Court, that action by the Clerk is essentially ministerial in nature. Its complete absence will not void an otherwise valid sale. *See Cheek v. Squires*, 200 N.C. 661, 158 S.E. 198 (1931). We are of the opinion

that, for the same reasons set out previously in respect to tender, the individual defendant has waived any objections he might have otherwise lodged against the existing form of the order of confirmation. Having received ample notice of the transaction, no one other than the individual defendant Clay B. Foreman, Jr., was in a better position to be aware of and seek correction of inadvertent errors in the order. This was not a summary proceeding. Therefore, the authority upon which plaintiff relies is not applicable. The apparent conflict our holding may create with such cases as *Stout v. Philippi Manufacturing & Mercantile Co.*, 41 W. Va. 339, 23 S.E. 571 (1895) may be resolved in that the instant case is factually distinguishable and further, there is substantial confusion (to which the individual defendant actively contributed) as to whether the sale should have been confirmed to the individual or the corporation. Should the evidence be taken to show that the bid was originally made in the name of the corporation and was subsequently assigned or otherwise transferred to the individual, tender and confirmation of sale to the corporation would be proper. *See Corbus v. Teed*, 69 Ill. 205 (1873). The order of confirmation directed the trustee to deliver a deed to "Allstate or its nominee" which may, upon the evidence of record before us, be quite sufficient as to Clay B. Foreman, Jr. We therefore find that there was sufficient evidence on this element to withstand defendant's directed verdict motions.

As it is not argued by any party that the upset bid has been complied with, we conclude that plaintiff established a *prima facie* case against the individual defendant as to each element of the claim for relief. Therefore, it was error for the trial court to direct a verdict in favor of the individual defendant Clay B. Foreman, Jr.

[2] Plaintiff also assigns as error the exclusion from evidence of the deposition of Naomi Chesson. Rule 32(a)(4), N.C. Rules Civ. Proc., permits the use of a deposition of a witness if the witness is unavailable to testify. A witness is unavailable under the rule if, among other things, the party seeking to use the deposition of the witness has been unable to procure the attendance of the witness. In the instant case, counsel for plaintiff informed the trial court that a subpoena had been returned unserved, with the Sheriff's office being unable to locate Naomi Chesson. As she was no longer Clerk of Pasquotank Superior Court, her presence in

the courthouse at the time of trial was not a foregone conclusion. However, the trial court indicated that counsel for plaintiff had not made a sufficient showing that Mrs. Chesson was unavailable and on that basis excluded her deposition. This was error. Nothing in the plain language of the Rule indicates that an attorney must maintain a continuous search for a witness until either the witness is found or the deposition is used. Any prejudice which accrues by the use of a deposition will normally be to the detriment of the party using it, in that readings from a deposition naturally have a less forceful impact upon the jury than will the testimony of a live witness. In the instant situation there were no defects contended for in respect to the notice of taking or in the actual taking of Mrs. Chesson's deposition and defendants were represented at its taking. We therefore conclude that the trial judge erred in refusing to allow plaintiff to use Mrs. Chesson's deposition. The freedom with which such a deposition may be used is suggested in *Transportation, Inc. v. Strick Corp.*, 291 N.C. 619, 231 S.E. 2d 597 (1977).

As counsel for plaintiff did not cause the contents of Mrs. Chesson's deposition to be included in the record, we would ordinarily be unable to determine if the erroneous exclusion of the evidence was prejudicial. In view of the unusual circumstances of this case, we ordered, *sua sponte*, that the Clerk of Superior Court for Pasquotank County transmit to us a true copy of the deposition as filed in the records of this matter below. Our examination of the substance of this deposition persuades us that its exclusion was clearly prejudicial to plaintiff. Therefore, we must order a new trial as to the corporate defendant.

We do not consider other errors contended for by appellants, as they may not recur on retrial.

In 75CvS239, new trial.

In 77CvS221, new trial.

Judges PARKER and ERWIN concur.

FEIBUS & COMPANY, INC. (N. C.) (FORMERLY F. G. REALTY CORPORATION) v. GODLEY CONSTRUCTION COMPANY, INC., M. R. GODLEY AND F. O. GODLEY

No. 7926SC233

(Filed 4 December 1979)

1. **Rules of Civil Procedure § 6— order signed out of term and district**

Where the trial judge denied defendant's motion for summary judgment during term, the court could thereafter sign the order out of term and out of the district. G.S. 1A-1, Rule 6(c).

2. **Fraud § 12— drainage pipe metal instead of concrete—no actionable fraud**

In an action to recover damages for the collapse of a portion of a building which had been constructed over an underground corrugated metal drain pipe, representation by defendant that the pipe was concrete did not constitute actionable fraud, since the evidence tended to show that the way in which the pipe was installed rather than the kind of pipe created the problem.

3. **Limitation of Actions § 4.2— negligent construction of drainage line—action barred by statute of limitations**

Plaintiff was not entitled to go to the jury on issues raised as to the alleged negligent construction of a drainage line and fill over which defendants built a warehouse for plaintiffs, since all construction on the drainage pipe was completed before defendants had any relationship with plaintiff; no duty lay between defendants and plaintiff at the time of the construction; the installation of the pipe was completed no later than February 1965 and by February 1968 the statute of limitations had run; and the cause was not revived by the ratification of G.S. 1-15(b).

4. **Sales § 6.3— warehouse—implied warranty of fitness—statute of limitations**

In an action to recover damages for the collapse of a portion of a building which had been constructed over an underground drainage pipe, plaintiff's cause of action based upon a breach of implied warranty of fitness of the building for the purpose for which it was sold and intended to be used was barred by the statute of limitations.

APPEAL by plaintiff from *Griffin, Judge.* Judgment entered 26 October 1978 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 25 October 1979.

The plaintiff, Feibus & Company, Inc., is engaged in the textile waste business. Defendant, Godley Construction Company, Inc., is a construction company located in Charlotte. The individual defendants, F. O. Godley and M. R. Godley, are stockholders in the construction company. F. O. Godley is also an

officer. The defendants are land developers and building contractors.

In February, 1965, the plaintiff entered into two sealed contracts—one with the individual defendants for exchange of real estate, the other with the corporate defendant whereby the corporation agreed to construct a building on the land received in the exchange. The building was occupied by the plaintiff in August, 1965, and finally completed in 1967.

On 18 June 1975, a portion of the building collapsed causing severe damage. The collapsed portion had been constructed over an underground corrugated metal drain pipe which had been previously installed at the request of the individual defendants under agreement with an independent contractor who is now deceased.

Plaintiff repaired the lands and building located thereon and brought suit against the defendants as joint venturers.

The complaint of the plaintiff set out three causes of action:

In the first cause the plaintiff alleged fraud, charging that defendant had misrepresented and concealed the nature of a drain pipe, the improper installation of the pipe, and the nature of the fill over it. The pipe was located on the lands sold by the individual defendants to the plaintiff for the location of a building thereon, which building was constructed by the corporate defendant.

The second cause of action was based on alleged negligence in the construction of the fill upon which the building was constructed and the drain culvert which ran under the property.

A third cause of action was based upon a breach of implied warranty of fitness of the building for the purpose for which it was sold and intended to be used.

Prayer for relief sought damages in the sum of $250,000 against the defendants.

The defendants denied the allegations of the plaintiff and pleaded various statutes of limitations, including G.S. 1-50, G.S. 1-15, and G.S. 1-52.

Thereafter, the defendants filed a motion for summary judgment, which was denied by Judge Kirby. A petition for writ of certiorari was denied by this Court.

Upon trial, at the conclusion of the plaintiff's evidence, the defendant moved for a directed verdict to all three causes under Rule 50. The motion was allowed by Judge Griffin.

Plaintiff appealed.

Hasty, Waggoner, Hasty, Kratt & McDonnell, by William J. Waggoner and John H. Hasty, for plaintiff appellant.

Jones, Hewson & Woolard, by Hunter M. Jones and William L. Woolard, for defendant appellee.

HILL, Judge.

The record, together with the briefs, presents to this Court a lengthy set of documents for consideration. However, although three causes of action are alleged and eight questions presented for consideration, the conclusions of law follow well accepted principles.

[1] The defendant moved for summary judgment under Rule 56, together with a motion to strike portions of plaintiff's affidavits. The motion was denied by Judge Robert Kirby, who directed plaintiff's counsel to reduce the denial to a written order and address it to his home in Cherryville for signature. The session of court was then adjourned on that day.

Defendants excepted to the executed order of Judge Kirby, contending that it was invalid because signed out of term and out of district without defendant's consent.

Rule 6(c) of the North Carolina Rules of Civil Procedure clearly permits such acts to be done. Judge Kirby did not hear the motion out of term and district. He gave his decision in term and simply documented his decision by signing the order and mailing it to the clerk of court after the term had expired. Hence, the objection of the defendants is groundless.

Plaintiff's evidence tended to show that on 29 June 1964, Robert T. Godley acting on behalf of Godley Construction Company, wrote a letter to the corporate predecessor of the plaintiff stating, among other things, that:

> Specialists handle all details—planning, site selection, design and specs, financing, and construction. This service frees the business owner from tedious details.

As a result of the letter, the plaintiff and defendant began negotiations for a warehouse. Two contracts were signed: one with the individual defendants for an exchange of real estate, and a second for construction of a building by the corporate defendant on the exchanged land.

Lionel Feibus, an officer of the plaintiff corporation, testified that he did not remember whether he became aware of the drain line traversing the property before or after the contracts were signed. However, he testified that plaintiff's attorney wrote him a letter dated 2 March 1965 stating that:

> [T]here is a buried 60-inch concrete drain extending through the center of the property . . . and will lie under the contemplated building. We are advised by the surveyor that this pipe is buried 40 feet in the ground and would, therefore, not constitute any objection to the contemplated use of the property.

Feibus contacted F. O. Godley who advised him substantially as follows:

> [D]on't worry about it. Every city in the world is run with the same kind of culverts, and nothing happens. This [pipe] is very deep in the ground and concrete and there is nothing to be concerned about.

Subsequently, F. O. Godley told plaintiff's agents the pipe was of reinforced concrete and 60 inches in diameter. On other occasions the pipe was represented to be 40 inches in diameter. One time it was stated that the pipe had been installed for three or four years, another time twelve years. It was represented that the property had never flooded; that the water had not been high enough where you could tell it; that very little water flowed through the pipe; that the soil was compacted, would not settle, and as good as virgin soil.

Surveys of the property showed the pipe traversed the property under the site of the proposed building; that the pipe was not 40 feet below the surface, but only 27 feet; and that the land

conveyed to plaintiff contained five acres and not seven (adjustment in construction cost of the building offset the shortage in acreage).

Plaintiff contends that he relied on the statements by Mr. F. O. Godley and proceeded with the construction. Financing was arranged with Liberty Life Insurance Company which raised a question concerning the location of the drain line. A core drilling of the area revealed that the fill consisted of sand, mixed silt, and some organic material. Thereafter, the loan for permanent construction was closed with Liberty Life. The building was constructed over the drain line and could not be located elsewhere because of a railroad siding.

In June, 1975, a portion of the building's floor collapsed, at which time it was discovered that the drain line consisted of a 36-inch and 48-inch metal corrugated pipe, rather than a 60-inch concrete pipe.

Plaintiff's testimony showed that the metal pipe was improperly installed. No bedding had been provided, and the fill dirt on top of the pipe consisted of silt, sand, organic material, and some clay. The sections of the pipe were joined by belting, not by collars. As a result of the weight of the soil above the pipe and the manner in which the pipe was installed, the pipe flattened, creating cracks in the joints, and permitting the soil to ravel (erode) above the pipe and into it. Over the years the cavity above the pipe became increasingly larger. Finally, the floor of the building collapsed.

Plaintiff's expert witness testified that the cave-in would not have been avoided by the use of concrete pipe instead of metal pipe. He testified, "It wouldn't have made any difference, the critical thing was the way it was installed."

The representations as to the character of the fill were alleged to be in three parts:

(1) that the pipe had been installed as few as three years or as many as twelve years earlier;

(2) that the fill was compacted; and

(3) that it was as good as virgin soil.

Although the exact time that the pipe was installed is uncertain, this is not material. There was no evidence that the statement concerning the compaction of the soil was false. The third statement is obviously a statement of opinion.

There was other testimony concerning the case, all of which has been considered, but the foregoing gives us the basis for decision. We must decide if there was sufficient evidence of fraud to withstand the defendant's motion for a directed verdict on the first cause of action. We hold that there was not.

> While the broad outlines of fraud have been indicated by regarding it as including any cunning, deception, or artifice used, in violation of a legal or equitable duty, to circumvent, cheat, or deceive another, the forms it may assume and the means by which it may be practiced are as multifarious as human ingenuity can devise, and the courts consider it unwise or impossible to formulate an exact, definite and all inclusive definition thereof. 37 C.J.S. Fraud § 1, p. 204.
>
> Various statements of the elements of actionable fraud have been made, the most comprehensive one including the making, falsity, and materiality of a representation, the speaker's knowledge of its falsity or ignorance of its truth, his intent that it should be acted on by the person and in the manner reasonably contemplated, the hearer's ignorance of its falsity, his rightful reliance on its truth, and his consequent and proximate injury. 37 C.J.S. Fraud § 3, p. 215.

Justice Adams in *Electric Co. v. Morrison*, 194 N.C. 316, 317, 139 S.E. 455 (1927), defined fraud as follows:

> The essential elements of actionable fraud or deceit are the representation, its falsity, scienter, deception, and injury. The representation must be definite and specific; it must be materially false; it must be made with knowledge of its falsity or in culpable ignorance of its truth; it must be made with fraudulent intent; it must be reasonably relied on by the other party; and he must be deceived and caused to suffer loss.

Not all misrepresentations are fraudulent, and all of the essential elements thereof must be present to have actionable fraud.

> Representations are likewise immaterial if they caused no injury, or if they were mere expressions of opinion on which the hearer had no right to rely. 37 C.J.S. Fraud § 18, p. 253.
>
> [T]he question is not whether the hearer believed the representation material but whether it was in fact material. 37 C.J.S. Fraud § 18, p. 254.

[2] The thrust of plaintiff's first cause of action is based upon the misrepresentations by the defendant concerning the type of pipe; that the underground pipe carrying drainage was of concrete when in fact it was of metal. However, the record shows the type of pipe is not the problem. The pipe was not properly bedded, and the weight of the soil caused the pipe to partially collapse and come apart at the seams where it was not properly joined together. The soil from above was sandy and silt-like, and raveled (eroded) through the seams, causing a cavity above the pipe which over the years grew into such dimensions that it caused the floor of the building to collapse.

Hence, the representation that the pipe was concrete did not constitute actionable fraud.

Since we are of the opinion there is no actionable fraud as to the first cause of action, we will not address the question of the statute of limitations as to this first cause of action.

[3] As to the second cause, was the plaintiff entitled to go to the jury on issues raised as to the alleged negligent construction of the drainage line and the fill over it?

All construction was done before the defendants had any relationship with the plaintiff. No duty lay between the defendants and the plaintiffs at the time of construction of the drainage line and the fill—all of which was done at least four years before 1965, the year any purported obligations could have arisen. Plaintiffs are not privy to any contract affecting construction of the drain line and the fill thereover.

Plaintiff treats this cause of action as one in tort based on negligence. It is clear from *Ports Authority v. Roofing Co.*, 294 N.C. 73, 83, 240 S.E. 2d 345 (1978), that no tort action ". . . lies against a promisor for his simple failure to perform his contract, even though such failure was due to negligence or lack of skill." It

is equally clear that plaintiff would have no cause of action against the estate of the independent contractor. *See Ports Authority*, at pp. 87-89.

Plaintiff is not basing his tort claim on the breach of any contract. The claim is based solely on defendant's negligent installation of the drainage pipe. However, the claim is barred by G.S. 1-52(5). *See Sellers v. Refrigerators, Inc.*, 283 N.C. 79, 194 S.E. 2d 817 (1973).

The installation of the pipe was certainly completed no later than February, 1965. By February, 1968, the statute had run and plaintiff's action was barred. The cause was not revived by the ratification of G.S. 1-15(b). *See Jewell v. Price*, 264 N.C. 459, 461, 142 S.E. 2d 1 (1965). Even if G.S. 1-15(b) did apply in this case, plaintiff's cause would be barred by the ten-year limitation.

[4] As to the third cause of action, likewise the action should be dismissed.

> [A] vendor of land is not subject to liability for physical harm caused to his vendee or others while upon the land after the vendee has taken possession by any dangerous condition, whether natural or artificial, which existed at the time the vendee took possession. RESTATEMENT (SECOND) OF TORTS § 352 (1965).

The official comment to § 352 indicates that the doctrine of *caveat emptor* still retains much of its original force in contracts for the sale of land and that the implied warranties which have grown up around the sale of chattels have never developed in sales of land.

Furthermore, if an implied warranty could be said to exist in sales of land where there is an express warranty relating either to the fitness of the article sold or to a subject closely related thereto, no warranty can be implied. 164 A.L.R. 1328 (citing North Carolina cases). *Also see* 11 Strong, N.C. Index 3d, Sales § 6, p. 393.

Plaintiff, of course, argues that the express warranty applies only to the building itself and not to the condition of the land. Implied covenants can arise and prevail where there is no expression on the subject matter of the implied covenant. See 20 Am. Jur. 2d, Covenants, Conditions and Restrictions § 12, p. 585.

> . . . [A]n express warranty on one subject does not exclude an implied warranty on an entirely different subject . . . .

Hyman v. Broughton, 197 N.C. 1, 3, 147 S.E. 434 (1929), *citing Guano Co. v. Live Stock Co.*, 168 N.C. 442, 84 S.E. 774 (1915).

However, we need not decide whether an implied warranty existed. The third cause of action—if it existed—is barred by the statute of limitations.

For the reasons set out above, the judgment entered by the trial judge is

Affirmed.

Judges VAUGHN and ERWIN concur in the result.

STATE OF NORTH CAROLINA v. KEITH EUGENE COLLINS

No. 7921SC549

(Filed 4 December 1979)

1. **Criminal Law § 23— plea bargain—refusal of prosecution to honor—agreement not enforceable**

A defendant has no constitutional right to a plea bargain, and a plea agreement, though signed by counsel for both parties, does not become an enforceable contract until agreed to by the trial judge; therefore, defendant's plea agreement was not specifically enforceable where the prosecutor, at the probable cause hearing, refused to honor the agreement, a plea of not guilty was entered, and defendant had not changed his position to his detriment in reliance on the agreement.

2. **Constitutional Law § 67— confidential informant—disclosure of identity not required**

In a prosecution of defendant for possession of LSD and PCP, the trial court did not err in denying defendant's motion to compel the State to reveal the name and address of a confidential informant, since officers testified at a suppression hearing to the contents of the tip and their reasons for believing the informant to be reliable; furthermore, G.S. 15A-978(b) did not require the State to disclose the informant's name since testimony by an officer that he accompanied another officer and an informant to the place where defendant was selling drugs and that he saw substantially what the other officer had testified to seeing occur there was sufficient corroboration of the second officer's testimony to show the existence of the informant at the time of the tip.

3. Searches and Seizures § 10— search after warrantless arrest—probable cause

There was no merit to defendant's contention that he was entitled to suppression of drugs seized at the time of his warrantless arrest because the officer failed to comply with G.S. 15A-401(b), since an informant's information combined with the officer's observations at the scene gave the officer reasonable grounds to believe a crime was being committed in his presence.

4. Searches and Seizures § 47— motion to suppress evidence—nonexistence of confidential informer—admissibility of evidence

Under G.S. 15A-978(c) the court should have considered defendant's evidence offered to show the nonexistence of a confidential informant, and failure to do so at the suppression hearing was prejudicial error.

APPEAL by defendant from *Walker (Hal H.), Judge.* Judgment entered 12 April 1979 in Superior Court, FORSYTH County. Heard in the Court of Appeals 24 October 1979.

Defendant was indicted for possession of lysergic acid diethylamide (LSD) (Case # 79CR9602) and possession of phencyclidine (PCP) (Case # 79CR9603). He moved to dismiss for the State's failure to honor a plea bargain, to suppress evidence, and to compel the State to reveal the name and address of an informant. These motions were denied.

The State presented evidence that on the afternoon of 3 January 1979, plain clothes officers of the Winston-Salem Narcotics Squad went in an unmarked car to Parkland High School. The officers had received information from an informant who had given reliable information several times in the past that drugs were being sold out of a van parked at the school every day between 2:00 and 2:15 p.m. The officers waited in their car 10 minutes before the van arrived. After the van drove up, Detective Rose saw approximately 15 people approach the van, put their hands into the windows, and then leave. Rose then had his informant go to the van with money to purchase narcotics. The informant waited behind a young white male at the side of the van, approached the van, and then went into the school, where he called Rose by telephone. He relayed the information that as he approached the van a woman at the van door had just purchased marijuana from the driver. The informant also saw a joint in the ashtray of the van. On the basis of this information, Rose searched the van. Defendant was in the driver's seat. In defendant's wallet Rose found a sheet of paper with 37 yellow dots, and Rose then arrested defendant. Defendant said he was cold, and

asked for his leather jacket from the van. The only leather jacket in the van was later found to contain seven small bags of a white-yellowish powder and one little bag of green vegetable matter. Chemical analysis revealed the yellow dots to be LSD, the powder to be PCP, and the green vegetable matter to be marijuana.

Preston Whited testified for defendant that he is 18 years old and attends Parkland High School. On 3 January 1979 at about 2:00 p.m. Whited approached the van and asked defendant if he had any dope for sale. Neither approaching nor leaving the van did he see anyone else standing around the van.

Defendant was convicted and sentenced to 4-5 years in each case, to run consecutively. He appeals.

Attorney General Edmisten, by Special Deputy Attorney General W. A. Raney, Jr., for the State.

Stephens, Peed & Brown, by B. Ervin Brown II, for defendant appellant.

ARNOLD, Judge.

[1] Defendant first assigns error to the court's refusal to dismiss for the State's failure to abide by a plea bargain, arguing that he has been deprived of his Sixth Amendment right to the effective assistance of counsel and his Fourteenth Amendment right to substantive due process.

On 17 January 1979 defendant and the State entered into a plea agreement, as follows:

> Keith Collins is charged with possession of LSD, PCP, and marijuana, and he is willing to cooperate fully with the WSPD in the giving of information and assistance to the WSPD which will lead to the arrest of known criminals. In return, the State will allow the defendant to plead guilty as charged in the Superior Court and will guarantee that he will not receive active time. That the defendant has three (3) months to perform tasks assigned to him by the WSPD to their satisfaction. The defendant agrees that he will not raise his speedy trials rights under Chapter 15. That the defend-

ant's cases now pending in District Court will be dismissed under the pretext of an illegal search.

s / H. COLE, Ass. D.A.
s / W. GRAINGER, WSPD
s / B. ERVIN BROWN, II

At the probable cause hearing on the felony charges, Assistant District Attorney Dan Johnson refused to honor the plea agreement. He testified at the hearing on defendant's motion to dismiss for this refusal that he was unwilling to honor the agreement because he believed it was an inappropriate bargain in light of the severity of the cases; he knew he would be held responsible and so did not want to make a decision in haste; and he was quite upset that he had not been consulted about the negotiations, since he was in charge of the criminal docket for that month and usual office procedure was that he be consulted.

Defendant relies upon *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed. 2d 427 (1971), to support his motion, but that case is clearly distinguishable. In *Santobello* the defendant had, in reliance on the prosecutor's agreement to make no recommendation as to the sentence, entered a plea of guilty to a lesser offense. The sentencing hearing was not held for some months, and at the hearing another prosecutor had replaced the prosecutor who negotiated the plea. The second prosecutor, apparently ignorant of the plea agreement, recommended the maximum sentence, and the judge imposed that sentence. The Supreme Court, however, vacated and remanded, saying that "when a plea rests in any significant degree on a promise or agreement of the prosecutor . . . such promise must be fulfilled." *Id.* at 262, 92 S.Ct. 499, 30 L.Ed. 2d 433. The case now before us is very different from *Santobello*, for here no plea was entered in reliance on the agreement. When the second Assistant District Attorney refused to honor the plea agreement, a plea of not guilty was entered, and defendant went to trial.

Defendant argues, however, that even in this situation he is entitled to have the plea bargain enforced. For this proposition he relies upon *Cooper v. United States*, 594 F. 2d 12 (4th Cir. 1979). In *Cooper*, the government attorney proposed a plea agreement to defendant's counsel, who later communicated the proposal to defendant and obtained his assent. Defense counsel contacted the

government attorney by telephone, but before he could tell him of defendant's acceptance the government attorney informed defense counsel that the offer had been withdrawn. The court in *Cooper* recognized that no contract right had arisen and that promissory estoppel was not available because there had been no detrimental reliance on defendant's part, but found a constitutional right of "fairness" that had been violated, and held that "a constitutional right to enforcement of plea proposals may arise before any technical 'contract' has been formed, and on the basis alone of expectations reasonably formed in reliance upon the honor of the government in making and abiding by its proposals." *Id.* at 18.

We can find no basis in logic or fundamental fairness for the holding in *Cooper*. A defendant has no constitutional right to a plea bargain. *Weatherford v. Bursey*, 429 U.S. 545, 51 L.Ed. 2d 30, 97 S.Ct. 837 (1977). The defendant here had not changed his position to his detriment in reliance on the agreement, and the plea agreement, though signed by counsel for both parties, did not become an enforceable contract until it was agreed to by the trial judge. *See* G.S. 15A-1023(b). Our decision that this plea agreement was not specifically enforceable is in accord with decisions from other states. See *Shields v. State*, 374 A. 2d 816 (Del. 1977) (State may withdraw from a plea agreement at any time prior to an act by defendant constituting detrimental reliance) and *People v. Heiler*, 79 Mich. App. 714, 262 N.W. 2d 890 (1977) (plea agreement not binding until approved by trial court or relied on by defendant to his detriment). We find no error in the denial of defendant's motion to dismiss.

[2] Defendant next contends that the court erred in denying his motion to compel the State to reveal the name and address of the informant. He relies upon *Roviaro v. United States*, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed. 2d 639 (1957), but that case, dealing as it does with the necessity to disclose the name of an informant who would be a material witness at trial on the question of guilt or innocence, is not on point. The situation in *McCray v. Illinois*, 386 U.S. 300, 18 L.Ed. 2d 62, 87 S.Ct. 1056, *reh. denied* 386 U.S. 1042, 18 L.Ed. 2d 616, 87 S.Ct. 1474 (1967), is more similar to the one now before us. There the petitioner sought to have an informant's name revealed at the suppression hearing, but the court ruled that the testimony of the arresting officers as to what the in-

former had actually said and to why the officers believed the information was credible was sufficient to establish probable cause, and so the informant's name need not be revealed. The court continued: "Nothing in the Due Process Clause of the Fourteenth Amendment requires a state court judge in every such hearing to assume the arresting officers are committing perjury." *Id.* at 313, 18 L.Ed. 2d 72, 87 S.Ct. 1063. See also *State v. Ketchie*, 286 N.C. 387, 211 S.E. 2d 207 (1975). The informant's tip in the present case is closely analogous to that in *McCray*, and the officers testified at the suppression hearing to the contents of the tip and their reasons for believing the informant to be reliable. We find no necessity that the informant's name be revealed.

Defendant's further argument that G.S. 15A-978(b) requires the State to disclose the informant's name is without merit. Controlling on this point is our decision in *State v. Bunn*, 36 N.C. App. 114, 243 S.E. 2d 189, *cert. denied* 295 N.C. 261, 245 S.E. 2d 778 (1978). The testimony of Officer Grainger that on 3 January 1979 he "had occasion to accompany Officer Rose and an informant to the Parkland High School parking lot" and that he saw substantially what the other officer had testified to seeing occur there is sufficient corroboration of Officer Rose's testimony to show the existence of the informant at the time of the tip, which is all that is required. *Id.*

[3] We find no merit in defendant's argument that he was entitled under G.S. 15A-974(2) to suppression of the drugs because of the arresting officer's violation of G.S. 15A-401(b). Defendant argues the officer's alleged failure to comply with G.S. 15A-401(b)(2), but we believe that it is -401(b)(1) which applies to the present case, and accordingly we find no violation. The informant's information combined with the officer's observations at the scene gave the officer reasonable grounds to believe a crime was being committed in his presence. *State v. Wooten*, 34 N.C. App. 85, 237 S.E. 2d 301 (1977).

[4] At the hearing on the motion to suppress, defendant offered the testimony of several witnesses to the effect that no one who could have been an informer had approached the van on the afternoon of the arrest, but this testimony was excluded by the trial court, relying on G.S. 15A-978(a) and *State v. Winfrey*, 40 N.C. App. 266, 252 S.E. 2d 248, *cert. denied* 297 N.C. 304 (1979), which

interprets that statute. Defendant is correct that this reliance was misplaced, since subsection (c) of G.S. 15A-978 expressly says that this statute "does not limit the right of a defendant to contest the truthfulness of testimony offered in support of a search made without a warrant," as is the case here. The parties have cited no cases, and we find none, which deal with attacks on the veracity of testimony given to establish probable cause at a suppression hearing in a non-search warrant case. The purpose of a suppression hearing would be served poorly, however, if only one of the parties were allowed to present evidence. Here defendant moved to suppress evidence which was vital to the State's case, and he offered the testimony of four witnesses to prove that in fact there could have been no informant, and therefore no probable cause for the warrantless search. Defendant was entitled to have this testimony considered by the trial court.

Under G.S. 15A-978(c) the court should have considered defendant's evidence offered to show the non-existence of the informant. Failure to do so at the suppression hearing was prejudicial error. *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed. 2d 667 (1978). Thus, we remand this cause to the Superior Court of Forsyth County. The presiding judge at a session of court authorized for criminal cases, with defendant and his counsel present, shall conduct a hearing on defendant's motion to suppress at which the evidence he considers shall include defendant's evidence offered to prove the non-existence of the informant. If the presiding judge finds from the evidence presented that the informant did not exist he will find the facts and enter an order setting aside the verdict and granting defendant a new trial. However, if the judge finds that there was an informant, he shall find the facts and order commitment to issue in accordance with the 12 April 1979 judgments entered in Forsyth Superior Court.

Remanded with instructions.

Judges WEBB and WELLS concur.

GAIL IVEY LYNN v. RONALD DALE LYNN

No. 7926DC419

(Filed 4 December 1979)

Divorce and Alimony §§ 24, 24.4— child support—credit for cost of furnace—contempt for violation of support order

The trial court did not err in granting defendant credit toward his child support payments for a portion of the cost of a furnace installed by defendant at plaintiff's request in the residence occupied by plaintiff and the children where the obligation for the furnace was incurred after the child support order was entered. However, even though the effect of the court's award of such credit to defendant was to make defendant current with respect to his support obligations, the court could nevertheless find defendant in contempt for his willful refusal to make the child support payments when due in violation of the court's support order and without lawful excuse.

APPEAL by defendant from *Cantrell, Judge.* Judgment entered 3 April 1979 in District Court, MECKLENBURG County. Heard in the Court of Appeals 24 October 1979.

Plaintiff brought this action by way of a motion in the cause in which she alleged defendant wilfully violated a consent judgment providing for custody and support of their minor children. The consent judgment, filed 17 November 1978, granted plaintiff custody of the children and required defendant to pay child support in the sum of $125 per month beginning 1 October 1978, and adjusting the amount every few years. On 16 February 1979 plaintiff filed a motion to require the defendant to appear and show cause why he should not be held in contempt for wilful failure to pay the child support ordered in the consent judgment. Defendant filed a reply and counterclaim, in which he denied that he failed to abide by the terms of the consent judgment and alleged that he had installed a new furnace in the residence occupied by the plaintiff and their children at plaintiff's request for the benefit of the children. Defendant stated that he was currently unemployed, but upon reemployment would resume the ordered support payments.

While the record discloses that at the show cause hearing evidence was presented by both parties, none of this evidence appears in the record. The trial judge made findings of fact in which she found defendant in wilful contempt, granted defendant credit

against the arrearage of support payments based on the cost of installation of the furnace and awarded counsel fees to plaintiff. Defendant has appealed from the contempt, counsel fee, and credit portions of the trial court's order. Plaintiff has cross-appealed from the credit portion of the order.

J. Reid Potter for plaintiff appellee.

Ronald Williams for defendant appellant.

WELLS, Judge.

In her findings of fact the trial court determined that the defendant had not met his obligations under the consent judgment in that he failed to pay the plaintiff the required $125 monthly support payment for the months of January, February, and March of 1979. The court further found that at plaintiff's request, which was made prior to the entry of the consent judgment, defendant had installed a furnace in the residence occupied by plaintiff and their children, at a cost of $515 and that defendant was entitled to a credit for part of that expenditure against his child support obligations. The trial court then concluded that defendant's failure to pay the child support payments in arrears was in contempt of court, but that defendant should be credited with $375 against the support obligations for the installation of the furnace, and the court ordered defendant to pay the sum of $200 in attorney's fees to plaintiff's counsel. The effect of this allowance of credit by the court was to make the defendant's support payments current as of the time of the hearing.

The court ordered that the defendant make all of the support payments required under the consent judgment from the date of the 3 April 1979 order. Based upon her finding that the defendant was in wilful contempt, the trial court ordered defendant to put up for sale certain real property owned by the defendant in Mecklenburg County and that such property should be sold forthwith. The court further ordered that if the amount received from the sale of the property was less than $5,000, the entire amount received was to be paid into the clerk of Superior Court as a performance bond for defendant's support obligations, and if the amount received from the sale of the property was in excess of $5,000, the defendant should post a performance bond with the clerk in the amount of $5,000.

Defendant contends that the trial court erred in holding him in contempt, since as a result of the credit he was given by the trial court for the cost of installing the furnace, defendant was in actuality found to be current in his support obligations. He also argues that the court committed error in granting him only partial credit of $375, when the evidence showed that the reasonable value of the furnace was $515. Defendant contends that since the evidence did not justify the court's finding him in wilful contempt, it was error for the court to order him to pay the plaintiff's counsel fees in the action.

Plaintiff assigns as error the granting of credit to the defendant against the child support obligations for the installation of the furnace, arguing that the evidence did not show that she ever agreed that the installation of the furnace would be in lieu of or could substitute for the child support payments. Furthermore, plaintiff contends the evidence showed that the defendant had agreed to install the furnace before the consent judgment was ever entered.

Since there is no narration of evidence in the record we must accept the trial court's findings of fact as being supported by the evidence. *Fellows v. Fellows*, 27 N.C. App. 407, 219 S.E. 2d 285 (1975). We must therefore apply the law to those findings of fact as they appear in the record.

The defendant did not make his January, February, or March support payments. He could have made the payments. If we stop here, his failure is wilful and contempt lies. The issue therefore narrows to the sole question of the credit allowed for the furnace. The question of support payment credits was before this Court in *Goodson v. Goodson*, 32 N.C. App. 76, 231 S.E. 2d 178 (1977). In *Goodson*, the father claimed credit for voluntary expenditures for clothing, food, recreation, and medical treatment for the children. The *Goodson* Court, finding no North Carolina precedent and a division of authority in other jurisdictions, established guidelines to be followed in such cases. We quote in pertinent part from that decision:

> We think that the better view allows credit when equitable considerations exist which would create an injustice if credit were not allowed. Such a determination necessarily must depend upon the facts and circumstances in each case. We can-

> not begin to detail every case in which credit would or would not be equitable. However, since we are enunciating this principle for the first time in this State, we feel a duty to offer some guidelines for the trial judge. The delinquent parent is not entitled as a matter of law to credit for all expenditures which do not conform to the decree. Nor should the delinquent parent be entitled to credit for obligations incurred prior to the time of the entry of the support order. * * * The delinquent parent is not entitled as a matter of law to a deduction proportionate to the amount of time spent with the child. Credit is not likely to be appropriate for frivolous expenses or for expenses incurred in entertaining or feeding the child during visitation periods. * * * Credit is more likely to be appropriate for expenses incurred with the consent or at the request of the parent with custody. Payments made under compulsion of circumstances are also more likely to merit credit for equitable reasons. * * * We emphasize that these are not hard and fast rules, and that the controlling principle is that credit is appropriate only when an injustice would exist if credit were not given.

32 N.C. App. at 81, 231 S.E. 2d at 182. *See also,* Note, *Survey of Developments in North Carolina Law, 1977,* 56 N.C. L. REV. 843, 1050-51 (1978).

The trial court found as a fact that the request for installation of the furnace was made by plaintiff prior to the entry of the consent judgment on 17 November 1978, which established the monthly support obligations. One of the guidelines announced in *Goodson* was that credit should not be allowed for obligations incurred *prior* to the time of the entry of the support order. The trial court explicitly found with respect to defendant's installation of the furnace that the "obligation incurred in such installation was subsequent to said Order with the [p]laintiff's consent." We are bound by the trial court's finding of fact on this point, and the court was therefore justified in awarding defendant credit for installing the furnace. Pursuant to our holding in *Goodson,* the trial court had wide discretion in deciding exactly how much credit to award and we see no abuse of discretion here.

However, although the *effect* of the trial court's award of credit to the defendant was to make the defendant current with

respect to the support payments, the trial court could have nevertheless found defendant in contempt for having wilfully refused to make the support payments when due in violation of the order and without justifiable excuse. Since the court found that defendant had the ability to make the required payments but wilfully failed to make them, these findings were sufficient in themselves to justify the court's conclusion as to contempt. *Boyer v. Boyer*, 27 N.C. App. 422, 219 S.E. 2d 252 (1975). That equity may dictate that defendant be given credit for providing plaintiff with an appliance requested by her does not excuse defendant from wilfully violating the explicit terms of a judicial order.

Plaintiff is entitled to rely on defendant's regular and continuous monetary payments to meet her daily expenses. The record is void of any finding by the trial court that both plaintiff and defendant agreed that the furnace be provided in substitution for support payments, and the trial court was therefore justified in finding a wilful violation of the order. A party bound by court order to make payments to another party may not, without risk of violation, unilaterally modifiy the form of compensation provided in the order. Accordingly, the trial court could properly find defendant in contempt and order defendant to pay plaintiff her reasonable attorney's fees.

Affirmed.

Judges ARNOLD and WEBB concur.

FRANCES BRIGHAM v. J. ROBINSON HICKS, THE NALLE CLINIC COMPANY, AND THE CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY

No. 7826SC993

(Filed 4 December 1979)

1. Physicians, Surgeons and Allied Professions § 11— duty to inform patient of risks of medical procedure

There may be an action for assault if a physician performs a surgical procedure on a person without properly informing that person of the risks involved so that an informed consent may be given, and if there is some danger peculiar to the procedure of which the patient is not aware, it is the

physician's duty to warn the patient of this danger; but if the likelihood of an adverse result is relatively slight, much must be left to the discretion of the physician or surgeon in determining what he should tell his patient as to adverse consequences.

2. **Physicians, Surgeons and Allied Professions § 17.1— failure to inform patient of risks—insufficiency of evidence**

The trial court properly granted summary judgment for defendant on plaintiff's claim that defendant assaulted her by performing a medical procedure on her without informed consent, since defendant did not tell plaintiff that one of the risks of the procedure was that she could become tense enough to cause her blood pressure to drop to a dangerous level, but such complications were not so likely or peculiar to the procedure that it was not within defendant's discretion to determine whether he should warn his patient of them.

3. **Physicians, Surgeons and Allied Professions § 20— doctor's negligence—patient's fear—proximate cause of injury**

The trial court in a malpractice action properly granted summary judgment for defendant where plaintiff failed to show that defendant's negligent method of performing a medical procedure proximately caused her injuries, but the uncontradicted evidence did tend to show that the cause of plaintiff's injury was her fear.

Judge MITCHELL concurs in the result.

APPEAL by plaintiff from *Hasty, Judge.* Order entered 13 July 1978 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 28 June 1979.

This is an appeal by the plaintiff from a summary judgment in favor of all defendants. The plaintiff alleged two claims. First, she alleged that the defendant J. Robinson Hicks, an orthopedic surgeon, assaulted her by performing a procedure on her known as a Craig needle biopsy without obtaining her informed consent. She alleged as her second claim that Dr. Hicks and the other defendants, through their agents, were negligent in the performance of the biopsy procedure.

The plaintiff testified by deposition and in an affidavit that in October 1972, the defendant Hicks performed a Craig needle biopsy on her in the operating room of Charlotte Memorial Hospital. She stated he informed her it was a minor surgical procedure with no danger of complications. She stated further that after the procedure had commenced, Dr. Hicks told a technician operating an image intensifier used in the procedure that the image intensifier was malfunctioning, that he became angry and

reached across the plaintiff, pushed the machine, and shouted at the technician. Shortly thereafter she felt intense pain in her left leg which began jerking uncontrollably. She then heard Dr. Hicks say he had struck a nerve. She testified further that Dr. Hicks continued the procedure and shortly thereafter she heard a "squishy sound and gurgle," and Dr. Hicks stated he had probably hit a ligament. A few moments later blood started pouring from her mouth and she heard someone say her blood pressure was seventy over forty. She then lost consciousness. She testified further as to her injuries as a result of the biopsy procedure.

Dr. Hicks, in answer to interrogatories and by deposition, stated that the plaintiff was his patient in October 1972. He gave her some tests and felt that she might have cancer of the spine. In order to determine whether she had cancer, he felt a Craig needle biopsy should be performed. He testified that if she had cancer and was not treated for it, she would have lived for only a short time. He stated that he told her he thought the biopsy was necessary and that it would cause some discomfort. A Craig needle biopsy is a procedure by which instruments are inserted into the body of a patient and a sample is extracted from a vertebra. In this case, the instruments were inserted from a posterior position of the patient so that they would not perforate a major artery or organ. As a part of the procedure, a fluoroscope was used which provided an X-ray picture of the area in which the instruments were inserted so that the person performing the biopsy could properly place the instrument on the vertebra to draw a sample. An image intensifier was used with the fluoroscope in order to get a better image of the area in which the instruments were inserted. Dr. Hicks testified that the image intensifier was not functioning properly when it was first activated, and he sent for a technician who got it to function properly before Dr. Hicks began the procedure. After he had drawn one sample from a vertebra of the plaintiff and was drawing another, her blood pressure dropped. He had her anesthetized and when her blood pressure did not return to normal, he call Dr. Harry K. Daugherty, a thoracic and cardiovascular surgeon. They were both afraid a major artery or organ had been perforated and it was decided to perform an exploratory laparotomy to determine if this was the case. The exploratory laparotomy revealed that no major artery or organ had been perforated. There had been a

tense situation in the operating room and in his opinion, this, with the loss of blood, caused the patient to go into shock. There had not been a sufficient loss of blood by itself to cause the drop in her blood pressure.

Dr. Harry K. Daugherty testified that he performed an exploratory laparotomy on plaintiff following a Craig needle biopsy. He was called to the operating room and felt in her abdomen what appeared to be an abdominal mass. This was indirect evidence of a large amount of blood and it was decided to perform the exploratory operation. If there had been extensive bleeding, the plaintiff could have died. The abdomen was opened and it was found that no major artery or organ had been perforated. There was a small amount of blood diffused through the psoas muscle. In his opinion, one of the instruments used in the biopsy had severed a vein which caused a small amount of bleeding. The mass he had felt was probably her kidney which could move within the plaintiff.

Mrs. Brigham stated she did not know whether the problem with the image intensifier had been corrected at the time the first pain occurred. Mrs. Brigham also filed an affidavit of Janice E. Rusmisell in which she stated that she is an X-ray technician who was employed by the Charlotte Memorial Hospital on 17 October 1972, that she was called to the operating room to relieve the image intensifier operator, and that when she entered the operating room, Dr. Hicks was "sitting behind the patient, and that the needle was in the patient's back."

All defendants made motions for summary judgment based on answers to interrogatories, the depositions, and affidavits. The court allowed summary judgment for all defendants, and the plaintiff appealed.

Paul L. Whitfield, and Rodney W. Seaford, for plaintiff appellant.

Golding, Crews, Meekins, Gordon and Gray, by John G. Golding and Harvey L. Cosper, Jr., for defendant appellees.

WEBB, Judge.

[1, 2] We discuss first the plaintiff's claim that defendant assaulted her by performing a Craig needle biopsy on her without

her informed consent. We note at the outset that G.S. 90-21.3 has no application in this case. It was ratified 12 May 1976 and does not apply to litigation pending at that time. The courts in this state had recognized that there may be an action for assault if a physician performs a surgical procedure on a person without properly informing that person of the risks involved so that an informed consent may be given. *See Watson v. Clutts*, 262 N.C. 153, 136 S.E. 2d 617 (1964); *Starnes v. Taylor*, 272 N.C. 386, 258 S.E. 2d 339 (1968), and *Butler v. Berkeley*, 25 N.C. App. 325, 213 S.E. 2d 571 (1975). The cases say that if there is some danger peculiar to the procedure of which the patient is not aware, it is the physician's duty to warn the patient of this danger. It has also been said that if the likelihood of an adverse result is relatively slight, much must be left to the discretion of the physician or surgeon in determining what he should tell his patient as to adverse consequences. Dr. Hicks, in this case, did not tell the plaintiff that one of the risks of the procedure was that she could become tense enough to cause her blood pressure to drop with the consequences that followed. Plaintiff contends failure to inform her of this makes it a jury question as to whether the procedure was performed with her informed consent. We hold that on the evidence of this case, the complications which resulted were not so likely or peculiar to the procedure that it was not within Dr. Hicks' discretion to determine whether he should warn his patient of them. The consequences of not performing the procedure could have been serious. We cannot hold the physician violated his duty to inform by not warning the patient of the possibility that she could become upset to a point which would cause her blood pressure to fall to a dangerous level.

The briefs raise a question as to whether this Court should adopt a rule requiring expert testimony to establish the extent of a physician's duty to inform patients of the risks of proposed treatment. *See* 52 A.L.R. 3d 1084 (1973) as to how other jurisdictions have dealt with this problem. In light of the ground upon which this opinion is based, we do not pass on this question.

The superior court properly granted summary judgment against plaintiff on her claim for assault.

[3] Plaintiff's second claim is based on the negligence of Dr. Hicks in performing the Craig needle biopsy. To establish liability

upon the surgeon or physician in malpractice cases, there must be proof of actionable negligence by the defendant which was the proximate cause of the plaintiff's injury. *Starnes v. Taylor, supra.* The plaintiff contends there was evidence of negligence in that Dr. Hicks started the procedure before he had a satisfactory image on the image intensifier. She contends this violated the standard of care as testified to by Dr. Hicks who said it was his responsibility not to proceed until he had a satisfactory image. There is a conflict as to whether Dr. Hicks began the procedure before the image was satisfactory. It can be inferred from the affidavit of Janice E. Rusmisell and in the deposition of the plaintiff that he did so. Dr. Hicks testified he did not. For purposes of this appeal we have to believe the plaintiff's evidence. Assuming that Dr. Hicks did start the procedure before he had the proper image and was negligent in doing so, the plaintiff must show this negligence was a proximate cause of her injury. We hold that on the evidence in this record, the plaintiff has not done so. Dr. Hicks and Dr. Daugherty testified without contradiction that the cause of the plaintiff's injury was not a severed vessel or organ, but the plaintiff's fear. On this evidence, a jury could not reasonably conclude that plaintiff's injury was proximately caused by the insertion of the needle before the image was clear. If this evidence had been presented to a jury, all defendants would have been entitled to directed verdicts in their favor. Defendants' motions for summary judgment were properly allowed. *Moore v. Fieldcrest Mills*, 296 N.C. 467, 251 S.E. 2d 419 (1979).

Affirmed.

Judge MARTIN (Robert M.) concurs.

Judge MITCHELL concurs in the result.

In re Garrison

IN THE MATTER OF THE PETITION FOR APPLICATION FOR RESTORATION OF LICENSE OF THOMAS S. GARRISON, JR., ASHEVILLE, NORTH CAROLINA

No. 7910SC59

(Filed 4 December 1979)

1. **Attorneys at Law § 12— reinstatement of license of disbarred attorney—discretion of State Bar Council—constitutionality of statute**

The statute giving the State Bar Council the discretion to reinstate the license to practice law of a disbarred attorney upon satisfactory evidence of "proper reformation" of the attorney, G.S. 84-32, does not constitute an unconstitutional delegation of legislative power.

2. **Attorneys at Law § 12— reinstatement of license of disbarred attorney—public interest**

Where the trust previously bestowed in an attorney by reason of his office has once been betrayed, the determination of subsequent fitness to reassume such a high public office may rightfully hinge upon consideration of the public interest as well as the existence of minimal requirements required of a new admittee.

3. **Attorneys at Law § 12— denial of reinstatement of law license—failure to pay judgments**

The State Bar Council did not err in the denial of petitioner's application for reinstatement of his license to practice law where there was evidence that six judgments were rendered against petitioner as the result of his misapplication of funds, four judgments which were compromised have been satisfied but petitioner has made no restitution for two other judgments exceeding $30,000 which he has been unable to compromise, and petitioner renounced funds which would have helped him to satisfy the judgments, since petitioner's willingness to satisfy only the judgments that could be compromised constituted evidence of the lack of proper reformation as required by G.S. 84-32.

APPEAL by petitioner from *Bailey, Judge.* Order entered 21 August 1978 in Superior Court, WAKE County. Heard in the Court of Appeals 25 September 1979.

Petitioner, a disbarred attorney, filed an application with the Secretary of the North Carolina State Bar Council seeking reinstatement as an attorney-at-law. A hearing was held by a Hearing Committee, and the Committee recommended that petitioner be reinstated though it expressed some reservations:

> "2. The Hearing Committee feels some concern about the fact that Applicant has not paid all of the judgments ob-

tained against him as a result of his defalcations, the Bertha Aiken judgment (around $8,000.00 (R p 56)), the Mayda Gill judgment (about $17,000.00 (R p 56)) remaining unpaid, and a portion of the Federal income tax judgment (around $2,000.00 (R p 57)) all remaining unpaid. In addition, in the Mayda B. Gill case, there does not appear to have been any criminal charges brought or disposed of with regard to this defalcation.

3. The Hearing Committee feels, however, that, due to the age of Applicant, if he is ever to have his license reinstated, it should be reinstated at a time when it will be of some use to him rather than to delay reinstatement until the unpaid judgments are paid which will, without question, require a number of years. He has, through commendable effort, rehabilitated himself to a marked degree and has gained the respect of the people in his community for his exemplary conduct in difficult circumstances, even though the circumstances were the result of his own actions."

Upon consideration and reconsideration, the Council denied petitioner's application for reinstatement. Petitioner filed a petition in Superior Court for judicial review. The petition was denied, and petitioner appealed.

Harold D. Coley, Jr., for the North Carolina State Bar.

Long, McClure, Parker, Hunt & Trull, by Robert B. Long, Jr., for petitioner appellant.

ERWIN, Judge.

[1] Petitioner contends that G.S. 84-32 which provides in pertinent part that "[w]henever any attorney has been deprived of his license, the council, in its discretion, may restore said license upon due notice being given and satisfactory evidence produced of proper reformation of the licentiate before restoration" is an unconstitutional delegation of legislative power, because it gives the North Carolina State Bar Council unbridled discretion in the restoration of licenses. We disagree.

The Legislature, in its infinite wisdom, has endowed the North Carolina State Bar Council with the duty of ascertaining when a wayward attorney has presented such satisfactory

evidence of reformation so as to entitle the attorney to be listed once more on the attorney rolls of our State. G.S. 84-23 and G.S. 84-32. This, the Legislature may do as long as it prescribes a sufficient standard of guidance. *In re Willis*, 288 N.C. 1, 215 S.E. 2d 771 (1975), *appeal dismissed*, 423 U.S. 976, 46 L.Ed. 2d 300, 96 S.Ct. 389 (1975); *Turnpike Authority v. Pine Island*, 265 N.C. 109, 143 S.E. 2d 319 (1965); *State v. Harris*, 216 N.C. 746, 6 S.E. 2d 854 (1940).

The standard set forth in the statute is the production of satisfactory evidence of *proper reformation*. Whether or not an applicant applying for reinstatement as an attorney has presented satisfactory evidence of such reformation is a factual determination lawfully delegated to the Council. *See In re Willis, supra*, and *Foster v. Medical Care Comm.*, 283 N.C. 110, 195 S.E. 2d 517 (1973). We find no unconstitutional delegation of legislative power.

Petitioner further contends that the Superior Court erred in affirming the Council's denial of his application for reinstatement. We disagree.

The term, "proper reformation," is not expressly defined in the statute. However, the State Bar Council has interpreted the term to mean that the applicant must demonstrate

> "[b]y clear and convincing evidence that he or she has the moral qualifications, competency and learning in law required for admission to practice law in this State and that the resumption of the practice of law within the State by the petitioner will be neither detrimental to the integrity and standing of the bar or the administration of justice nor subversive of the public interest."

Rules and Regulations of the North Carolina State Bar, Article IX, § 25(A)(3), 288 N.C. 767-68 (1975). When viewed in proper context, this interpretation of the requisite showing cannot be said to be clearly erroneous. The reinstatement of an attorney is a matter not to be lightly regarded. As Chief Justice Stacy admonished in *In re Applicants for License*, 191 N.C. 235, 239, 131 S.E. 661, 663 (1926):

> "[C]onsider for a moment the duties of a lawyer. He is sought as counselor, and his advice comes home in its ultimate effect to every man's fireside. Vast interests are committed to his

care; he is the recipient of unbounded trust and confidence; he deals with his client's property, his reputation, his life, his all. An attorney at law is a sworn officer of the court, whose chief concern, as such, is to aid in the administration of justice. In addition, he has an unparalleled opportunity to fix the code of ethics and to determine the moral tone of the business life of his community. Other agencies, of course, contribute their part, but in its final analysis, trade is conducted on sound legal advice. Take, for example, a commercial center of high ideals, another of low standards, and there will invariably be found a difference between the bars of the two localities. The legal profession has never failed to make its impress upon the life of the community. It is of supreme importance, therefore, that one who aspires to this high position should be of upright character, and should hold, and deserve to hold, the respect and confidence of the community in which he lives and works. *In re Dillingham*, 188 N.C., p. 165; *In re Applicants for License*, 143 N.C., 1.

'No profession,' says Mr. Robbins in his American Advocacy, 251, 'not even that of the doctor or preacher, is as intimate in its relationship with people as that of the lawyer. To the doctor the patient discloses his physical ailments and symptoms, to the preacher the communicant broaches as a general rule only those things that commend him in the eye of heaven, or those sins of his own for which he is in fear of eternal punishment, but to his lawyer he unburdens his whole life, his business secrets and difficulties, his family relationships and quarrels and the skeletons in his closet. To him he often commits the duty of saving his life, of protecting his good name, of safeguarding his property, or regaining for him his liberty. Under such solemn and sacred responsibilities, the profession feels that it owes to the people who thus extend to its members such unparalleled confidence the duty of maintaining the honor and integrity of that profession on a moral plane higher than that of the merchant, trader or mechanic.' "

[2] Although *In re Applicants for License* dealt with an initial application for admission, it is equally apropos here. Where, as here, the trust previously bestowed in an attorney by reason of his office has once been betrayed, the determination of subse-

quent fitness to reassume such a high office may rightfully hinge upon consideration of the public interest as well as the existence of minimal requirements required of a new admittee. *In re Weaks*, 407 S.W. 2d 408 (1966).

> "Moreover, the court, in determining the present fitness of a petitioner for reinstatement to practice law will, among other matters, such as the making or failure to make restitution, take into consideration the applicant's character and standing prior to disbarment or suspension or resignation, his present mental and moral qualifications, the nature and character of the charge for which he was disbarred or suspended, his conduct subsequent thereto, and the time that has elapsed between the disbarment, suspension, or resignation and the application for reinstatement." (Footnotes omitted.)

Annot., 70 A.L.R. 2d 268, 284 (1960).

[3] In denying petitioner's application, the Council had before it evidence that petitioner had compromised four of the six civil judgments rendered against him but had failed to make restitution for two outstanding judgments against him in excess of $30,000.00. Petitioner also renounced funds which would have enabled him to help satisfy the judgments against him.

Petitioner's willingness to satisfy only the judgments that could be compromised, while failing to satisfy those not the subject of compromise, is evidence of the lack of proper reformation required by the statute. Determination of the satisfaction of the requirement of reformation of character involves an exercise of delicate judgment on the part of those entrusted with the statutory duty. The ultimate determination belonged to the Council, not the Hearing Committee. *See* G.S. 84-23 and G.S. 84-32. Petitioner has failed to prove he has carried his burden.

The judgment entered below is

Affirmed.

Judges VAUGHN and HILL concur.

Pridgen v. Callaway

J. C. PRIDGEN AND WIFE, DOLLETHA M. PRIDGEN v. JOHN RAYMOND CALLAWAY AND WIFE, MARGARET C. CALLAWAY, PARTNERS TRADING AND DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF CALLAWAY LAND AND TIMBER COMPANY; CROSSROADS WOODYARDS, INC.; CALLAMAC, INC.; AND ALMON FRANK JOHNSON

No. 794SC255

(Filed 4 December 1979)

1. **Trial § 10.2— court's remarks to witness—no error**

Where the trial court, during plaintiffs' cross-examination of a witness, interrupted to ask the witness if he could read and write, the witness responded that he couldn't and the judge said, "That's what I figured," plaintiffs were not prejudiced since the judge's comment was designed to show what plaintiffs were trying to prove.

2. **Principal and Agent § 4— timber wrongfully cut—instructions to cut given by defendant's agent—sufficiency of proof of agency**

In an action to recover for the wrongful cutting of timber on plaintiffs' land, evidence was insufficient for the jury to consider whether the person who gave the instructions to do the cutting was acting as agent for the individual male defendant or for defendant partnership where it consisted of (1) an equivocal statement by the person who actually cut the wood that the person who ordered the cutting worked for the male defendant, and (2) testimony by a witness that the person who ordered the cutting told him that he worked for the male defendant, and such hearsay statement of an agent to prove his agency should have been excluded from consideration by the jury.

3. **Trespass § 8.2— cutting timber—damages doubled by jury instead of court—no error**

In an action to recover for the wrongful cutting of timber on plaintiffs' land, there was no merit to plaintiffs' contention that the court erred in instructing the jury to determine the amount of damages and then double it to arrive at their verdict, rather than instructing the jury to find the amount of damages and then doubling it himself. G.S. 1-539.1.

APPEAL by plaintiffs from *Smith (Donald L.), Judge.* Judgment entered 31 October 1978 in Superior Court, SAMPSON County. Heard in the Court of Appeals 13 November 1979.

Plaintiffs sued the defendants for the wrongful cutting of timber on the plaintiffs' land. The plaintiffs took a dismissal with prejudice as to the defendant Callamac, Inc., and it was stipulated at the trial that no judgment would be taken against the defendant Almon Frank Johnson. Evidence was offered at the trial that John Raymond Callaway was the chief executive officer of Cross-

roads Woodyards, Inc. which was in the business of purchasing timber. John Callaway and his wife Margaret Callaway were in a partnership which bought real estate for investment. Curtis Deason was employed by Crossroads Woodyards, Inc. to find and purchase timber for the corporation. Mr. Deason testified that he made an agreement with J. C. Pridgen to cut pine and hardwood timber from land owned by the plaintiffs. Mr. Pridgen testified that the agreement was that Mr. Deason would cut only pine timber. Morrell Devone was engaged by Mr. Deason to cut the timber and he was instructed by Mr. Deason to cut hardwood as well as pine. Pine and hardwood were cut. At the close of the evidence, the court granted motions for directed verdicts in favor of defendants John Raymond Callaway and wife Margaret C. Callaway. The jury found that Crossroads Woodyards, Inc. had cut timber on the plaintiffs' land without their consent and permission and that "double the value of such wood" was $1,500.00. From a judgment based on this verdict, the plaintiffs have appealed.

Jeff D. Johnson III, for plaintiff appellants.

Benjamin R. Warrick, for defendant appellees.

WEBB, Judge.

[1] The plaintiffs have brought forward three assignments of error. The first deals with a statement made by the judge while the plaintiffs' attorney was cross-examining a witness. The plaintiffs' attorney was questioning the witness in regard to a telephone directory. The witness was having difficulty with his answers and the following colloquy occurred.

> "COURT: Let me ask you this, Mr. Carr: Are you able to read and write?
>
> WITNESS: No sir.
>
> COURT: That's what I figured."

The plaintiffs contend this was an improper comment by the court on the evidence. Plaintiffs concede in their brief that one purpose of the cross-examination was to prove the witness was illiterate. Since the judge's comment was designed to show what the plaintiffs were trying to prove, we hold the plaintiffs did not suffer prejudicial error.

[2] The plaintiffs' second assignment of error deals with the directed verdict in favor of defendants John Raymond Callaway and Margaret C. Callaway. Plaintiffs contend there was sufficient evidence for the jury to consider whether Curtis Deason was acting as agent for the partnership between the Callaways when Deason made the agreement to cut the timber and when he directed which timber would be cut. He contends this is so since Morrell Devone testified Curtis Deason worked for Mr. Callaway and a witness testified over objection for the plaintiffs that Mr. Deason told him Mr. Callaway was his "bossman." As to the testimony of Morrell Devone, there is no showing that he was familiar with the corporate structure of Crossroads Woodyards, Inc. or the partnership relationship of the Callaways so that he could testify as to who had employed Mr. Deason. There was other evidence that Mr. Deason was employed by the corporation of which Mr. Callaway was chief executive officer. When Mr. Devone said Mr. Deason worked for Mr. Callaway, he could have intended by this statement that Mr. Callaway was his superior within the corporation. In the context of this case, we hold this statement by Mr. Devone as to the employment of Mr. Deason is too equivocal to be considered as evidence that he was employed by the partnership. The testimony of a witness that Curtis Deason told him he worked for Mr. Callaway was a hearsay statement of an agent to prove his agency. It was narrative of a past occurrence and should have been excluded from consideration by the jury. 2 Stansbury, N.C. Evidence, § 169 (Brandis rev. 1973). We hold there was not sufficient evidence for jury consideration that Mr. Deason was acting as an agent for Mr. Callaway or for the Callaway partnership.

[3] The plaintiffs' last assignment of error deals with the charge to the jury. The court instructed the jury that if they found the plaintiffs had suffered damages, they should double the amount of damages in arriving at their verdict. The plaintiffs contend this was error. They say the jury should have found the amount of damages and this should have been doubled by the court. G.S. 1-539.1 provides:

> (a) Any person, firm or corporation not being the bona fide owner thereof or agent of the owner who shall without the consent and permission of the bona fide owner enter upon the land of another and injure, cut or remove any

valuable wood, timber, shrub or tree therefrom, shall be liable to the owner of said land for double the value of such wood, timber, shrubs or trees so injured, cut or removed.

The parties in their briefs have cited no cases in this jurisdiction, and we have found none in our research which pass on the question as to whether the jury under proper instructions from the court should find double damages or whether the jury should determine the damages which should then be doubled by the court. *See* 87 C.J.S., Trespass, § 134(e)(2) (1954) and 111 A.L.R. 79, 102 (1937) for cases on this subject from other jurisdictions. We can find nothing in the statute which requires that the court let the jury determine the damages and then have the court double the damages. We hold the court did not commit error by charging as it did. By this holding we do not mean to imply we would have found error if the court had let the jury determine the actual damages and had doubled the damages as found by the jury.

No error.

Judges VAUGHN and MARTIN (Harry C.) concur.

STATE OF NORTH CAROLINA v. HUEY BURKE HICKS

No. 7910SC587

(Filed 4 December 1979)

Receiving Stolen Goods § 7— felonious possession of stolen goods—insufficient verdict

Judgment is arrested in a prosecution for felonious possession of stolen goods where one interpretation of the written verdict submitted to the jury by the court would permit the jury to find defendant guilty if it should find that the property was worth more than $200.00 without regard to whether defendant knew or had reasonable grounds to believe that the property had been stolen, and where the jury's verdict of "Guilty of possession of stolen property" failed to find defendant guilty of any crime.

Judge HEDRICK concurring in result.

Judge WELLS joins in the concurring opinion.

State v. Hicks

APPEAL by defendant from *Lee, Judge.* Judgment entered 18 January 1979 in Superior Court, WAKE County. Heard in the Court of Appeals 13 November 1979.

Defendant was tried, upon indictments proper in form, for breaking and entering and larceny and also for felonious possession of stolen goods. The jury acquitted him of the breaking and entering and larceny charges, but convicted him of felonious possession of stolen goods. He was sentenced to not less than three nor more than five years' imprisonment, suspended for five years upon specified conditions. From judgment imposing sentence, defendant appeals, assigning error.

Attorney General Edmisten, by Assistant Attorney General Nonnie F. Midgett, for the State.

Emanuel and Thompson, by W. Hugh Thompson, for the defendant.

MARTIN (Robert M.), Judge.

When the trial judge submitted possible verdicts to the jury in this case, the one for the offense of possession of stolen property read as follows:

> Guilty of possession of stolen property knowing of [sic] having reasonable grounds to believe that the property was stolen pursuant to a breaking or entering or that the property was worth more than $200.00 OR Not Guilty.

This proposed verdict would allow the jury to convict defendant of felonious possession of stolen property if the jury should find that the property was worth more than $200.00, without regard to whether defendant knew or had reasonable grounds to believe that the property was in fact stolen. The verdict returned by the jury and signed by its foreman merely recites that defendant was found guilty of possession of stolen property, without further stating the basis of the verdict. Because of the ambiguity of the proposed verdict as submitted to the jury, and in view of the fact that the jury's verdict as returned does not in any way dispel the cloud of ambiguity hovering over this matter, we arrest the judgment entered therein.

Judgment in 78CRS71736 arrested.

Judges HEDRICK and WELLS concur in the result.

Judge HEDRICK concurring in result.

I agree that the judgment must be arrested, and that the written verdict submitted to the jury is susceptible of more than one interpretation. However, I believe judgment should be arrested by this Court for the reasons to follow below.

Defendant was charged in a proper bill of indictment with the unlawful and willful possession of certain described property "knowing or having reason to believe the property to have been feloniously stolen, . . . as the result of a breaking and entering of a business warehouse . . . and in that the value of the property exceeded . . . ($200.00)," G.S. § 14-71.1 (1977). At the conclusion of the trial thereon, the judge submitted, in writing, the following possible verdicts:

> Guilty of possession of stolen property knowing of [sic] having reasonable grounds to believe that the property was stolen pursuant to a breaking or entering or that the property was worth more than $200.00 OR Not Guilty.

The jury returned, in writing, signed by the foreman, the following "unanimous verdict": "Guilty of possession of stolen property". Upon motion of the defendant, the jury was polled by the clerk's reading to each individual juror the written verdict submitted by the court (as set out above), and asking if he or she assented thereto. Each juror did assent to the verdict as read by the clerk.

The purpose of G.S. § 15A-1237(a) requiring that "[t]he verdict must be in writing, signed by the foreman, and made a part of the record of the case", is made plain by the Official Commentary to the section. I quote therefrom:

> The provision . . . is new. It is contemplated that the jury will be given a verdict form setting out the permissible verdicts recited by the judge in his instructions. This procedure should cure a great many defects that occur when the foreman of the jury inadvertently omits some essential element of a verdict in stating it orally.

If the express purpose of § 15A-1237(a) is to be achieved, it is essential that the written verdict submitted to the jury be correct in every detail, and that the trial judge not accept a verdict which deviates in any material measure from the permissible verdicts submitted.

Defendant herein assigns as error the denial of his motion for appropriate relief made after verdict and judgment, pursuant to G.S. § 15A-1411. On appeal, he argues that the verdict does not conform to the charge in the bill of indictment, and that the verdict accepted by the court does not support the judgment. Without doubt, the verdict returned by the jury was not one of the permissible verdicts submitted to it. Instead, the written verdict purported to find defendant "Guilty of possession of stolen property". It is hardly necessary to observe that the written verdict, signed by the foreman, fails to find defendant guilty of any crime cognizable under our law. Nor was the defect cured in this case, as the Attorney General argues, by the polling of the jury. In my opinion, the polling, following as it did upon the heels of a thoroughly feckless written verdict, served only to compound the error.

The trial judge committed fatal error in accepting the jury's written verdict. When the impermissible written verdict was returned, the judge should have immediately instructed the jury that its verdict was not acceptable under his instructions. He then should have re-instructed the jury with respect to the permissible verdicts, and ordered the jurors to continue their deliberations until they reached an acceptable verdict in the case. In a criminal case, when the verdict is not responsive to the indictment, or when the verdict is "incomplete, imperfect, insensible, or repugnant", the judge, in the exercise of a limited legal discretion, must refuse to accept it, and direct the jury to retire and bring in a proper verdict. 4 Strong's N. C. Index 3d, *Criminal Law* § 126.4, at 661 (1976).

Since the verdict does not support the judgment, I would treat defendant's assignment of error for the denial of his motion for appropriate relief as a motion for arrest of judgment in this Court, *State v. Daniels*, 43 N.C. App. 556, 259 S.E. 2d 396 (1979), and allow same.

Judgment arrested.

Judge WELLS concurs.

RAYMOND J. HENRY v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION AND BILLY ROSE, STATE OF NORTH CAROLINA HIGHWAY ADMINISTRATOR

No. 7927SC259

(Filed 4 December 1979)

Eminent Domain § 5— person displaced by public works project—relocation assistance—computation of amount—discretionary matter

G.S. Chapter 133, which provides assistance for persons displaced as a result of public works programs, commits the matter of relocation assistance payments absolutely and solely to the discretion of the officials of the agency involved; therefore plaintiff service station operator, who was displaced by the taking of his property by the Department of Transportation, was not entitled to any method of calculation of payments other than that determined by the agency officials involved, nor was plaintiff entitled to judicial review of the decision of the Department of Transportation.

APPEAL by plaintiff from *Burroughs, Judge*. Judgment entered 28 February 1979 in Superior Court, GASTON County. Heard in the Court of Appeals on 13 November 1979.

Plaintiff herein operated a Shell service station in Charlotte, North Carolina, under a "dealer's lease contract" with Shell Oil Company which was to continue through 30 September 1978. On 5 July 1977 Shell notified plaintiff that his lease would be terminated, effective 29 August 1977, because the North Carolina Department of Transportation was acting pursuant to its power of eminent domain to acquire the property on which plaintiff's station was located. Thus, plaintiff "was forced to move his business and to relocate" approximately one-quarter of a mile away. Thereafter, the Department determined the amount of relocation assistance money it would pay plaintiff under G.S. § 133-8 by considering his income for the two years immediately preceding its acquisition of the property. Plaintiff brought suit, charging that the defendant Department "failed to exercise reasonable, fair and equitable judgment" in so calculating his damages. He contended:

7. . . . That plaintiff asked the Court to take judicial notice of the fact that the two calendar years immediately preceding the . . . condemnation, the entire United States suffered under its first ever oil embargo and gasoline shortage. That one of the hardest hit industries during these two years was the personally owned service stations. That the personal income to the operators of said service stations during the years of 1975 and 1976 was substantially distorted due to the oil embargo and its increase in the price of all petroleum products. . . .

8. Plaintiff respectfully contends . . . that due to the unusual nature of his business and the world oil situation that occurred in the two years immediately preceding this acquisition, it would be more equitable to use the third year immediately prior to the acquisition since that was before the oil embargo and its singularly devastating effect upon certain businesses.

Defendant moved to dismiss the action pursuant to Rule 12(b), G.S. § 1A-1, contending that the court lacked subject matter jurisdiction since the State had not consented to be sued, and that, in any event, plaintiff had failed to state a claim for which relief was available. On 28 February 1979, the court allowed the motion, concluding that the statute under which plaintiff claimed "does not create any right enforceable in any court and the determination of the defendants . . . is conclusive and not subject to judicial review." Plaintiff appealed.

Whitesides and Robinson, by Henry M. Whitesides, for plaintiff appellant.

Attorney General Edmisten, by Special Deputy Attorney General James B. Richmond, for defendant appellee.

HEDRICK, Judge.

Plaintiff brings his case to this Court seeking a reversal of the trial judge's determination that Chapter 133 of the North Carolina General Statutes does not provide for judicial review, and that the decision of the Department of Transportation acting thereunder is, thus, final. He cites no authority to support his position. He merely argues that he "should have a right" to judicial review.

The statute at issue in this case, "The Uniform Relocation Assistance and Real Property Acquisition Policies Act," declares its purpose to be the establishment of "a uniform policy for the fair and equitable treatment of persons displaced as a result of public works programs. . . ." G.S. § 133-6. In carrying out that goal, the agency involved is empowered to reimburse "displaced" persons, *in its discretion*, as follows:

> § 133-8. *Moving and related expenses.*—(a) Whenever the acquisition of real property for a program or project undertaken by an agency will result in the displacement of any person, such agency *may* make a payment to any displaced person, upon application *as approved by the head of the agency* . . . [Emphasis added.]

Subsection (a) goes on to list what expenses *may* be reimbursed. Subsections (b) and (c), on the other hand, provide for payments in lieu of those authorized by subsection (a), if the displaced person is eligible under (a). Plaintiff herein elected to proceed under subsection (c) which sets up, in pertinent part, the following payment scheme:

> (c) Any displaced person eligible for payments . . . *may* receive a fixed payment in an amount equal to the average annual net earnings of the business. . . . For purposes of this subsection, the term "average annual net earnings" means one half of any net earnings of the business . . . , before federal, State, and local income taxes, during the two taxable years immediately preceding the taxable year in which such business . . . moves from the real property acquired for such project, or during such other period as the head of such agency determines to be more equitable for establishing such earnings, . . . [Emphasis added.]

Quite plainly, these sections commit the matter of relocation assistance payments absolutely and solely to the discretion of the officials of the agency involved. The use of the auxiliary verb "may" connotes "permission, possibility, probability or contingency", Black's Law Dictionary 1131 (rev. 4th ed. 1968), and, "[o]rdinarily, when a statute employs the word 'may,' its provisions will be construed as permissive and not mandatory." 12

Strong's N.C. Index 3d, *Statutes* § 5.3, at p. 68 (1978). We are of the opinion that § 133-8 confers no right either to receive such payments or to demand that the amount of payments, if granted, be calculated other than as the agency officials determine.

We are bolstered in our construction of § 133-8 by § 133-17, which unambiguously declares:

> *Administrative payments.*—. . . Nothing contained in this Article shall be construed as creating any right enforceable in any court and the determination of the agency under the procedure provided for in G.S. 133-14 shall be conclusive and not subject to judicial review.

Section 133-14 authorizes the agency to adopt rules and regulations, including "[p]rocedure for an aggrieved displaced person to have his determination of eligibility or amount of payment *reviewed by the agency head or its administrative officer. . . .*" (Our emphasis.) The legislative intent is repeatedly made manifest by such clear and unequivocal language, and the courts must heed the plain and definite meaning contained therein. *Norris v. Home Security Life Insurance Co.*, 42 N.C. App. 719, 257 S.E. 2d 647 (1979); Strong's *supra* at § 5.5. *See also Merge v. Troussi*, 394 F. 2d 79 (3d Cir. 1968).

We hold that Chapter 133 creates neither right nor remedy pursuant to which plaintiff can press a claim against defendant. The statute bestows no more than a gift. The judge properly allowed defendant's motion to dismiss on Rule 12(b)(6) grounds, *see Carolina Builders Corp. v. AAA Dry Wall, Inc.*, 43 N.C. App. 444, 259 S.E. 2d 364 (1979), and authorities therein cited, and the judgment entered 28 February 1979 is accordingly

Affirmed.

Judges MARTIN (Robert M.) and WELLS concur.

STATE OF NORTH CAROLINA v. KENNETH NORWOOD

No. 799SC573

(Filed 4 December 1979)

1. **Criminal Law § 146.2— sentence of ten years to life—appeal to N. C. Supreme Court**

A sentence of from ten years to life imposed on defendant convicted of second degree burglary and second degree rape constituted a sentence of "imprisonment for life" within the meaning of G.S. 7A-27 so that an appeal from those convictions must be taken to the N. C. Supreme Court rather than to the N. C. Court of Appeals.

2. **Robbery § 4.2— asportation—taking money from victim**

Evidence that defendant took $4.30 from the prosecuting witness but did not leave her home with it was sufficient evidence of asportation for the jury to convict defendant of common law robbery.

Judge MARTIN (Harry C.) dissenting.

APPEAL by defendant from *Browning, Judge.* Judgment entered 8 March 1979 in Superior Court, PERSON County. Heard in the Court of Appeals 13 November 1979.

Defendant was charged in bills of indictment with the crimes of first degree burglary, first degree rape and robbery with a dangerous weapon. He was convicted of second degree burglary, second degree rape and common law robbery. The charges of second degree burglary and second degree rape were consolidated for judgment and the defendant received a sentence of ten years to life imprisonment. He received a concurrent sentence of ten years on the charge of common law robbery.

Defendant appealed to this Court.

Attorney General Edmisten, by Assistant Attorney General Sandra M. King, for the State.

John W. Tolin, Jr., for defendant appellant.

WEBB, Judge.

[1] At the outset we are faced with the question of the jurisdiction of this Court to hear the appeals in the burglary and rape cases. The defendant received a sentence in those cases of from ten years to life in prison. G.S. 7A-27 says:

> (a) From a judgment of a superior court which includes a sentence of death or imprisonment for life, unless the judgment was based on a plea of guilty or nolo contendere, appeal lies of right directly to the Supreme Court.

The question with which we are faced is whether a sentence of from ten years to life is a sentence of imprisonment for life so that an appeal must be taken to the Supreme Court of North Carolina. We hold that this is a sentence of imprisonment for life within the meaning of the statute. It is true that the defendant may not serve for life under this sentence. This is so in any sentence of life imprisonment. We hold that when a defendant may serve for life under a sentence, this is a sentence to life imprisonment and appeal lies directly to the Supreme Court. We have no jurisdiction to hear the cases involving burglary and rape and the appeal as to these two charges must be dismissed.

[2] As to the charge of common law robbery, the defendant by his only assignment of error contends there was not sufficient evidence of taking and carrying away the property of the prosecuting witness to be considered by the jury. The State's evidence tended to show the defendant took $4.30 from the prosecuting witness, but did not leave her home with it. This is sufficient evidence of asportation for the jury to convict defendant of common law robbery. *State v. Walker*, 6 N.C. App. 740, 171 S.E. 2d 91 (1969).

Appeal dismissed as to 78CRS5197 and 78CRS5200.

No error as to 78CRS5198.

Judge VAUGHN concurs.

Judge MARTIN (Harry C.) dissents.

Judge MARTIN (Harry C.) dissenting.

I concur in No. 78CRS5198, the charge of common law robbery, but must respectfully dissent from the opinion of the majority in the burglary and rape charges.

Upon the conviction of the defendant of burglary in the second degree and second-degree rape, the trial court consolidated

the cases for judgment and sentenced the defendant to a term of imprisonment "of ten years (10) to life imprisonment in the North Carolina Department of Correction."

The majority holds this is a sentence of "imprisonment for life" and that under N.C.G.S. 7A-27 this Court does not have jurisdiction of the appeal of these cases because the appeal lies of right directly with the Supreme Court. I cannot agree with this holding.

The sentence imposed was not one of imprisonment for life but rather an indeterminate sentence of from ten years to life. Reference to N.C.G.S. 14-52(a) discloses that the punishment for burglary in the first degree is imprisonment for life. Punishment for burglary in the second degree is imprisonment for not less than seven years nor more than life imprisonment. Second-degree rape is punishable by imprisonment for life or for a term of years. N.C. Gen. Stat. 14-21(2). The punishment for burglary in the second degree and second-degree rape is not a "specific punishment" within the meaning of N.C.G.S. 14-2. *See State v. Stimpson*, 279 N.C. 716, 185 S.E. 2d 168 (1971). A punishment of life imprisonment is a specific punishment. The trial court could have sentenced the defendant to life imprisonment but chose instead to impose an indeterminate sentence. A typical form of a life sentence is: It is the judgment of the court that the defendant be imprisoned for the term of his natural life in the State's prison, and this is both the minimum and maximum term. *See* N.C. Trial Judges' Bench Book II.11A.4(F) (1979).

The majority states that "when a defendant *may* serve for life under a sentence," it is a life sentence. (Emphasis added.) In my opinion, a life sentence is one by which the defendant is *ordered* by the court to be imprisoned for his natural life and the defendant *must* serve for the remainder of his natural life, unless sooner released by action of the executive branch of government. The General Assembly has specified that a sentence of life imprisonment shall be considered as a sentence of imprisonment for a term of eighty years. N.C. Gen. Stat. 14-2. The possibility of such early release by way of parole, pardon, commutation or other executive action is not a proper consideration in determining the nature of a sentence.

I vote to hold this Court has jurisdiction of the appeals from the burglary and rape convictions.

A careful consideration of the assigned errors on all charges does not disclose any prejudicial error. I find no error in defendant's trial.

DONALD DAVIS v. HUFF AMBULANCE SERVICE, INC., AND RICHARD KENT HUFF, SR.

No. 7923DC224

(Filed 4 December 1979)

1. **Master and Servant § 8— employment contract—hours per week—sufficiency of evidence**

In an action by an employee to recover overtime pay from his employer, testimony by plaintiff that at the time he took the job he thought he "would be working 40 hours in 8 hour shifts" was a sufficient basis for the trial court's conclusion that the employment contract between the parties contemplated a "regular" eight hour shift and forty hour work week.

2. **Master and Servant § 9— overtime wages claimed by plaintiff—Fair Labor Standards Act applicable**

The Fair Labor Standards Act governed defendants' liability, if any, for overtime wages claimed by plaintiff ambulance driver.

3. **Master and Servant § 9— overtime wages claimed—method of computation**

Where the parties have agreed that the employee is to work a regular forty hour week at a specified weekly salary, the regular hourly rate is determined by dividing that salary by forty hours, and the amount of overtime is determined by multiplying that hourly wage by one and one-half as to each hour worked in excess of forty; therefore, plaintiff, who was paid $125 weekly and who accumulated overtime of five hours one week and twenty hours the following week throughout his employment with defendants, was entitled to collect overtime pay of $1637 from defendant.

APPEAL by defendants from *Osborne, Judge.* Judgment entered 6 October 1978 in District Court, YADKIN County. Heard in the Court of Appeals 24 October 1979.

Plaintiff employee sued the defendant corporate ambulance service and its principal director and stockholder for overtime pay allegedly owing. The parties stipulated before trial that plaintiff was employed by the ambulance service at a gross salary of

$125 per week and that he was employed on a shift in which he actually worked twenty-four hours on and twenty-four hours off. Plaintiff alleged in his complaint that he was employed by the ambulance service during the period between September 1974 through 3 April 1975 and as the result of his work schedule he was required to work five hours overtime one week and twenty hours overtime the following week as computed under the Fair Labor Standards Act. Plaintiff demanded $1,637 in overtime wages, court costs, and $500 for his attorney's fees. Defendants answered, denying the operative allegations of the complaint.

At trial, plaintiff testified in his own behalf and the president of the ambulance service testified in behalf of the defendants. The court, sitting in the absence of a jury, found that plaintiff was employed by the defendants from early October 1974 through the beginning of April 1975 at a salary of $125 per week on a "regular" workshift and that plaintiff was unaware that he would be required to work the lengthy hours which he in fact did work until after he took the job. The court further determined that during the course of plaintiff's employment with the defendants he worked five hours overtime one week and twenty hours the next week on an alternating basis. The court calculated plaintiff's regular hourly rate at $3.12 per hour and overtime rate at $4.68 per hour, and found the defendants jointly liable to the plaintiff in the amount of $1,637 for overtime pay, $500 for plaintiff's attorney's fees, and court costs. From this judgment the defendants appeal.

Zachary, Zachary & Harding, by Lee Zachary, for the plaintiff appellee.

Randleman, Randleman & Randleman, P.A., by J. Michael Randleman, for the defendant appellants.

WELLS, Judge.

[1] Defendants first assign as error the trial court's finding that when plaintiff was first employed by defendants the understanding between the parties was that plaintiff would work a regular shift and a forty-hour week. While the trial court, consistent with the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* (1938), could have found that plaintiff had contracted to work an "irregular" workshift or weekly hours in excess of forty, 29 C.F.R.

§ 778.114 (1968), he was not required to do so here. Plaintiff testified, "When I took the job, I thought I would be working 40 hours in 8 hour shifts." Despite defendant Huff's evidence to the contrary, this statement is a sufficient basis for the trial court's conclusion that the employment contract between plaintiff and defendants contemplated a "regular" eight-hour workshift and forty-hour workweek. *Henderson County v. Osteen*, 297 N.C. 113, 254 S.E. 2d 160 (1979).

[2] Defendants also assign as error the trial court's finding with respect to the number of overtime hours worked by plaintiff, plaintiff's regular and overtime rates of pay, and the total overtime wages due plaintiff. The parties concede that the Fair Labor Standards Act governs defendants' liability, if any, for overtime wages. Pursuant to 29 U.S.C. § 207:

> (a)(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

[3] Since the trial court properly concluded that the employment contract between plaintiff and defendants was for a regular workweek of forty hours, the trial court's conclusion that defendant's regular rate under the Act was $3.12 per hour and overtime rate was $4.68 must be sustained. The term "regular rate" is not defined in the Act. Where, as found by the trial court in the present case, the parties have agreed that the employee is to work a regular forty-hour week at a specified weekly salary, the regular hourly rate is determined by dividing that salary by forty hours, and the amount of overtime is determined by multiplying that hourly wage by one and one-half as to each hour worked in excess of forty. *Transportation Co. v. Missel*, 316 U.S. 572, 86 L.Ed. 1682, 62 S.Ct. 1216 (1942), *reh. denied*, 317 U.S. 706, 87 L.Ed. 563, 63 S.Ct. 76 (1942); *Marshall v. Shirt Corp.*, 577 F. 2d 444 (8th Cir. 1978).

The trial court concluded that plaintiff worked seventy-two hours one week and ninety-six hours the next week on an alternating basis. Since the parties agree that under the Act, nine hours of each twenty-four hour shift were allotted to sleeping and eating and were not compensable, plaintiff had alternating compensable hours of employement of forty-five and sixty hours per week. Thus, plaintiff accumulated overtime of five hours one week and twenty hours the following week throughout his employment with defendants. The trial court correctly calculated defendants' liability to plaintiff for overtime pay in the amount of $1,637.

Affirmed.

Judges ARNOLD and WEBB concur.

J. C. BILLINGS v. BILLINGS TRUCKING CORPORATION, INC.

No. 7923SC286

(Filed 4 December 1979)

1. **Automobiles § 89.2— instruction on last clear chance not required**

Plaintiff was not entitled to an instruction on last clear chance where defendant's employee was negligent in backing a truck into a highway and striking plaintiff, plaintiff was contributorily negligent in failing to heed a warning by defendant's flagman to stop, and defendant's employee did not have the means and the time to avoid harming plaintiff after plaintiff drove past the flagman.

2. **Automobiles § 90.14; Negligence § 37— instructions—defining negligence as "fault"—harmless error**

Plaintiff was not prejudiced by the trial judge's instruction that if he had to define "negligence" in one word he would probably use the word "fault" where the court then properly instructed that the correct definition of "negligence" is the omission or failure to do that which a reasonably prudent person would do or doing something which a reasonably prudent person would not do under the same or similar circumstances.

APPEAL by plaintiff from *Rousseau, Judge.* Judgment entered 12 January 1979 in Superior Court, WILKES County. Heard in the Court of Appeals 15 November 1979.

Plaintiff instituted this action to recover for personal injuries he sustained when an automobile operated by plaintiff collided with defendant's tractor trailer. The parties offered evidence tending to show that at about 3:00 p.m., on 15 February 1977, plaintiff was proceeding east on Cherry Street. An employee of defendant was posted as a flagman on Cherry Street while another of defendant's employees drove a tractor trailer from a parking area into Cherry Street. Plaintiff passed the flagman and drove behind the trailer. Defendant's vehicle then backed into plaintiff's vehicle. The jury answered issues of negligence and contributory negligence in the affirmative. Plaintiff appeals.

Hayes, Hayes and Evans, by Samuel C. Evans, for plaintiff appellant.

Moore & Willardson, by Larry S. Moore and Robert P. Laney, for defendant appellee.

VAUGHN, Judge.

[1] Plaintiff contends that the judge should have submitted an issue and instruction on the doctrine of last clear chance which "is regarded in this jurisdiction as but an application of the doctrine of proximate cause." *Exum v. Boyles*, 272 N.C. 567, 578, 158 S.E. 2d 845, 854 (1968). The issue is thus whether plaintiff's failing to heed the warning of defendant's flagman and his driving to a position where he was hit by the rear of defendant's truck as it entered the highway is the proximate cause of the injury or whether the backing of the truck onto the road and into defendant's car is the proximate cause of plaintiff's injury. For plaintiff to be entitled to the instruction, there must be evidence that plaintiff was in a position of inadvertent or helpless peril which defendant's employees thereafter discovered or should have discovered and that the defendant's employees had the means *and the time* to avoid the injury and failed to so do. *Vernon v. Crist*, 291 N.C. 646, 231 S.E. 2d 591 (1977). This is not such a case. All events occurred within a very few seconds. It was simply a case of negligence and contributory negligence. The defendant's employee was negligent in backing out and plaintiff was contributorily negligent in not heeding a warning to stop. The employee of defendant did not have an existing ability to avoid harming plaintiff after plaintiff drove past the flagman. The

negligence was not subsequent to that of plaintiff but was simultaneous in time. "Peril and the discovery of such peril in time to avoid injury constitutes the backlog of the doctrine." *Ingram v. Smoky Mountain Stages, Inc.*, 225 N.C. 444, 447, 35 S.E. 2d 337, 339 (1945). Plaintiff was not entitled to the instruction.

[2] Plaintiff contends that the court erred in defining the word "negligence" as "fault." The alleged error occurred in the following instruction:

> "Now, actionable negligence consists of two elements, the first being negligence and the other, proximate cause. If I had to define the word 'negligence' in one word, I would probably use the word 'fault' but the accepted and correct definition of the word 'negligence' is the omission or failure to do that which a reasonable prudent person when guided by those considerations that ordinarily regulate the conduct of human affairs would do or doing something which a reasonable prudent person would not do under the same or similar circumstances. You will note the test is what a reasonable prudent person would or would not do under the same or similar circumstances. The test is not what the most careful or the most conscientious person would or would not do; but, again, the test is what a reasonable prudent and careful person would or would not do under the same or similar circumstances."

It is obvious from the foregoing that the judge gave the proper definition of negligence. We do note, however, that there will probably be no circumstances under which the judge will be required to define negligence in one word, and it served no useful purpose to speculate how he might do so before the jury in the case. There is, nevertheless, no possibility that plaintiff could have been prejudiced thereby.

We have carefully considered all of the arguments advanced by plaintiff. We conclude that no prejudicial error has been shown.

No error.

Judges WEBB and MARTIN (Harry C.) concur.

Penland v. Rehabilitation Center

BETTY L. PENLAND, PLAINTIFF v. BRENTWOOD REHABILITATION CENTER, INC. AND EDGEWOOD MANOR, INC., DEFENDANTS

No. 7928SC294

(Filed 4 December 1979)

Negligence §§ 57.5, 58— obstructed hallway—fall by nurse—jury question as to negligence and contributory negligence

In an action to recover for injuries sustained by plaintiff nurse, an invitee, when she tripped over boxes in the hallway of defendants' nursing home, evidence of defendants' negligence was sufficient to be submitted to the jury where it tended to show that the boxes were in a hallway and thus a dangerous condition existed for people using the hallway, and the condition had existed for five hours and was known to an employee of defendants; and evidence that the hall was dark and the boxes, which were stacked to a height of 12 to 14 inches, were similar in color to the floor raised a jury question as to whether plaintiff, in the exercise of reasonable care, should have seen and avoided them.

APPEAL by plaintiff from *Lewis, Judge.* Judgment entered 17 October 1978 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 15 November 1979.

Plaintiff sued defendants for injuries which she alleged were proximately caused by the defendants' negligence. Plaintiff's evidence tended to show that she was hired as a nurse by a person confined to a nursing home operated by the defendants. On 22 May 1976 at approximately 10:50 p.m., she went to work at the nursing home. She first went to the west wing of the nursing home to check on her patient. She stayed with her patient for approximately 15 minutes and then walked toward the east wing of the nursing home to sign in for the evening. She stopped in the lobby to speak to Mary McHone, a nurse employed by the defendants, who was on duty. She then started down the hallway in the east wing. There were some boxes stacked in the hall of the east wing "right at the corner of the intersection of the east wing hallway and a hallway leading back to the kitchen area away from the lobby." The lights in the hallway had been turned down so as not to bother the patients who had the doors to their rooms open. Mrs. Penland testified "[t]he lighting was so dim that the nurses used flashlights." Mary McHone testified that she had seen the boxes at 6:00 p.m. The floor at that place was tan and the boxes were brown. They were stacked to a height of 12 to 14 inches.

The lights in the lobby were on. The plaintiff tripped on the boxes and was injured. The court granted a motion for a directed verdict in favor of defendants. Plaintiff appealed.

McLean, Leake, Talman and Stevenson, by Joel B. Stevenson, for plaintiff appellant.

Roberts, Cogburn and Williams, by James W. Williams, for defendant appellees.

WEBB, Judge.

On this appeal we deal with whether there is sufficient evidence of negligence to be considered by the jury, and whether the evidence of contributory negligence is such that the jury could only answer this issue against the plaintiff. We hold it is a jury question as to both issues.

It was the duty of the defendants as operators of the nursing home to keep the premises in a reasonably safe condition so as not to unnecessarily expose the plaintiff, an invitee, to danger. Where, as in the case sub judice, there is no evidence of the origin of the unsafe condition, if an employee of the defendants had knowledge of it or if it had existed for such period of time that the defendants, as inviters, should by the exercise of reasonable care have known of its existence, this is evidence from which knowledge of the condition may be imputed to the defendants. *Long v. National Food Stores, Inc.*, 262 N.C. 57, 136 S.E. 2d 275 (1964). In this case there is substantial evidence from which the jury could find that the hallway in the east wing had an obstruction in it which was dangerous to persons walking in the hallway. This condition had existed for five hours and was known to Mrs. McHone, an employee of the defendants. This is evidence from which the jury could find there was a dangerous condition in the hallway, the knowledge of which could be imputed to the defendants. This makes the negligence issue for jury consideration.

This brings us to a consideration of the contributory negligence issue. If the boxes stacked in the hallway were so patent and obvious a danger that the plaintiff in the exercise of reasonable care for her safety should have seen and avoided them, she would by her own negligence have contributed to the

accident. *Hinson v. Cato's*, 271 N.C. 738, 157 S.E. 2d 537 (1967). In this case, we hold that the evidence that the hall was dark and the boxes, which were stacked to a height of from 12 to 14 inches, were similar in color to the floor, makes it a jury question as to whether the plaintiff, in the exercise of reasonable care, should have seen and avoided them. The issue of contributory negligence should have been submitted to the jury.

Reversed and remanded.

Judges VAUGHN and MARTIN (Harry C.) concur.

ITCO CORPORATION v. RONALD WEST AND MARGIE WEST

No. 797SC203

(Filed 4 December 1979)

Execution § 9; Homestead § 1— exceptions to allotment of homestead—jurisdiction

The superior court in Wilson County had no jurisdiction to pass upon exceptions to the allotment of a homestead in Franklin County.

APPEAL by defendants from *Brown, Judge*. Judgment entered 25 October 1978 in Superior Court, WILSON County. Heard in the Court of Appeals 23 October 1979.

Plaintiff obtained a judgment by default against defendant Ronald West on 1 June 1976 in the amount of $4,050.32. This judgment was obtained in Wilson County, docketed there and also docketed in the office of the Clerk of Superior Court for Franklin County.

Thereafter, execution was issued upon the judgment by the Clerk of Superior Court of Wilson County and forwarded to the Sheriff of Franklin County. In compliance with the execution, the Sheriff of Franklin County proceeded to allot defendant Ronald West's homestead from real property in Franklin County and returned the appraisers' report and return of personal property and homestead exemption to the Clerk of Superior Court of Wilson County. On 20 October 1977 Ronald West filed objections and exceptions to the appraisers' allotment and return of home-

stead and personal property exemption with the Clerk of Superior Court of Wilson County and the Clerk of Superior Court of Franklin County.

The case came on for hearing upon defendant's objections and exceptions 23 October 1978 at the regular civil session of superior court for Wilson County. After considering the record and argument of counsel, the trial court entered judgment 25 October 1978 dismissing defendant's objections and exceptions and ordering the Sheriff of Franklin County to proceed with the execution sale of the real property. From this judgment, defendants appeal.

Moore, Weaver and Beaman, by Stephen L. Beaman, for plaintiff appellee.

Thomas F. East and G. Hugh Moore, Jr., by G. Hugh Moore, Jr., for defendant appellants.

MARTIN (Harry C.), Judge.

From the face of the record on this appeal, we are met with the threshold question of whether the superior court of Wilson County had jurisdiction to hear and determine defendant's objections and exceptions to the homestead allotment.

The homestead allotment was made in Franklin County as defendant Ronald West's property was located in that county. The sheriff's return and the report of the appraisers were filed with the Clerk of Superior Court of Wilson County. Defendant Ronald West filed his objections and exceptions to the return in both Wilson and Franklin counties.

Although the homestead exemption is a constitutional right, Article X, North Carolina Constitution, it is left to the General Assembly to establish the procedures for the allotment of the property to be exempt. *Formeyduval v. Rockwell*, 117 N.C. 320, 23 S.E. 488 (1895).

The controlling portions of the statutes read:

> *Duty of appraisers; proceedings on return.*—. . . They must then make and sign . . . a return of their proceedings, . . . which shall be returned by the officer to the clerk of the court for the county in which the homestead is situated . . ..

> The officer must likewise make a transcript of the return over his hand and return it without delay to the clerk of the court of the county from whence the execution issued, ...

N.C. Gen. Stat. 1-372.

> *Exceptions to valuation and allotment; procedure.*—If the . . . judgment debtor . . . is dissatisfied with the valuation and allotment of the appraisers or assessors, he, within 10 days thereafter, . . . may notify the adverse party and the sheriff having the execution in hand, and file with the clerk of the superior court of the county *where the allotment is made* a transcript of the return of the appraisers . . .. Thereupon *the said clerk* shall put the same on the civil issue docket of the superior court for trial at the next session thereof as other civil actions, ...

N.C. Gen. Stat. 1-381, 1977 Supp. (emphasis added).

It thus appears that only the superior court of Franklin County had jurisdiction to hear and determine defendant's objections and exceptions to the return on the homestead allotment. Exceptions to the allotment of a homestead must be filed in the office of the clerk of the superior court of the county where the allotment is made (here Franklin County), together with a transcript of the allotment. *McAuley v. Morris*, 101 N.C. 369, 7 S.E. 883 (1888). We hold the superior court of Wilson County was without jurisdiction to pass upon the exceptions to the allotment of homestead upon real property in Franklin County.

Therefore, the judgment of the superior court of Wilson County dated 25 October 1978 is null and void; the same is hereby vacated and the proceedings in Wilson County are dismissed.

We note that although the Sheriff of Franklin County did not file the return of the proceedings of the appraisers in Franklin County, as required by N.C.G.S. 1-372, defendant Ronald West filed his exceptions and objections to the allotment in both Franklin and Wilson counties.

> The homestead right is a vested right and cannot be destroyed by any irregularity in the proceedings or want of procedure in the manner prescribed in The Code; therefore, when a failure in those methods occurs, it can, "in order to

enforce the right," be accomplished by other methods by the proper tribunal.

Formeyduval v. Rockwell, supra at 325, 23 S.E. at 488-89.

Vacated and dismissed.

Judges HEDRICK and CLARK concur.

LEMUEL SHIRLEY, JR. v. ADMINISTRATIVE OFFICE OF THE COURTS (TA-5983), ADMINISTRATIVE OFFICE OF THE COURTS (TA-5984), NORTH CAROLINA DEPARTMENT OF JUSTICE (TA-5985), NORTH CAROLINA DEPARTMENT OF SOCIAL REHABILITATION AND CONTROL (TA-5986), NORTH CAROLINA DEPARTMENT OF JUSTICE (TA-5987)

No. 7910IC313

(Filed 4 December 1979)

Appeal and Error § 40— Rules of Appellate Procedure mandatory

The Rules of Appellate Procedure are mandatory and apply to a litigant appearing *in propria persona.*

APPEAL by plaintiff from order of North Carolina Industrial Commission entered 20 November 1978. Heard in the Court of Appeals 27 November 1979.

Lemuel Shirley, Jr., plaintiff appellant, in propria persona.

Attorney General Edmisten, by Assistant Attorney General Ralf F. Haskell, for defendant appellees.

MARTIN (Harry C.), Judge.

Appellant violated Rule 10(a), (b)(1), (b)(2), and (c) of the North Carolina Rules of Appellate Procedure by failing to set out any exceptions in the record on appeal, failing to make exceptions as the basis of the assignments of error, and failing to indicate the pages of the record on appeal where the exceptions appear. Appellant also violated App. R. 28(b)(3) by failing to refer in his brief to the assignments of error, exceptions and pages where they appear in the record on appeal.

Exceptions not preserved and set forth as required by the Rules are deemed abandoned. Appellant does not properly raise in his brief the question whether the findings of fact and conclusions of law support the order. Rule 10(a), North Carolina Rules of Appellate Procedure.

For these reasons the appeal is subject to dismissal. The Rules of Appellate Procedure are mandatory. *Craver v. Craver*, 298 N.C. 231, 258 S.E. 2d 357 (1979); *State v. Brown*, 42 N.C. App. 724, 257 S.E. 2d 668 (1979).

The Rules of Appellate Procedure apply to a litigant appearing *in propria persona*. Neither counsel nor parties have any right to ignore the Rules of Appellate Procedure. *Owens v. Boling*, 274 N.C. 374, 163 S.E. 2d 396 (1968). The right of self-representation is not a license to avoid compliance with relevant rules of procedural law. *Faretta v. California*, 422 U.S. 806, 45 L.Ed. 2d 562 (1975). *See State v. Brincefield*, 43 N.C. App. 49, 258 S.E. 2d 81 (1979).

Appeal dismissed.

Judges VAUGHN and WEBB concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 4 DECEMBER 1979

HATLEY v. HATLEY No. 7819DC1080	Cabarrus (78CVD120)	Affirmed
HOWARD v. CONSTRUCTION CO. No. 7920SC108	Union (76CVS0458)	No Error
LANCASTER v. RYALS No. 798DC550	Wayne (78CVD110)	Affirmed
McKETHAN v. McKETHAN No. 7921DC217	Forsyth (78CVD2004)	Affirmed and Remanded With Directions
MESSER v. FAULKNER No. 7928SC306	Buncombe (77CVS2491)	No Error
MOSS v. MOSS No. 7914DC448	Durham (79CVD350)	Affirmed in Part, Vacated in Part, And Remanded
OKON v. OKON No. 7926DC343	Mecklenburg (78CVD8037)	Affirmed
SARGENT v. LUTHER No. 7928DC330	Buncombe (77CVD2349)	Affirmed
STATE v. BLACKMON No. 7918SC385	Guilford (78CRS19276)	No Error
STATE v. EILISON No. 799SC589	Person (78CRS1101) (78CRS1205)	No Error
STATE v. HENSLEY No. 7928SC466	Buncombe (78CRS18673)	No Error
STATE v. McDONALD No. 7912SC532	Cumberland (78CRS50367)	No Error
STATE v. MORGAN No. 7930SC559	Haywood (78CRS3848)	No Error
STATE v. RUSS No. 794SC597	Sampson (78CRS10835)	No Error
STATE v. ZIADY No. 798SC319	Wayne (78CR10389) (78CR10390) (78CR10391) (78CR10392) (78CR10393) (78CR10394) (78CR10591) (78CR10592)	No Error

STATE OF NORTH CAROLINA, EX REL. COMMISSIONER OF INSURANCE v. NORTH CAROLINA RATE BUREAU, LIBERTY MUTUAL FIRE INSURANCE COMPANY, LIBERTY MUTUAL INSURANCE COMPANY, AETNA CASUALTY & SURETY COMPANY, AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, STANDARD FIRE INSURANCE COMPANY, TRAVELERS INSURANCE COMPANY, LUMBERMENS MUTUAL CASUALTY COMPANY, UNITED STATES FIDELITY & GUARANTY COMPANY, AMERICAN MOTORISTS INSURANCE COMPANY, FIDELITY & GUARANTY INSURANCE UNDERWRITERS, TRAVELERS INDEMNITY COMPANY, MARYLAND CASUALTY COMPANY, TRAVELERS INDEMNITY COMPANY OF RHODE ISLAND, PENNSYLVANIA NATIONAL MUTUAL CASUALTY INSURANCE COMPANY

IN THE MATTER OF A FILING DATED OCTOBER 12, 1978 BY THE NORTH CAROLINA RATE BUREAU FOR REVISED WORKERS' COMPENSATION INSURANCE RATES DOCKET NO. 288

No. 7910INS338

(Filed 18 December 1979)

1. Master and Servant § 80— workers' compensation insurance rates—duty to promulgate

The Commissioner of Insurance does not have the affirmative power to promulgate rates for workers' compensation insurance, since this duty has been explicitly granted by the General Assembly to the N. C. Rate Bureau. However, the Rate Bureau has the burden of showing that its proposed rates are fair and reasonable.

2. Master and Servant § 80— rejection of filing by Commissioner of Insurance —showing required

The Commissioner of Insurance has the burden of affirmatively and specifically showing, by material and substantial evidence, how the Rate Bureau has not carried its burden should the Commissioner reject the proposed filing.

3. Master and Servant § 80— workers' compensation insurance rates—unreliability of unaudited data—insufficient evidence to support finding

A finding by the Commissioner of Insurance that unaudited statistical data furnished by the N. C. Rate Bureau was not reliable for workers' compensation insurance rate-making purposes was not supported by substantial evidence where the witness presented by the Department of Insurance, a C.P.A., admitted that a C.P.A. was not trained to evaluate loss experience data, and the uncontroverted testimony of an expert witness presented by the Rate Bureau showed in great detail how the statistical "editing" used by the National Council on Compensation Insurance in preparing the data used in the filing would detect source data errors and how, even if a source data error were undetected, the processing, including averaging and weighting, of the source data with time series data, calendar year data, policy year data, and in some

instances countrywide data, would negate any material effect of such error and would nonetheless lead to a fair calculation of reasonable rates.

4. **Master and Servant § 80— workers' compensation insurance rates—requirement that data be audited—arbitrary and capricious action**

The action of the Commissioner of Insurance in requiring audited data in a workers' compensation rate case was arbitrary and capricious, violated principles of due process and contravened the spirit if not the letter of the Administrative Procedure Act where (1) the Commissioner's initial disapproval notice directing the Rate Bureau to show that the filing was based on audited data was based on orders in two prior rate cases which were not binding on the Rate Bureau and constituted improper rule making; (2) the Commissioner's order was unreasonably vague in failing to indicate whether both national and state data should be audited, whether a complete audit rather than a statistical audit was required, how far back the audit must go, what statistical techniques and what sample sizes and various factors were to be used, and whether actuaries or accountants or both must conduct the audit; and (3) the order imposed an unreasonable burden upon the Rate Bureau to have to audit all the back records from workers' compensation companies in the nation over an unspecified period of time, particularly since no hearing was held in which the extent of this burden and the time and cost considerations were aired.

5. **Master and Servant § 80— workers' compensation insurance rates—investment income on invested capital**

The Commissioner of Insurance erred in requiring that investment income on invested capital be included in the rate-making formula for workers' compensation insurance rates.

6. **Master and Servant § 80— workers' compensation insurance rates—federal wage and price guidelines**

The Commissioner of Insurance erred in finding that a proposed increase in workers' compensation insurance rates violated federal wage and price guidelines since the guidelines were not promulgated until two weeks after the rate filing became effective and were only voluntary.

7. **Master and Servant § 80— workers' compensation rate filing—inclusion of previous rate increase**

A finding by the Commissioner of Insurance that a workers' compensation rate filing did not take into account a previous rate increase was unsupported by the evidence.

Judge ERWIN concurring.

Judge ARNOLD concurring in part and dissenting in part.

Chief Judge MORRIS concurring for purpose of clarifying holding on investment income on invested capital in *Comr. of Insurance v. Rate Bureau*, 41 N.C. App. 310.

APPEAL by the North Carolina Rate Bureau and member companies from Order of the Commissioner of Insurance issued 9 January 1979. Heard in the Court of Appeals 28 November 1979.

On 12 October 1978 the North Carolina Rate Bureau (hereinafter referred to as the "Bureau") pursuant to Article 12B of Chapter 58 of the General Statutes of North Carolina, filed with the Commissioner of Insurance a revised Workers' Compensation Rate Plan (hereinafter referred to as the "Filing"). The Filing proposed an increase of 19.8 percent in the overall level of workers' compensation insurance rates based upon changes in the benefit levels as well as increases in payout experience and trend factors.

On 14 November 1978 the Commissioner issued his disapproval notice and order contending that the Filing failed to comply with Chapter 58 of the General Statutes because: (1) the Filing contained no breakdown of incurred losses into paid losses, loss reserves, bulk reserves, and incurred but not reported losses; (2) the Filing did not take into account income from the investment of unearned premium reserves and loss reserves; (3) the Filing did not indicate whether the loss experience data was audited, as required by Orders of the Commissioner on 7 December 1977 and 27 February 1978; (4) the proposed rates were excessive due to basing of expense allowance solely on the experience of stock companies; and (5) countrywide expense and loss experience and other countrywide data were considered when credible North Carolina experience or data was available.

On 1 December 1978 the Bureau moved to vacate those portions of the disapproval order of 14 November 1978 which pertained to income from the investment of unearned premium reserves and loss reserves, and which pertained to auditing of loss experience data.

A hearing before the Commissioner of Insurance was held on 5 December 1978. The Bureau proffered the testimony of Roy Kallop. Kallop's qualifications as an expert included a bachelor's degree from Columbia College and a master's degree in mathematics at New York University. Kallop testified that he had been employed as an actuary with the National Council on Compensation Insurance since 1948, that he had participated in many filings and hearings pertaining to workers' compensation rates, that he was a Fellow of the Casualty Actuarial Society and had served on the Board of Directors of that organization, that he was a member of the American Academy of Actuaries and the International Actuarial Association, and that in the mid-1970's he

published a paper for the Casualty Actuarial Society on workers' compensation rate-making.

Kallop also explained that the National Council on compensation insurance was organized in 1922 under the sponsorship of the National Convention of Insurance Commissioners at a time when there was a series of separate state-by-state bureaus which proved to be an inefficient way of developing rates. Today the National Council's basic responsibility is to compute statistics, summarize them and prepare filings on behalf of the Council's members and subscribers. The Council is the official rate-making organization in about thirty states. For over thirty years the Council has assisted the North Carolina Rate Bureau and its predecessors in the compilation of statistics and exhibits in connection with rate filings subject to the Bureau's direction.

The North Carolina Department of Insurance (the "Department") presented the testimony of Byrum Tatum, Director of Technical Operations for the Department. Mr. Tatum had been a certified public accountant for seven years and prior to coming with the Insurance Department he had been a partner in a public accounting firm in Asheville, North Carolina. In addition, the Department presented a transcript of prior testimony of Dr. William B. Fairley. Dr. Fairley is an economist and statistician employed by the State Rating Bureau of the Division of Insurance of the Commonwealth of Massachusetts.

On 9 January 1979 the Commissioner issued an Order which disapproved the Filing in its entirety and allowed sixty days for the Bureau to submit an amended filing consistent with the Commissioner's Order. The Bureau now appeals from this Order.

Attorney General Rufus Edmisten by Assistant Attorney General Isham B. Hudson, Jr., for the State.

Young, Moore, Henderson & Alvis by Charles H. Young and George M. Teague for appellants.

CLARK, Judge.

Over the last seven years marking the tenure of the present Commissioner of Insurance, the Appellate Division has been beset with the burden of reviewing the Commissioner's disapproval of virtually every Filing which has proposed an increase in insurance rates. Almost invariably (in at least eighteen cases to

date) the Appellate Division has found the orders and rulings of the Commissioner to be unacceptable in whole or in part under the law of this State.* For several years the rate-making process was stalemated by a seemingly endless cycle in which the Commissioner would disapprove a rate filing, the Appellate Division would find no legal basis for the Commissioner's disapproval, and upon remand the Commissioner would find another ground for disapproving a proposed rate increase. In 1977 the General Assembly enacted major structural amendments to the insurance rate-making statutes in an apparent attempt to eliminate this regulatory impasse. In this regard, *see State ex rel. Commissioner of Insurance v. Rate Bureau,* 40 N.C. App. 85, 252 S.E. 2d 811, *cert. denied,* 297 N.C. 452, 256 S.E. 2d 810 (1979), as well as the comment of former Justice Lake in *Commissioner of Insurance v. N. C. Fire Insurance Rating Bureau,* 292 N.C. 471, 490, 234 S.E. 2d 720 (1977). It is not for this Court to impugn the motives of the Commissioner, *id.;* nor do we sit as a legislature with the responsibility of drafting insurance legislation; rather our duty is to interpret the insurance law as given to us by the General Assembly and to see that the law is properly enforced. We can only note, as the public record of a long series of cases before the Appellate Division shows, that the Commissioner, with undesirable frequency, over an extended period of time, has failed to effectively administer the insurance rate-making statutes in conformity with the purposes and standards prescribed by the General Assembly.

There seems to be no abatement of this trend, even after the 1977 amendments. The instant case presents the fifth appeal this year from disapproval orders of the Commissioner. *See also, State*

* In the following cases decided between 1973 and 1978 the Appellate Courts have reversed, modified or vacated the Commissioner's order in whole or in part. *State ex rel. Commissioner of Insurance v. Automobile Rate Office,* 19 N.C. App. 548, 199 S.E. 2d 479, *cert. denied,* 284 N.C. 424, 200 S.E. 2d 663 (1973); *Commissioner of Insurance v. Automobile Rate Office,* 24 N.C. App. 228, 210 S.E. 2d 439 (1974), *affirmed, cause remanded,* 287 N.C. 192, 214 S.E. 2d 98 (1975), *appeal after remand,* 30 N.C. App. 427, 227 S.E. 2d 603 (1976), *modified, cause remanded,* 292 N.C. 1, 231 S.E. 2d 867 (1977); *State ex rel. Commissioner of Insurance v. Auto Rate Office,* 24 N.C. App. 223, 210 S.E. 2d 441 (1974), *cert. denied,* 286 N.C. 412, 211 S.E. 2d 801 (1975), *appeal after remand,* 30 N.C. App. 477, 227 S.E. 2d 621 (1976); *State ex rel. Commissioner of Insurance v. Automobile Rate Office,* 23 N.C. App. 475, 209 S.E. 2d 411 (1974), *cert. denied,* 286 N.C. 412, 211 S.E. 2d 219 (1975); *State ex rel. Commissioner of Insurance v. Integon Life Insurance Company,* 28 N.C. App. 7, 220 S.E. 2d 409 (1975); *State ex rel. Commissioner of Insurance v. Compensation Rating and Inspection Bureau,* 28 N.C. App. 409, 221 S.E. 2d 96 (1976); *State ex rel. Commissioner of Insurance v. Automobile Rate Office,* 29 N.C. App. 182, 223 S.E. 2d 512 (1976); *State ex rel. Commissioner of Insurance v. Fire Insurance Rating Bureau,* 291 N.C. 55, 229 S.E. 2d 268 (1976); *State ex rel. Commissioner of Insurance v. Fire Insurance Rating Bureau,* 292 N.C. 70, 231 S.E. 2d 882 (1977); *Foremost Insurance Company v. Ingram,* 292 N.C. 244, 232 S.E. 2d 414 (1977); *Commissioner of Insurance v. Rating Bureau,* 292 N.C. 471, 234 S.E. 2d 720 (1977); *Automobile Rate Insurance Office v. Ingram,* 35 N.C. App. 578, 242 S.E. 2d 205 (1978); *State ex rel. Commissioner of Insurance v. Compensation Rating and Inspection Bureau,* 36 N.C. App. 98, 242 S.E. 2d 887 (1978).

ex rel. Commissioner of Insurance v. Rate Bureau, 40 N.C. App. 85, *supra; State ex rel. Commissioner of Insurance v. Rate Bureau*, 41 N.C. App. 310, 255 S.E. 2d 557 (1979); *Commissioner of Insurance v. Rate Bureau*, No. 7910INS58 (Filed 20 November 1979); *State ex rel. Commissioner of Insurance v. Rate Bureau*, No. 7910INS202 (Filed 20 November 1979). In each of these cases this Court has held that the Commissioner, in whole or in part, exceeded his power under the new insurance statutes enacted by the General Assembly in 1977, that the Commissioner's Findings of Fact were not supported by substantial evidence in the record or that the Commissioner acted in an arbitrary and capricious manner thereby depriving the regulated insurance companies of due process of law. In the case before us we must again vacate the disapproval order of the Commissioner.

[1] Simply speaking, the Office of the Commissioner of Insurance does not have the affirmative power to promulgate rates for workers' compensation insurance; rather, this duty has been explicitly granted by the General Assembly to the North Carolina Rate Bureau, G.S. § 58-124.17(3); *State ex rel. Commissioner of Insurance v. Rate Bureau*, No. 7910INS202 (Filed 20 November 1979). The Rate Bureau has the burden of showing that its proposed rates are fair and reasonable, *State ex rel. Commissioner of Insurance v. Rating Bureau*, 292 N.C. 70, 79, 231 S.E. 2d 882 (1977); that is, the carriers must show that under the rate schedule they will "retain a fair and reasonable profit and no more," *State ex rel. Commissioner of Insurance v. Rating Bureau*, 292 N.C. 471, 483, 234 S.E. 2d 720 (1977), and that overall rates are not "excessive, inadequate or unfairly discriminatory." G.S. § 58-124.19.

[2] Nonetheless, the new statutory scheme places on the Commissioner the burden of affirmatively and specifically showing, by material and substantial evidence, how the Bureau has not carried its burden should the Commissioner reject the proposed filing. G.S. § 54-124.21(a); § 58-9.6(b)(5). *See also, State ex rel. Commissioner of Insurance v. Rating Bureau*, 292 N.C. 70, 231 S.E. 2d 882 (1977); *State ex rel. Commissioner of Insurance v. Rate Bureau*, 40 N.C. App. 85, *supra*. If the Commissioner fails to make this affirmative showing "supported by substantial evidence," the presumption of *prima facie* correctness given to an order of the Commissioner by G.S. § 58-9.4 is rebutted and the filing will re-

main in effect. The standard of "substantial evidence" is not to be lightly regarded; it is more than a scintilla of evidence or a permissible inference; rather, "substantial evidence" is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *State ex rel. Commissioner of Insurance v. North Carolina Automobile Rate Administrative Office*, 287 N.C. 192, 214 S.E. 2d 98 (1975).

These administrative standards are the law of this State, and the Commissioner, whatever his objectives may be, and however laudable they may be, must conform with these guidelines or face the continued prospect of having each of his actions nullified or vacated by the appellate courts of this State. We hardly need to mention the inevitable detrimental consequences such ineffective regulatory review would have upon rate payers in North Carolina.

I

[3] The Bureau's first contention is that the Commissioner erred in finding that the statistical data furnished by the Rate Bureau was not reliable for rate-making purposes. The relevant findings of fact by the Commissioner are set forth as follows:

> "23. That the data upon which this filing is based has not been audited by the Bureau, the National Council on Compensation Insurance, the member companies of the Bureau, or independent auditors.
>
> 24. That the data has been subjected to an 'edit' performed by a computer and to a review for 'overall reasonableness and accuracy' performed by 'editors' employed by the National Council on Compensation Insurance (NCCI).
>
> 25. That an audit will detect errors and omissions that an edit will not detect.
>
> 26. That an 'audit' differs from an 'edit' in that an 'audit' requires the examination of sufficient competent evidential matter to ascertain the correctness of the data being utilized while an 'edit' only ascertains conformity to broad parameters of acceptability.
>
> 27. That the minimum reasonable audit procedures to be performed by the NCCI are the examination of the reported data by persons with adequate technical training as auditors

utilizing statistical sampling techniques with a sample size which is adequate to ascertain, with specified precision and reliability, the correctness of the data being reported.

28. That the accuracy of projections is dependent upon the accuracy of the underlying data.

29. That unaudited data is not reliable as a basis for making projections.

30. That the indicated rate level changes presented in this filing are projections based on unaudited data and are not reliable."

Similarly, the Commissioner articulated the following conclusions of law relating to the auditing of data.

"1. That due consideration has not been given to past and prospective loss experience within North Carolina.

2. That the proposed rates are excessive due to basing the expense allowance in the rate-making formula solely on the expense experience of stock companies when stock companies have greater expenses than other companies.

3. That countrywide expense and loss experience and other countrywide data was considered when credible North Carolina experience was available.

4. That the accuracy of projections is dependent upon the accuracy of the underlying data.

5. That unaudited data is not reliable as a basis for making projections and that the indicated rate level changes presented in this filing are projections based upon unaudited data and are not reliable.

6. That the Rate Bureau did not exercise due care in the preparation of the filing in that it failed to audit or cause to be audited the underlying data used to make projections of indicated rate level changes.

7. That the proposed rate level changes shown in the filing are excessive or inadequate to the extent that undetected errors in the unaudited data reported by companies would cause an overstatement or understatement thereof."

We do not find substantial evidence in the record to support the Commissioner's conclusion that the unaudited data was unreliable. First, on many occasions the Commissioner, sitting as a quasi-judicial trier of fact, tried to interject into the testimony his experience with alleged mistakes made in other rate filings by other classifications of carriers. First, these conclusory statements are of limited relevance, if any. We note that the Commissioner is bound to regard the rules of evidence applicable to the Trial Division of the General Court of Justice in North Carolina, since the rate-making proceeding is adversary in nature and involves "contested" matters. G.S. § 150A-29 (effective 1973). *Cf. In re Filing by Automobile Rate Office*, 278 N.C. 302, 318, 180 S.E. 2d 155 (1971), interpreting former statute G.S. § 143-317, -318, which included language concerning "legal rights, duties, or privileges," not found in G.S. § 150A-29. Second, the comments of the Commissioner made while cross examining a witness are not only not substantial evidence, they are not evidence at all. G.S. § 150A-29(b). Moreover, no documents were introduced, either by the Department or the Commissioner (however inappropriate it may be for the trier of fact to introduce evidence) to prove any mistakes which may have been detected in prior proceedings, much less to prove any errors in this proceeding. *Id.*

We next come to the testimony of Mr. Tatum, a certified public accountant (C.P.A.) working in the Department of Insurance. Mr. Tatum testified in effect that all unaudited data was unreliable. In an earlier decision, *In re Commissioner of Insurance v. Rate Bureau*, 41 N.C. App. 310, *supra*, a majority panel of this Court found that Mr. Tatum was a qualified expert witness. However, in this case, where one of the Commissioner's primary contentions is that the loss reserve data was unreliable. Mr. Tatum explained that C.P.A.s were not competent to evaluate loss reserve data:

> ". . . What I am saying is that even a certified public accountant cannot really determine the adequacy of reserves. *A CPA is not trained to determine or evaluate the reserves, he cannot certify the reserves*, it's against the professional ethics to certify the reserves." (Emphasis added.)

Stated differently, Mr. Tatum was not competent to testify that the complex statistical techniques used by the actuaries at the

National Council would not ferret out any material error in the calculation of reasonable rates, or, similarly, that even if an error in the source data were shown, that the error would, after the selective "editing" process used by the National Council, actually affect the end result in a *material* way. Moreover, Mr. Tatum did not present any evidence to show that the data used *in this Filing*, when processed by the techniques used by the National Council, was not reliable and would not produce reasonable rates.

In contrast, the Rate Bureau submitted the testimony of Roy Kallop, whose credentials are far superior to those of Byrum Tatum in matters of insurance statistics. Mr. Kallop testified as to a number of statistical and judgmental checks systematically used by the National Council:

(1) Review of listings of all daily validation runs to check the volume changes and to see if loss emergence is within certain parameters for different types of injuries;

(2) Printout and verifications of losses that exceed $10,000;

(3) Review of the relationship between total payroll and total premiums in any given year to check for aberrations in the data;

(4) Comparison of payrolls for different years for each class of case to observe any unusual changes;

(5) Comparison of computer runs of the distribution of premiums by size;

(6) Summations of unit statistical data by industry group and by classification for verification purpose;

(7) Comparisons of the report data with other statistical documents of the companies, including audited annual statements, "so that if there's any company that is not reserving properly, this would manifest itself as an anomaly in [the] procedures";

(8) Computation, for each industrial classification code, of a credibility factor for state credibility and national credibility, based upon actual experience and volume for each classification;

(9) Auditing of the National Council within the last three years by independent auditors or state insurance departments;

(10) Cross checks of the calendar year and policy year data;

(11) Review of company reportings for 3 years in a row; and

(12) Tracking of a loss development factor over a reporting period throughout a year and over a period of years in order to determine whether reserving has been too high or too low.

In addition, Mr. Kallop explained:

"The calendar year data is reconciled with policy year data. [S]o there is a check made to see that the calendar year reported is consistent with the summation of the policy year components. *The calendar year data is compared with the insurance expense exhibit.* The insurance expense exhibit is a report that is submitted to *each insurance department* by the insurance carrier. It is an exhibit that is affiliated with the annual statement . . . . [*See* G.S. § 58-21] The calendar year data cannot be actually balanced to the insurance expense exhibit in a precise sense, in that the experience that we have in our call excludes experience for the Longshore Act, because it is not part of this filing and coal mine experience, but also excludes U.S. Defense projects, rating plan experience, and coal mine experience, excess policies. *But we can check the two for reasonableness and where there is a difference, we then pursue it* to see if the difference is indeed due to the experience that normally is not included in our call. *So we do have a check for reasonableness. It is possible to detect significant variations between the company data and the insurance expense exhibit. If there is a difference between the two, then it is pursued to see if the difference might be due to an erroneous report . . .* or one of these other types of experience that is not part of our call." (Emphasis supplied.)

After explaining the sophisticated procedure of preparing and calculating data for a rate filing, Mr. Kallop summarized his professional opinion:

> "In my opinion, the methods that I have just described for making the various calculations that I have testified to and in producing the overall statewide rate level change as sound and reliable methods for doing so. These are the methods utilized by the National Council nationwide. This methodology is utilized in about forty or more states. In my opinion the methods that I have described in making the various calculations in the calculation of the overall rate level change *are actuarily sound* . . . . In my opinion, the *overall rate level change proposed in this filing is actuarily sound and is fully justified.*" (Emphasis supplied.)

Also, Mr. Kallop stated:

> ". . . In my opinion, the *data* that is utilized in this filing *is valid and reliable for rate-making purposes.*" (Emphasis supplied.)

In comparison, the Department presented no testimony by a qualified actuary who could testify that the data utilized in this Filing was not valid and reliable for rate-making purposes. Mr. Kallop's expert testimony as to the immateriality of any possible error in the edited data remains unrefuted and the Commission may not find as untrustworthy uncontradicted testimony or data submitted through competent and unimpeached witnesses. *State ex rel. Commissioner of Insurance v. Rating Bureau,* 292 N.C. 471, *supra.* We note that the instant case is distinguishable from *State ex rel. Commissioner of Insurance v. Rate Bureau,* 41 N.C. App. 310, *supra,* in several ways. First, as has already been explained, Mr. Tatum, a C.P.A., admitted in this case that a C.P.A. was not trained to evaluate loss experience data. Tatum was not competent to testify as to whether or not the statistical procedures applied by the National Council's actuaries to the source data would cull out or make adjustments for any material error that might appear in the source data, nor in fact did Tatum present any testimony which indicated that any such error in the source data did or would actually affect in a material way, the ultimate calculation of reasonable rates submitted by the Rate Bureau. Second, the uncontradicted testimony of Mr. Kallop in this case articulated with great detail how the statistical "editing" used by the National Council would detect source data errors, and how, even if a source data error were undetected, the processing, in-

cluding averaging and weighting, of the source data with time series data, calendar year data, policy year data, and in some instances countrywide data, would negate any *material* effect of such an error and would nonetheless lead to a fair calculation of *reasonable rates.*

We note that the Commissioner had substantial powers to collect any reasonable data it needed concerning the Filing but it did not do so. The Department could have shown that the data used in this Filing was inaccurate if that contention is at all true. First, G.S. § 58-16 authorizes the Commissioner to conduct any examination of the affairs of any company—and we think this includes reports made to the Rate Bureau by companies operating in this State—whenever "he deems it prudent to do so." Under the same section, the Commissioner must examine the companies at least every three years. In addition, G.S. § 58-21 requires each insurance company to file an annual statement with the Commissioner. Mr. Kallop testified, as quoted above, that the data used in this Filing was cross checked with the annual statement filed with the Department and we note that G.S. § 58-22 provides a punishment for intentional false statements made in annual statements filed with the Commissioner. Similarly, G.S. § 58-25 vests in the Commissioner the power to see any record kept by the insurance companies. Also, G.S. § 58-25.1 authorizes the Commissioner to require of any insurer a written and verified answer to any inquiry concerning the transactions and condition of the insurer. Finally, in the event G.S. § 58-16, *supra,* is insufficient, G.S. § 58-124.4 gives the Commissioner powers to require production of records and other information papers "necessary to ascertain the financial condition or legality of conduct" of any insurer, and, under this same section, the Commissioner could hire an actuary, at the carrier's expense, to assist in the examination of the records. Certainly data on loss reserves would be included within the scope of G.S. § 58-16, -124.4.

In sum, the Commissioner's Order does not sufficiently specify, based upon material and substantial evidence (G.S. § 58-9.6(b)(5); G.S. § 150A-51(5)) "in what respect and to what extent," (G.S. § 58-124.21) the rates proposed in this Filing are "excessive" or "discriminatory" (G.S. § 58-124.19(1)).

[4] Even if the Commissioner's Order were based upon substantial evidence, the action of the Commissioner in requiring audited data in this case was arbitrary and capricious, violated principles of due process and contravened the spirit if not the letter of the North Carolina Administrative Procedure Act. G.S. § 150A-1 to -64. This statement requires some elaboration.

First, the initial 14 November 1978 disapproval notice and order of the Commissioner was made upon an unlawful procedure. G.S. § 150A-51(3). The relevant portion of this notice and order provides:

> ". . . By Orders of December 7, 1977 and February 27, 1978 the Commissioner directed the North Carolina Rate Bureau and the National Council on Compensation Insurance to utilize audited loss experience as the basis of filings. You are hereby directed to furnish affidavits from each company that the reports, sent to the North Carolina Rate Bureau and the National Council on Compensation Insurance, upon which this filing is based were audited by independent auditors, including copies of the audit report and the auditors [*sic*] certification. You are further directed to furnish affidavits from the North Carolina Rate Bureau and the National Council on Compensation Insurance that the reports received from each company, upon which this filing is based, were audited by independent auditors, including copies of the auditor's report and certification. The information above is to be submitted no later than 6 December 1978."

The Order of 7 December 1977 pertained to a filing for workers' compensation rates. That Order, which in part was based upon a finding that loss experience reports were not audited, was vacated by this Court in *State ex rel. Commissioner of Insurance v. Rate Bureau*, 40 N.C. App. 85, *supra*. The Order of 27 February 1978 was affirmed in part by this Court on the auditing issue (Clark, J., dissenting), but that case, now pending appeal to the Supreme Court, pertained to automobile insurance rates and contained a substantially different set of testimony as to the reasonableness of the data used by the National Council on Compensation Insurance. Aside from the *stare decisis* effect of questions of law decided in the appellate opinions, neither the Orders of 7 December 1977 or 27 February 1978 could be binding upon

the Bureau in a subsequent filing. Each was an independent adjudication or rate-making proceeding as contemplated in the Administrative Procedure Act. G.S. § 150A-58(3), (4). Each required separate Findings of Fact. Yet, the Commissioner by his Order of 14 November 1978 purports to give these earlier Orders the effect of a "Rule." While the Commissioner certainly has the authority to issue rules and regulations necessary to carry out its statutory duties, G.S. § 58-9(1), he may not engage in rule making by adjudication, one filing at a time. The Administrative Procedure Act, from which provisions the Commissioner has not been exempted, G.S. § 150A-1(a), specifically sets forth "minimum procedural requirements," G.S. § 150A-9, which require, among other things, notice and the opportunity to be heard before the adoption of a rule. *American Guaranty & Liability Insurance Co. v. Ingram*, 32 N.C. App. 552, 233 S.E. 2d 398, *cert. denied*, 292 N.C. 729, 235 S.E. 2d 782 (1977). In particular, the statute provides:

> § 150A-12. "*Procedure for adoption of rules.*—(a) Before the adoption, amendment or repeal of a rule, an agency shall give notice of a public hearing and offer any person an opportunity to present data, views, and arguments. The notice shall be given within the time prescribed by any applicable statute, or if none then at least 10 days before the public hearing and at least 20 days before the adoption, amendment, or repeal of the rule. The notice shall include:
>
> (1) A reference to the statutory authority under which the action is proposed.
>
> (2) The time and place of the public hearing and a statement of the manner in which data, views, and arguments may be submitted to the agency either at the hearing or at other times by any person.
>
> (3) A statement of the terms or substance of the proposed rule or a description of the subjects and issues involved, and the proposed effective date of the rule."

These procedures were not followed before the Order of 14 November 1978 was issued. Nor was the "Rule" filed and published as required by G.S. § 150A-59 and § 150A-63.

Second, the order was arbitrary and capricious, G.S. § 150A-51(6), in that the order was unreasonably vague. No in-

dication was made, for example, as to whether both national and state data should be audited, whether a complete audit as opposed to a statistical audit was required, how far back the auditing must go, what statistical techniques, if any, and what sample sizes and various factors were to be used, and whether actuaries or accountants or both must conduct the audit.

Third, under the facts of this case, the order was arbitrary and capricious in that it imposes an unreasonable burden upon the North Carolina Rate Bureau to have to audit all the back records from workers' compensation companies in the nation over an unspecified period of time, particularly since no hearing was held in which the extent of this burden and the time and the cost considerations would be aired. It is one thing to require, in the future, that companies operating in North Carolina have independent audits of their reports to the Rate Bureau; it is quite another to require that all past data, particularly countrywide data be audited. The latter is patently unreasonable. In this regard it is interesting that the recent legislation amending G.S. § 58-124.20, not binding on this case, provides the Commissioner specific authority to require the filing of certain supporting data but *not* "with respect to business written prior to January 1, 1980." 1979 N.C. Adv. Legis., Serv., c. 824, sec. 2(e) (1979); that is, the legislature specifically rejected retroactive application of record keeping requirements.

The overall manner in which the Commissioner has handled the issue of auditing offends traditional notions of substantial justice and fairness and thus deprives the Bureau of the quintessential elements of due process.

Consequently, the Commissioner also erred in charging that the Rate Bureau acted dilatorily and in bad faith in not providing certain data. We have already found the Commissioner's action to be unreasonable. It naturally follows that the Rate Bureau acted properly in refusing to comply while registering its formal objection to the Commissioner's requests.

II.

[5] The Bureau's next contention is that the Commissioner erred in requiring investment income on invested capital to be taken into consideration in the rate-making formula. We agree. Quite

simply, stock companies with a conservative dividend policy would be penalized under such a requirement because interest income on their retained earnings or any "excess reserves" the company might have would be translated into a lower underwriting margin allowed on total premiums. In contrast, companies which kept their shareholders equity to a minimum would be allowed higher percentages because they would have less investment income to be considered in the calculation. Such a policy would discourage prudent financial management.

It is fundamental to recognize that insurance underwriters in this State are regulated in a different way than are utilities. Utilities are capital intensive and investors are allowed a fair return on their capital. In contrast, insurance underwriters provide a "service," and it has long been the rule in this State that it is more appropriate that allowable profit levels be ascertained by specifying an appropriate percentage of total premiums—their "underwriting margin." *In re Filing By Automobile Rate Office*, 278 N.C. 302, 314-315, 180 S.E. 2d 155 (1971); *In re Filing By Fire Insurance Rating Bureau*, 275 N.C. 15, 38, 165 S.E. 2d 207 (1969); *State ex rel. Commissioner of Insurance v. State ex rel. Attorney General*, 19 N.C. App. 263, 267-68, 198 S.E. 2d 575, *cert. denied*, 284 N.C. 252, 200 S.E. 2d 659 (1973). *See also Commissioner of Insurance v. Attorney General*, 16 N.C. App. 724, 729, 193 S.E. 2d 432 (1972).

Our decision in *State ex rel. Commissioner v. Rate Bureau*, 40 N.C. App. 85, *supra*, in which we held that it was proper for the Commissioner to consider investment income on unearned premium reserves and loss reserves, in no way extended to investment income on investor capital. Nor was such a result intended by the inadvertent use of the language "capital invested by insurer" in the majority opinion of *State ex rel. Commissioner of Insurance*, 41 N.C. App., *supra*, at 318. We now expressly hold that it is not proper for the Commissioner to consider investment earnings on capital invested by insurers in reviewing the rate-making formula proposed by the Rate Bureau.

We note that this result is also consistent with the recent amendment to G.S. § 58-124.19(2) which expressly allows consideration of investment income on unearned premiums and loss reserves but conspicuously leaves out investment income on investor capital. 1979 N.C. Adv. Legis. Serv., c. 824, sec. 1.

III.

[6] Counsel for the State conceded in oral argument that the Commissioner erred in finding that the proposed rate increase was in violation of federal wage and price guidelines. We agree with counsel. First, the wage and price guidelines were not promulgated until approximately two weeks after the filing became effective. In addition the guidelines were only voluntary. We do not need to reach the question of whether the Commissioner's disapproval upon this ground is an appropriate "judgment factor" under G.S. § 58-124.19(2).

IV.

[7] We agree with the Bureau that the Commissioner erred in finding that the Filing did not take into account the effect of the average 28.4% increase put into effect 1 February 1978. Indeed, the State conceded this point in its brief. Both Mize and Kallop testified for the Bureau that the increase was included in this Filing. There is absolutely no evidence in the record to support the Commissioner's finding.

V.

As we have already held that the Commissioner's findings of fact on the auditing issue were not backed by substantial evidence in the record, we do not need to consider whether the Commissioner improperly admitted both the testimony of Dr. William Fairley at a prior hearing and the *North Carolina Work Injury* exhibits.

The Rate Bureau's contentions concerning adoption of Dr. Fairley's profit theory, the burden of proof, use of countrywide data, and stock company expense data have already been resolved in the Bureau's favor by our earlier opinion in 40 N.C. App. 85, *supra.*

VI.

The Commissioner's Order disapproving the Filing by the Rate Bureau is vacated, and the rates proposed in the 12 October 1978 filing by the Rate Bureau are deemed approved, and remain in effect until changed as by law provided, and the reserved funds placed by the member insurance companies in the escrow account

pursuant to G.S. § 58-124.22(b) shall be remitted with interest to the member insurers by the escrow agents.

Vacated.

Judge ERWIN concurs and files concurring opinion.

Judge ARNOLD concurs in part and dissents in part and files opinion.

Chief Judge MORRIS concurs in this opinion for the sole purpose of clarifying the holding of this Court in *State ex rel. Commissioner of Insurance*, 41 N.C. App., *supra*, at 318, pertaining to investment income on investor capital as a factor to be considered in rate-making. Clark, J., and Arnold, J., the other two judges on the panel in that case, are on the panel in the case *sub judice*.

Judge ERWIN concurring.

The record in the instant case provides forceful and compelling reasons to vacate the order entered by the Commissioner as stated in the opinion. The testimony of William B. Fairley given in a prior case was considered by the Commissioner. Fairley did not appear as a witness in the case *sub judice*. The Rate Bureau did not have an opportunity to cross-examine him as to the issues in this case. In the case of *Commissioner of Ins. v. Rate Bureau*, 44 N.C. App. 75, 259 S.E. 2d 926 (1979), No. 7910INS58, I dissented from the majority opinion which vacated the order of the Commissioner. In comparing the two cases, I find a marked distinction compelling the vacating of the order in the instant case which did not appear of record in *Commissioner of Ins. v. Rate Bureau, supra*.

Judge ARNOLD dissenting.

I concede that the Commissioner appears to have disregarded the greater weight of the evidence, and the better logic, in the instant case by disregarding Mr. Kallop's testimony. However, I dissent from the majority's holding that there is no substantial evidence to support the Commissioner's conclusion that the

unaudited data was unreliable. Mr. Tatum's statement that a "CPA is not trained to *determine or evaluate the reserves*" (emphasis added) does not lead to the conclusion that a CPA is therefore unqualified to give an opinion concerning the reliability of unaudited reports and whether they are an appropriate basis on which to base future projections.

In summary, while I do not agree with the conclusion reached by the Commissioner, I cannot hold that there is no evidence to support it. On this point only, and such legal conclusions as follow, I dissent.

ROY H. JOHNSON, W. CONNETTE JOHNSON, FORREST H. HARMON, LEWIS E. LAMB, JR., AND ALVIN A. STURDIVANT, JR., D/B/A KERNERS VILLAGE COMPANY v. PHOENIX MUTUAL LIFE INSURANCE COMPANY AND CAMERON-BROWN COMPANY

No. 7821SC1130

(Filed 18 December 1979)

1. **Fraud § 1— elements**

The essential elements of actionable fraud require that there be a material misrepresentation that relates to a past or existing fact, is definite or specific, was made with knowledge of its falsity or culpable ignorance of its truth, was made with the intention that it should be acted upon, and causes reasonable reliance on the part of the recipient of the misrepresentation to his detriment.

2. **Fraud § 12— construction of shopping center—procuring mortgage loan—substitution of tenants—summary judgment improper**

In an action to recover for fraud by defendant Cameron-Brown, which had been given the exclusive right to negotiate a permanent mortgage loan for plaintiff partners to construct a shopping center, evidence of defendant's fraud was sufficient to be submitted to the jury and the trial court erred in entering summary judgment for defendant where such evidence tended to show that an agent of defendant had told plaintiffs that their having secured four named tenants for the shopping center was sufficient for defendant insurance company to make the permanent loan and that the other tenants would be no problem; the agent represented to plaintiffs that substitution of tenants would be no problem; the agent intended that plaintiffs rely on these representations and advance funds toward the project's completion; there was ample evidence that the agent knew or had reason to believe that his representation as to the ease of substitution was false; plaintiff's attempts to obtain other tenants proved difficult under the terms of defendant insurance company's loan com-

mitment; the agent knew or had reason to believe that the commitment was conditioned on leases which had not been, and might never be, negotiated, especially a bank lease; plaintiffs entered into a construction loan agreement with a bank which required plaintiffs to comply with the terms of its commitment with defendant insurance company, and the construction lender insisted that plaintiffs comply with that part of the commitment requiring plaintiffs to have a ground lease with a named bank; and because plaintiffs were unable to satisfy defendant insurance company, the construction lender refused to advance construction funds, and defendant insurance company subsequently exercised its option to terminate the loan commitment.

3. **Fraud § 12— procurer of mortgage loan—fiduciary relationship—constructive fraud—summary judgment improper**

In an action to recover for fraud by defendant, who had been given the exclusive right to negotiate a permanent mortgage loan for plaintiff partners to construct a shopping center, the trial court erred in entering summary judgment for defendant where the evidence tended to show that an agency relationship existed between plaintiffs and defendant, that plaintiffs placed great reliance on representations by defendant's agent, and that defendant was deeply involved in negotiations between plaintiffs and defendant insurance company, since the evidence did not show that, as a matter of law, no confidential or fiduciary relationship was established between plaintiffs and defendant, and evidence was sufficient to show that defendant was therefore guilty of constructive fraud.

4. **Unfair Competition § 1— procurer of mortgage loan—regulation by Fair Trade Act**

Defendant Cameron-Brown was engaged in the commerce or trade of selling its services as a loan finder for plaintiffs' permanent loan and therefore was regulated by G.S. Chapter 75 prohibiting unfair and deceptive trade practices.

5. **Limitation of Actions § 8.1— fraud—time of discovery**

Plaintiffs' claims of fraud and unfair and deceptive trade practices against defendant, who was to negotiate a permanent mortgage loan for them to construct a shopping center, were not barred by the statute of limitations where plaintiffs only gradually became aware of the facts constituting fraud, and plaintiffs were not made aware of such facts by the time a bank terminated its construction loan commitment with plaintiffs.

Judge CLARK dissenting.

APPEAL by plaintiffs from *McConnell, Judge*. Judgment entered 18 May 1978 in Superior Court, FORSYTH County. Heard in the Court of Appeals 31 August 1979.

The plaintiffs in this action are partners in a partnership named Kerners Village Company (KVC), formed in March 1973 to develop a shopping center near Kernersville, North Carolina. In May 1973 KVC entered into a written agreement with defendant

Cameron-Brown Company (Cameron) giving Cameron the exclusive right to negotiate a permanent mortgage loan for $1,350,000 with interest at an annual rate of 8½ percent. At the time KVC authorized Cameron to seek a loan commitment, KVC had negotiated only four leases for the center: Lowe's, Macks, Revco, and Goodyear. These were regarded by KVC and Ralph W. Mullins, Cameron's agent, as major credit tenants. KVC had informed Mullins that while they were discussing possible leases with Sears and the Bank of North Carolina, such leases had not been secured. Mullins sought a loan commitment from Phoenix Mutual Life Insurance Company (Phoenix).

In early July, not having received a commitment, KVC contacted Mullins expressing its concern about delays in the project and informing Mullins that it had other lenders who were interested in making a loan for the project. Mullins then urged Phoenix to make a prompt offer. On 20 July 1973, Phoenix tendered a commitment to KVC for a fifteen-year loan of $1,300,000 at nine percent interest. KVC accepted the commitment in a letter dated 30 July 1973 subject to two conditions. On 14 August 1973 Phoenix modified its loan commitment offer along lines similar to those suggested by KVC, and KVC accepted the offer as modified on 30 August 1973.

The loan commitment was conditioned, *inter alia*, on there being in effect at the time of the closing leases to Lowe's Foods, Inc., Macks Stores, Inc., Revco, Inc., Goodyear Co., Sears Catalogue Store, and the Bank of North Carolina, for given terms of fifteen or twenty years, each at a specified annual rent. The loan commitment further required that KVC find an interim construction lender reasonably acceptable to Phoenix who would be willing to agree to assign the loan to Phoenix at par upon completion of construction. The loan commitment provided, "This commitment may be terminated at our election if such agreement has not been delivered to us within ninety days from the date of your acceptance of this commitment." Following these events, KVC paid Cameron a loan commitment fee of $13,000 and Phoenix a stand-by fee of $26,000.

In early September, KVC informed Mullins that Sears had declined to enter a lease, but that Pic-'N-Pay Stores was available as a substitute. Mullins recommended to Phoenix that Pic-'N-Pay

be substituted for Sears. Further discussions took place between Mullins and KVC as to a reduction in the total square feet available for rent in the project. On 9 October 1973, Mullins wrote to Phoenix, providing a revised schedule of estimated income for the center. On 27 November 1973, KVC sent Mullins an amendment to the commitment in which Phoenix agreed to substitute Pic-'N-Pay, but also proposed to reduce the loan to $1,200,000. KVC accepted the revised commitment and on 4 December 1973 Mullins returned it to Phoenix.

Pic-'N-Pay did not sign and on 7 January 1974 Mullins informed Phoenix of this development and requested that Phoenix allow future substitution of an unknown tenant for Pic-'N-Pay. On 22 January 1974 Phoenix wrote to Mullins advising that it would allow substitution of Pic-'N-Pay, but would require $140,260 per year *in credit lease income, including the bank lease*, to substantiate the $1,200,000 loan. Mullins promptly advised KVC of Phoenix's response. Mullins resigned from Cameron on 31 January 1974.

KVC did not obtain a firm commitment from the Bank of North Carolina or any other bank because approval by the North Carolina Banking Commission prior to the commencement of construction could not be obtained. Due to the above difficulties and the inability of KVC to raise the $100,000 difference in permanent loan financing, KVC's construction lender, North Carolina National Bank (NCNB) refused to advance funds. As a result of the delay in obtaining financing for the project, construction costs increased, necessitating renegotiation of all the leases. Subsequent negotiations between the parties proved unsuccessful and Phoenix terminated the commitment by letter dated 16 July 1974. Requests by KVC to obtain a refund of the $26,000 stand-by fee it had paid to Phoenix and the $13,000 placement fee it had paid to Cameron were denied.

Through its partners KVC filed suit against Phoenix and Cameron alleging that the defendants entered into a deliberate course of conduct designed to force KVC into an untenable economic condition so that completion of the project would be impossible. KVC averred that on 17 June 1974 Phoenix cancelled its previous loan commitments and issued a new one at a higher interest rate with a hold-back clause for $250,000 knowing its offer

would be unacceptable to KVC and KVC would be forced to abandon its project. The complaint alleged that as a result of the defendants' actions, compliance with earlier loan commitments was rendered impossible and that the above actions constituted unfair and deceptive trade practices in violation of Chapter 75 of the North Carolina General Statutes entitling KVC to treble damages and reasonable attorney's fees. Plaintiffs additionally averred that the stand-by fee collected by Phoenix and placement fee they paid Cameron were unearned and accordingly should be returned.

Defendants answered plaintiff's complaint denying liability for any damage sustained by KVC and moved for summary judgment under G.S. 1A-1, Rule 56. This motion was granted by the trial court, based upon the pleadings, the dispositions of all partners comprising KVC, the deposition of agent Fredrick A. Osmers of Phoenix, and the affidavit of agent Ralph W. Mullins (Mullins) of Cameron. From this judgment plaintiffs appeal.

Badgett, Calaway, Phillips, Davis & Montaquila, by Chester C. Davis, for plaintiffs appellants.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by John L. Jernigan and Raymond H. Goodmon III, for defendant appellee Cameron-Brown Company.

Cansler, Lockhart, Parker & Young, P.A., by Thomas Ashe Lockhart and George K. Evans, Jr., for defendant appellee Phoenix Mutual Life Insurance Company.

WELLS, Judge.

The single issue presented in this appeal is whether the trial court erred in granting defendants' motions for summary judgment. Summary judgment is appropriate only "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); *Cox v. Funk*, 42 N.C. App. 32, 255 S.E. 2d 600 (1979).

[1] "Summary judgment is apt to be inappropriate in an action based on a complex scheme of fraud where the court is asked to decide the motion on lengthy affidavits and documents and

voluminous depositions." 6 Moore's Federal Practice ¶ 56.17 [27], p. 866 (2d ed. 1979). The case before us is precisely such an action. Plaintiffs contend that Mullins' statement as to the ease with which plaintiffs could substitute other tenants for the minor tenants which would have to be listed in the loan commitment were false and fraudulent. The essential elements of actionable fraud require that there be a material misrepresentation that: 1) relates to a past or existing fact; 2) is definite and specific; 3) was made with knowledge of its falsity or culpable ignorance of its truth; 4) was made with the intention that it should be acted upon; and 5) causes reasonable reliance on the part of the recipient of the misrepresentation to his detriment. *Rosenthal v. Perkins*, 42 N.C. App. 449, 257 S.E. 2d 63 (1979). In order for each defendant to prevail on its Rule 56 motion each must show that evidence of one or more of the above elements of fraud is unavailable to the plaintiffs. *Russo v. Mountain High, Inc.*, 38 N.C. App. 159, 247 S.E. 2d 654 (1978).

[2] The depositions before the trial court show a sufficient forecast of evidence that: 1) agent Mullins of Cameron had told KVC that their having secured Lowe's, Revco, Macks and Goodyear as tenants was sufficient for Phoenix to make the permanent loan and that the other tenants would be no problem; 2) Mullins intended that KVC rely on this representation and advance funds towards the project's completion; 3) KVC's attempts to obtain other tenants proved difficult under the loan commitment of 20 July 1973; 4) Mullins knew, or had reason to believe, that the commitment was conditioned on leases which had not been, and might never be, negotiated, especially the bank lease; 5) KVC entered into a construction loan agreement with NCNB which required KVC to comply with the terms of its commitment with Phoenix and NCNB insisted that KVC comply with that part of the Phoenix commitment requiring KVC to have a ground lease with the Bank of North Carolina; and 6) because KVC was unable to satisfy Phoenix, NCNB refused to advance construction funds and Phoenix subsequently exercised its option to terminate the loan commitment.

The depositions, based on first-hand knowledge of two of KVC's officers, reveal that Cameron, through agent Mullins, had represented to plaintiffs that substitution would be no problem.

According to Lewis E. Lamb, Jr., at the time KVC submitted its original loan application:

> . . . Mr. Mullins reviewed the progress of the loan and he said, "You have secured the four major tenants, which is our primary interest." The four major tenants were Lowe's, Revco, Macks and I believe Goodyear. There was some discussion of the minor tenants, at which time we had some discussion of our negotiations with Sears, but he (Mullins) said that was of no consequence. He (Bill Mullins) said whoever your local, or minor, tenants are, that is—I can't recall if the word substitution was used, or something to that effect. Anyway, . . . what he was conveying was that . . . the loan was not contingent on the . . . smaller leases. He said, "you have gotten your four majors, [and] I have no reason to think that the loan will not . . . go through."
>
> * * *
>
> At the first meeting, Mullins said these four major tenants were acceptable for the progress of the loan (i.e., the permanent financing for this shopping center.)
>
> * * *
>
> Q. (Lockhart): So, when you signed Exhibit One (the July 20, 1973 loan commitment), you knew, and you were on notice, that if you and your associates did not have all of these leases specified in Paragraph Nine, that Phoenix would not have any obligation to make that loan, didn't you?
>
> A. No, I didn't because Mr. Mullins had told me differently.
>
> Q. Different from what you see in that letter there?
>
> A. Yes.

Similarly, in his deposition Roy Johnson stated that at the time the KVC partners signed the loan commitment from Phoenix of 20 July 1973:

> Well, we didn't have [the] Sears Store. We didn't have a bank. We may or may not ever get Sears. That's what we knew at that time. But we did have four credit tenants with

> 73 percent of our space leased and substitutions were not a great problem in the minds of Bill Mullins or ourselves. . . . Well, let me restate that. He led us to believe that there was no problem and he was the expert.

There can be no doubt that this representation was material and specific.

There is also ample evidence that Mullins knew or had reason to believe that his representation as to the ease of substitution was false. Roy Johnson stated in his deposition that on 27 November 1973, at the time Phoenix offered to amend its previous loan commitment, "we had been assured by the people at Cameron-Brown that this would be one of the contingencies that would be taken out [of the commitment]." Nonetheless, Osmers, Phoenix's agent, stated:

> Q. (Davis): When was the first time that Mr. Mullins mentioned having a problem with the bank lease or of taking the bank requirement out of the loan commitment, do you recall?
>
> A. Never was mentioned at any time. . . . Never had any telephone conversations at all about the bank lease.

Osmers also stated in his deposition the importance of the bank ground lease to Phoenix:

> Q. And it was a matter of significance to the company in approving this project for a loan to have a bank at the facility where the shopping center would be?
>
> A. That's right. . . . The bank has stability, and they are considered usually good tenants, and in this instance, they were going to build their own improvements. . . .
>
> Q. It wasn't just the annual rent that the bank would produce, it was the character and nature of the banking business and the fact that the bank would be building its own improvements that would have value to the project?
>
> A. That's right.

There was also evidence that Cameron was unaware of the problem with the bank until a later date, that some substitutions were routinely granted by lenders such as Phoenix and that Roy

Johnson's personal knowledge of the events to which he testified during the deposition was limited. The previous testimony, however, was sufficient to raise a material issue of fact as to whether Mullins intentionally deceived plaintiffs or made culpably ignorant representations.

> The existence of fraud necessarily involves a question concerning the existence of a fraudulent intent on the part of the party accused of such fraud. The intent of a party is a state of mind generally within the exclusive knowledge of that party and, by necessity, must be proved by circumstantial evidence. Summary judgment is generally inappropriate under such circumstances.

Bank v. Belk, 41 N.C. App. 328, 339, 255 S.E. 2d 430, 437 (1979).

[3] We have been discussing the elements of *actual* fraud. Since the record contains evidence of an agency relationship between KVC and Cameron, that KVC placed great reliance on Mullins' representations, and that Cameron was deeply involved in the negotiations between KVC and Phoenix, we cannot say that, as a matter of law, no confidential or fiduciary relationship was established between KVC and Cameron. If Cameron should be found to have been KVC's agent, Cameron was a fiduciary. *Vail v. Vail*, 233 N.C. 109, 63 S.E. 2d 202 (1951). As such, Cameron could be found to have committed "constructive fraud" even in the absence of actual dishonesty or intent to defraud. *Priddy v. Lumber Co.*, 258 N.C. 653, 129 S.E. 2d 256 (1963).

There can be no dispute that the depositions provided ample evidence to show Mullins intended that KVC risk a great deal of the partners' capital in reliance on his representations that a loan would be forthcoming from Phoenix, or that large sums were lost by KVC when the project fell through. Under these circumstances the reasonableness of KVC's reliance on Mullins' alleged misrepresentations became a question to be resolved by the trier of fact. *See, Johnson v. Lockman*, 41 N.C. App. 54, 254 S.E. 2d 187 (1979), *disc. rev. denied*, 297 N.C. 610, 257 S.E. 2d 436 (1979). Similarly, it cannot be said that as a matter of law Mullins' alleged assurances regarding the availability of substitutions were merely opinions of what future action Phoenix would take with respect to KVC's requests to substitute, as contended by Cameron, which would render any such misrepresentations inac-

tionable. *See, e.g., Myrtle Apartments v. Casualty Co.*, 258 N.C. 49, 127 S.E. 2d 759 (1962). Given the expressed reliance by KVC on Mullins' expertise, a reliance which the evidence shows was encouraged by Mullins, Mullins' representations were factual in nature, an explanation of the terms and conditions of the commitment KVC was considering accepting from Phoenix, based on Mullins' prior experience.

On motion for summary judgment we cannot say that Phoenix's substitute loan commitment offer of 17 June 1974, which did not include a bank or Sears, but which stated a higher annual interest rate, plus a $250,000 "hold back" of funds by Phoenix unless certain conditions were met by plaintiffs, was sufficient to preclude plaintiffs from suffering any loss as a result of Mullins' alleged misrepresentations. Nor do we agree with defendant Cameron's contention that because the plaintiffs never found *any* substitute tenants to replace Sears and the Bank of North Carolina, any misrepresentation which Cameron may have made with respect to the ease of substitution was not a cause of the decisions of Phoenix and NCNB to cancel their respective loan commitments. The point is that from the depositions before the trial court, plaintiffs have shown a sufficient forecast of evidence showing difficulty in obtaining permission from Phoenix to substitute *anyone* other than a bank for the Bank of North Carolina. This evidence is sufficient to show that plaintiffs were fraudulently misled or misinformed by Cameron as to the extent of this difficulty. Plaintiffs, to survive defendant Cameron's motion for summary judgment, are not required to go through the mere formality of obtaining actual substitute tenants who would ultimately be rejected by Phoenix.

Neither are we convinced by defendant Cameron's argument that plaintiffs' damages were caused solely by NCNB's cancellation of its construction loan agreement. Under the specific terms of plaintiffs' commitment with NCNB, plaintiffs' construction loan was conditioned upon plaintiffs' "faithful and timely compliance with all the terms and conditions of [its] commitment [with Phoenix]." Phoenix cancelled its commitment to make a permanent loan on grounds that KVC had not obtained a construction loan. There is certainly a question of fact whether NCNB would have had the right to terminate its construction loan agreement with plaintiffs if substitution for the Bank of North Carolina had

been expeditiously permitted by Phoenix under the loan commitment between Phoenix and plaintiffs.

If plaintiffs were induced to employ defendant Cameron by fraudulent misrepresentations as to the ease of substitution for KVC's tenants, Cameron would be precluded by its conduct from retaining the $13,000 "placement fee" it had collected from plaintiffs. *Tuggle v. Haines*, 26 N.C. App. 365, 216 S.E. 2d 460 (1975), *cert. denied*, 288 N.C. 253, 217 S.E. 2d 681 (1975). The "placement fee" was clearly in the nature of a commission for obtaining a lender for KVC's permanent loan.

Although we have determined that the depositions presented a sufficient forecast of evidence available to plaintiffs showing that Cameron, through its agent Mullins, could have deceived and misled plaintiffs, there is no such evidence against Phoenix. All of the evidence adduced shows that Phoenix acted wholly within its contractual prerogative in cancelling its commitment with the plaintiffs. There was no forecast of evidence produced by plaintiffs in support of their allegation of collusion between Phoenix and Cameron to force plaintiffs to abandon their project. Nor was there any evidence produced of misconduct on the part of Phoenix.

Furthermore, from the uncontradicted deposition of Phoenix's agent, Osmers, Phoenix did not pay Cameron any commission or fee for placing the KVC loan and there was no apparent contractual or agency relation between Phoenix and Cameron. Accordingly, summary judgment for Phoenix on both plaintiffs' first cause of action concerning fraud as well as their second cause of action under Chapter 75 of the North Carolina General Statutes was properly granted by the trial court. Similarly, the record fails to show any evidence of Phoenix's willingness to cancel its original loan commitment unless the plaintiffs would enter into a substitute commitment. Under these circumstances there was no "mutual cancellation" of the original loan commitment, and summary judgment for defendant Phoenix was properly granted on plaintiffs' third cause of action. *See, Vickery v. Fisher Governor Co.*, 417 F. 2d 466 (9th Cir. 1969).

The trial court also dismissed plaintiffs' second cause of action against defendant Cameron brought pursuant to Chapter 75 of the North Carolina General Statutes. On 14 June 1977, at the

time plaintiffs filed their complaint in this action, G.S. 75-1.1 provided in pertinent part:

> (a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.
>
> (b) The purpose of this section is to declare, and to provide civil legal means to maintain, ethical standards of dealings between persons engaged in business, and between persons engaged in business and the consuming public within this State, to the end that good faith and fair dealings between buyers and sellers at all levels of commerce be had in this State.
>
> * * *
>
> (d) Any party claiming to be exempt from the provisions of this section shall have the burden of proof with respect to such claim.

G.S. 75-1.1(a) and (b) were subsequently rewritten, effective as to actions commenced on or after 27 June 1977, to state:

> (a) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.
>
> (b) For the purposes of this section, "commerce" includes all business activities however denominated, but does not include professional services rendered by a member of a learned profession.

1977 N.C. Sess. Laws, ch. 747. The amendment, effective two weeks after the present action was filed, is not applicable here.

[4] Since we have held that there was sufficient evidence of fraud to withstand defendant Cameron's motion for summary judgment, this evidence would likewise be sufficient to constitute an unfair or deceptive act under G.S. 75-1.1(a). *Hardy v. Toler*, 288 N.C. 303, 218 S.E. 2d 342 (1975). Cameron, however, argues that prior case law and the qualifying language of G.S. 75-1.1(b) referring to "buyers and sellers" renders Chapter 75 inapplicable to the present action. We do not agree.

We have previously held that a real estate agency was engaged in "trade or commerce" within the purview of G.S. 75-1.1(a). *Rosenthal v. Perkins*, 42 N.C. App. 449, 257 S.E. 2d 63 (1979). Similarly, a Federal court applying North Carolina substantive law has held that chapter 75, as this statute was worded prior to the 1977 amendments, was applicable to the sale of insurance. *Ray v. Insurance Co.*, 430 F. Supp. 1353 (W.D.N.C. 1977). We hold that defendant Cameron was engaged in the commerce or trade of selling its services as a loan finder for plaintiffs' permanent loan, and as such, was regulated by Chapter 75. Our Supreme Court's decision in *State ex rel. Edmisten v. Penney, Co.*, 292 N.C. 311, 233 S.E. 2d 895 (1977), holding Chapter 75 inapplicable to debt collection practices, is factually distinguishable from the present action. In light of the General Assembly's action amending the statute virtually immediately after the *J. C. Penney* opinion was filed, we believe the Court's holding in that case should be narrowly construed.

[5] Defendant Cameron also argues that plaintiffs' claims for fraud and under Chapter 75 are barred by the statute of limitations. The three-year statute is applicable to both causes of action. G.S. 1-52(9); *Holley v. Coggin Pontiac, Inc.*, 43 N.C. App. 229, 259 S.E. 2d 1 (1979). However, the statute accrues from the time a reasonable person would be put on notice of the facts constituting fraud. *Driggers v. Commercial Credit Corp.*, 31 N.C. App. 561, 230 S.E. 2d 201 (1976). Whether a plaintiff should have discovered these facts more than three years prior to the institution of the action is ordinarily for the jury to decide. *Huss v. Huss*, 31 N.C. App. 463, 230 S.E. 2d 159 (1976).

In the present action there is evidence that plaintiffs only gradually became aware of the difficulty of substitution. We do not agree with defendant Cameron that, as a matter of law, plaintiffs were aware of the difficulty of substitution by 23 May 1974, the date NCNB terminated its construction loan commitment with plaintiffs. The record provides evidence that at that point in time Phoenix was preparing a proposal that would have deleted Sears and any bank from the loan commitment. A jury could reasonably find that plaintiffs could not have been expected to discover the fraud until after they realized the terms under which Phoenix would permit substitution.

We affirm the trial court's award of summary judgment as to defendant Phoenix on all plaintiffs' claims, and reverse the granting of defendant Cameron's motion for summary judgment as to plaintiffs' claims for fraud, violation of G.S. 75-1.1 and the return of plaintiffs' placement fee.

Affirmed in part and reversed in part.

Judge ERWIN concurs.

Judge CLARK dissents.

Judge CLARK dissenting.

The majority concludes that Mullins of Cameron-Brown falsely represented to the KVC partners that "substitution would be no problem."

Assuming that this conclusion is supported by the depositions of the partners and that it was a representation of subsisting fact rather than an opinion or promissory representation, it must be considered in light of the circumstance that Cameron-Brown was a loan broker without any duty to solicit and obtain tenants to occupy space in the Kerners Village project. Nor is there anything in the representation that would relieve the KVC partners of the duty to make a reasonable effort to obtain tenants acceptable to Phoenix. Subsequent to the so-called misrepresentation Phoenix did allow Pic-'N-Pay as a substitution for Sears with no problem to the partners. The statement in the majority opinion that "it cannot be said as a matter of law Mullins' alleged assurances regarding the *availability* of substitutions" (emphasis added) indicates to me that the representation was interpreted to mean that acceptable tenants were readily available rather than that acceptable tenants obtained by the partners could be substituted with ease or with no problem. That the partners did not find such tenants available does not have the retroactive effect of making Mullins' statements a misrepresentation which would constitute an element of actual fraud. Nor does the failure of the partners to find acceptable substitute tenants create a breach by Mullins of a fiduciary duty to disclose all material facts so as to constitute constructive fraud. It is my opinion that all defendants carried the burden of establishing that there was no

material issue of facts on plaintiffs' claims for fraud or for violation of G.S. 75-1.1, and I would affirm the summary judgment in favor of all defendants.

I. H. EUBANKS, ADMINISTRATOR OF THE ESTATE OF JAMES ELLIS "BILLY" EUBANKS v. FIRST PROTECTION LIFE INSURANCE COMPANY

No. 794SC79

(Filed 18 December 1979)

1. **Rules of Civil Procedure § 7— pleading not counterclaim—reply not required**

Plaintiff's failure to file a reply to defendant's purported "counterclaim" did not operate as an admission of the facts alleged therein where defendant's pleading did nothing more than raise an affirmative defense to plaintiff's cause of action to which a reply was neither required nor permitted by G.S. 1A-1, Rule 7(a). G.S. 1A-1, Rule 8(c) and (d).

2. **Insurance § 37— action on life insurance policy—prima facie case**

Defendant insurer's admission in the pleadings of execution and delivery of a policy of credit life insurance, payment of premium, and death of the insured established plaintiff's prima facie case in an action on the policy, and the burden was then on defendant to prove its allegations of false and material representations justifying its refusal to pay benefits.

3. **Rules of Civil Procedure § 9— action by administrator—failure to allege authority—amendment at close of evidence**

Plaintiff administrator's failure to make an affirmative averment in the complaint showing his capacity and authority to sue as required by G.S. 1A-1, Rule 9(a) was cured by amendment at the close of the evidence in the trial.

4. **Insurance § 2; Principal and Agent § 5.2— admission of agency in interrogatories—evidence of agent's acts**

Where defendant insurer admitted in its answer to interrogatories that a car dealer had authority to enroll eligible debtors under a master group policy of credit life insurance, defendant cannot complain of evidence of the car dealer's role as defendant's agent in the execution of the credit life insurance policy issued to the insured.

5. **Insurance § 21— prior credit life insurance coverage—irrelevancy to incontestability clause**

In an action to recover under a policy of credit life insurance, evidence of prior, expired policies of credit life insurance issued by defendant to the decedent were not admissible to establish that defendant had continuously covered decedent for a period exceeding two years and was therefore barred by the policy's incontestability clause from raising the defense of misrepresentation.

6. Insurance § 18.1— credit life insurance—misrepresentations as to medical treatment—instructions not presented by evidence

In an action on a credit life insurance policy in which defendant denied liability on the ground of misrepresentations by insured concerning medical treatment within a year prior to the application, the court's instruction that twelve months may reasonably be understood "to mean approximately twelve months" was not presented by the evidence and was thus erroneous where defendant's uncontradicted evidence showed that insured received the medical treatment within six months of the date of his application, a time span which could not reasonably be equated with "approximately twelve months." Similarly, the court's instruction that a representation on an application for insurance that the applicant is in good health does not require that he be in perfect health, and that a representation that the applicant does not suffer from a particular disease is not necessarily false merely because the applicant does not have that disease was erroneous as not being presented by the evidence since the provision in question referred to whether the applicant had been treated for, or advised to have treatment for, certain listed diseases, not whether he knew the state of his own health or of his affliction with a particular disease.

7. Insurance § 18.1— credit life insurance—misrepresentation of medical treatment—instruction on materiality

In an action on a credit life insurance policy, the trial court erred in instructing the jury that a misrepresentation in an application for an insurance policy will prevent recovery on the policy if it is "false and material" where the alleged misrepresentation related to medical treatment and was thus material as a matter of law.

APPEAL by defendant from *Strickland, Judge*. Judgment signed 23 October 1978 and filed 24 October 1978 in Superior Court, JONES County. Heard in the Court of Appeals 26 September 1979.

This action was originally brought in the name of James Ellis Eubanks, by I. H. Eubanks, against First Protection Life Insurance Company to recover $20,000.00, the benefits of a credit life insurance policy issued by the defendant Company effective 7 February 1977 on the life of James E. Eubanks. In the complaint plaintiff alleged the execution of the policy payable to R & W Chevrolet Co., Inc. and in the alternative to the Estate of James Ellis Eubanks, payment of premium, the death of the insured on 26 April 1977, submission of proof of death of the insured, demand for payment, and defendant's refusal to pay. In addition, plaintiff alleged that for at least two years prior to plaintiff's intestate's death, defendant had issued credit life insurance policies on James E. Eubanks's life. In its answer, defendant admitted the is-

suance of a $20,000.00 credit life insurance certificate on the life of James E. Eubanks, the first beneficiary being R & W Chevrolet Company, Inc., and the second beneficiary being the Estate of James Ellis Eubanks. Defendant further admitted receipt of proof of the death of the insured, but alleged in what was captioned a "counterclaim" that in his application for insurance the insured had made material representations concerning medical treatment which were false, and that the claim was denied because of the misrepresentations. Refund of the premium had been tendered but refused. Included in the answer was a motion to dismiss, which the court subsequently denied.

On 25 July 1978 defendant moved for summary judgment on the ground that there was no genuine issue as to any material fact, and on 9 August 1978, plaintiff made a similar motion. Both motions were denied, and the case came on for trial at the 18 September 1978 term of Superior Court in Jones County.

Plaintiff presented evidence at trial that on 1 October 1976 plaintiff's intestate, James Ellis Eubanks, purchased a tractor-trailer from R & W Chevrolet Company, Inc. The purchase was financed through GMAC. The financing contract on the 1 October 1976 purchase was due 1 January 1977. Because plaintiff's intestate was unable to pay the $31,475.76 owing on the contract on 1 January, he agreed in early February to pay $5,000.00 on the account, and a credit life insurance policy was drawn up within a week. Application for the policy was signed by him some time prior to 7 February 1977. At the time it was signed, the manager of R & W Chevrolet was present. He did not read the application to the insured, and he could not testify that the insured did in fact read the application before signing it. The application contained the following provision above the signature line:

> (3) To the best of my knowledge and belief during the past year, I have not been treated for, nor have I been advised to have treatment for any of the following except as stated below.
>
> Any disease of the heart, or any disease of the circulatory system, high blood pressure or cancer or other malignant neoplasm or leukemia or uremia or any disease of the kidney or diabetes or tuberculosis, or emphysema, or any disease of the lungs, or cirrhosis of the liver or alcoholism.

Below that statement was a space in which the applicant was to list diseases and conditions. On the application in question, nothing was listed. The policy also contained an incontestability clause which stated:

> Except for Non-Payment of Premium this Certificate shall be incontestable after it has been in force during the lifetime of the Insured Debtor for a period of two (2) years from the effective date of the Certificate. No statement made by any person insured under the Certificate relating to his insurability shall be used in contesting the validity of the insurance covering such person after such insurance has been in force for a period of two years during such person's lifetime and prior to the date on which the claim arose.

The remainder of the application, which called for information on the amount of insurance, the premium, and the terms of payment, was not filled in until some time after the insured signed, because R & W Chevrolet had not yet received the necessary figures from GMAC.

Evidence was also admitted, over defendant's objections, of three earlier credit life insurance policies issued by defendant to plaintiff's intestate in connection with the financing of other purchases from R & W Chevrolet.

Defendant offered evidence to show that between 23 August 1976 and 8 October 1976, plaintiff's intestate was treated by his physician on a number of occasions for hypertension. On several of the occasions he was also treated for a urinary tract infection and a gastrointestinal ailment. He was experiencing high abdominal pain which was relieved by antacid. His physician testified that the insured was unconvinced during that time that he suffered from hypertension.

On 14 April 1977, the insured was admitted to the hospital with severe chest pains, and he died on 26 April 1977. The cause of death was acute myocardial infarction which resulted from arteriosclerotic cardiovascular disease caused by hypertension. The physician who treated him in the hospital testified that the insured told him that he had a history of hypertension.

Defendant's Vice-President of Claims testified that the Company received Eubanks' application some time after 7 February

1977. Had the Company known of his treatment for hypertension from August through October 1976, it would have conducted further investigation to determine insurability.

At the close of defendant's evidence, plaintiff was allowed to amend his complaint to allege his qualification as administrator of the Estate of James E. Eubanks. Defendant moved for a directed verdict, which motion was denied. The court submitted three issues to the jury, which answered them as follows:

> 1. Did the Plaintiff's intestate, James Ellis Eubanks, in his written application to the Defendant represent that to the best of his knowledge and belief during the past year he had not been treated for, nor had he been advised, to have treatment for any disease of the heart or any disease of the circulatory system or high blood pressure?
>
> ANSWER: No.
>
> 2. Was said representation false?
>
> ANSWER: No.
>
> 3. What amount if any, is the Plaintiff entitled to recover of the Defendant?
>
> ANSWER: $20,000.00.

Defendant's further motions for judgment notwithstanding the verdict and for new trial were denied. Defendant appeals from judgment on the verdict awarding plaintiff $20,000.00.

Brock, Foy & Proctor, by Jimmie C. Proctor for plaintiff-appellee.

Hatch, Little, Bunn, Jones, Few & Berry, by David H. Permar and John McClain for defendant-appellant.

PARKER, Judge.

[1] In its answer defendant captioned its allegations of false representations a "counterclaim." The Company now contends that plaintiff's failure to file a reply to that "counterclaim" operated as an admission of those allegations, entitling it to summary judgment or a directed verdict. The propriety of the trial court's denial of the motion for summary judgment is not proper-

ly before the court on this appeal. A motion for summary judgment is a pretrial motion which does not determine the merits. The effect of denial is merely to allow the case to go to trial. *Oil Co. v. Smith*, 34 N.C. App. 324, 237 S.E. 2d 882 (1977). As to the denial of the motion for directed verdict, if the Company's allegations had in fact set up a counterclaim, plaintiff's failure to reply would have operated as an admission of the facts alleged therein. G.S. 1A-1, Rule 8(d). However, we conclude that, in effect, defendant did nothing more than raise an affirmative defense to plaintiff's cause of action to which a reply was neither required nor permitted by G.S. 1A-1, Rule 7(a). G.S. 1A-1, Rule 8(c) provides: "When a party has mistakenly designated a defense as a counterclaim . . . , the court, on terms, if justice so requires, shall treat the pleading as if there had been a proper designation." Although defendant prayed in its "counterclaim" for cancellation of the policy, it was seeking no affirmative relief other than that which would naturally flow from successful defense to plaintiff's action on the insurance contract.

[2] Neither was defendant entitled to a directed verdict on the grounds that the evidence established its defense as a matter of law. Defendant's admission in the pleadings of execution and delivery of the policy of credit life insurance, payment of the premium, and death of the insured established plaintiff's prima facie case. Thereafter, the burden was on defendant to prove its allegations of false and material representations justifying refusal to pay benefits. *Rhinehardt v. Insurance Co.*, 254 N.C. 671, 119 S.E. 2d 614 (1961); *Tolbert v. Insurance Co.*, 236 N.C. 416, 72 S.E. 2d 915 (1952). The evidence was insufficient to establish defendant's affirmative defense as a matter of law, and defendant's assignment of error directed to the court's denial of the motion for directed verdict is overruled. *See Huffman v. Insurance Co.*, 8 N.C. App. 186, 174 S.E. 2d 17 (1970).

[3] Defendant also assigns error to the denial of its motion to dismiss on the grounds that the suit was not brought by a person having standing to sue and that the complaint failed to allege the administrator's legal capacity to sue. Prior to trial, plaintiff as a matter of right amended the caption of the complaint to read, "I. H. Eubanks, Administrator of the Estate of James Ellis "Billy" Eubanks". As administrator, I. H. Eubanks was the real party in interest entitled to sue on behalf of the estate. G.S. 1A-1,

Rule 17(a). Although it is true that plaintiff failed, as required by G.S. 1A-1, Rule 9(a), to make an affirmative averment showing his capacity and authority to sue, that error was cured by amendment at the close of the evidence in the trial. Under the liberal provisions of Rule 15(a), a party may amend his pleadings by leave of court even after the beginning of trial. The rule specifies that "leave shall be freely given when justice so requires." This is not a case in which the allegation was necessary to confer subject matter jurisdiction. In the absence of any showing of prejudice to the defendant, we fail to find any abuse of discretion on the part of the trial judge in allowing the amendment.

[4] Defendant next contends that the court erred in allowing the admission of evidence to show that the President of R & W Chevrolet and/or R & W Chevrolet were the agents of the defendant because no such agency was alleged in the complaint or in a reply. This contention is without merit. As already stated, defendant's "counterclaim" was no more than an affirmative defense and, by operation of Rule 8(c) of the Rules of Civil Procedure, the allegations therein were deemed denied. Plaintiff clearly was not required in its complaint to allege agency and estoppel on the part of the insurer when the answer raising the affirmative defense had not yet even been filed. Further, in answer to interrogatories filed by plaintiff, defendant admitted that R & W Chevrolet, although not a general agent of the Company, had authority to enroll eligible debtors under a master group policy of credit life insurance and to issue the Company's certificates. Having admitted this agency, the defendant cannot complain that plaintiff offered evidence concerning its agent's role in the execution of the policy issued to the insured.

[5] There is, however, merit to defendant's contention that the trial court erred in admitting statements of counsel, testimony, and exhibits relating to prior, expired certificates of credit life insurance issued to the insured. Plaintiff argues that these policies were admissible to establish that defendant had continuously covered plaintiff's intestate for a period exceeding two years and, therefore, was barred by the policy's incontestability clause from raising the defense of misrepresentation.

Plaintiff's Exhibits 1 & 2 were credit life insurance policies in the amount of $10,000.00 each which had been issued to the dece-

dent in 1975 in connection with the financing of truck purchases in that year. The second of the policies expired on 25 August 1976, and the financing contract which had been issued in connection with plaintiff's Exhibits 1 & 2 had been paid in full by the time plaintiff's exhibit 4, covering the account on the October 1976 purchase, was signed. Similarly, plaintiff's Exhibit 3, a credit life insurance policy issued on 1 August 1976 in the amount of $16,128.27 for a period of 6 months ending 1 February 1977 covered a different account from that covered by the February 1977 policy, and that contract also had been paid in full.

Moreover, the first two policies issued to the insured in 1975 required no debtor signature on the application and were in the amount of $10,000.00 each. They specified that the period of incontestability was one year. The third policy, plaintiff's Exhibit 3, was issued in the amount of $16,128.27. On the application for this policy, the debtor's disclosure of treatment for certain diseases, including high blood pressure, and his signature, were required. That policy expired on 1 February 1977, prior to the effective date of the policy sued on in this action. Each of the expired policies contained a statement in bold print that it was nonrenewable. To hold the defendant to the terms of the incontestability clause contained in the policy effective 7 February 1977, based on a theory of continuous coverage over a period of years, would require that we strain to convert expressly nonrenewable contracts which involved varying degrees of risk to the insurer into a single contract, contrary to the written expression of the parties' agreement. This the Court has no power to do. *See Lineberry v. Trust Co.*, 238 N.C. 264, 77 S.E. 2d 652 (1953). Therefore, evidence of prior policies was irrelevant to the principal issue in this lawsuit; that is, whether the insured had made a false representation in his application for a policy of credit life insurance which became effective on 7 February 1977, and its admission was error.

[6] There was also error in the court's charge to the jury. The burden on an insurer who seeks to avoid payment on a policy of insurance is to show that the insured made a statement which was material and false. *Tolbert v. Insurance Co., supra.* However, representations made in an insurance application in the form of written answers to written questions relating to health are deemed material as a matter of law. *Sims v. Insurance Co.*, 257

N.C. 32, 125 S.E. 2d 326 (1962); *Jones v. Insurance Co.*, 254 N.C. 407, 119 S.E. 2d 215 (1961); *Assurance Society v. Ashby*, 215 N.C. 280, 1 S.E. 2d 830 (1939). When instructing the jury on the issue of the falsity of the representation in this case, the court charged that "where the question [on an application] relates to a specific time period the representation is not necessarily false if it does not fall literally within that period. Twelve months may be reasonably understood by a reasonable person to mean approximately twelve months." Although the judge correctly stated a principle of law, the issue was not presented by the evidence in this case. Defendant's uncontradicted evidence shows that plaintiff's intestate had received medical treatment for high blood pressure in August, September and October of 1976, within *six* months of the date of his application, a time span which could not reasonably be equated with "approximately twelve months." Similarly, the judge charged the jury that a representation on an application for insurance that the applicant is in good or sound health does not require that he be in perfect health, and that a representation that the applicant does not suffer from a particular disease is not necessarily false merely because the applicant does have that disease. Again, such a charge did not involve the principles of law arising from the evidence presented in this case. The provision in the application here in question referred to whether the applicant had been *treated* for, or *advised to have treatment* for, certain listed diseases, not to whether he knew the state of his own health or of his affliction with a particular disease. An instruction relating to a factual situation of which there is no evidence is erroneous. *Dennis v. Voncannon*, 272 N.C. 446, 158 S.E. 2d 489 (1968); *Veach v. American Corporation*, 266 N.C. 542, 146 S.E. 2d 793 (1966).

[7] At the same time that the court charged the jury on principles not arising on the evidence in the case, the court also erred in instructing the jury that "the law provides that a representation in an application for a policy of insurance will prevent a recovery on the policy and entitle the insurance company to rescind the policy if it is false and *material*," (emphasis added), without tendering the instruction which the defendant had requested in writing, that the representation in question was material as a matter of law. This charge is similar to that held to be reversible error in *Sims v. Insurance Co.*, *supra*. In that case,

the trial judge referred to materiality in stating the contentions of the insurer in regard to false statements relating to health on an insurance policy. On review, the Supreme Court stated: "From this instruction the jury may well have concluded that it had the duty of passing upon the materiality of insured's answers to the questions in the application concerning her health. This is not the case. 'In an application for a policy of insurance, written questions relating to health and written answers thereto are deemed material as a matter of law.' " 257 N.C. at 40, 125 S.E. 2d at 332. Taken as a whole, the charge could only have been confusing to the jury and prejudicial to defendant.

For the errors noted above, the judgment appealed from is vacated and the case is remanded for a

New trial.

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

LEISURE PRODUCTS, INC. v. MITCHELL JEROME CLIFTON, LARRY ADAM SHUNKEWILER, A. J. TRUCKING COMPANY AND AERO TRUCKING COMPANY

No. 797SC333

(Filed 18 December 1979)

1. Evidence § 17; Automobiles § 90.4— tow truck—flashing amber light—negative evidence inadmissible—failure to display amber light—instructions improper

In an action to recover for damages to plaintiff's truck which was struck while being towed by one defendant, the trial court erred, first, in allowing the jury to consider negative evidence that the amber light on defendant's tow truck was not flashing, since the witness who gave the negative testimony could not tell whether the light was flashing because of the noonday sun, and, second, in charging the jury to answer the issue of the tow truck driver's negligence in the affirmative if it found that a proximate cause of the collision was the driver's violation of G.S. 20-130.2 in failing to "display an amber light," since it was uncontradicted that defendant's tow truck was equipped with the lights required by law.

2. Evidence § 34.1; Automobiles § 49.2— tractor trailer driver—admissions—substantive evidence

In an action to recover for damages to plaintiff's truck sustained when a tractor trailer collided with it, the trial court erred in limiting the jury's consideration of the tractor trailer driver's earlier admissions which conflicted with his trial testimony to the issue of the driver's credibility, since the driver's early explanations of the collision were competent as substantive evidence on the issue of his negligence.

APPEAL by the defendant Clifton from *Bruce, Judge.* Judgment entered 7 November 1978 in Superior Court, NASH County. Heard in the Court of Appeals on 27 November 1979.

Plaintiff instituted this civil action seeking to recover $21,647.78 for damages to its 1973 International truck as a result of a motor vehicle collision on 26 April 1977 in Johnston County. According to the evidence developed at trial, the accident happened around noon in the southbound lanes of Interstate 95 just outside Benson, North Carolina. Plaintiff's witness Ricky Vann Bass testified that he was employed as a truck driver for the plaintiff at that time and had been driving the van-type truck [hereinafter referred to as the van] prior to the accident. He was headed to Sumter, South Carolina with a load of mobile home supplies. As he headed south on I-95 outside Benson, the van broke down. Vass pulled it onto the emergency strip to the right of the lanes of travel, determined that he could not correct the trouble, and called a tow-truck.

The tow-truck was owned and operated by the defendant Clifton. He testified that the truck, a 1960 F-750 Ford, was in "perfect condition" on 26 April 1977, and that he had been in the garage business for approximately 30 years. Clifton hooked the plaintiff's van to his tow-truck, using two chains and a tow-sling to lift it up and secure it. Then he and Bass climbed into the cab of the tow-truck and pulled onto the highway. Clifton was driving in the right-hand lane, heading south towards his garage. According to Bass, they had proceeded approximately 100 yards when the collision occurred. He testified, "We started down I-95 . . . and we were talking and the next thing I knew, we were turned over." The van also overturned and immediately caught fire. Bass and Clifton scrambled out of the tow-truck, which thereafter caught fire, and saw that a tractor-trailer had collided with the rear of the van. The tractor portion of it had overturned

and was on fire. Subsequently, it was determined that the tractor-trailer, which was carrying ten packages of glass weighing approximately 40,000 pounds, was being operated by the defendant Shunkewiler. At trial, Shunkewiler testified that, on the day of the accident, he was employed as a long-haul truck driver by the defendant A. J. Trucking Company. He had left the company's terminal in Baltimore, Maryland, at approximately 3:00 a.m. that day and was headed to Lumberbridge, North Carolina, about 100 miles south of the accident scene. The glass was being shipped under a bill of lading issued by the defendant Aero Trucking Company.

The evidence established that the weather conditions, at the place and time of the accident, were clear and sunny, and that the surface of the road was concrete.

In its complaint, plaintiff charged that the combined negligence of the defendants Clifton and Shunkewiler caused the collision. With respect to the defendant Clifton, plaintiff alleged the following negligent acts:

A. He failed to maintain a proper lookout.

B. He failed to install the necessary signals and lights upon the wrecker.

C. He was operating a wrecker on the public highway at a speed which impeded the flow of traffic.

Shunkewiler's negligence, plaintiff contended, consisted of the following:

A. He failed to maintain a proper lookout.

B. He operated a motor vehicle on the public highway at a high and dangerous rate of speed for the conditions then existing.

C. He followed the vehicle in front of him too closely.

D. He failed to apply his brakes within sufficient time to avoid a collision, or if he did apply his brakes, he was operating a vehicle with inadequate brakes.

E. He failed to reduce his speed within sufficient time to avoid a collision.

F. He ran into the rear of the vehicle immediately preceding him.

At the close of all the evidence, the trial court submitted the following issues to the jury, which were answered by it as indicated:

1. Was the plaintiff, Leisure Products, Inc., damaged by the negligence of the defendant, Larry Adam Shunkewiler?

ANSWER: Yes

2. Was the plaintiff, Leisure Products, Inc., damaged by the negligence of the defendant, Mitchell Jerome Clifton?

ANSWER: yes

3. What amount, if any, is the plaintiff, Leisure Products, Inc., entitled to recover for damage to personal property?

ANSWER: $20,000.00

4. Was the cargo being transported in the vehicle operated by the defendant, Larry Adam Shunkewiler, the glass specified in the bill of lading dated April 20, 1977, issued by Aero Trucking, Inc., defendant, under a certificate issued by the Interstate Commerce Commission?

ANSWER: Yes

From a judgment that plaintiff recover $20,000.00, together with interest, jointly and severally of all four defendants, the defendant Clifton appealed.

Fields, Cooper and Henderson, by Milton P. Fields, for plaintiff appellee.

Walter L. Horton, Jr., for the defendant appellant Clifton.

HEDRICK, Judge.

[1] Defendant Clifton's sole question on appeal relates to the trial judge's charge to the jury. In particular, he attacks that portion of the charge wherein the judge instructed the jury with respect to the alleged violation by Clifton of G.S. § 20-130.2, which provided, at the time of the accident herein, in pertinent part as follows:

> *Use of amber lights on certain vehicles.*—All wreckers operated on the highways of the State shall be equipped with an amber-colored flashing light which shall be so mounted and located as to be clearly visible in all directions from a distance of 500 feet.

(We note that this section was amended by 1979 Session Laws, ch. 1, sec. 1, effective 26 January 1979, by substituting a comma for the period at the end of the sentence set out above and adding thereafter the following language: "which light shall be activated when towing a vehicle.")

The judge read this statute to the jury and instructed it that a violation thereof was "negligence within itself." Then, in his final mandate concerning the issue of the defendant Clifton's negligence, he charged as follows:

> [I]f the plaintiff has proven by the greater weight of the evidence, that at the time of the collision, that the defendant Mitchell Jerome Clifton was negligent in *any one* or more of the following respects, in that he failed to drive in a marked lane, or, that he failed to give a signal when turning from a direct line, or, *he failed to display an amber light*, that is, if the plaintiff has proved by the greater weight of the evidence, that the defendant Mitchell Jerome Clifton was negligent in *any one* or more of those respects and if the plaintiff has further proved by the greater weight of the evidence that such negligence was a proximate cause of the plaintiff's damages, then it would be your duty to answer this issue, yes, in favor of the plaintiff.
>
> [Our emphasis.]

Defendant Clifton does not contend that Judge Bruce misstated the law. Rather, he argues that the evidence fails to show that he violated G.S. § 20-130.2, or that the "presence or absence of an amber colored flashing light was a proximate cause of the collision between the vehicles." Thus, he urges that it was prejudicial error for Judge Bruce to instruct the jury at all with regard to this statute. We agree, for a number of reasons.

First, it is uncontradicted that defendant's tow-truck was equipped with the lights required by law. Benson Police Officer, Joseph Smith, who witnessed the accident, testified, "The tow-

truck was standard and was equipped with an amber light on top of its cab." Plaintiff's own employee, Mr. Bass, corroborated this testimony and, more significantly, stated, "When I got into the tow-truck, the driver had the flashing light operating on his tow-truck." The record is wholly devoid of any evidence that the tow-truck was not equipped with lights in accordance with law.

Secondly, plaintiff's contention that the amber light was not flashing, and thus was not visible as mandated by § 20-130.2, is, likewise, not supported by the evidence. Both Bass and Clifton testified that the light was flashing. No witness positively asserted that the light was not on.

Plaintiff directs our attention, however, to the testimony of two witnesses that they did not *see* the light flashing. Police Officer Smith said there was an amber light on top of the tow-truck, but he could not "recall" whether it was flashing "since it was in the noonday sun." The defendant Shunkewiler testified, "I did not see any lights on the van or the wrecker." On cross-examination, this witness testified further as follows:

> Q. Is it sort of a courtesy in the profession of long haul truck driving that if you are going to pass another vehicle, you flash your headlights in the day time?
>
> A. In the noon time, it . . . you wouldn't hardly be able to see it.
>
> Q. At noon time, you say headlights would be very difficult to see?
>
> A. Yes sir, it would be.

Negative evidence, that is, evidence that the witness did not see or did not hear, is ordinarily much less reliable than affirmative testimony showing the contrary fact. It is weak at best, and is admissible as some evidence of the negative inference only upon a showing that the witness so testifying was in a position to hear or see, or would have heard or seen. *Vann v. Hayes*, 266 N.C. 713, 147 S.E. 2d 186 (1966); *Morris v. Jenrette Transport Co.*, 235 N.C. 568, 70 S.E. 2d 845 (1952). The inherent problem with such evidence was well-stated by our Supreme Court in the case of *K. B. Johnson & Sons, Inc. v. Southern Railway Co.*, 214 N.C. 484, 487-88, 199 S.E. 704, 706 (1938):

> The basic psychological, as well as probative, weakness of negative evidence lies in this: The fact may have taken place in the sight or hearing of a person who may not have perceived it; or who perceived it falsely because of defective perceptive apparatus, unfavorable surrounding conditions, or the state of mind of the witness; or who, having originally perceived it correctly, has since forgotten it.

Given these manifest infirmities, it becomes absolutely mandatory for the witness to demonstrate that he or she was in a position to hear or see, meaning that the witness was "so situated that in the ordinary course of events he would have heard or seen the fact had it occurred." *Id.* at 488, 199 S.E. at 707. If, upon examining the surrounding circumstances and conditions of perception of the witness, it becomes evident that the witness was not so situated, the negative testimony is meaningless. It is of no probative force and should not be considered by the jury. *Blanton v. Frye*, 272 N.C. 231, 158 S.E. 2d 57 (1967); *Ballard v. Ballard*, 230 N.C. 629, 55 S.E. 2d 316 (1949).

A fair reading of the evidence in the case at bar demonstrates that the brightness of the noonday sun prevented both Smith and Shunkewiler from being able to perceive whether the amber-colored light was flashing on defendant Clifton's tow-truck. In similar cases, a witness's testimony that he did not see lights burning on a stalled vehicle in his path of travel, in the face of testimony that he was momentarily blinded by the lights of an on-coming vehicle, has been held insufficient to require its submission to the jury since the witness was in no position to see what he said he did not see. *Blanton v. Frye, supra*; *Morris v. Jenrette Transport Co., supra.*

The same is true in this case. It is a matter of common knowledge that the brightness of the sun can render "invisible" headlights, turn signals, and traffic-control lights. The sun can have a blinding effect on one's ability to see. We hold that neither Smith nor Shunkewiler was so situated as to be able to see the flashing light, and, thus, their negative testimony that they did not see it lacks sufficient probative value to require its submission to the jury. "The rights of persons and things ought not to rest, and the law will not permit them to depend, upon the uncertain testimony of a witness who says he did not [see]," when he

was in no position to see. *K. B. Johnson & Sons, Inc. v. Southern Railway Co., supra* at 488, 199 S.E. at 707.

It is clear from the foregoing discussion that the absence of a flashing light on the tow-truck, or the failure of the defendant Clifton to turn it on, could not, under these circumstances, be a proximate cause of the collision. Since the defendant Shunkewiler could not have seen the light, whether it was on or off is of no consequence. It follows that the judge erred, first, in allowing the jury to consider negative evidence that the light was not flashing and, second, in charging it to answer the issue of defendant Clifton's negligence in the affirmative if it found that a proximate cause of the collision was Clifton's violation of the statute in failing to "display an amber light". Since we cannot ascertain upon what grounds the jury adjudged Clifton negligent, its verdict against him cannot stand.

A fortiori, we reject plaintiff's contention that the jury verdict can be justified on the grounds that Clifton hoisted the van in such a manner as to obscure the amber light, and thereby violated the statute. Plaintiff asks us to engage in sheer speculation that, if the van had not been so hoisted, the defendant Shunkewiler would have been more likely to see the flashing amber light and, therefore, could have avoided the accident. This we will not do. To the contrary, we are persuaded that a violation of G.S. § 20-130.2 in whatever respect, if any violation existed, did not contribute in any degree to the occurrence of this collision. The record establishes to our satisfaction that this accident proximately resulted from either (1) the sole negligence of the defendant Shunkewiler in any of the respects alleged by plaintiff; or (2) the sole negligence of the defendant Clifton in allowing the van to cross over the center line and into Shunkewiler's path; or (3) the joint and concurring negligence of these two defendants in these respects.

[2] Error in the charge on the foregoing account alone entitles the defendant Clifton to a new trial. However, we find it necessary to discuss, briefly, his sixth assignment of error by which he attacks another portion of the court's instructions relating to extrajudicial admissions of the defendant Shunkewiler.

State Highway Patrol Trooper Charles Ryals, who arrived on the scene shortly after the accident, testified as follows:

> The truck driver [Shunkewiler] first stated that he was changing gears and looked up and saw the vehicle in front of him and could not get out of the way to keep from hitting it. He said that he was in the outside or right lane at the time. He said he did not have time to go around it before he hit it at that time.

Plaintiff's employee Bass testified that he talked to Shunkewiler at the scene, and Shunkewiler "said he didn't really know what had happened, that he must have dozed off or something." Subsequently, Shunkewiler changed his version of what had happened and told Trooper Ryals that "he was going to pass the vehicle he was coming up on and as he pulled out to pass, the vehicle came over into his lane and he hit it." Shunkewiler told only the second version to the jury.

With respect to the earlier conflicting statements, Judge Bruce charged the jury to consider such testimony only as "bearing upon the truthfulness of that particular witness in deciding whether you will believe or disbelieve his testimony at this trial." In other words, Judge Bruce limited the jury's consideration of Shunkewiler's admissions to the issue of his credibility. Defendant Clifton argues that the statements were competent as substantive evidence on the issue of Shunkewiler's negligence. We agree.

More than a century ago, Justice Ruffin, speaking for the Court in *McRainy v. Clark*, 4 N.C. 698 (1818), declared: "The rule is universal that whatever a party says or does shall be evidence against him, to be left to the jury. . . . I know of no solitary exception to this rule, and cannot imagine one." *See also McDonald v. Carson*, 95 N.C. 377 (1886). Although exceptions have since been created—none of which are applicable here—the rule has stood the test of time. 2 Stansbury's N.C. Evidence, *Admissions* § 167 (Brandis rev. 1973). *See State v. Gaines*, 283 N.C. 33, 194 S.E. 2d 839 (1973). Admissions of a party, especially when made against his own interest, bear strong probative force and, when relevant to the issues, are competent substantive evidence against the party making the statements. The weight accorded them, like all the other evidence in the case, is for the jury. We are of the opinion, and so hold, that Shunkewiler's early explanations of the collision are competent substantive evidence on the issue of his negligence, and are accordingly admissible against him to the benefit of all other parties.

Defendant Clifton brings forward and argues other assignments of error. We do not find it necessary to discuss them since they are not likely to occur at the new trial. For the reasons hereinabove set out, as to the plaintiff's claim against the defendant Clifton, there must be a

New trial.

Judges MARTIN (Robert M.) and WELLS concur.

STATE OF NORTH CAROLINA v. GAYLE POOLE

No. 7915SC555

(Filed 18 December 1979)

1. **Criminal Law § 76.4— confession—voir dire hearing—incompetent evidence—absence of prejudice**

Defendant was not prejudiced when, during a hearing on a motion to suppress defendant's in-custody statement, an officer testified that he asked defendant if what happened to decedent bothered her and that defendant replied that she did not worry about things like that, since such testimony was not used by the trial judge in his findings and conclusions as to the voluntariness of defendant's statement.

2. **Criminal Law § 75— failure to permit defendant to visit family or friends—admissibility of confession**

Defendant's confession was not rendered inadmissible because she was not permitted to visit with her parents or friends who were at the police station where defendant did not request that she be allowed to visit with her family or friends.

3. **Criminal Law § 75.3— confession—effect of statement by defendant's boyfriend**

Defendant's confession was not rendered inadmissible because her boyfriend, in the presence of law officers, urged her to tell the truth and told her that the two of them would be together and everything would be all right.

4. **Criminal Law § 75.11— confession—sixteen-year-old defendant**

The evidence supported the trial court's determination that the confession of a sixteen-year-old girl was made voluntarily and understandingly where her rights were explained to her and she indicated an adequate understanding of them; she was given the opportunity to have counsel provided for her by the State; she could read and write and had progressed to the seventh grade; she was given food and offered water and restroom facilities; the somewhat lengthy period of questioning was broken by the meal; and although defendant

contends she was mentally and physically exhausted, she told her story twice with little variance.

5. **Criminal Law § 74— reading transcript of tape recording of confession**

The trial court did not err in permitting a witness to read a typewritten transcript of a tape recording of defendant's confession, although the transcript was not signed by defendant, where the witness testified that he was present when the confession was recorded and that he compared the transcript with the tape recording and that the same questions and answers appeared on both.

6. **Homicide §§ 28.8, 30.3— refusal to instruct on involuntary manslaughter or accident or misadventure**

The trial court in a murder prosecution did not err in refusing to instruct on involuntary manslaughter or death by accident or misadventure where the evidence tended to show that defendant beat the victim on the head with a stick, defendant and her boyfriend then robbed the victim and placed him in a stream while he was unconscious, and he died of drowning, since the evidence showed that the victim's death resulted from unlawful acts amounting to felonies done intentionally with malice.

APPEAL by defendant from *McLelland, Judge,* and *Martin, Judge.* Judgment entered 14 March 1979 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 25 October 1979.

Defendant, a sixteen-year old girl, was tried under a bill of indictment for the murder of Horace Mitchell Payne on 28 May 1977, and convicted of voluntary manslaughter. Her boyfriend, Tommy White, a twenty-three year old man, was likewise indicted for the same crime, but the trial of the two parties was severed.

Defendant Poole had been going with her boyfriend, White, for over a year prior to the death of Payne. She and White had stolen a truck and gone to a campsite on Payne's land about a week before Payne's death and remained there until after Payne's death.

The defendant was arrested 23 August 1978 between 4:30 and 5:00 p.m. in Orange County. Her parents, or the parents of her boyfriend, were at the jail, but defendant did not see them during the evening.

At approximately 10:00 p.m. the defendant observed Tommy White in the headquarters of the Orange County Sheriff's Department along with two other persons later identified as officials of

the Alamance County Sheriff's Department. At that time, White, in the presence of the two members of the Alamance Sheriff's Department, urged the defendant to tell the truth and they would be together and for her not to worry (later explained to mean not in prison but after the case was finally over).

Later during the evening, the defendant was taken by the two Alamance Sheriff's Department members to another room where she was read her *Miranda* rights, which she waived.

The defendant advised the deputies that she had not eaten, and soft drinks and food were ordered for the three of them. After the meal, the defendant was interrogated by the deputies, one of whom testified that prior to taping the defendant's statement, they "ran through it once."

Subsequently, the defendant was indicted for murder in the first degree, and an attorney was appointed for her defense. A motion to suppress the defendant's statement, supported by the defendant's affidavit, was considered by the trial judge prior to trial.

Defendant by affidavit used in the motion alleged that she was financially unable to employ counsel; that while in a detention cell she observed Tommy White with whom she had a close relationship prior to her arrest, and two other persons later identified as officials in the Alamance County Sheriff's Department; that Tommy White induced her to make statements to such members of the sheriff's department regarding the matters for which she is charged herein; that she had not eaten anything from the time of her arrest until read her *Miranda* rights; that she was mentally and physically exhausted, hungry and confused and did not voluntarily, understandingly or intelligently waive advice of counsel or representation of counsel in connection with interrogation, and that such statements made by the defendant during interrogation were not voluntarily made.

Thereafter, the two officers testified concerning facts occurring prior to and during the interrogation, and the court further interrogated the defendant as follows:

> COURT: Miss Poole, did Mr. Overman tell you that you had a right to be silent, to have a lawyer, and so on?
>
> A. Yes, he did.

COURT: Did you understand that you had such a right and did you tell him you understood that?

A. Yes, I told him I understood.

COURT: DId you understand it?

A. No, I didn't.

COURT: How was it you told him you understood when you didn't?

A. Well, you know, I understood, you know, what he was reading, but I didn't, you know, fully understand what I could be getting myself into by talking to him.

COURT: But you did understand that you did not have to talk to him, did you not?

A. Yes.

COURT: And you did sign this document that was presented here?

A. Yes, I did.

From the evidence before the court at that time, the court entered the following Order on Motion to Suppress:

> . . . I find from the evidence, giving due consideration to the arguments of counsel, that the Defendant, Gayle Poole, was taken into custody to the Sheriff's Office in Orange County on the afternoon of August 23, 1978, between 5:30 and 6:00 o'clock p.m.; that the Defendant was then sixteen and one-half years of age, had a seventh grade education, was able to read and write, was mature and alert; that Alamance County Sheriff's Officers Overman and Qualls at Hillsborough began an interview with Defendant at about 10:00 o'clock p.m.; that neither she nor the officers had eaten at that time, and food was ordered for all; that while they waited for the food the Defendant was advised of her Miranda rights as the same are set out in the Orange County Sheriff's Department form admitted into evidence as State's Exhibit 1; that she told the officers that she understood the rights read to her, did not want an attorney present, and was willing to answer questions; that she signed the waiver of these rights also set out on that form and responded to questions put to her.

From these findings, I conclude that while the Defendant might have lacked a full understanding of the legal niceties of her actions she did not lack capacity to understand and did understand her Miranda rights; that the interview was conducted under circumstances in no sense coercive; that she waived her rights to be represented at the interview by counsel and to remain silent, freely and intelligently; that the statement given by the Defendant was freely, understandingly, and voluntarily given.

The defendant had filed an objection to the joinder of this case with that of Tommy White for trial, and the court allowed a severance of the cases on its own motion.

At the trial of the case the State offered evidence including a transcribed copy of the tape containing the interrogatories and answers made by the defendant which had been compared with the original tape and found to be the same. Defendant objected to the introduction of the confession at the time of the trial.

Briefly, the facts in the statement showed that the defendant gave the confession after being advised of her *Miranda* rights; that she and Tommy White were at a campsite on Mitchell Payne's farm and saw Payne, the deceased; that White and Payne were drinking beer; that Tommy got scared and wanted to shoot Payne, and defendant told him not to; that Tommy tried to smother Payne with a pillow and ended up choking him; that the defendant took a flashlight from Mitchell Payne and then hit him on the forehead with a stick the size of a tobacco stick; that the defendant "guessed" Mitchell Payne died; that she could not remember if it were Tommy alone or she and Tommy who put Payne in a creek after robbing him of his wallet and car keys; that she could not hear Payne breathing before he was put in the creek, but she could hear a little heartbeat; that she did not intend to kill Payne while hitting him with the stick; that she was trying to help Tommy kill Payne but was scared to hit him hard. The defendant and Tommy then burned the evidence at the campsite and left in Payne's car.

During the hearing on the Motion to Suppress, one of the officers testified that after the confession was taped he asked the defendant if it bothered her as to what happened to Mitchell

Payne, Defendant testified that she did not worry about things like that. Defendant objected to such testimony as prejudicial.

From a verdict of guilty of voluntary manslaughter, the defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Thomas H. Davis Jr., for the State.

Paul H. Ridge, for defendant appellant.

HILL, Judge.

The record on appeal is voluminous and contains numerous exceptions, but the most serious deals with the statement of the defendant to the officers on the night of her arrest.

[1] Did the court err in overruling the objection of the defendant to improper and irrelevant evidence as to comments of the defendant not involved in her statement which was the subject of a Motion to Suppress, but which evidence was allowed to be injected into the hearing and which defendant contends was prejudicial? Defendant contends that the only reason she was asked by the officers if it bothered her as to what happened to Mitchell Payne was to excite prejudice or sympathy, and that she was entitled to a new trial. We do not agree. This evidence was not used by the trial judge in his findings of fact and conclusions of law as to the voluntariness of the confession given by the defendant. It was simply ignored.

Was the confession properly admitted into evidence? We hold that it was.

The burden of showing the voluntariness of the confession is on the State. *State v. Williams*, 276 N.C. 703, 174 S.E. 2d 503 (1970); *rev'd on other grounds*, 403 U.S. 948, 29 L.Ed. 2d 860, 91 S.Ct. 2290 (1971); *on remand*, 279 N.C. 388, 183 S.E. 2d 106 (1971). It is to be determined by a trial judge upon a *voir dire* in the absence of the jury. *State v. Haskins*, 278 N.C. 52, 178 S.E. 2d 610 (1971).

[2] The record reveals that defendant did not request that she be able to visit with her family or friends, and the record further shows that the officers conducting the interview did not ask

whether or not defendant wished to communicate with her family or friends. Absent such request, we find no error. *See State v. Curmon*, 295 N.C. 453, 245 S.E. 2d 503 (1978).

[3] The defendant contends that Tommy White was an *agent provocateur* of the Alamance County Sheriff's Department. White urged the defendant to tell the truth and told her that the two of them would be together and everything would be all right. This is no promise of any advantage that would tend to render defendant's confession involuntary. *See State v. Matthews*, 231 N.C. 617, 58 S.E. 2d 625 (1950); *cert. denied* 340 U.S. 838, 95 L.Ed. 615, 71 S.Ct. 24 (1950).

The defendant's youth and lack of high mentality, standing alone, and the somewhat lengthy period of interrogation do not necessarily render the statement involuntary. *State v. Thompson*, 287 N.C. 303, 214 S.E. 2d 742 (1975); *modified* 428 U.S. 908, 49 L.Ed. 2d 1213, 96 S.Ct. 3215 (1976).

[4] In this case defendant's rights were explained to her. She indicated an adequate understanding. The defendant was given the right to call in counsel—to be provided for her by the State. There was evidence that she could read and write and had progressed to the seventh grade and was a little more mature than the average sixteen year old. There is no evidence of physical abuse. She was given food and offered water and restroom facilities. The period of questioning was broken by the meal. Defendant contends she was tired and mentally and physically exhausted, but she appears to have told her story twice with little variance.

In determining whether a defendant's will was overborne in a particular case, the court must assess the totality of all of the surrounding circumstances. This was done before receipt of the confession into evidence. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 36 L.Ed. 2d 854, 93 S.Ct. 2041 (1973). *See also State v. Silver, infra.*

We have examined the entire record and are of the opinion that there is evidence to substantiate the finding by the presiding judge that the confession was voluntarily and understandingly made. *State v. Silver*, 286 N.C. 709, 213 S.E. 2d 247 (1975).

[5] The defendant objected to a reading of a typed transcript of the confession made on tape on the night of arrest. State's witness testified that he was present throughout the course of questioning and that the tape recording of the questioning had been reduced to transcription; that he had compared the copy of the transcript and the tape, and the same questions and answers appeared both places.

Defendant contended that a witness should not be permitted to read from a written transcript unless the transcript itself is admissible as an exhibit. *State v. Potter*, 295 N.C. 126, 244 S.E. 2d 397 (1978). The trial judge ruled previously that the defendant's confession was freely, knowingly, and voluntarily made and admissible in trial, and the defendant's counsel admits that the transcription, absent a few minor typographical errors, was the same statement given and taped by police officers, which had been ruled admissible.

The facts in this case are distinguishable from *State v. Potter, supra*, and *State v. Walker*, 269 N.C. 135, 152 S.E. 2d 133 (1967). In those cases the transcripts were based upon what the officers *remembered hearing* at the time of interrogation. The memory of man is subject to error. The transcriptions in this case are made from the original tape. We see no error because they are not signed.

[6] Defendant further contends that the court erred by refusing to charge the jury on involuntary manslaughter or death by accident or misadventure. There was no evidence to support such instruction.

The State's evidence clearly supports the fact that the defendant and her boyfriend accomplice, Tommy White, placed the deceased in a creek in an unconscious state and that he died of drowning. Prior to placing the deceased in the water, the defendant had beaten the decedent maliciously on the head with a stick. The defendant and her boyfriend had robbed the deceased. Such evidence clearly shows that the death of the deceased was the result of unlawful acts amounting to felonies done intentionally with malice. Therefore, the trial court's refusal to charge the jury in involuntary manslaughter was completely proper.

Involuntary manslaughter is the unlawful killing of a human being, unintentionally and without malice, proximately resulting from the performance of an unlawful act not amounting to a felony, or resulting from some act done in an unlawful or culpable negligent manner, when fatal consequences were not improbable under all the facts existent at the time, or resulting from a culpably negligent omission to perform a legal duty. 6 Strong's N.C. Index 3d, Homicide, § 6.1, p. 537; *State v. Massey*, 271 N.C. 555, 157 S.E. 2d 150 (1967).

Any defense that the death of Payne was the result of an accident or misadventure must be predicated upon the absence of an unlawful purpose on the part of the defendant and the absence of culpable negligence. *State v. Faust*, 254 N.C. 101, 118 S.E. 2d 769, *cert. denied*, 368 U.S. 851, 7 L.Ed. 2d 49, 82 S.Ct. 85 (1961).

Likewise, there is ample evidence in this case to sustain a charge to the jury upon the doctrines of acting in concert and aiding and abetting. When two or more persons aid and abet each other in the commission of a crime, all being present, each is a principal and equally guilty regardless of any conspiracy or previous confederation or design, and regardless of which is the actual perpetrator. *State v. Terry*, 278 N.C. 284, 179 S.E. 2d 368 (1971); *State v. Overman*, 269 N.C. 453, 153 S.E. 2d 44 (1967). A defendant who enters into a common design for a criminal purpose is equally deemed by the law a party to every act done by others in the furtherance of such design. *State v. Lovelace*, 272 N.C. 496, 158 S.E. 2d 624 (1967).

Admittedly, the trial judge must instruct a jury to a lesser included offense of the crime charged when there is evidence from which the jury could find that the defendant committed the lesser offense. *State v. Redfern*, 291 N.C. 319, 230 S.E. 2d 152 (1976). There was no evidence present in this case which would support a verdict of involuntary manslaughter or death by accident or misadventure.

The defendant contends that the trial court erred in refusing to dismiss the charges against the defendant at the conclusion of the evidence for the State, and in refusing the defendant's motion to set aside the jury verdict. We hold the evidence to be sufficient in both instances to sustain the trial judge's rulings. Further, the defendant's sentence was within the limits permitted by

statute, and the trial judge did not err in rendering judgment and sentence set forth in the record.

In the trial of this case, we find

No error.

Judges VAUGHN and ERWIN concur.

STATE OF NORTH CAROLINA v. JAMES VANTY LAMB

No. 7916SC571

(Filed 18 December 1979)

Criminal Law § 122.2— jury's failure to reach verdict—instructions improper

Where the jury foreman advised the court that in his opinion the jury could not reach a decision, the trial court erred in instructing the jurors that, if they did not agree upon a verdict, another jury might be called upon to try the case, that the State and defendant had a tremendous amount of time and money invested in the case, and that retrial involved a duplication of all the time and expense. G.S. 15A-1235.

APPEAL by defendant from *Gavin, Judge*. Judgment entered 26 January 1979 in Superior Court, ROBESON County. Heard in the Court of Appeals 12 November 1979.

The defendant, an employee of Tomberlin Associates, Inc., was convicted of (1) forging an endorsement on a check drawn on the Housing Authority of the City of Lumberton and payable to Tomberlin Associates; and (2) uttering a check with a forged endorsement. The record of the case on appeal contains over 300 exceptions. All have been carefully considered, and one is dispositive.

Attorney General Edmisten, by Assistant Attorney General Rudolph A. Ashton III, for the State.

John Wishart Campbell for defendant appellant.

HILL, Judge.

The jury in this case began deliberations at approximately 5:25 p.m. and returned to the courtroom at 6:35 p.m. when they

were sent for dinner. At 8:30 p.m. the jury returned to deliberate, and at 9:50 p.m. the sheriff brought them back into the courtroom. The judge inquired as to the numerical division of the jury and was advised it was nine to three. The foreman advised the court that in his opinion the jury could not reach a decision, whereupon the court then stated, among other things, that,

> Both the State and the defendants have a tremendous amount of time and money invested in this case.
>
> If you don't reach a verdict, it means that it will have to be tried again by another jury in this county and that involves a duplication of all the expense and all of the time.
>
> **********
>
> I don't like to do this at all. I don't want anyone to think that I am trying to coerce a verdict, because I am not. I just feel that the time and expense involved justifies one more effort on your part.

On the following morning at 9:30 a.m., the trial judge further addressed the jury:

> Members of the jury, I presume that you realize what a disagreement means. It means, of course, that it will be another week that will be consumed in the trial of this action again.
>
> I don't want to force you or coerce you in any way to reach your verdict, but it is your duty to try and reconcile your differences and try to reach a verdict if it can be done without any surrender of one's conscientious convictions.
>
> You've heard the evidence in this case. A mistrial will mean that another jury will have to be selected to hear the case and the evidence again.
>
> 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 do to reason this matter over together as reasonable men and women and reconcile your differences if that's possible without the surrender of your conscientious convictions and to reach a verdict.

At 11:13 a.m. a verdict of guilty on both counts was reported to the court.

Did the court err in its charge to the jury in failing to conform with G.S. 15A-1235, which was effective 1 July 1978?

In times long gone by, when a jury was unable to reach a verdict the trial court simply deprived the jurors of food, water, and fire until it reached a verdict. Note, *The Allen Charge: Recurring Problems and Recent Developments*, 47 NYU Law Rev. 296, 296 n. 3 (1972); Becker, *The Criminal Case: The Allen Charge*, TRIAL, Vol. 15, No. 10, p. 46.

Today a more subtle approach is used to break a deadlocked jury. The trial court's charge to the jury remains, with the blessings of the U. S. Supreme Court, the chosen instrument to pressure deadlock juries to reach a verdict. The landmark case of *Allen v. United States*, 164 U.S. 492, 41 L.Ed. 528, 17 S.Ct. 154 (1896), approved a jury charge filled with psychological pressures, the most salient portion being as follows:

> . . . that in a large proportion of cases absolute certainty could not be expected; that, although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor, and with a proper regard and deference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so; that they should listen, with a disposition to be convinced, to each other's arguments; that, if much the large number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority were for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority. 164 US at 501.

The United States Supreme Court has not directly examined the "Allen Charge" since 1896. Consequently, this potentially coercive device has been rebounding through the civil and criminal justice systems for over eighty years. The thrust of the charge, coupled with its widespread use, has earned for it the

title of the "dynamite charge." "During this period some judges have applied the Allen Charge, others have embellished and tinkered with it, while still others have courageously refused to allow its use." TRIAL, *supra*, at 47.

Consider only a few of the problems which the charge has generated:

> Because it instructs the jury to consider extraneous and improper factors, inaccurately states the law, carries a potentially coercive impact, and burdens rather than facilitates the administration of justice, we conclude that further use of the charge should be prohibited in California.

People v. Gainer, 19 Cal. 3d 835, 842, 139 Cal. Rptr. 861, 864, 566 P. 2d 997, 1000 (1977).

Certainly one of the most questionable features of the "Allen Charge" is its discriminatory admonition directed to the minority jurors to rethink their position in light of the view of the majority. Such an instruction violates the basic tenets of American justice. Such a charge places the sanction of the court behind the majority view and urges minorities to relinquish their view simply because they are in the minority.

There are other embellishments:

(1) . . . the case at sometime must be decided.

This is legally inaccurate and simply not true as any trial lawyer knows.

(2) . . . the expense and inconvenience of a retrial.

Both convictions *and* not guilty verdicts cost less than retrials.

Some federal decisions indicate the "dynamite charge" " . . . should be used with great caution, and only when absolutely necessary." *U. S. v. Flannery*, 451 F. 2d 880 (1st Cir. 1971); others state that the "Allen Charge" stands by the "barest margin." *U.S. v. Kenner*, 354 F. 2d 780 (2d Cir. 1965), *cert. denied* 383 U.S. 958; some reverse when there is the slightest deviation from the original Allen Charge. *See U.S. v. Harris*, 391 F. 2d 348 (6th Cir. 1968), *cert. denied* 393 U.S. 874; *U.S. v. Rogers*, 289 F. 2d 433 (4th Cir. 1961); while still others have indicated they would disallow

portions of the charge, e.g., urging the minority jurors to rethink their position. *Walsh v. U.S.*, 371 F. 2d 135 (9th Cir. 1967), *cert. denied* 388 U.S. 915.

At least three federal circuits have banished the Allen Charge in the exercise of their supervisory powers and replaced it with the ABA standard: the District of Columbia, the Seventh Circuit, and the Third Circuit. See *U.S. v. Thomas*, 449 F. 2d 1177 (D.C. Cir. *en banc* 1971); *U.S. v. Brown*, 411 F. 2d 930 (7th Cir. 1969), *cert. denied* 396 U.S. 1017; *U.S. v. Fioravanti*, 412 F. 2d 407 (3d Cir. 1969), *cert. denied* 396 U.S. 837.

The American Bar Association has recognized the problem with growing concern over the years, and in 1968, through its Project on Minimum Standards for Criminal Justice, published a modification of the Allen Charge. The suggested ABA instruction is in the form of directions to the trial court, which the court may paraphrase in delivery to the jury:

> 5.4 Length of deliberations; deadlocked jury.
>
> (a) Before the jury retires for deliberation, the court may give an instruction which informs the jury:
>
> (i) that in order to reach a verdict, each juror must agree thereto;
>
> (ii) that jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement if it can be done without violence to individual judgment;
>
> (iii) that each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;
>
> (iv) that in the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and
>
> (v) that no juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.
>
> (b) If it appears to the court that the jury has been unable to agree, the court may require the jury to continue their

deliberations and may give or repeat an instruction as provided in subsection (a). The court shall not require or threaten to require the jury to deliberate for an unreasonable length of time or unreasonable intervals.

(c) The jury may be discharged without having agreed upon a verdict if it appears that there is no reasonable probability of agreement.

"The Commentary accompanying the [above] text indicates that the new charge is designed to be less coercive because it tells *all* jurors to consult with one another in reaching a verdict rather than singling out the minority alone. The Commentary explicitly demands that the *Allen* Charge no longer be used." Note, *Supplemental Jury Charges Urging a Verdict—The Answer is Yet to be Found*, 56 Minnesota Law Review 1199, 1204 (1972).

North Carolina has long been cognizant of the growing awareness of possible coerciveness when the Allen Charge or modification thereof is used. Nevertheless, the court has never abolished the charge. The uniform recommended charge in N.C.P.I.—Crim. 101.40 recommends the following as a model for juries appearing to be deadlocked:

> I presume you ladies and gentlemen realize what a disagreement means. It means, of course, that it will be [another week of the] [more] time of the Court that will have to be consumed in 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. A mistrial, of course, will mean that another jury will have to be selected to hear the case and evidence again. 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 over together as reasonable men and women and 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.

In the recent case of *State v. Alston*, 294 N.C. 577, 243 S.E. 2d 354 (1978), Justice Branch (now Chief Justice) addressed the

problems dealing with deadlocked juries and the responses thereto by trial judges.

In the *Alston* case the defendant complained of,

(1) the court's mention of the inconvenience and expense of empaneling another jury to try the case;

(2) the court's statement that an agreement would ease the tension within the jury but that disagreement would be the first step towards deadlock;

(3) the court's admonition that the jury should not put up with any juror who wanted to discuss one point endlessly; and

(4) an intimation by the court that any juror who found himself in the minority should question the correctness of his decision. *Alston*, at 592.

Justice Branch cited the *Allen* case, acknowledged that confusion had arisen because of modifications and extensions, and then stated:

> However, our Court has solidly established certain rules for our guidance, *e.g.*, a trial judge has no right to coerce a verdict, and a charge which might reasonably be construed by a juror as requiring him to surrender his well-founded convictions or judgment to the view of the majority is erroneous. (citations omitted) *Alston*, at 592.

In *Alston*, the so-called "dynamite charge" was given before the jury had begun its deliberations and consequently before there was any disagreement among the jurors. Justice Branch noted that, absent other factors, giving such an instruction *before* the jury commences its deliberations is not reversible error, and proceeded to address the objections:

(1) The Court has held that the isolated mention of the expense and inconvenience of re-trying a case does not warrant a new trial unless the charge as a whole coerces a verdict. *State v. Williams*, 288 N.C. 680, 220 S.E. 2d 558 (1975); *State v. Brodie*, 190 N.C. 554, 130 S.E. 205 (1925).

(2) The statements that an agreement would ease tension within the jury, and disagreement would be the first step

toward deadlock and that the jury should not talk endlessly did not constitute error. In our State a cardinal rule is that the charge will be read contextually and an excerpt will not be held to be prejudicial if a reading of the whole charge leaves no reasonable grounds to believe that the jury was misled. *Hammond v. Bullard*, 267 N.C. 570, 148 S.E. 2d 523 (1966). Hence, in *Alston*, the entire charge left no basis for a juror to believe he was being coerced into a verdict.

(3) Language which instructs a juror in the minority to question the correctness of his decision must be tempered with other language in which the trial judge must make it clear to the jury that by such instruction the court does not intend that any juror should surrender his conscientious convictions or judgment. *Allen v. U.S., supra; State v. McKissick*, 268 N.C. 411, 150 S.E. 2d 767 (1966).

Justice Branch then concluded that the instructions given by the trial judge at the termination of the "dynamite charge" dispelled any coercive effect which might have resulted from the challenged statements.

Thereupon, Justice Branch continued,

This case is, however, the latest in a long series of cases in which courts have been required to pass upon the acceptability of instructions urging a verdict. Under normal circumstances, we would have deemed it appropriate to here establish definite guidelines in order to prevent future problems with such charges. However, the General Assembly has made such efforts unnecessary by the enactment of G.S. 15A-1235, effective 1 July 1978 which provides:

Length of deliberations; deadlocked jury.—(a) Before the jury retires for deliberation, the judge must give an instruction which informs the jury that in order to return a verdict, all 12 jurors must agree to a verdict of guilty or not guilty.

(b) Before the jury retires for deliberation, the judge may give an instruction which informs the jury that:

(1) Jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;

(2) Each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;

(3) In the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and

(4) No juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.

(c) If it appears to the judge that the jury has been unable to agree, the judge may require the jury to continue its deliberations and may give or repeat the instructions provided in subsections (a) and (b). The judge may not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.

(d) If it appears that there is no reasonable possibility of agreement, the judge may declare a mistrial and discharge the jury.

G.S. 15A-1235 is based upon the standards approved by the American Bar Association. *See*, American Bar Association Standards Relating to Trial by Jury, Section 5.4 (Approved Draft 1968). This enactment provides our trial judges and our practicing bar with clear standards for such instructions. *Alston*, at 596, 597.

G.S. 15A-1235 arose as part of an examination by the Criminal Code Commission entitled, *The Legislative Program and Report to the General Assembly of North Carolina.* In the report, at the conclusion of the language which later was to become G.S. 15A-1235, appears the exact language that is now set out in the Official Commentary to G.S. 15A-1235. The passage states that,

The Commission considered three possible approaches to the deadlocked jury:

(1) the 'weak' charge set out in the A.B.A. Standards;

(2) the 'strong' Allen charge traditionally used in the federal courts; and

(3) the even stronger charges authorized under North Carolina case law.

After much discussion, the Commission approved this section, which in its essentials follows A.B.A. Standards, Trial by Jury § 5.4. The Commission deleted from its draft a provision previously sanctioned under North Carolina case law which would have authorized the judge to inform the jurors that if they do not agree upon a verdict another jury may be called upon to try the case.

The four subdivisions of subsection (b) are linked together with the conjunction 'and.' This reflects the Commission's view that whenever the judge gives any of the instructions authorized by subsection (b), he must give all of them.

Subsection (c) requires that the instructions to a deadlocked jury must contain all the provisions of subsections (a) and (b).

The Report of the Criminal Code Commission was directed to the General Assembly and used by the Assembly in its deliberations concerning this statute. The legislature—with the Commentary before it—adopted the statute and inherently acknowledged the limitations imposed by the Official Commentary.

Therefore, as of 1 July 1978, deadlocked juries are to be instructed in accordance with the guidelines established by G.S. 15A-1235.

The case before us was tried at the 4 December 1978 Session of the Robeson County Superior Court and is bound by the limitations set out in G.S. 15A-1235. It was error under the then existing law for the court to charge the jurors that if they did not agree upon a verdict another jury might be called upon to try the case; that the State and defendants had a tremendous amount of time and money invested, and retrial involved a duplication of all the time and expense.

For the reasons set out above, the case is

Reversed and remanded for a new trial.

Chief Judge MORRIS and Judge PARKER concur.

FIRST CITIZENS BANK & TRUST COMPANY v. D. J. MARTIN (ALSO KNOWN AS DAVID J. MARTIN) AND WIFE, MARILYN B. MARTIN

No. 7910SC73

(Filed 18 December 1979)

1. **Bills and Notes § 17; Mortgages and Deeds of Trust § 32— deficiency judgment—one year statute of limitations—maker with no interest in mortgaged property**

Only a party with an interest in mortgaged property may assert G.S. 1-54(6) as a bar to an action for a deficiency judgment; therefore, defendants who were makers of the promissory note in question but who did not pledge any collateral as security could not raise the one year statute of limitations under G.S. 1-54(6) as a bar to plaintiff's action for a deficiency.

2. **Bills and Notes § 17; Limitation of Actions § 13— partial payment by one obligor—new date for statute of limitations—no binding effect on co-obligor—jury question**

In an action to recover the balance due on a promissory note, a payment on the note by one defendant did not fix the date of payment as a new date from which the statute of limitations began to run against the second defendant unless the second defendant agreed to, authorized, or ratified the partial payment by the first defendant, and a material issue of fact remained for the jury with respect to this question. G.S. 1-27.

3. **Bills and Notes § 17— ten year statute of limitations—notes under seal—jury question**

In an action to recover the balance due on a promissory note where a corporate seal appeared but there was no seal after defendants' names, a material issue of fact was raised as to the intent of the parties to enter into a sealed instrument, and the ten year statute of limitations of G.S. 1-47(2) was therefore not necessarily applicable.

APPEAL by defendants from *Godwin, Judge.* Order and judgment entered 29 November 1978 in Superior Court, WAKE County. Heard in the Court of Appeals 26 September 1979.

Plaintiff bank sued defendants for the balance due on a promissory note after foreclosure of a deed of trust on property securing the debt. Plaintiff alleged in its complaint, filed 10 February 1978, that on 20 July 1973 plaintiff loaned the defendants and Investment Securities, Inc. (Investment) $125,000 in return for which the defendants executed a six-month note which they also endorsed on the back. As security for the note, Investment gave a deed of trust on real property it owned in Durham County. De-

fendant David Martin made a partial payment on the note on 6 September 1974.

Upon the default of defendants and Investment on the note, plaintiff caused the deed of trust to be foreclosed, and the note was credited with the sum of $24,362. On 27 June 1975 Investment filed a voluntary petition for proceedings under Chapter X of the Federal Bankruptcy Act and on 27 August 1976 a plan of reorganization was confirmed by the Federal court, pursuant to which the sum of $17,604.70 was paid toward interest accruing on the note. As of 1 October 1978, there remained a balance of unpaid interest of $7,823.98 and principal in the amount of $100,000.

Defendants admitted the existence of the note and the balance due thereon, but denied they had signed the note as indorsers. Defendants also plead the statute of limitations under G.S. 1-54(6) and G.S. 1-52(1) as bars to plaintiff's claim. Defendants moved the trial court for judgment on the pleadings under G.S. 1A-1, Rule 12(c) and in the alternative under Rule 15 to amend their answer to assert G.S. 45-21.36 as an additional bar to plaintiff's action. Plaintiff moved under Rule 56 for summary judgment. From the trial court's denial of both of defendants' motions and the court's action granting plaintiff's motion for summary judgment, defendants appeal.

Manning, Fulton & Skinner, by Thomas C. Worth, Jr., and Catherine C. McLamb, for plaintiff appellee.

Maupin, Taylor & Ellis, P.A., by Richard C. Titus and Richard M. Lewis, for defendant appellants.

WELLS, Judge.

[1] The first question we consider is whether defendants, who were makers of the promissory note but who did not pledge any collateral as security, may raise the one-year statute of limitations under G.S. 1-54(6) as a bar to plaintiff's action for a deficiency. G.S. 1-54 provides that an action must be brought within one year, "(6) For a deficiency judgment on any debt, promissory note, bond or other evidence of indebtedness after the foreclosure of a mortgage or deed of trust on real estate securing such debt, [or] promissory note. . . ." In the present action the plaintiff bank has sued only the two individual makers of the note for the deficiency

resulting after the foreclosure, and have not sued the corporate maker who was also the mortgagor of the property pledged as security. On its face the statute does not state whether it is available as a defense to a party liable as a maker on an underlying note who is not a mortgagor of the property on which the creditor has foreclosed.

We have found no case in this jurisdiction which defines the term "deficiency judgment" in a manner relevant to the situation at hand. Other jurisdictions are divided on the issue and some have held the term "deficiency judgment" applicable to all debtors while others have limited the term to mortgagors only. *See e.g., In re Development Co.*, 482 F. 2d 243 (3rd Cir. 1973); *Stretch v. Murphy*, 166 Or. 439, 112 P. 2d 1018 (1941); *Cameron Brown South, Inc. v. East Glen Oaks, Inc.*, 341 So. 2d 450 (La. App. 1976). We are bound to interpret the statute as we believe the General Assembly intended. *Mazda Motors v. Southwestern Motors*, 296 N.C. 357, 250 S.E. 2d 250 (1979).

First adopted by the General Assembly in 1933, G.S. 1-54(6) was obviously intended to restrict the personal liability of debtors upon the foreclosure of property during the depression. 1933 N.C. Sess. Laws, ch. 529. *See*, 2 Glenn, Mortgages § 150, pp. 840-841 (1943); Osborne, Nelson and Whitman, Real Estate Finance Law § 8.3, pp. 528-529 (1979); Perlman, "Mortgage Deficiency Judgments During an Economic Depression," 20 Va. L. Rev. 771 (1934). In that same year the General Assembly adopted other legislation affecting deficiency judgments. A statute was adopted prohibiting actions for a deficiency in purchase money mortgages. G.S. 45-21.38.

The General Assembly also adopted an Act which allowed the mortgagee or other person with an interest in the mortgaged property to enjoin the sale of the collateral where the price offered was inadequate or inequitable. Where the property was purchased by the mortgagee, the mortgagor was permitted to show, as a defense to an action by the mortgagee for a deficiency, that the purchase price was less than the land's fair market value. 1933 N.C. Sess. Laws, ch. 275, presently codified as G.S. 45-21.36. This defense was explicitly granted only when the mortgagee sued "to recover a deficiency judgment against the mortgagor, trustor, or other maker of any such obligation *whose property has*

been so purchased. [Emphasis added.]" *Id.* From this Act it seems clear that the General Assembly intended to limit protection to those persons who held a property interest in the mortgaged property, and that such protection was not applicable to other parties liable on the underlying debt.

We also note that it has been the law of our State for many years that a creditor whose debt is secured by way of a mortgage or deed of trust has the choice of two actions: One, *in personam* for his debt; and the other *in rem* to subject the mortgaged property to its repayment—and a resort to one such action is no waiver of the other. *Silvey v. Axley*, 118 N.C. 959, 23 S.E. 933 (1896). *See also, Underwood v. Otwell*, 269 N.C. 571, 153 S.E. 2d 40 (1967). Under the explicit terms of the note in issue in the case at bar, each of the makers agreed to be liable for the entire debt. Under these circumstances plaintiff could have sued either or both of the defendants *in personam* for the entire balance owing prior to foreclosure on the mortgaged property, and of course, the deficiency statute of limitations would never have come into play.

We do not believe the individual defendants in this action should be allowed to assert the one-year statute of limitations for a deficiency judgment merely because the plaintiff elected to foreclose on the mortgaged property first. The mortgagor corporation is the only party to the note which has suffered a loss as a result of the foreclosure and it is the only party who we believe should have the right to assert the abbreviated statute of limitations of G.S. 1-54(6). Accordingly, we hold that only a party with an interest in the mortgaged property may assert G.S. 1-54(6) as a bar to an action for a deficiency judgment. We note that our holding is consistent with the general rule that a statute of limitations should not be applied to cases not clearly within its provisions. *Fishing Pier v. Town of Carolina Beach*, 274 N.C. 362, 163 S.E. 2d 363 (1968); *Holley v. Coggin Pontiac, Inc.*, 43 N.C. App. 229, 259 S.E. 2d 1 (1979).

[2] We now consider whether plaintiff's action is barred by the three-year statute of limitations for liability arising out of a contract or other obligation under G.S. 1-52(1). The parties agree that plaintiff's cause of action first accrued on 20 January 1974, the date the promissory note became due and payable. *Hall v. Hood*, 208 N.C. 59, 179 S.E. 27 (1935). *See also, Oil Co. v. Oil Co.*, 34 N.C. App. 295, 237 S.E. 2d 921 (1977).

While defendant David Martin admits that his partial payment of the note on 6 September 1974 extends the date of accrual of plaintiff's cause of action against him to that date, *Smith v. Davis*, 228 N.C. 172, 45 S.E. 2d 51 (1947), the date of accrual for defendant Marilyn Martin was not so extended. The 1953 General Assembly rewrote G.S. 1-27 so as to overrule previous case law extending the date of accrual for all co-obligors when partial payment was made by any one such obligor. 1953 N.C. Sess. Laws, ch. 1076. *See, e.g., Saieed v. Abeyounis*, 217 N.C. 644, 9 S.E. 2d 399 (1940); *Davis v. Alexander*, 207 N.C. 417, 177 S.E. 417 (1934); *Dillard v. Mercantile Co.*, 190 N.C. 225, 129 S.E. 598 (1925); *Moore v. Goodwin*, 109 N.C. 218, 13 S.E. 772 (1891); *Green v. Greensboro College*, 83 N.C. 449 (1880). Since the effective date of this amendment, a "payment by a joint obligor does not now fix the date of such acknowledgment or payment as a new date from which the statute begins to run unless such payment is authorized or ratified [by the other co-obligors]." *Pickett v. Rigsbee*, 252 N.C. 200, 206, 113 S.E. 2d 323, 328 (1960). *See also*, Note, "A Survey of Statutory Changes in North Carolina in 1953," 31 N.C. L. Rev. 375, 397-398 (1953).

Plaintiff maintains that defendant Marilyn Martin acceeded to such an extension of time in the body of the note. However, the note provides only that "the granting to the maker or makers of this note, or any other party, of any extension or extensions of time for payment of any sum or sums due hereunder . . . shall not in any way release or affect the liability of the maker or makers, endorser or endorsers of this note." This provision states only that the bank may extend the time of payment of the note for one maker without extending the time for payment for other makers. It is not, as plaintiff urges, an agreement by defendant Marilyn Martin that she acceeds to or acknowledges any partial payment made by a co-obligor. Since we find no conclusive evidence of the required authorization or ratification on her part in the record we hold that a material issue of fact remains with respect to this question.

On 11 July 1975 Judge Dupree entered an order in the Federal District Court enjoining the commencement of any action at law in any court against defendants David J. Martin and Marilyn B. Martin to take possession of any of the defendants' property, pursuant to the pending reorganization of Investment Securities, Inc. under Chapter X of the Federal Bankruptcy Act. This order remained in effect until 30 January 1976 when an

order was entered in that action terminating the previous restraining order. The effect of this Federal injunction was to toll the statute of limitations for plaintiff's action against both defendants for the 203 days the injunction was in effect. G.S. 1-23; *Highway Comm. v. Transportation Corp.*, 226 N.C. 371, 38 S.E. 2d 214 (1946).

[3] Accordingly, entry of summary judgment against defendant David Martin was proper under the three-year statute of limitations. However, even though the statute had been tolled during the period of the Federal injunction, the fact that we have held the date of accrual of plaintiff's cause of action against Marilyn Martin was not necessarily extended due to David Martin's partial payment of the note on 6 September 1974, a material issue of fact remains as to whether the three-year statute had run prior to plaintiff's commencement of the action against her. Thus, we now consider plaintiff's contention that the ten-year statute of limitations for an instrument under seal pursuant to G.S. 1-47(2) is applicable here.

The note in question was executed as follows:

Witness _____ signature and seal, the day and year above written.

ATTEST: _____

s / D. J. MARTIN
Secretary

(Corporate Seal)

INVESTMENT SECURITIES, INC.
By: s / (Illegible)
President

s / MARILYN B. MARTIN
s / D. J. MARTIN

s / MARILYN B. MARTIN

s / DAVID J. MARTIN (Illegible)

The word "(Seal)" does not appear after the defendants' signatures. While the individual defendants could have adopted the seal of the third obligor—the corporation—as their own, the

presence of three obligors and only one seal creates, "an ambiguity on the face of the document as to whether all of the signers intended to adopt the seal as their own." *Oil Corp. v. Wolfe*, 297 N.C. 36, 39, 252 S.E. 2d 809, 810 (1979). While we are aware that plaintiff's affiant, Jack Holt, stated in his affidavit that the notes executed by the Martins, "were intended to be and were understood by the parties to be sealed instruments," there is no basis given for this statement and it appears that this comment is a mere conclusion of Holt.

Similarly, defendant David Martin stated that he, "executed the note . . . not under seal," and it cannot be stated with certainty whether he was stating a legal conclusion or contending that at the time of execution he did not intend for the note to be under seal. That another note appears in the record which was executed by the defendants which does contain the word "(Seal)" next to defendants' signatures does not answer the question of what the parties intended with respect to the note presently under consideration. We are constrained to hold that a material issue of fact remains as to the intent of the parties to enter into a sealed instrument, and accordingly G.S. 1-47(2) is not necessarily applicable to the present action. This being the case, the trial court erred in concluding as a matter of law that the statute of limitations did not bar plaintiff's action against defendant Marilyn Martin, and summary judgment against her was improvidently granted.

Finally, we see no abuse of discretion in the trial court's action denying defendants' motion under G.S. 1A-1, Rule 15(a) to amend their answer. We have already held that G.S. 45-21.36 was not available as a defense to these non-mortgagor defendants.

We affirm the trial court's entry of summary judgment against defendant David Martin and reverse as to defendant Marilyn Martin.

Affirmed in part and reversed in part.

Judges ARNOLD and WEBB concur.

TEXFI INDUSTRIES, INC., A CORPORATION v. THE CITY OF FAYETTEVILLE, A MUNICIPAL CORPORATION, BETH FINCH, MAYOR, AND J. L. DAWKINS, WAYNE WILLIAMS, MILDRED EVANS, BILL HURLEY, GEORGE MARKHAM, MARION GEORGE, MEMBERS OF THE CITY COUNCIL OF THE CITY OF FAYETTEVILLE, AND A. D. JOHNSON, ACTING TAX COLLECTOR FOR THE CITY OF FAYETTEVILLE

No. 7912SC38

(Filed 18 December 1979)

1. **Municipal Corporations § 2.4— standing of corporation to attack annexation ordinance**

A corporation had standing to assert that an annexation statute has been applied to it in an unconstitutional manner by allegedly denying it effective notice of annexation and by allegedly denying it an opportunity to register its opposition to the annexation in a manner equal to the right of opposition exercisable by resident voters.

2. **Municipal Corporations § 2— annexation referendum—no vote by corporation—equal protection**

A corporation is not denied equal protection of the laws because corporations have no right to vote in an annexation referendum held pursuant to G.S. 160A-25.

3. **Municipal Corporations § 2— hearing on annexation—notice by publication—due process**

Notice by publication of a public hearing on annexation pursuant to G.S. 160A-24 does not provide inadequate notice to parties affected by the annexation in violation of their right to due process, since the General Assembly may annex land without notice to anyone.

APPEAL by both plaintiff and defendants from *McConnell, Judge.* Judgment entered 1 November 1978 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 20 September 1979.

Plaintiff-appellant, Texfi Industries, Inc. (Texfi), is a Delaware corporation with a place of business in Cumberland County, North Carolina, and its corporate headquarters in Greensboro, North Carolina. Texfi owns personal property in Cumberland County and leases real property under an agreement which requires Texfi to pay all real property taxes on the leased premises.

On 27 September 1976 the Fayetteville City Council, defendants herein, adopted, pursuant to N. C. Gen. Stat. § 160A-24 *et seq.*, a resolution to consider the annexation of a certain tract of land within which the property leased by appellant and other commercial and industrial enterprises, but no residences were located. The resolution set a public hearing for 25 October 1976 at the City Hall and notice of the hearing was published in *The*

Fayetteville Observer on 28 September 1976, 5 October 1976, 12 October 1976 and 19 October 1976. The hearing was held, no opposition to the hearing was voiced and the subject property was annexed at the hearing. There is no dispute that the appellees complied with all of the statutory requirements of Chapter 160A, Article 4A, Part 1 of the North Carolina General Statutes for the purpose of effecting the annexation.

Plaintiff commenced this action on 8 December 1977 alleging that the annexation statute was unconstitutional on its face and as applied because the notice provisions in N.C. Gen. Stat. § 160A-24 are not sufficient to give reasonable notice to parties affected by the annexation and because the statute, which gives resident voters but not corporations in the area proposed for annexation a right to approve or reject the annexation by referendum, denies plaintiff equal protection of the law.

Defendant-appellees, in timely fashion, filed a Motion to Dismiss pursuant to Rule 12(b) of the North Carolina Rules of Civil Procedure, asserting that the complaint failed to state a claim upon which relief could be granted, lack of subject matter jurisdiction, lack of plaintiff's capacity and standing to sue, laches and equitable estoppel.

On 1 November 1978 the trial court granted defendants' motion to dismiss on the grounds that the Complaint failed to state a claim upon which relief can be granted and that plaintiff, as a corporate lessee, lacks standing to sue. Plaintiff appealed from the judgment, and defendants cross assign as error the failure to dismiss on the other grounds cited in their motion to dismiss.

McCoy, Weaver, Wiggins, Cleveland & Raper by L. Stacy Weaver, Jr. and Reginald M. Barton, Jr. for plaintiff appellant.

Robert C. Cogswell, Jr. for defendant appellees.

CLARK, Judge.

I. STANDING

[1] We agree with appellees that there is a fine line between the issue of standing and the issue of failure to state a claim. One may have standing to assert a claim which the Court in its final analysis decides has no merit. The gist of standing is whether

there is a justiciable controversy being litigated among adverse parties with substantial interest affected so as to bring forth a clear articulation of the issues before the court. The often-stated rule that a taxpayer has no standing to challenge questions of general public interest that affects all taxpayers equally, *Green v. Eure*, 27 N.C. App. 605, 608, 220 S.E. 2d 102 (1975), *cert. denied*, 289 N.C. 297, 222 S.E. 2d 696 (1976), does not apply where a taxpayer shows that the tax levied upon him is for an unconstitutional, illegal or unauthorized purpose, *Wynn v. Trustees*, 255 N.C. 594, 122 S.E. 2d 404 (1961), that the carrying out of the challenged provision "will cause him to sustain personally, a direct and irreparable injury," *Nicholson v. State Education Assistance Authority*, 275 N.C. 439, 448, 168 S.E. 2d 401, 406 (1969), or that he is a member of the class prejudiced by the operation of the statute, *Appeal of Martin*, 286 N.C. 66, 209 S.E. 2d 766 (1974). More particularly, if an annexation "is neither authorized by law nor made under the color of law it is void and is subject to attack by anyone having a sufficient personal interest in the litigation." *Taylor v. City of Raleigh*, 290 N.C. 608, 618, 227 S.E. 2d 576, 582 (1976). We find that appellant has standing to assert that the annexation statute has been applied to it in an unconstitutional manner by allegedly denying appellant effective notice of annexation and by allegedly denying appellant opportunities to register its opposition to the annexation in a manner equal to the right of opposition exercisable by resident voters. Here appellant asserts that its own constitutional rights have been injured and the claims asserted are not frivolous. No direct economic injury need be shown in order to have standing to assert that one's constitutional rights have been violated. However, whether a party has asserted a claim upon which relief can be granted is an entirely different question.

II. EQUAL PROTECTION

[2] Texfi contends that it has been denied equal protection of the laws because corporations have no right to vote as "qualified resident voters" in a referendum on the question of municipal extension, held pursuant to N.C. Gen. Stat. § 160A-25, notwithstanding the fact that Texfi, like resident taxpayers, must pay all real and personal property taxes located within the municipality. We recognize that "[a] State has no more power to deny to corporations the equal protection of the law than it has to individual

citizens." *Gulf, Colorado & Sante Fe Railway Co. v. Ellis*, 165 U.S. 150, 154, 17 S.Ct. 255, 41 L.Ed. 666 (1897). We do not agree, however, that appellant has been denied equal protection of the law in the instant case.

Our first task under traditional equal protection analysis is to identify the nature of Texfi's interest, and in this regard we hold that corporations have no fundamental, inalienable rights of suffrage, either spelled out in or implied from the due process clause and law of the land clause of, respectively, the United States Constitution and North Carolina Constitution. This simple holding reveals the tip of an iceberg concerning the constitutional rights of corporations.

It has long been the rule that with respect to "property rights," a private corporation is a "person" within the meaning of both the equal protection and due process clause of the Fourteenth Amendment. *Kentucky Finance Corporation v. Paramount Auto Exchange Corporation*, 262 U.S. 544, 43 S.Ct. 636, 67 L.Ed. 1112 (1923). However, it was also established that the "liberty" guarantee of the Fourteenth Amendment applied to natural persons only and not to such artificial persons as corporations. *Pierce v. Society of Sisters*, 268 U.S. 510, 535, 45 S.Ct. 571, 69 L.Ed. 1070 (1925). This result followed from a conception of liberty, held by our Founding Fathers, as exemplified by Thomas Jefferson's language in the Declaration of Independence and Article I, section 1 of the North Carolina Constitution, that liberties were inalienable divine endowments which by their very nature could not inhere in secular institutions. *See, e.g., Meachum v. Fano*, 427 U.S. 215, 229, 96 S.Ct. 2532, 49 L.Ed. 2d 451 (1976) (Mr. Justice Stevens, dissenting). Similarly, this result followed from the reasoning that ". . . the only rights [a corporation] can claim are the rights which are given to it in that character, and not the rights which belong to its members as a citizen of a state . . . ." *Bank of Augusta v. Earl*, 38 U.S. (13 Pet.) 519, 587, 10 L.Ed. 274 (1839).

In *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 55 L.Ed. 2d 707, 98 S.Ct. 1407 (1978), however, the United States Supreme Court rejected this dichotomy between the liberty and property interests of corporations as "an artificial mode of analysis, untenable under decisions of this Court." 435 U.S. at

778-79. A new test was propounded by Mr. Justice Powell: "Whether or not a particular guarantee is 'purely personal' or is unavailable to corporations for some other reason depends on the nature, history, and purpose of the particular constitutional provision." 435 U.S. at 778-79 fn. 14. The opinion went on to explain that the argument that corporations, as creatures of the State, have only those rights granted them by the State, was "an extreme position [which] could not be reconciled either with the many decisions holding state laws invalid under the Fourteenth Amendment when they infringe protected speech by corporate bodies." *Id.* Nonetheless, the Court recognized that "[c]ertain 'purely personal' guarantees, such as the privilege against compulsory self-incrimination, are unavailable to corporations and other organizations because the 'historic' function of the particular guarantee has been limited to the protection of individuals." *Id.* Similarly, the opinion noted that corporations have been denied equality with individuals in the enjoyment of a right to privacy. *California Bankers Assn. v. Schultz*, 416 U.S. 21, 65-67, 39 L.Ed. 2d 812, 94 S.Ct. 1494 (1974).

Following the analysis prescribed by the Supreme Court, we hold that the plaintiff-corporation has no fundamental right to vote in the annexation referendum. The history, policy, and purposes are quite clear. The right to vote is the right to participate in the decision as to how the social-political organ will act. The right to vote derives from the fundamental notion of the social compact which forms the very foundation of a constitutional democracy. Corporations are limited artificial entities, designed primarily for the purpose of managing economic resources and by their very nature cannot share an identity with the broader humane, social, economic, ideological and political concerns of the human body politic and which by their very nature cannot be members of the body politic. There are practical considerations as well. Given the development of modern corporate law it is quite easy for a single corporation to have many subsidiaries and affiliates; consequently, corporations could easily become political hydra, which, unlike individual resident citizens, could multiply their voting power merely by creating property-owning subsidiaries in the area proposed for annexation. Such a potential result would clearly be in contravention of the principle that "a State may not dilute a person's vote to give weight to other in-

terests." *Evans v. Cornman*, 398 U.S. 419, 422-423, 90 S.Ct. 1752, 26 L.Ed. 2d 370 (1970). Finally, we note that the primary interests which the plaintiff corporation has at stake are its property interests. Under North Carolina law, property interests alone cannot establish voting rights. Article I, section 11 of the North Carolina Constitution explicitly states that "[a]s political rights and privileges are not dependent upon or modified by property, no property qualification shall affect the right to vote or hold office."

Having found that corporations, as artificial entities have no fundamental inalienable rights of suffrage, and noting that to our knowledge corporations have never been found to be a suspect class, we find, under traditional equal protection analysis and for the reasons stated above, that there was a rational basis for the classification of persons allowed to participate in annexation referenda under N.C. Gen. Stat. § 160A-24, -25. *See also, Rexham Corporation v. Town of Pineville*, 26 N.C. App. 349, 216 S.E. 2d 445 (1975).

III. DUE PROCESS

[3] We similarly find no merit in plaintiff's argument that notice by publication as set forth in N.C. Gen. Stat. § 160A-24 denied appellants due process rights to notice. In North Carolina municipal corporations are political subdivisions of the State. Article VII, section 1 of the North Carolina Constitution vests in the General Assembly the power to create and destroy any political subdivision as well as the power to change the boundaries of any such subdivision. No notice need be given to anybody, whether citizen, resident, nonresident or taxpayer in order for the General Assembly to carry out this provision. As was explained by Mr. Justice Moody, for the United States Supreme Court:

> ". . . In all these respects [the extent of municipal boundaries and powers] the state is supreme, and its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by an provision of the Constitution of the United States. Although the inhabitants and property owners may, by such changes, suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason . . . there is nothing in the Federal Constitution which protects them from these injurious consequences. . . ."

Hunter v. Pittsburg, 207 U.S. 161, 179, 28 S.Ct. 40, 52 L.Ed. 151 (1907). *See also, Holt Civic Club v. City of Tuscaloosa*, 99 S.Ct. 383 (1978). Since the General Assembly may annex land without notice to anyone it naturally follows that any notice, whether by publication or otherwise, is more than sufficient. *See generally*, 56 Am. Jur. 2d Municipal Corporations § 62 (1971).

As we have found the claims of plaintiff-appellant to be without merit, we need not consider the various defenses asserted by defendant-appellees.

The trial court's ruling that plaintiff had no standing to sue is reversed.

The trial court's rulings that plaintiff's equal protection and procedural due process claims failed to state claims upon which relief could be granted are approved, and the judgment is

Affirmed.

Judges HEDRICK and MARTIN (Harry C.) concur.

IN RE: ANNEXATION ORDINANCE ADOPTED BY THE CITY OF ALBEMARLE, ORDINANCE NO. 78-7, TO EXTEND THE CORPORATE LIMITS OF THE CITY OF ALBEMARLE, NORTH CAROLINA UNDER THE AUTHORITY GRANTED BY PART 3, ARTICLE 4A, CHAPTER 160A OF THE GENERAL STATUTES OF NORTH CAROLINA

No. 7920SC194

(Filed 18 December 1979)

1. **Municipal Corporations § 2.1— annexation—areas developed for urban purposes—undeveloped land between boundaries and developed areas to be annexed—compliance with statutes**

There was no merit to petitioners' contention that the trial court erred in concluding that respondent's ordinance and plan for annexation complied with the provisions of G.S. 160A-48, nor was there merit to their contention that the tests of G.S. 160A-48(c) must be applied to the entire tract sought to be annexed by respondent, since respondent did not seek to annex undeveloped lands beyond the developed areas peripheral to its present boundaries but instead sought to annex undeveloped lands which were between its boundaries and those substantial areas developed for urban purposes which it also sought to annex; furthermore, while the tests of G.S. 160A-48(c) were uniformly ap-

plied to the areas developed for urban purposes and those tracts were thereby qualified for annexation under the statute, the other areas were qualified under subsection (d) of the same statute.

2. **Municipal Corporations § 2.1— annexation—public hearing—failure to explain report—statute basically complied with**

Respondent city did not fail to comply with the annexation procedures outlined in G.S. 160A-49(d) where an officer of respondent, at a public hearing, read the entire report on the proposed annexation without making any explanation of it; the meeting was then opened to questions and continued at length while people asked any questions they wished concerning the proposed annexation; petitioners made no showing of prejudice because the report was not explained; and the portion of the statute requiring an explanation of the report was substantially if not literally complied with.

3. **Municipal Corporations § 2.6— annexation—extension of municipal services**

There was no merit to petitioners' contention that respondent failed to comply with provisions of G.S. 160A-47(3) pertaining to the extension of municipal services to the area to be annexed and the timetable for so doing, since the report and ordinance clearly and unequivocally set forth what steps would be taken in order to assure municipal services to the annexed area on the same basis as the rest of the city.

APPEAL by plaintiffs from *Walker (Ralph), Judge.* Judgment entered 27 October 1978 in Superior Court, STANLY County. Heard in the Court of Appeals 22 October 1979.

Petitioners instituted this proceeding seeking judicial review of respondent City's ordinance No. 78-7, which provided for annexation of certain areas to respondent's corporate limits. The petition for review alleged that the respondent had failed to meet the requirements of Chapter 160A of the North Carolina General Statutes, specifically N.C. Gen. Stat. §§ 160A-47(3), 160A-48, and 160A-49(d) and that petitioners would suffer material injury as a result. After receiving evidence and hearing arguments of counsel, the trial court found facts and concluded that respondent's plan and ordinance for annexation had complied with all pertinent requirements of the annexation statutes. Judgment was entered for respondent, but implementation of the annexation was stayed pending appeal. From this judgment petitioners appeal, assigning error.

Edwin H. Ferguson, Jr., for petitioners appellant.

Henry C. Doby, Jr., for respondent appellee.

MARTIN (Robert M.), Judge.

[1] Petitioners, by their third assignment of error, contend that the trial court erred in concluding that respondent's ordinance and plan for annexation complied with the provisions of N.C. Gen. Stat. § 160A-48. The pertinent portions of the statute in question are set out below:

> § 160A-48. Character of area to be annexed.—(a) A municipal governing board may extend the municipal corporate limits to include any area
>
> (1) Which meets the general standards of subsection (b), and
>
> (2) Every part of which meets the requirements of either subsection (c) or subsection (d).
>
> (b) The total area to be annexed must meet the following standards:
>
> (1) It must be adjacent or contiguous to the municipality's boundaries at the time the annexation proceeding is begun.
>
> (2) At least one eighth of the aggregate external boundaries of the area must coincide with the municipal boundary.
>
> (3) No part of the area shall be included within the boundary of another incorporated municipality.
>
> (c) Part of all of the area to be annexed must be developed for urban purposes. An area developed for urban purposes is defined as any area which meets any one of the following standards:
>
> (1) Has a total resident population equal to at least two persons for each acre of land included within its boundaries; or
>
> (2) Has a total resident population equal to at least one person for each acre of land included within its boundaries, and is subdivided into lots and tracts such that at least sixty percent (60%) of the total acreage consists of lots and tracts five acres or less

in size and such that at least sixty percent (60%) of the total number of lots and tracts are one acre or less in size; or

(3) Is so developed that at least sixty percent (60%) of the total number of lots and tracts in the area at the time of annexation are used for residential, commercial, industrial, institutional or governmental purposes, and is subdivided into lots and tracts such that at least sixty percent (60%) of the total acreage, not counting the acreage used at the time of annexation for commercial, industrial, governmental or institutional purposes, consists of lots and tracts five acres or less in size.

(d) In addition to areas developed for urban purposes, a governing board may include in the area to be annexed any area which does not meet the requirements of subsection (c) if such area either:

(1) Lies between the municipal boundary and an area developed for urban purposes so that the area developed for urban purposes is either not adjacent to the municipal boundary or cannot be served by the municipality without extending services and/or water and/or sewer lines through such sparsely developed area; or

(2) Is adjacent, on at least sixty percent (60%) of its external boundary, to any combination of the municipal boundary and the boundary of an area or areas developed for urban purposes as defined in subsection (c).

The purpose of this subsection is to permit municipal governing boards to extend corporate limits to include all nearby areas developed for urban purposes and where necessary to include areas which at the time of annexation are not yet developed for urban purposes but which constitute necessary land connections between the municipality and areas developed for urban purposes or between two or more areas developed for urban purposes.

From this statute it may be seen that two different levels of analysis must be employed in determining whether property sought to be annexed by a municipality meets the statutory requirements. Initially, the entire area to be annexed viewed as a whole, must meet all of the standards enunciated in N.C. Gen. Stat. § 160A-48(b). Assuming the area so qualifies, the next inquiry is whether all parts of the area to be annexed meet either the standards of N.C. Gen. Stat. § 160A-48(c) (property developed for urban purposes) or the standards of N.C. Gen. Stat. § 160A-48(d) (property not otherwise meeting the developed for urban purposes criteria).

Petitioners strongly contend that the tests of N.C. Gen. Stat. § 160A-48(c) must be applied to the entire tract sought to be annexed by respondent. When so applied, it is argued, the tract does not meet the requirements, and so the annexation is not valid. In support of this contention they cite *In re Annexation Ordinance [Charlotte],* 284 N.C. 442, 202 S.E. 2d 143 (1974). In that case, the municipality sought to annex land, all of which had been qualified under the "developed for urban purposes" test. However, the area to be annexed was subdivided by the City into study areas. In some of the more populated study areas, "population credits" (the excess of persons in the area over the two per acre required by N.C. Gen. Stat. § 160A-48(c)(1)) were employed to extend the boundaries of the study areas outward into land which, by itself, did not meet the developed for urban purposes test. The court held that this was not a proper application of the statutory standard. Instead, the population credits accumulated in one study area must be applied uniformly to the area to be annexed as a whole. Therefore, when all of the property sought to be annexed by a municipality was qualified under the standard of N.C. Gen. Stat. § 160A-48(c)(1), the standard must be uniformly applied to that area as a whole. *Also see In re Annexation Ordinance [Goldsboro]* 296 N.C. 1, 249 S.E. 2d 698 (1978).

A markedly different situation is presented by the instant case. Respondent does not seek to annex undeveloped lands beyond the developed areas peripheral to its present boundaries, but rather seeks to annex undeveloped lands which lie between its boundaries and those substantial areas developed for urban purposes which it also seeks to annex. Furthermore, while the tests of N.C. Gen. Stat. § 160A-48(c) have been uniformly applied

to the areas developed for urban purposes and those tracts are thereby qualified for annexation under this statute, the other areas have been qualified under subsection (d) of the same statute.

The annexation statutes as embodied in Chapter 160A recognize that municipalities of differing sizes tend to display differing patterns of development in the areas outside the municipal boundaries:

> § 160A-33. Declaration of policy.—It is hereby declared as a matter of State policy:
>
> * * *
>
> (4) That new urban development in and around municipalities having a population of less than 5,000 persons tends to be concentrated close to the municipal boundary rather than being scattered and dispersed as in the vicinity of larger municipalities, so that the legislative standards governing annexation by smaller municipalities can be simpler than those for larger municipalities and still attain the objectives set forth in this section. . . .
>
> § 160A-45. Declaration of policy.—It is hereby declared as a matter of State policy:
>
> * * *
>
> (4) That new urban development in and around municipalities having a population of 5,000 or more persons is more scattered than in and around smaller municipalities, and that such larger municipalities have greater difficulty in expanding municipal utility systems and other service facilities to serve such scattered development, so that the legislative standards governing annexation by larger municipalities must take these facts into account if the objectives set forth in this section are to be attained. . . .

Respondent is a municipality having more than 5,000 persons, and its development pattern has been somewhat scattered, as contemplated by the statute. Were we to accept petitioners' argu-

ment that the total annexation area must meet the urban purposes test without regard for whether the property is annexed under subsection (c) or subsection (d) of N.C. Gen. Stat. § 160A-48, much of the statute in question would be rendered meaningless, and the clear intent of the Legislature, as expressed by the unequivocal language quoted above and from N.C. Gen. Stat. § 160A-48, would be contravened. Respondent's situation is precisely that which the Legislature apparently contemplated when the pertinent portions of Chapter 160A were enacted. When subsection (d) of N.C. Gen. Stat. § 160A-48 (or its predecessor) has been before the court, it has been similarly interpreted. *See In re Annexation Ordinance [Jacksonville]* 255 N.C. 633, 122 S.E. 2d 690 (1961). Petitioners have adduced no evidence to show that the "developed for urban purposes" test was not uniformly applied to the portion of the area to be annexed under N.C. Gen. Stat. § 160A-48(c). Neither have petitioners shown that the standards of subsection (d) of the same statute were not applied uniformly to those portions of the area to be annexed under that subsection. The trial court found, and his findings are supported by abundant competent evidence of record, that all of the area to be annexed complied with the requirements of N.C. Gen. Stat. § 160A-48(b), and he further found that all of the tracts into which the area had been subdivided complied either with the requirements of subsection (c) or (d). On that basis he found the statutes to have been complied with and affirmed the ordinance. Having determined that petitioners' contentions in this question are not supported by statute or applicable authority, we conclude that the trial court was correct in its ruling. Petitioners' assignment of error is overruled.

[2] Petitioners have also contended that certain of the provisions of N.C. Gen. Stat. § 160A-49 were not complied with, specifically subsection (d) of that section. That statute provides in pertinent part:

> § 160A-49. Procedure for annexation.
>
> * * *
>
> (d) Public Hearing.—At the public hearing a representative of the municipality shall first make an explanation of the report required in G.S. 160A-47. Following such explana-

> tion, all persons resident or owning property in the territory described in the notice of public hearing, and all residents of the municipality, shall be given an opportunity to be heard.

Petitioners presented evidence which tended to show that at the public hearing, an officer of respondent read the entire report on the proposed annexation without making any explanation of it. The meeting was then open to questions, and continued at length while persons present asked any questions they wished to ask concerning the proposed annexation. Petitioners' argument is that by failing first to explain the report, the statutory procedure was not complied with and therefore the ordinance must be invalidated. This contention is feckless. Petitioners have not shown what, if any, prejudice accrued as a result of this minor technical variance from statutory procedure. The trial court concluded, and we agree, that this portion of the statute has been substantially, if not literally, complied with. *See In re Annexation Ordinance [New Bern]* 278 N.C. 641, 180 S.E. 2d 851 (1971). *Also see Adam Millis Corporation v. Kernersville*, 6 N.C. App. 68, 169 S.E. 2d 496 (1969). This assignment of error is overruled.

[3] Lastly, petitioners contend that respondent has failed to comply with certain provisions of N.C. Gen. Stat. § 160A-47(3), which pertains to the extension of municipal services (including garbage and trash collection, water and sewerage service, street maintenance, etc.) to the area to be annexed and the timetable for so doing. A review, point for point, of all of the evidence of record pertinent to these assignments of error would be of no value here. The report and ordinance of respondent clearly and unequivocally set forth what steps will be taken in order to assure municipal services to the annexed area on the same basis as the rest of the city. The report and ordinance meticulously detail what equipment will be acquired, what interim steps will be taken, where funds for operations and expansion will be obtained and demonstrates scrupulous care to comply with the requirements of parity and timing of N.C. Gen. Stat. § 160A-47(3). The trial court found from this evidence that respondent had complied with these requirements and petitioners have brought forth no basis upon which to overturn the findings and conclusions based thereon. The standards of specificity set forth in *In re Annexation Ordinance [Jacksonville]* 255 N.C. 633, 122 S.E. 2d 690 (1961),

have more than been met in this regard. The assignment of error is overruled.

In the proceedings below we find no error.

Affirmed.

Chief Judge MORRIS and Judge PARKER concur.

KENNETH W. WOODARD AND MILDRED WOODARD, D/B/A WOODARD ELECTRIC SERVICE COMPANY v. NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY

No. 7930SC257

(Filed 18 December 1979)

1. **Insurance § 149— liability insurance—insurer's waiver of right to raise negligence issue**

An agreement in which defendant insurer on a contractor's liability policy waived its right to defend or settle a suit against the insured in Georgia and agreed that, in a suit by insured to determine defendant's liability under the policy, it would "not plead or assert any defense to such suit based upon the fact that the insured has not been adjudicated to be legally obligated to pay damages" constituted a waiver of defendant's right to raise the issue of insured's liability in the Georgia suit; therefore, insured was not required to prove the negligence of its employee in an action against defendant insurer for reimbursement of damages paid by insured in a settlement of the Georgia case.

2. **Insurance § 149— liability insurance—completed operations hazard**

The evidence failed to show as a matter of law that fire damage to an egg packing plant arose out of a "completed operations hazard" which was excluded from coverage in a contractor's liability policy issued by defendant insurer where there was evidence tending to show that insured's employee was called to the egg packing plant to repair a malfunctioning fluorescent light, an employee of the egg packing plant observed a wisp of smoke around the "repaired" light fixture before insured's employee left the plant, and a fire which destroyed the egg packing plant was first observed around the light fixture in question an hour and a half after insured's employee left the premises.

APPEAL by defendant from *Thornburg, Judge*. Judgment entered 21 October 1978 in Superior Court, CLAY County. Heard in the Court of Appeals 13 November 1979.

The plaintiffs insured (the Woodards) brought this action to recover damages from defendant insurance company under the contractor's liability provisions of a special "multi-peril" policy of insurance.

Suit was brought against the Woodards in the United States District Court for the Northern District of the State of Georgia, in which Ralph Kimsey alleged that his building had been destroyed by a fire caused by the negligence of one of the Woodards' employees in performing electrical repair work in the building. Kimsey sought damages in excess of $76,000.

Under the Woodards' insurance contract with defendant, coverage for such risks was limited to $25,000 for each occurrence, and property damage arising from a "completed operations hazard" was excluded from coverage. The Woodards called on defendant to defend the suit on their behalf. Defendant denied coverage, but agreed to defend the suit under a reservation of rights, whereby the issue of coverage was left open for later determination.

The Woodards then employed Georgia counsel, experienced in defending insurance company interests in damage suits, to represent them in the Georgia action. This attorney investigated the fire loss thoroughly. Kimsey offered to settle the Georgia suit for $25,000. The Woodards' Georgia counsel advised them to make demand on the defendant insurer to settle for this amount, and if defendant refused, he recommended that the Woodards minimize their exposure by settling the Georgia suit and then pursuing their rights against defendant.

Demand was made upon defendant to settle, but defendant refused, maintaining its position of no coverage. At this point, the Woodards and defendant entered into an agreement dated 5 October 1977, pursuant to which defendant waived its right to defend or settle the Georgia suit. The Woodards then paid Kimsey $25,000 in settlement of the Georgia suit and demanded reimbursement from defendant, which was refused. The Woodards then brought the present action to recover their loss. From a verdict and judgment for the Woodards, defendant has appealed.

Van Winkle, Buck, Wall, Starnes & Davis, P.A., by O. E. Starnes, Jr., for the plaintiff appellees.

Morris, Golding, Blue & Phillips, by William C. Morris, Jr., for the defendant appellant.

WELLS, Judge.

[1] Defendant argues on appeal that the trial court erred in failing to grant its motions for a directed verdict and for judgment NOV. Defendant contends that these motions should have been granted because: (1) The Woodards, at trial, never proved their employee was negligent, and therefore the Woodards' liability to Kimsey and defendant's derivative liability to reimburse the Woodards was never established; and (2) as a matter of law, damage to Kimsey's building arose out of a "completed operations hazard" which was excluded from coverage under the terms of the insurance policy. We will deal with each of these arguments in the order stated above.

The insurance contract between the parties provided the following coverage:

> 1. COVERAGE C—BODILY INJURY AND PROPERTY DAMAGE LIABILITY:
>
> The Company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies, caused by an occurrence and arising out of the ownership, maintenance or use of the insured premises and all operations necessary or incidental to the business of the named insured conducted at or from the insured premises and the Company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient, but the Company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the Company's liability has been exhausted by payment of judgments or settlements.

The policy limited action against the defendant as follows:

> G. ACTION AGAINST COMPANY. No action shall lie against the Company unless, as a condition precedent thereto, there shall have been full compliance with all of the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the Company.
>
> * * *

Under the foregoing provisions of the policy, defendant had the duty to defend the Georgia suit and the right to control settlement of the suit short of judgment. At the time the Woodards were confronted with the $25,000 settlement offer from Kimsey, the Woodards and defendant entered into an agreement dated 5 October 1977 in which the defendant waived its right to settle or refuse to settle the Georgia suit. Additionally, that agreement contained the following paragraphs:

> (2) It is further stipulated and agreed that in the event a future suit is instituted by the insureds against the insurer to judicially determine the question of whether or not North Carolina Farm Bureau Mutual Insurance Company has coverage of the loss sued for in the aforesaid Civil Action Number C 76-113 G, the insurer agrees that *it will not plead or assert any defense to such suit based upon the fact that the insureds have not been adjudicated to be legally obligated to pay damages* as provided in coverage C of the policy relating to bodily injury and property damage liability.
>
> (3) Neither the insurer nor the insureds waive any rights which they now have or may have (except as expressly set forth in paragraphs (1) and (2) preceding), and the parties agree that the actions taken by the insureds as specified herein, and particularly the payment of the settlement proceeds, and the foregoing agreements of the insurer, have in no way prejudiced the rights, of either party, and said actions shall not be construed or contended to be an admission that no *coverage* is afforded under the policy or that *coverage* is afforded by the policy. Except as herein limited either party may assert any right or remedy or defense as it may deem appropriate. (Emphases added.]

Despite having agreed to relinquish its defense of and control over the Georgia suit, defendant now argues it is entitled to raise the same defense it explicity waived in the agreement of 5 October 1977—the Woodards' legal liability to Kimsey. In this regard defendant would have the Woodards prove the negligence of their employee, Brent Southard. While by its explicit terms the agreement between the parties preserved defendant's right to raise the defense of lack of policy *coverage*, the same agreement waived defendant's right to raise the issue of the Woodards' *liability* to Kimsey.

[2] As to defendant's second argument, we hold that the evidence produced at trial failed to show that as a matter of law, the Georgia suit arose out of a "completed operations hazard" which was excluded from coverage in the policy issued by defendant. Under Section II of the policy:

> * * * Operations shall be deemed completed at the earliest of the following times:
>
> (1) when all operations to be performed by or on behalf of the named insured under the contract have been completed.
>
> (2) when all operations to be performed by or on behalf of the named insured at the site of the operations have been completed, or
>
> (3) when the portion of the work out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.
>
> Operations which may require further service of maintenance work, or correction, repair or replacement because of any defect or deficiency, but which are otherwise complete, shall be deemed completed.

Appellant strongly contends that these provisions of the policy operate to deny coverage under the circumstances surrounding the Woodards' claim. The fire loss which was the subject of the Georgia suit occurred in an egg plant operated by Kimsey. The Woodards' employee, Brent Southard, had been

called to the Kimsey plant to repair a malfunctioning fluorescent light fixture. At trial, the Woodards offered the testimony of three employees who were present and working in the Kimsey egg plant on the day of the fire.

One of these witnesses, Robert Hunter, testified that he had worked in the Kimsey plant for about eight years and that on the day of the fire, he notified Kimsey that one of the fluorescent lights in the cooler room was not working. This employee stated that he later observed Southard at work in the cooler room and that even before Southard left, he observed a wisp of smoke about the lights and smelled an odor of plastic in the area which he had not smelled before. Within two hours, the employee learned the building was on fire.

Another witness, Frances Hunnicutt, testified that she had worked in the Kimsey plant for eight or nine years and that on the morning of the fire she was working in the plant with Edith Edwards, another Kimsey employee. Hunnicutt stated that at about 10:00 or 10:30 A.M., she smelled something "hot", and at her lunch break she saw the light in question smoking and called Edith Edwards' attention to it. Hunnicutt testified that shortly thereafter, the light was on fire and fell onto a pallet of eggs which was also set ablaze. Edith Edwards corroborated Hunnicutt's testimony, although neither of these witnesses observed Southard's presence at the plant.

The following issue was tendered to the jury:

> Was the work performed by [p]laintiffs' employee, Brent Southard, a "completed operations" as alleged in the [a]nswer?

The jury answered this issue in the negative.

Defendant argues that because the Woodards' evidence tends to show that Southard left the plant at about 10:00 or 10:15 A.M. and the fire was not observed until noon, the trial court should have found as a matter of law that the completed operations clause of the policy excluded coverage. Defendant maintains that the employee's work had been completed, since he left the plant with the lights working and at least an hour and a half had elapsed before the fire was observed. Defendant relies principally upon *Daniel v. Casualty Co.*, 221 N.C. 75, 18 S.E. 2d 819 (1942).

In *Daniel*, the insured plumbing company had contracted with a customer to convert a hot water heater into a heating stove. There was evidence to show that the plumbing company had agreed to fix the hot water heater so that it would be satisfactory in giving heat and be safe. In performing the job the plumber sealed the water jacket of the heater, but some water remained inside. About two months later, when a fire was lit in the heater, the heated water in the sealed water jacket turned to steam, expanded, and caused the heater to explode and injure the customer. The defendant insurance company raised the defense of a completed operations hazard.

In construing the definition of the term "complete" our Supreme Court stated:

> We do not consider that the work is complete within the meaning of the insurance contract so long as the workman has omitted or altogether failed to perform some substantial requirement essential to its functioning, the performance of which the owner still has a contractual right to demand.
>
> There is evidence here from which the jury might infer that by reason of the omission on the part of Alphin Plumbing and Heating Co. to do work essential to the functioning of the heater in the manner intended and called for in the contract, the work at the time plaintiff sustained her injury had never reached that condition of completeness that would render the restrictive clause in the policy operable.

221 N.C. at 77, 18 S.E. 2d at 820. *See in general*, Annotation, "Construction and Application of Clause Excluding from Coverage of Liability Policy 'Completed Operations Hazards,' " 58 A.L.R. 3d 12 (1974); 7A Appleman, Insurance Law and Practice § 4497.06, pp. 150-155 (Berdal ed. 1979); 12 Couch, Insurance 2d § 44:435, pp. 20-21 (2nd ed. 1964).

Under the sound reasoning of our Supreme Court in *Daniel*, it appears to us in the case *sub judice*, that the Woodards' obligation to Kimsey was not "completed" until the light fixtures were put in a *safe* working condition. Even under the definition of "completed operations hazard" stated in the policy, there was sufficient evidence to deny defendant's motion for a directed verdict. As mentioned previously, Edwards, Kimsey's employee, testified

that he observed a wisp of smoke around one of the "repaired" light fixtures *while Southard was still in the building.* Since the trial court properly denied defendant's motion for a directed verdict the court's denial of defendant's motion for judgment NOV must also be sustained. G.S. 1A-1, Rule 50; *Insurance Co. v. Chantos*, 298 N.C. 246, 258 S.E. 2d 334 (1979).

Affirmed.

Judges HEDRICK and MARTIN (Robert M.) concur.

BRANCH BANKING AND TRUST COMPANY v. MARGARET W. CREASY

No. 7926SC360

(Filed 18 December 1979)

1. **Uniform Commercial Code § 28— guaranty—nondelivery alleged—summary judgment improper**

In an action to recover on a guaranty executed by defendant who alleged nondelivery of the instrument, the trial court erred in entering summary judgment for plaintiff where the evidence tended to show that defendant executed the guaranty to secure a $35,000 note of her estranged husband; defendant executed the guaranty upon the instruction of her lawyer who was a partner in the same law firm as her husband; defendant left the guaranty with her lawyer, where she "figured it was in safe hands"; defendant never authorized delivery of the guaranty to plaintiff; she did not place it within the possession of her husband, the principal debtor; and her lawyer did not deliver it to plaintiff. G.S. 25-3-306(c).

2. **Uniform Commercial Code § 31— guaranty—nondelivery alleged—plaintiff not holder in due course as matter of law**

In an action to recover on a guaranty executed by defendant where defendant raised an issue of nondelivery of the instrument, evidence was insufficient to show that plaintiff was a holder in due course of the guaranty as a matter of law where the evidence tended to show that plaintiff did not take in good faith and without notice of any defense against it on the part of any person in that plaintiff knew that defendant and her husband, the principal debtor, were separated and that the husband was in financial difficulty, his $35,000 note with plaintiff being in default; the plaintiff nevertheless gave the husband a completed guaranty form with directions to secure defendant's signature; plaintiff took no precautions to insure fair dealing with defendant; and plaintiff made no inquiries concerning the guaranty when it had readily available means to make such an investigation.

Judge WEBB dissenting.

APPEAL by defendant from *Hasty, Judge.* Judgment entered 19 December 1978 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 29 November 1979.

Margaret W. Creasy married Thomas C. Creasy Jr. 9 June 1955 and three children were born of that marriage. On 17 October 1975, she and Creasy separated and have lived separate and apart since that date. At the time of their separation, Creasy was a licensed lawyer in North Carolina, practicing in Charlotte as a partner in the law firm of Miller, Creasy, Johnston and Allison. After the separation of defendant and Creasy, she was represented by Thomas Miller, of the law firm in which Creasy was also a partner, in the negotiation of a marital settlement with her husband.

At the time of the separation, Creasy owed plaintiff $35,000 on a note payable 30 October 1975. About 20 October 1975, Creasy requested plaintiff to renew this note and plaintiff agreed if Creasy would have his wife execute a new guaranty agreement, witnessed by someone other than Creasy. Plaintiff bank gave Creasy a completed guaranty form for this purpose, which Creasy handed to Miller, then acting as attorney for defendant, with the request that Miller have defendant sign. On 30 October 1975, Creasy's $35,000 note to plaintiff was in default, and Mr. Tyler, an officer of plaintiff, contacted Creasy several times requesting that the guaranty agreement be signed and returned to the bank.

Thereafter, on 7 November 1975, Miller took the guaranty to the home of defendant and requested that she sign it. Miller was under the impression that plaintiff held an unlimited guaranty executed by defendant and hoped to substitute the $35,000 guaranty for it. (Such a paper was introduced in evidence by plaintiff, but defendant denied ever signing it and the signature of the alleged witness on the paper is illegible.) Although defendant did not want to be responsible for any of the debts of Creasy, she signed the guaranty and gave it to her lawyer, Miller. He took the paper to his private office at the law firm and placed it in a manila folder, along with other papers relating to his negotiations with Creasy of the marital settlement. Defendant did not give him any instructions about delivering the guaranty to plaintiff but said she "figured it was in safe hands." At one point Miller testified,

"It was not my intention for Branch Branking and Trust Company to obtain the document." Later, he said, "[I]t was my intention when I left the home of Mrs. Creasy to cause it to be delivered to Branch Banking, ..." Miller did not deliver the guaranty to plaintiff nor to anyone on behalf of plaintiff. It was in the manila folder in his private law office the last time he saw it.

Tyler testified that on 18 November 1975 the guaranty was "returned" to him and placed in the plaintiff's files on Creasy. Thereafter, Creasy's $35,000 loan was renewed by plaintiff. Creasy paid his loan obligations to plaintiff in full on 9 January 1976, and on 10 February 1976 he again borrowed $35,000 from plaintiff. This note was renewed 10 May 1976 and Creasy failed to repay it. On 13 July 1976, four days after the due date of Creasy's note, plaintiff made demand upon defendant to pay the $35,000. Defendant refused and plaintiff instituted this suit.

Plaintiff moved for summary judgment, which was allowed by Judge Hasty on 19 December 1978, and defendant appeals.

Murchison & Guthrie, by Alton G. Murchison III, for plaintiff appellee.

Stack and Stephens, by Warren C. Stack, for defendant appellant.

MARTIN (Harry C.), Judge.

We hold the entry of summary judgment for plaintiff was error. The rules and procedures governing motions for summary judgment should now be familiar learning. They are well expressed in *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971), and it would serve no useful purpose to restate them here.

Plaintiff on the hearing for summary judgment produced the guaranty, admittedly signed by defendant. Then, through the witnesses Miller and Margaret Creasy, plaintiff produced evidence showing nondelivery of the guaranty by defendant, or her attorney Miller, to plaintiff. The evidence of Miller and Mrs. Creasy raises a reasonable inference that the guaranty was stolen by Tom Creasy, signed by him and then returned by him to the bank. Miller testified at one place in the record he intended to

cause the guaranty to be delivered to the bank, but at another place he says it was not his intention for the bank to obtain the document. At any rate, he did not deliver or cause the guaranty to be delivered to the bank. Rather, he placed it with other papers relating to the controversy between defendant and her husband where it remained for eleven days. The record is unclear as to how the bank got possession of the paper; Tyler testified the executed guaranty was "returned" to him on 18 November 1975, which indicates that he had possession of the executed guaranty prior to that date.

[1] Nondelivery of a negotiable instrument is a defense to an action upon it. N.C. Gen. Stat. 25-3-306(c). Once evidence of this defense is raised, the holder of the guaranty has the burden of proving that it is a holder in due course. *Hooker v. Hardee,* 192 N.C. 229, 134 S.E. 485 (1926); *Bank v. Furniture Co.,* 11 N.C. App. 530, 181 S.E. 2d 785, *cert. denied,* 279 N.C. 393, 183 S.E. 2d 241 (1971).

Plaintiff contends there was delivery and relies heavily upon *Oil Co. v. Welborn,* 20 N.C. App. 681, 202 S.E. 2d 618, *cert. denied,* 285 N.C. 235, 204 S.E. 2d 25 (1974). We find *Welborn* clearly distinguishable from this case. In *Welborn,* the defendant, wife of the principal debtor, after signing the guaranty placed it within the possession of the principal debtor, who then transmitted it to the creditor. The Court held she was liable on her guaranty even though she never authorized delivery of it to the creditor. Here, Mrs. Creasy left the guaranty with her lawyer, where she "figured it was in safe hands." She never authorized delivery of it to the bank, she did not place it within the possession of Creasy, the principal debtor, and her lawyer did not deliver it to the bank. From the materials before the court, we cannot hold as a matter of law that there was a delivery of the guaranty by defendant to plaintiff.

[2] Defendant having raised an issue of nondelivery of the guaranty, we must now examine the materials before the trial court to determine if plaintiff is a holder in due course of the guaranty as a matter of law. A holder in due course takes the instrument free of the defense of nondelivery. N.C. Gen. Stat. 25-3-305(2).

To be a holder in due course, plaintiff must show it is a holder that took the guaranty (1) for value, and (2) in good faith, and (3) without notice of any defense against it on the part of any person. N.C. Gen. Stat. 25-3-302(1)(a)(b)(c). Plaintiff is a holder of the guaranty for value, having received the instrument as security for an antecedent claim against Creasy. N.C. Gen. Stat. 25-3-303(b).

Plaintiff must take the guaranty in "good faith." "Good faith" means honesty in fact in the conduct or transaction concerned. N.C. Gen. Stat. 25-1-201(19). The statute does not further define "good faith" with respect to banks; however, when referring to a merchant the added requirement of the observance of reasonable commercial standards of fair dealing in the trade is applicable. N.C. Gen. Stat. 25-2-103(1)(b). Surely, the standards of good faith of a bank should be no less than those of a merchant. Did plaintiff comply with this standard in dealing with defendant? Plaintiff knew Creasy and defendant were separated, and that Creasy was in financial difficulties (his $35,000 note with plaintiff being in default). Yet the bank gave *Creasy* a completed guaranty form with directions to secure defendant's signature. Wouldn't a reasonable commercial standard under these circumstances require the plaintiff to have Mrs. Creasy come into the bank for the purpose of signing the guaranty? Even after the guaranty was "returned" to the plaintiff, its officer, Tyler, took no precautions to ensure fair dealing to defendant. He could have easily called defendant and questioned her about her signing the guaranty. There is no evidence that Tyler was familiar with the signature of the witness Miller. Why didn't Tyler call Miller about the guaranty?

In considering fundamental questions of law such as the meaning of good faith, the old cases are often the best cases. In 1838 the Supreme Court in *Bunting v. Ricks*, 22 N.C. 130, 134 (1838), speaking through the great Chief Justice Ruffin, said:

> [M]uch less than actual or particular knowledge in detail is sufficient to convert a person into a trustee who cooperates with a dishonest trustee in an act amounting to a breach of trust. Constructive notice, from the possession of the means of knowledge, will have that effect, although the party were actually ignorant—but ignorant merely because he would not investigate. It is well settled that if anything appears to a

> party calculated to attract attention or stimulate inquiry, the person is affected with knowledge of all that the inquiry would have disclosed.

Applying this principle to the conduct of plaintiff, we find a substantial question of material fact arises whether the circumstances plaintiff had knowledge of were calculated to "stimulate inquiry" and require it to investigate concerning the guaranty, when it had readily available the means to make such investigation. A phone call to defendant would have disclosed that she signed the guaranty and gave it to her lawyer, not to Creasy. Inquiry of Miller would have disclosed the guaranty was surreptitiously or feloniously taken from his private office. Under the doctrine of *Bunting*, the plaintiff's position would be affected by such knowledge and plaintiff would not be a holder in due course.

This same reasoning applies with equal force to the requirement that plaintiff be without notice of any defense to the guaranty by any person, and in particular, the defendant. N.C. Gen. Stat. 25-3-302(1)(c). The plaintiff had knowledge of circumstances concerning the guaranty that raise the question whether plaintiff should have made inquiry of defendant and Miller as to its delivery. *Bunting v. Ricks, supra.* Certainly it would not be a reasonable commercial example of good faith in dealing with defendant to rely solely upon the word or actions of the principal debtor, Creasy, when verification was as close as the telephone on Tyler's desk.

The materials before the trial court were not sufficient to hold as a matter of law that plaintiff was a holder in due course of the guaranty. With this holding, it is not necessary for us to determine whether plaintiff, if it were a holder in due course, took the guaranty free of the defenses of duress in the obtaining of defendant's signature on the paper and the illegality of the transaction based upon the theft or unauthorized taking of the guaranty from attorney Miller's office. We leave these questions for further proceedings in the trial court.

The summary judgment was improvidently entered and it is

Reversed.

Judge ERWIN concurs.

Judge WEBB dissents.

Judge WEBB dissenting.

I dissent from the majority because I believe that on the evidence before the court, the bank took the guaranty in good faith. In the light most favorable to the defendant, the evidence shows the guaranty was given to defendant's husband who later returned it to the bank properly executed by defendant. The majority concludes the bank should have done something more such as call the defendant or her attorney to confirm that she meant for the guaranty to be delivered. In this I believe the majority is mistaken. We have held that when a bank delivers a loan guaranty to a customer, who later returns the guaranty properly executed, the bank cannot rely on the guaranty without further inquiry. In this I believe we have unduly restricted commercial transactions in this state.

Defendant executed the guaranty and it was witnessed by her attorney. The attorney then carried it to his office where it was available for defendant's husband to take it to the bank. If one of two innocent parties must suffer from the delivery, I do not believe it should be the bank. I believe *Oil Co. v. Welborn*, 20 N.C. App. 681, 202 S.E. 2d 618, *cert. denied*, 285 N.C. 235, 204 S.E. 2d 25 (1974) governs and I vote to affirm.

RICHARD J. HALL v. HIGH POINT, THOMASVILLE AND DENTON RAILROAD COMPANY

No. 7922SC159

(Filed 18 December 1979)

1. Evidence § 18— experimental evidence—circumstances not shown to be substantially similar

In an action to recover for injuries suffered by plaintiff when his motorcycle struck defendant's unlighted boxcar at a grade crossing at night, the trial court properly excluded evidence of an experiment conducted by plaintiff's witness relating to the visibility of a train at the crossing at night where there was no evidence that the experiment was conducted under the same atmospheric conditions as existed at the time of the accident and no evidence as to the speed the witness was traveling when he conducted the experiment.

2. Evidence §§ 34.1, 35— statements by defendant's employee—res gestae—admission against interest

A statement by defendant railroad's brakeman that he ran as hard as he could but did not get there in time to stop plaintiff, made several minutes after plaintiff's motorcycle struck defendant's train at a grade crossing, was not admissible as part of the *res gestae* or as a declaration against the interest of defendant.

3. Railroads § 5.8— grade crossing accident—contributory negligence of motorcyclist

In an action to recover for injuries suffered by plaintiff when his motorcycle struck defendant railroad's unlighted boxcar at a grade crossing at night, plaintiff's evidence disclosed that he was contributorily negligent as a matter of law in failing to see the boxcar where it showed that the weather was clear and dry; there were no obstructions to block plaintiff's view; he was familiar with the location of the crossing; and the motorcycle headlights revealed an object 250 feet ahead of plaintiff, but he did not see the boxcar until he was 30 to 35 feet from it.

APPEAL by plaintiff from *Hairston, Judge*. Judgment entered 22 September 1978 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 18 October 1979.

Plaintiff filed this civil action to recover for personal injuries and property damage he sustained in a grade-crossing collision between his motorcycle and defendant's boxcar.

Around 11:00 p.m. on 11 May 1972, plaintiff and two other motorcycle riders had been proceeding in a southerly direction on Liberty Drive in Thomasville. At the intersection of Liberty Drive and Trinity Street, they had stopped for the stoplight. When the light changed, plaintiff had continued along Liberty Drive. Thirty to thirty-five feet from the crossing, plaintiff saw the unlit train sitting across the track but was unable to avoid the collision. There was a street light behind the train, but it did not illuminate it. The boxcars and wheels of the train were dark, and in the background, were dark bushes.

The crossing is located at the crest of a slight incline on Liberty Drive. One hundred feet from the crossing in a northerly direction, a hosiery mill is located, and a light is located in front of the building. Plaintiff was familiar with the railroad crossing, having crossed it approximately 100 times. On the night of the accident, the weather was clear and dry, and there were no obstructions of his view. Plaintiff's motorcycle had a regular, standard

motorcycle headlight which illuminated objects up to 250 or 300 feet ahead, but he did not see the train.

Mrs. Sanya Hester testified in pertinent part:

"[I] was visiting my mother, close to the crossing, she living on Jay Avenue. I left her house after dark, traveling by car in a Corvette, went down Jay Avenue to Liberty Drive, made a right turn and was about two or three blocks from the crossing then. It's level there and then an incline a little more towards the crossing. I got about to the train; I did not see it at first; I had to stop quickly. I sat there a second; I heard a loud crash. A man came out from the right and said go call an ambulance, then I realized there had been an accident. He came from my right and was on the other side of the train. As I came up, I could not see on the other side of the train at all into the street on the other side. My lights were up there above the wheels of the train. I rode back to my mother's house, had her call the ambulance and went back. I had lived close to this crossing on Jay Avenue since I was fourteen with my mother.

COURT: You were going north?

A. Yes, sir.

COURT: You never saw the boxcars in the direction in which plaintiff was coming, is that right?

A. No."

At the conclusion of plaintiff's case, defendant moved for a directed verdict. The trial court granted the motion. Plaintiff appealed.

J. W. Clontz, for plaintiff appellant.

Lovelace, Gill & Snow, by James B. Lovelace, for defendant appellee.

ERWIN, Judge.

[1] Plaintiff contends the trial court erred in excluding evidence of an experiment conducted by plaintiff's witness relating to the visibility of a train at the crossing at night. We disagree.

Whether or not evidence of experiments is admissible is, under the circumstances of each case, a preliminary question for the determination of the court in the exercise of its discretion, which will not be interfered with by an appellate tribunal unless an abuse is made clearly to appear. *Service Co. v. Sales Co.*, 259 N.C. 400, 131 S.E. 2d 9 (1963); *Mintz v. R.R.*, 236 N.C. 109, 72 S.E. 2d 38 (1952). Normally, however, to be admissible, an experiment must satisfy two requirements: (1) it must be under conditions substantially similar to those prevailing at the time of the occurrence involved in the action, and (2) the result of the experiment must have a legitimate tendency to prove or disprove an issue arising out of such occurrence. *Service Co. v. Sales Co., supra,* and *Mintz v. R.R., supra.* The trial court found that plaintiff had failed to meet the first requirement enumerated above.

Plaintiff's witness would have testified that some two weeks later between midnight and 1:15 a.m., he returned to the scene of the accident. He approached the crossing from a southerly direction on his motorcycle, a Honda 350, which was almost identical and the same size as plaintiff's Triumph 500 except for the size of the engine, and the lights on the two motorcycles shone the same. In approaching the crossing on Liberty Drive, the witness started from the intersection at Trinity Street. A boxcar was across the street as he approached the crossing, but he was unable to see the boxcar until he was "[a]s far from here to the end of the wall there." It is not clear to us as to the distance to which the witness was testifying. However, it is clear to us that the trial court did not err in excluding the results of the witness' experiments, because there is no evidence in the record that the experiments were conducted under the same atmospheric conditions, *i.e.*, plaintiff testified that the weather was clear and dry and that there were no obstructions, while the proffered testimony of plaintiff's witness only reveals that the night was dark. Also, there is no evidence as to the speed which the witness was traveling when he conducted the experiment. Accordingly, this assignment of error is overruled.

[2] As his second assignment of error, plaintiff contends the trial court erred in excluding the statement of the railroad's brakeman that he ran as hard as he could run, but did not get there in time to stop him.

The record reveals that the brakeman's statement was made several minutes after the accident, was not part of the *res gestae*, and was therefore properly excluded, *see Lee v. R.R.*, 237 N.C. 357, 75 S.E. 2d 143 (1953); *Bailey v. R.R.* and *King v. R.R.*, 223 N.C. 244, 25 S.E. 2d 833 (1943); *Batchelor v. R.R.*, 196 N.C. 84, 144 S.E. 542 (1928), nor was the statement admissible as a declaration against the interest of defendant. *See Staley v. Park*, 202 N.C. 155, 162 S.E. 202 (1932).

[3] Finally, plaintiff contends that the trial court erred in entering a directed verdict against him. We disagree.

Plaintiff's own evidence, when viewed in the light most favorable to him, reveals that on the night of the accident, the weather was clear and dry. There were no obstructions to block his view. He was familiar with the location of the railroad crossing, having crossed it at least 100 times. His headlights revealed an object at least 250 feet ahead of him, but he did not see the boxcar until he was 30 to 35 feet from it. Regardless whether or not plaintiff actually saw the boxcar, the law imposed upon him the duty to exercise such care so that he should have seen it. *Lee v. R.R.*, 212 N.C. 340, 193 S.E. 395 (1937).

The facts in *Lee, supra*, are practically on all fours with those in the present case. In *Lee, supra*, the plaintiff was driving eastward on a state highway on the west side of the city of Goldsboro when he collided with a flatcar standing across the highway. Plaintiff did not see the flatcar because of the shadows cast by trees and small houses. As here, defendant had failed to provide lights or signals of the presence of the flatcar, and plaintiff could not and did not see the flatcar in time to stop his automobile and avoid the collision. Nevertheless, our Supreme Court stated:

> "[I]n the case at bar there was no rain, but there were 'other conditions on the highway,' namely, the darkened condition of the highway caused by the shadows from the trees and houses on the defendant's right of way [sic]. If this darkened condition rendered it impossible for the plaintiff to see a flat car [sic] across the highway in time to enable him to stop his automobile at the rate of speed at which he was operating it soon enough to avoid a collision, there was a failure to exercise due care on the part of the plaintiff in operating his

> automobile at such a rate of speed. If the plaintiff saw, or by the exercise of due care could have seen, the flat car [sic] in time to stop his automobile soon enough to avoid the collision and failed to do so, there was likewise a failure to exercise due care on his part. The plaintiff, according to his own testimony, was guilty of contributory negligence either in failing to drive within the radius of his lights, that is at a speed at which he could stop within the distance to which his lights would disclose the existence of obstructions, or in failing to see the flat car [sic] in time to avoid the collision. It makes no difference which horn of the dilemma the plaintiff takes, his cause of action is defeated by his own negligence."

212 N.C. at 342, 193 S.E. at 396.

Since the Supreme Court's decision in *Lee, supra*, it has decided the cases of *Beasley v. Williams*, 260 N.C. 561, 133 S.E. 2d 227 (1963), and *Jernigan v. R.R. Co.*, 275 N.C. 277, 167 S.E. 2d 269 (1969).

The Supreme Court held in *Beasley, supra*, that the failure of a driver to stop a motor vehicle within the radius of the lights of the vehicle or within the range of his vision is no longer negligence *per se* or contributory negligence *per se*. In *Jernigan, supra*, the Supreme Court held that entry of a motion of nonsuit against the plaintiff on the grounds of contributory negligence was improper where the plaintiff motorist collided in the nighttime with a train engine standing on a railroad crossing, the tracks were on a downgrade, and a trestle obstructed plaintiff's view.

Even so, the court did not alleviate the duty of an operator of a motor vehicle or motorcycle from a continuing duty to look and listen before entering upon a railroad crossing. *See Jernigan, supra*. Likewise, plaintiff was under a duty to see what could have been seen. *See Lee v. R.R., supra*.

Plaintiff's evidence shows that he should have seen the boxcar in time to avoid the collision, that his failure to do so was a proximate cause of his injury, and that he was guilty of contributory negligence as a matter of law. To the extent that *Lee v. R.R., supra*, iterates this alternative ground for entering a directed verdict, formerly judgment of nonsuit, it is still the law.

The judgment entered below is

Affirmed.

Judges VAUGHN and HILL concur.

STATE OF NORTH CAROLINA v. WAYNE SEAY

No. 7921SC647

(Filed 18 December 1979)

1. **Constitutional Law § 50— five years between offenses and indictments—no denial of speedy trial**

Defendant in an embezzlement prosecution was not denied his right to a speedy trial by the lapse of five years from the time of the alleged offenses to the time indictments were handed down where the evidence tended to show that the length of the delay because of defendant's own assurances that he would repay was not a period of five years but really little more than a year; defendant's own promise of repayment along with a heavy SBI caseload and the complicated nature of this case caused the delay; defendant's own assurances constituted a waiver of most of the time span when an indictment could have been brought; and no prejudice from the delay was shown by defendant.

2. **Embezzlement § 1— elements of offense**

Embezzlement in violation of G.S. 14-90 is made up of four elements: (1) defendant must be the agent of the prosecutor; (2) by terms of his employment, office or other fiduciary relationship he was free to receive the property of his principal; (3) he received the property in the course of his employment, office or other fiduciary relationship; and (4) knowing it was not his own, he converted it to his own use or fraudulently misapplied it.

3. **Embezzlement § 6— defendant as fiduciary**

Defendant in an embezzlement case was in a fiduciary relationship where he was a promoter of a limited partnership in which the prosecutors invested; behind a corporate front, he was in charge of investing the money in real property; he received and deposited their money in the account of a corporation of which he was secretary-treasurer and which he had designated to be general partner for the limited partnership; and the money was not invested as promised and was not returned to those who invested it.

4. **Embezzlement § 6.1— fiduciary—definition in instructions proper**

The trial court in a prosecution for embezzlement in violation of G.S. 14-90 properly defined a fiduciary as "a person having a duty created by his undertaking to act primarily for another's benefit."

State v. Seay

APPEAL by defendant from *Rousseau, Judge.* Judgments entered 19 April 1979 in Superior Court, FORSYTH County. Heard in the Court of Appeals 4 December 1979.

Defendant was charged in two bills of indictment with embezzlement of funds from Inez Poindexter and James Belton. In April, 1973, James Belton, Inez Poindexter and at least one other were solicited by Roger Tise to make investments in Salem Properties, a limited partnership, which would be formed once sufficient capital was raised and which would make investments in real property. The general partner for this limited partnership was to be American Marketing Corporation. Robert McLawhorn was president and defendant was secretary-treasurer of the general partnership corporation. Tise was hired and trained by McLawhorn to solicit capital for the limited partnership. The evidence is in dispute on whether his compensation was to be a salary with a 10% commission for sales or a straight 10% commission. He did receive one check for $500.00 which was designated a "commission advance" and which was drawn on Intercapital Corporation of which defendant was president and McLawhorn was secretary-treasurer.

Poindexter and Belton were provided with subscription letters, power of attorney forms and copies of a partnership agreement for Salem Properties which designated American Marketing Corporation as general partner. Partnership subscriptions were in $100.00 units, and the agreement of partnership was not to become effective or to be recorded with the register of deeds until a minimum of $50,000.00 in capital was raised. The agreement also provided that "[t]he general partner agrees that it will, in the name of the partnership, jointly open and thereafter maintain in a North Carolina bank a bank account or accounts in which shall be deposited all contributions of the partners and all other partnership income and that it will use such funds solely for the business of the partnership." Poindexter contributed $500.00 on 6 April 1973 and Belton contributed $400.00 on 2 April 1973 to the Salem Properties investment explained to them by Tise. Both delivered checks to Tise made payable at his instructions to "American Marketing Corporation, General Partner." Both checks were delivered by Tise to defendant. The checks were cashed and endorsed "For Deposit only, American Marketing Corporation by Wayne Seay." Tise was fired shortly after these solicitations were made.

In the latter part of 1973, Poindexter began inquiring of defendant about her investment. She was given his phone number by Tise who was her son. She called him every month or so about returning the money and was given assurance that he was working on everything and would "get things a-goin'." In March or April, 1975, Tise talked with Seay about the investments and was assured that they were safe but not reachable. In February, 1976, Poindexter consulted an attorney and made a written complaint to the Attorney General in Raleigh. In September, 1976, she saw the district attorney for the twenty-first judicial district. The district attorney wrote defendant a letter and defendant responded by phone in November, 1976. Defendant acknowledged receipt of the money and gave excuses of ill health and promised to repay in thirty days. Belton and Poindexter hired an attorney who also reached defendant. He told their attorney he was financially unable to repay at that time but promised to contact the attorney again within a week about the matter. He never did. The SBI began an investigation in 1977. A limited partnership known as Salem Properties with the general partner being American Marketing Corporation was never registered nor formally created. Poindexter and Belton were never reimbursed nor repaid for their contribution. Indictments were brought against defendant on 27 February 1978 for embezzlement from Poindexter and Belton.

Defendant presented evidence through the testimony of Robert McLawhorn that he and defendant concluded after firing Tise that the investment solicitations made by Tise which totaled $1,000.00 should be returned. They accordingly sent Tise a letter instructing him to use the commission advance to repay Poindexter, his mother. The letter contained $500.00 in cash with which he was to reimburse Belton and another subscriber for their contributions to the Salem Properties venture.

The jury returned verdicts of guilty and judgments were entered thereon. Defendant appeals.

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

Morrow, Fraser and Reavis, by John F. Morrow, for defendant appellant.

VAUGHN, Judge.

[1] Defendant first assigns error in the denial of his pretrial motion to dismiss for denial of his right to a speedy trial embodied in the Sixth Amendment of the United States Constitution applicable to the states through the Fourteenth Amendment and the Eighteenth Section of the First Article of the North Carolina Constitution. Almost five years had passed from the alleged embezzlements in April, 1973 until the 27 February 1978 indictments.

Such a long period of time, nothing else appearing, constitutes unusual and undue delay.

> "[W]hen there has been an atypical delay in issuing a warrant or in securing an indictment and the *defendant shows* (1) that the prosecution deliberately and unnecessarily caused the delay for convenience or supposed advantage of the State; and (2) that the length of delay created a reasonable possibility of prejudice, defendant has been denied his right to a speedy trial and the prosecution must be dismissed."
>
> *State v. Johnson*, 275 N.C. 264, 277, 167 S.E. 2d 274, 283 (1969) (emphasis added).

The circumstances of each case are controlling but factors to be considered by a court in determining whether an accused has been deprived of a speedy trial are (1) the length of the delay, (2) the cause of the delay, (3) waiver by the defendant and (4) prejudice to the defendant. *State v. McKoy*, 294 N.C. 134, 240 S.E. 2d 383 (1978). *State v. Johnson, supra.* In this case, defendant has not shown a deliberate and unnecessary delay caused by the State resulting in a reasonable possibility of prejudice to defendant.

The only possible prejudice shown by defendant at the hearing on the motion was that all records for the varied companies and partnerships he was involved in were lost when the building owner repossessed the business office for all the companies sometime in July or August of 1973. This loss of evidence was not caused or in any way contributed to by the handing down of an indictment in early 1978.

For the first three years of this time span, defendant gave assurance to his alleged victims that the money was safely invested. Not until February of 1976 was any official of the State of North Carolina informed of or complained to in regard to the Poindexter and Belton investments. In September, 1976, the local district attorney received the information and contact was made with defendant. In early November, 1976, he promised the district attorney he would repay the money and was given thirty days to do so. Thus, until early December, 1976, any delay in bringing defendant to trial lies squarely on his shoulders.

In April of 1977, ancillary to an investigation of another set of corporations and partnerships in which defendant was involved, information the local district attorney had on the Poindexter and Belton investments was turned over to the White Collar Crime Unit of the SBI. Because of a heavy caseload, this unit did not begin investigating these particular embezzlements by defendant until October, 1977. Bank records involving the Poindexter and Belton payments were not received until January of 1978. Indictments were brought the next month. The only possible prejudicial delay on these facts was from December, 1976, a time by which defendant was to repay the investors, until February, 1978, a period of little more than a year which was not a period constituting prejudicial delay in defendant's case. It was a reasonable period for investigation particularly in light of the many and varied business and legal entities surrounding defendant.

Thus, looking at the four factors we are to consider according to *State v. McKoy, supra,* and *State v. Johnson, supra,* the facts and circumstances of this case present the following: (1) the length of the delay because of defendant's own assurances that he would repay was not a period of five years but really little more than a year; (2) defendant's own promises of repayment along with a heavy SBI caseload and the complicated nature of this case caused the delay; (3) the defendant's own assurances constituted a waiver of most of the time span when an indictment could have been brought and (4) no prejudice has been shown by defendant.

> "The burden is on an accused who asserts the denial of his right to a speedy trial to show that the delay was due to the

neglect or wilfulness of the prosecution. A defendant who has himself caused the delay, or acquiesced in it, will not be allowed to convert the guarantee, designed for his protection, into a vehicle in which to escape justice." *State v. Johnson*, 275 N.C. at 269, 167 S.E. 2d at 278; *see also State v. Wright*, 290 N.C. 45, 224 S.E. 2d 624 (1976), *cert. den.*, 429 U.S. 1049, 50 L.Ed. 2d 765, 97 S.Ct. 760 (1977).

The trial court properly denied the motion.

[2, 3] Defendant's other assignment of error deals with the jury instruction on the definition of fiduciary. Defendant was charged with embezzlement in violation of G.S. 14-90 which provides:

"If any person exercising a public trust or holding a public office, or any guardian, administrator, executor, trustee, or any receiver, or *any other fiduciary*, or any officer or agent of a corporation, or any agent, consignee, clerk, bailee or servant, except persons under the age of sixteen years, of any person, shall embezzle or fraudulently or knowingly and wilfully misapply or convert to his own use, or shall take, make away with or secrete, with intent to embezzle or fraudulently or knowingly and willfully misapply or convert to his own use any money, goods or other chattels, bank note, check or order for the payment of money issued by or drawn on any bank or other corporation, or any treasury warrant, treasury note, bond or obligation for the payment of money issued by the United States or by any state, or any other valuable security whatsoever belonging to any other person or corporation, unincorporated association or organization which shall have come into his possession or under his care, he shall be guilty of a felony, and shall be punished as in cases of larceny." (Emphasis added.)

The words "or any other fiduciary" were added by amendment in 1939 to enlarge the scope of the statute after a restrictive reading by the Court in *State v. Whitehurst*, 212 N.C. 300, 193 S.E. 2d 657 (1937) and *State v. Ray*, 207 N.C. 642, 178 S.E. 224 (1935). *See State v. Ross*, 272 N.C. 67, 157 S.E. 2d 712 (1967). Embezzlement in violation of this statute is made up of four elements: (1) the defendant must be the agent of the prosecutor; (2) by terms of his employment, office or other fiduciary relationship he was to receive the property of his principal; (3) that he

received the property in the course of his employment, office or other fiduciary relationship and (4) knowing it was not his own, he converted it to his own use or fraudulently misapplied it. *See, e.g., State v. Ellis,* 33 N.C. App. 667, 236 S.E. 2d 299, *cert. den.,* 293 N.C. 255, 236 S.E. 2d 708 (1977). In this case, defendant was in a fiduciary relationship. He was a promoter of a limited partnership in which the prosecutors of this case, Poindexter and Belton, invested. Behind a corporate front, he was in charge of investing the money in real property. He received and deposited their money in the account of a corporation of which he was secretary-treasurer and which he had designated to be general partner for the limited partnership. The money was not invested as promised and was not returned to those who invested it. Defendant's promises, promotions, receipt and disbursement of money, and his position in American Marketing Corporation gave him a fiduciary relationship with the investors. The funds were misapplied before the partnership was formed. No partnership property was embezzled. The investments of Poindexter and Belton were instead embezzled and they were embezzled by one in a fiduciary relation to them. *See* Annot. 82 A.L.R. 3d 822, 851-54 (1978). Defendant's actions were encompassed in the "any other fiduciary" part of the statute.

[4] "Fiduciary" thus became a crucial term in the case. The trial court instructed "a fiduciary is defined in law as a person having a duty created by his undertaking to act primarily for another's benefit." This definition was adequate for the case. Courts have been hesitant to define the term as is the case with the term "fraud" for fear one may escape the consequence of his actions for failure to meet a technical definition. We re-echo this today and in approving the trial court's wording by no means declare its wording the definition of fiduciary. Our Courts have said:

> "The relation may exist under a variety of circumstances; it exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence. 'It not only includes all legal relations, such as attorney and client, broker and principal, executor or administrator and heir, legatee or devisee, factor and principal, guardian and ward, partners, principal and agent, trustee and *cestui que trust,* but it extends to any

possible case in which a fiduciary relation exists in fact, and in which there is confidence reposed on one side, and resulting domination and influence on the other.' "

Abbitt v. Gregory, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931) (citations omitted).

The wording of the instruction in this case was similar to this and adequate.

No error.

Judges WEBB and MARTIN (Harry C.) concur.

VIRGLE RAY ENDSLEY v. WOLFE CAMERA SUPPLY CORPORATION D/B/A WOLFE CAMERA

No. 7926DC150

(Filed 18 December 1979)

Rules of Civil Procedure § 60.2— setting aside judgment for "surprise"—counsel in another court

The trial court did not err in setting aside judgment for defendant on the ground of "surprise" pursuant to G.S. 1A-1, Rule 60(b)(1) where trial of the case began in the Mecklenburg County District Court at 4:00 p.m. and was scheduled to reconvene at 10:30 the next morning; plaintiff was not in court when the trial reconvened and judgment was entered dismissing his action with prejudice and giving judgment for defendant on its counterclaim; plaintiff's attorney was required to be in court in an adjoining county at 9:30 a.m. on the day plaintiff's case was scheduled to reconvene to enter a plea for a client; plaintiff's attorney had arranged to have his case called first at 9:30 a.m., but the judge was late, arriving a few minutes before 10:00 a.m.; plaintiff's attorney immediately disposed of his case and arrived at the Mecklenburg District court at 11:00 a.m.; and on the date plaintiff's case was to reconvene, his attorney's secretary telephoned the Clerk of Court of Mecklenburg County and advised her of the attorney's tardiness and the reason therefor.

APPEAL by defendant from *Bennett, Judge*, from order entered 17 October 1978; and from *Brown, Judge*, from order entered 15 December 1977, in District Court, MECKLENBURG County. Heard in the Court of Appeals 17 October 1979.

Plaintiff brought this action to recover payment for work performed and materials supplied pursuant to an oral contract. Defendant answered and counterclaimed, alleging failure of consideration and damages caused by failure of performance by plaintiff. Trial of the case began at 4:00 o'clock in the afternoon before Judge Saunders and was scheduled to reconvene at 10:30 the next morning. Plaintiff was not in court when the trial reconvened and in his absence, judgment was entered dismissing his action with prejudice and giving judgment for defendant for $2,500.

In apt time plaintiff filed a motion to set the judgment aside, stating the facts on which he based the motion but not the rule or legal grounds upon which he believed he was entitled to relief. In support of his motion, plaintiff alleged that his attorney was required to be in District Court in Gaston County at 9:30 A.M. on the day this trial was scheduled to reconvene at 10:30 A.M., but that at the time of recess the previous afternoon he was not aware of this conflict. Plaintiff's attorney stated that he appeared in Gaston County District Court at 9:00 A.M. to enter a plea for a client on a D.U.I. charge, that he arranged to have his case called first at 9:30 A.M., but the judge was late, arriving a few minutes before 10:00 A.M., and that he immediately disposed of his case and departed for Mecklenburg District Court, arriving at 11:00 A.M.

Plaintiff's attorney further averred that in the meantime his secretary had called the Mecklenburg County Clerk of Court to inform the court about the Gaston County conflict and that his secretary was informed by the Clerk's office that the trial judge had two matters set for 10:30 A.M. In a "supplemental motion" plaintiff alleged that his motion was made pursuant to G.S. 1A-1, Rule 60(b) and that he had a meritorious claim and defense, stating the grounds therefore. Defendant responded to plaintiff's motion and supplemental motion.

Seven months later, on 15 December 1977, hearing was held on plaintiff's Rule 60(b) motion before Judge Brown. He set the judgment aside on the grounds that plaintiff was "surprised" by the delay of the proceedings in Gaston County. He ordered the cause rescheduled for hearing, but did not set aside findings made at the original trial, leaving the weight of those findings to the discretion of the judge who would hear the case.

On 17 October 1978, Judge Bennett heard the case. Plaintiff presented testimony in his behalf and defendant presented the findings of fact entered at the first trial. Judge Bennett entered judgment for the plaintiff against the defendant in the amount of $1,125 and court costs. Defendant appeals.

Ronald Williams for plaintiff appellee.

Newitt & Bruny, by Roger W. Bruny, for defendant appellant.

WELLS, Judge.

The sole question presented on appeal is whether it was error for Judge Brown to set aside the judgment for defendant on grounds of "surprise" on the facts in this case. We find no error.

In his order of 15 December 1977, Judge Brown made careful findings of fact with respect to the events surrounding the initial trial, and then concluded as a matter of law that plaintiff was entitled to have the judgment set aside. A motion for relief under Rule 60(b) is addressed to the sound discretion of the trial court and appellate review is limited to determining whether the trial court abused its discretion. *Sink v. Easter*, 288 N.C. 183, 217 S.E. 2d 532 (1975); *Harrington v. Harrington*, 38 N.C. App. 610, 248 S.E. 2d 460 (1978); *Burwell v. Wilkerson*, 30 N.C. App. 110, 226 S.E. 2d 220 (1976).

This seems to be a matter of first impression before the courts of our State and it presents a novel question. We are guided by the statement of our Supreme Court that, "The surprise contemplated by the statute is some condition or situation in which a party to a cause is unexpectedly placed to his injury, without any fault or negligence on his own, which ordinary prudence could not have guarded against." *Townsend v. Coach Co.*, 231 N.C. 81, 85, 56 S.E. 2d 39, 42 (1949), quoting from 49 C.J.S. Judgments § 280(c), p. 503 (1947). There is no such "surprise" where a party is merely alarmed by an action taken by the court. *Crissman v. Palmer*, 225 N.C. 472, 35 S.E. 2d 422 (1945). Neither does a party's erroneous view of the law constitute a "surprise" sufficient to vacate a judgment. *Lerch v. McKinne*, 187 N.C. 419, 122 S.E. 9 (1924). Nor is a judgment given by consent of a party's attorney, allegedly without authorization, a "surprise"

within the purview of the rule. *Hairston v. Garwood*, 123 N.C. 345, 31 S.E. 653 (1898).

The parties have cited no North Carolina authority directly in point. However, Rule 60(b)(1) is identical to its Federal counterpart. Plaintiff has directed our attention to a pertinent Federal case, *Golf Association v. Park Commission*, 507 F. 2d 227 (5th Cir. 1975), which involved a similar occurrence.

In *Golf Assocation*, plaintiff's counsel alleged in support of his Rule 60(b) motion that he was prepared to present his case in the Federal District Court at 10:00 A.M., but that he had a hearing in state court at 9:30 A.M. on the same day. Although the judge in the state court action assured plaintiff's counsel that the hearing would end in time for counsel's 10:00 A.M. appearance in Federal Court, the hearing did not terminate until 10:20 A.M. and plaintiff's counsel did not arrive in the Federal court until 10:28 A.M. By this time the Federal District Court judge had entered judgment for the defendants. Plaintiff's motion under Rule 60(b) was denied by the trial court. The Fifth Circuit reversed without stating the specific subdivision of Federal Rule 60(b) under which it was holding. The Court stated:

> Rule 60(b) of the Federal Rules of Civil Procedure is a remedial provision intended to prevent injustice by allowing parties their day in court even though some technical error has occurred which would otherwise be grounds for default or dismissal. Recognizing the remedial intention of the rule, this Court has noted that it should be given a liberal construction [citation omitted]. It is generally held that even where there may be evidence in the record which would call for dismissal, any doubt should be resolved in favor of a trial on the merits [citations omitted].

507 F. 2d at 228-229.

The facts in the action *sub judice* present a stronger case for granting relief from judgment than the facts which existed in *Golf Association*. In the case at bar the court found that, prior to 10:30 A.M. on the date trial was to reconvene, the secretary to plaintiff's counsel telephoned the Clerk of Court and advised her of the attorney's tardiness and the reason therefore.

Since Federal Rule 60(b) was derived from § 473 of the California Code of Civil Procedure, the California decisions interpreting that section prior to its incorporation into the Federal Rules have some interpretative utility for the present (b)(1). 7 Moore's Federal Practice ¶ 60.22[1], p. 246 (2nd ed. 1979). A California case, *Miller v. Lee*, 52 Cal. App. 2d 10, 125 P. 2d 627 (1942), was in fact cited by our Supreme Court in *Townsend* in support of the Court's definition of "surprise" which was quoted above. 231 N.C. at 85, 56 S.E. 2d at 42. We note that relief has been granted for "surprise" where a default judgment was rendered against a foreign corporation whose local agent, on advise of counsel, ignored a summons served upon him and did not notify the corporation. *Roberts v. Wilson*, 3 Cal. App. 32, 84 P. 216 (1906). Similarly, there was a "surprise" sufficient to vacate a judgment where counsel had failed to file an amended pleading, believing that a judgment would not be given by the court at that time. *Heilbron v. Campbell*, 5 Cal. Unrep. 745, 23 P. 1032 (1890).

While the "surprise" which the trial court found in the present case may more appropriately have been labeled "mistake" or "excusable neglect", we cannot say that this "surprise" was of a fundamentally different nature than the "surprise" envisioned by our Supreme Court in *Townsend* or found by the California courts in *Roberts* or *Heilbron*. The main point is that the trial court found sufficient facts to show that there was a good excuse for the tardiness of plaintiff's counsel. *See*, 11 Wright & Miller, Federal Practice and Procedure: Civil § 2858, pp. 164-166 (1973).

In the case now before us, the action of Judge Brown allowed the trial on the merits to be completed and concluded in an orderly way. The record and evidence before Judge Brown formed a reasonable basis for his conclusion and we see no abuse of discretion.

Affirmed.

Judges ARNOLD and WEBB concur.

STATE OF NORTH CAROLINA v. ROBERT AARON TILLEY

No. 791SC548

(Filed 18 December 1979)

1. **Arrest and Bail § 3.5; Criminal Law § 75.1— probable cause for arrest—officer requesting arrest by radio—statements not fruit of illegal arrest**

Officers had probable cause to arrest defendant in Tyrrell County for a misdemeanor not committed in their presence pursuant to G.S. 15A-401(b) where a police officer in Manteo, Dare County, observed a car leave the gas pumps of a motor company at a high rate of speed at 2:30 a.m.; the officer pursued the car but was unable to intercept it; the officer then discovered that the coin-operated self-service apparatus on a gas pump at the motor company had been broken open; the officer called officers in adjoining Tyrrell County and asked that they stop a described vehicle; and a Tyrrell County officer thereafter stopped a car fitting such description while it was occupied by defendant, since officers in Tyrrell County could properly arrest a suspect at the request of a Manteo officer who had probable cause to believe that the suspect had committed the offense of breaking into a coin-operated gas pump. Therefore, statements made by defendant to officers were not inadmissible as fruit of an illegal arrest.

2. **Burglary and Unlawful Breakings § 2— breaking into coin- or currency-operated machine—requirements for warning decal not element of crime**

The requirement of G.S. 14-56.1 and G.S. 14-56.3 that a decal be posted on coin-operated or paper currency vending machines stating that it is a crime to break into vending machines is not an element of the offense of forcibly breaking into a coin-operated or currency vending machine.

APPEAL by defendant from *Browning, Judge.* Judgment entered 17 January 1979 in Superior Court, DARE County. Heard in the Court of Appeals 23 October 1979.

Defendant was convicted of three misdemeanor charges of forcibly breaking and entering coin-operated machines in gas pumps in or near the Town of Manteo on 30 November 1978. He appeals from the consolidated judgment imposing a prison term of two years.

Attorney General Edmisten by Associate Attorney Lucien Capone III for the State.

Kellogg, White and Evans by Billy G. Edwards for defendant appellant.

CLARK, Judge.

[1] Defendant made a pretrial motion to suppress all written and oral statements made by him to law enforcement officers on the ground that such statements were the fruit of an arrest made without probable cause.

After the hearing on the motion, the court made findings of fact based on the testimony of Officers Robert D. Mauldin, Lt. David Griggs, and Billy Brown for the State and Barry Lee Whitehead for the defendant, as follows:

> "That on November 30, 1978, at or near the Tillett Motor Company, Manteo, North Carolina, and at or about 2:30 A.M., a Manteo police department patrolman, Robert Mauldin, observed a blue-green Gremlin leaving the scene of the Tillett Motor Company at a high rate of speed; that he pursued the automobile which ran a red light while headed North on U.S. Highway 64, to the vicinity of Manns Habor, North Carolina, and there lost contact with the automobile.
>
> That thereafter he returned to Manteo and the Tillett Motor Company; that Mr. Mauldin alerted the Sheriff's Department in Tyrrell County, and that sometime later, a little after 2:30, the Sheriff of Tyrrell County observed a car meeting the general description of the car seen by Mr. Mauldin, and bearing both defendants, and the car was stopped by the Tyrrell County Sheriff's Department, and that the Sheriff held the two defendants at gun point and asked them to exit the car, and placed them in a shelter for approximately one hour.
>
> That thereafter the Sheriff of Tyrrell County called Dare County to ascertain why he had stopped the car and to tell them that he had the two defendants in custody; that while the two defendants were in the custody of the Sheriff of Tyrrell County, and Officer Mauldin they consented to a search of the automobile at which time the Sheriff and Officer Mauldin found a tire tool and a handgun. That thereafter Mr. Mauldin, of the Manteo police department, went to Tyrrell County at approximately 4:15 in the morning with warrants for the arrest of the two defendants. The warrants in both

cases, 3801 and 3856, are referred to by reference and made a part of this voir dire.

That the two defendants were then returned to Dare County at which time Mr. Tilley was advised of his rights and questioned by Mr. Mauldin at 6:15 A.M. That Mr. Tilley signed a written Waiver of those rights, which has been introduced as State's Exhibit 3 and is incorporated herein by reference.

That Mr. Whitehead was also advised of his rights pursuant to a form introduced as State's Exhibit 4, which is incorporated herein by reference.

That Mr. Tilley at that time made no statement, and that Mr. Whitehead made an oral statement to Officer Mauldin.

That thereafter, in the early afternoon, at approximately 1 P.M., on the said date, that is November 30th, 1978, Mr. Tilley and Mr. Whitehead were again advised of their rights, and in the presence of Lieutenant Griggs of the Nags Head police department, made both a written and oral statement. That State's Exhibit 2 is a written Waiver of the Rights, and contained on the back of State's Exhibit 2 is the statement written by Mr. Tilley, which is incorporated herein by reference.

That State's Exhibit 1 is the Written Waiver of Rights as to Mr. Whitehead, and that on the back of that statement contains the written statement of Mr. Whitehead, which is incorporated herein by reference.

That the statements of oral and written [*sic*] implicated the defendants in the criminal activities involved.

That at the time Lieutenant Griggs talked to the defendants he told them that he would discuss with the District Attorney the possibility of having the cases consolidated for the purposes of trial.

That based on the foregoing Findings of Fact the Court concludes the following:

(1) That the statements made by both Mr. Tilley and Mr. Whitehead were made under such circumstances as did not violate their Constitutional rights and are admissible in trials

as to each defendant. Further that the statements made by Mr. Whitehead and Mr. Tilley were not made in the presence of the other defendant, and therefore are inadmissible in a joint trial of the two defendants.

(2) That search of the automobile in Tyrrell County by a Sheriff of Tyrrell County was made pursuant to a consent given by the defendants, and that the fruits of that search are thereby admissible in the trial of the case as to both Mr. Whitehead and Mr. Tilley.

(3) That the apprehension of Mr. Whitehead and Mr. Tilley was made upon probable cause under such circumstances as the officer in Tyrrell County could reasonably believe that the defendants would elude arrest if not detained at that time. Further that the Sheriff of Dare County obtained a lawful warrant upon which the arrest of both Mr. Tilley and Mr. Whitehead was effected, and that the arrest of both Mr. Tilley and Mr. Whitehead was made under such circumstances as did not violate the Constitutional rights of either of the defendants.

The Court now finds that the statements made as to the defendants and that the search of the defendants' car in Tyrrell County, and that the arrest of each of the defendants were made under such circumstances as did not violate the Constitutional rights of the defendants in these cases."

In determining the issue raised by defendant on appeal, we must determine first if the defendant's arrest was illegal, and, if so, whether the fruit of the poison tree doctrine requires an exclusion of the evidence. See *Wong Sun v. United States,* 371 U.S. 471, 9 L.Ed. 2d 441, 83 S.Ct. 407 (1963); *Brown v. Illinois,* 422 U.S. 590, 45 L.Ed. 2d 416, 95 S.Ct. 2254 (1975).

G.S. 15A-401(b)(2) provides that an officer may make an arrest without a warrant for a misdemeanor committed out of his presence if the officer has probable cause to believe the accused "will not be apprehended unless immediately arrested. . . ."

When Mauldin, a policeman in the Town of Manteo in Dare County, made a call to law enforcement officers in adjoining Tyrrell County requesting that they stop "a blue Pacer with a dark blue stripe," he had probable cause to believe that the occupants

of the vehicle had broken into a coin-operated gas pump on the premises of Tillett Motors. He saw the vehicle leave the scene at a high rate of speed and pursued it for eight miles without being able to get close enough to read the license number. Mauldin then returned to the scene and found that the self-service pump had been broken into. The facts and circumstances within the knowledge of Officer Mauldin were sufficient to warrant a prudent man in believing that the suspects had committed the offense of breaking into the coin-operated gas pump. See Strong's N.C. Index Arrest and Bail § 3.1 (1976).

The law officers in Tyrrell County who stopped the vehicle occupied by defendant and Barry Whitehead relied solely on the basis of a radio dispatch from Officer Mauldin. When the Tyrrell County officers held defendant and Whitehead at gunpoint and took them to the county jail, such control and custody constituted an arrest even though no formal declaration was made. *State v. Tippett*, 270 N.C. 588, 155 S.E. 2d 269 (1967); *State v. Ausborn*, 26 N.C. App. 481, 216 S.E. 2d 396 (1975). The law officers did not have probable cause to arrest the defendant, but it is established that probable cause for an arrest can be imputed from one officer to others acting at his request. The officers receiving the request are entitled to assume that the officer requesting aid had probable cause to believe that a crime had been committed. If the transmitting officer did not have probable cause, the arrest would be illegal. *Whitley v. Warden*, 401 U.S. 560, 91 S.Ct. 1031, 28 L.Ed. 2d 306 (1971); *State v. Jacobs*, 277 N.C. 151, 176 S.E. 2d 744 (1970); *State v. Westry*, 15 N.C. App. 1, 189 S.E. 2d 618, *cert. denied*, 281 N.C. 763, 191 S.E. 2d 360 (1972).

Since defendant was in an automobile traveling away from the scene of the crime, both Officer Mauldin and the Tyrrell County officers were warranted in the belief that defendant would not be apprehended unless immediately arrested. Thus, in arresting the defendant without a warrant for a misdemeanor offense not committed in their presence, the arresting officers complied with N.C. Gen. Stat. § 15A-401(b), and the arrest was both constitutionally valid and legal.

Even assuming, *arguendo*, that the defendant had been illegally arrested and held at the time he made the confession, this was not sufficient to render his confession, otherwise voluntarily

competent as a matter of law, inadmissible. Nonetheless, the facts and circumstances surrounding the illegal arrest and the in-custody statement should be considered in determining whether the confession is voluntary and admissible. *State v. Sanders*, 295 N.C. 361, 245 S.E. 2d 674 (1978); 4 Strong's N.C. Index 3d *Criminal Law* § 75.1 (1976). In the instant case the findings of fact and conclusions made by the trial court in ruling on the voluntariness of the confessions are fully supported by the evidence.

[2] Defendant also contends that since N.C. Gen. Stat. §§ 14-56.1 and 14-56.3 provide that on coin-operated and paper currency machines referred to in the statutes a decal shall be posted stating it is a crime to break into them, that this provision is a necessary element of the offense charged. We find no merit in this argument. *State v. Whitehead*, 42 N.C. App. 506, 257 S.E. 2d 131 (1979). The posting provision is set out in a separate paragraph and is not couched in the terms of a proviso. An interpretation that a person could not be convicted of breaking into such machines unless there was a decal posted thereon would strain to the limits reason and common sense. We find that the decal posting provision was added by the legislature for the purpose of an added deterrent effect. Where possible, the language of a statute will be interpreted so as to avoid an absurd consequence. *State v. Hart*, 287 N.C. 76, 213 S.E. 2d 291 (1975).

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

No error.

Judges HEDRICK and MARTIN (Harry C.) concur.

STATE OF NORTH CAROLINA v. MARY HAZEL GRAY

No. 7925SC624

(Filed 18 December 1979)

1. Criminal Law § 89.8— unrelated criminal charges against witness—hope of reward for testimony—cross-examination properly denied

The trial court in a homicide prosecution did not err in refusing to allow defendant to question a witness about unrelated criminal charges against him

for the purpose of showing that he had a hope of reward from his testimony, since the evidence tended to show that no offers of leniency in exchange for the witness's testimony had been made; the State had in fact rejected a plea agreement proposed by the witness's attorney; and the witness's testimony was consistent with the final statement he gave to police two days after the homicide.

2. Criminal Law § 113.7— homicide—instruction on acting in concert proper

The trial court in a homicide prosecution adequately charged the jury, upon sufficient evidence, that defendant would be guilty if she and her son, acting together, killed deceased.

APPEAL by defendant from *Thornburg, Judge*. Judgment entered 7 February 1979 in Superior Court, BURKE County. Heard in the Court of Appeals 28 November 1979.

Defendant and her son Robert Campbell were indicted for the murder of Donald Gray, defendant's husband. Under a plea agreement by the terms of which he would testify at defendant's trial and would receive no more than twenty years active sentence, Robert Campbell pled guilty to second degree murder.

Officer Richards of the Drexel police testified for the State that he was called to the Gray home in the early morning hours of 25 June 1978 in relation to a domestic dispute. He had been there at other times for the same reason, and on each occasion defendant had been drinking and her husband had not. Defendant said that her husband had hit her, and she "said she was going to kill Mr. Gray, something had to be done with him." Later that morning Richards saw defendant walking down the street and she told him her husband had assaulted her again. Around 7:30 a.m. Richards was called back to the Gray home, the killing having occurred there by that time.

Subsequently, defendant told the police that Robert had killed her husband because "[w]e no more than walked in the door, and my husband had a twelve gauge shotgun pointed right at me. He told me to get out or he was going to kill me."

Officer Yount testified that he was notified by radio at about 6:55 a.m. that there had been a shooting at the Gray residence. When he entered the house he found defendant, Joe Hallyburton, Robert Campbell and Danny Campbell seated at the kitchen table. Defendant told him that Robert had killed her husband. She told

him that it was self-defense, but he observed no bruises or scratches on her. When he first asked her defendant answered that she had not been assaulted.

Robert Campbell testified that at 6:00 or 6:30 on the morning of 25 June his mother came to the place where he lived and asked him to go with her to Castle Bridge to look for her husband. She said he had beaten her up and she was going to shoot him. Defendant had been drinking "quite a bit." Robert, his younger brother Danny, and his friend Joe Hallyburton went with her. Defendant "said if I didn't shoot him that she would," and "said that if she shot him she wouldn't collect no insurance but if I did, she would."

When they failed to find Gray at Castle Bridge they went to look for him at Bear Campbell's, and defendant said "if he come out the door into the parking lot, to shoot him. She said that if I was to get sent off, it wouldn't be but a couple of years, but it would be worth it to have him gone." Campbell agreed to shoot Gray, but testified he did not mean it; he was only trying to keep his mother from shooting Gray.

Having failed to find Gray at Bear Campbell's, they returned to the Gray residence, and defendant said her husband was not there because she didn't see his car. Robert knew Gray was there, and when he went inside he took with him the gun that had been in the car. Defendant went into the bedroom where Gray was lying down, and they started "fussing." Defendant picked up the twelve gauge shotgun that was lying beside Gray's bed and started running with it. Gray ran after her "and then she started yelling, shoot him, shoot him." Campbell shot him once and defendant "said shoot him, shoot him, he ain't dead." Campbell fired four shots altogether. When Gray fell he was still alive, but defendant, rather than calling an ambulance, instructed the boys as to the story they should tell the police. She told them to say that Gray had held a gun to her head, although this was not true. Robert testified that he had taken the gun into the house intending to give it to Gray "to stop the killing," but he changed his mind when defendant got Gray's gun and was running with it saying "Shoot him, shoot him." Campbell "became excited and shot him."

Joe Hallyburton testified, corroborating Robert Campbell's testimony. When the police came, he told them the story that de-

fendant had told him to tell, but that statement was a lie. He gave the police three false statements and a fourth true one. Defendant's counsel was not allowed to cross-examine Hallyburton about a number of unrelated charges against him which had been dismissed.

Hallyburton's mother, Gail Williams, testified that about a week before the shooting defendant came to her house, and during the conversation there said that her husband had been beating her and she was going to kill him. Georgia Henson testified that she received a call from defendant around 5:30 on the morning of the shooting. Defendant was looking for her husband and said she was going to kill him.

Defendant presented no evidence. She was found guilty of second degree murder and sentenced to 30 years. She appeals.

Attorney General Edmisten, by Associate Attorney J. Chris Prather, for the State.

Mitchell, Teele, Blackwell & Mitchell, by W. Harold Mitchell and H. Dockery Teele, Jr., for defendant appellant.

ARNOLD, Judge.

[1] Defendant contends that the trial court erred in refusing to allow her counsel to question the witness Hallyburton about unrelated criminal charges against him, for the purpose of showing that he had a hope of reward from his testimony. Before ruling upon the defendant's request to so examine Hallyburton, the trial court held a lengthy voir dire. It revealed that a number of the charges against the witness had been dismissed as frivolous by the trial judges before whom they were brought, dropped by the prosecuting witnesses, or dismissed by prosecutors for insufficient evidence. On the remaining felony charges no offers of leniency in exchange for the testimony had been made, and in fact the State had rejected a plea agreement proposed by Hallyburton's attorney. Upon this evidence the court denied defendant's request, and we find no error in this denial. We are aware of this court's holding in *State v. Biggerstaff*, 16 N.C. App. 140, 191 S.E. 2d 426 (1972), that evidence of unrelated criminal charges which had been dropped should have been admitted to show that the witness "was in such a position that she might have felt it ad-

visable to curry favor with the State." *Id.* at 145, 191 S.E. 2d 429. However, the evidence presented on voir dire in the present case gave no indication that the witness had received, or hoped for, favors from the State. Hallyburton's testimony was consistent with the final statement he gave to police two days after the shooting, and with the testimony of Robert Campbell. He testified that his attorney sought a plea bargain "wanting them to guarantee me probation if I testified, but they wouldn't deal, so I'm going to testify anyway." We note that any witness under indictment is in a position where it may appear to him "advisable to curry favor with the State," and yet our Supreme Court has expressly held that for purposes of impeachment a witness may not be cross-examined as to whether he has been indicted on an unrelated criminal offense. *State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174 (1971).

Defendant cannot complain of purported inadequacies in the charge on self-defense, since there is no evidence in this case to support a charge on self-defense. See *State v. Bailey*, 4 N.C. App. 407, 167 S.E. 2d 24 (1969). The charge given in error could only have worked to defendant's benefit.

[2] Defendant contends that the trial court erred in charging the jury on "acting in concert" and failing to charge on "aiding and abetting." Defendant has failed to show, however, how this alleged error is prejudicial.

One who actually participates in the deed is a principal in the first degree (acting in concert), and one who is actually or constructively present and aids in the commission of the crime is a principal in the second degree (aiding and abetting). *State v. Allison*, 200 N.C. 190, 156 S.E. 547 (1931). It has long been recognized in North Carolina that the distinction between principals in the first and second degree is a distinction without a difference, and that both are equally guilty. *State v. Benton*, 276 N.C. 641, 174 S.E. 2d 793 (1970); *State v. Allison, supra*; *State v. Whitt*, 113 N.C. 716 (1893). The trial court adequately charged the jury, upon sufficient evidence, that defendant would be guilty if she and Robert Campbell, acting together, killed the deceased. We find no prejudicial error in the charge.

The defendant received a fair trial, free from prejudicial error.

No error.

Judges CLARK and ERWIN concur.

STATE OF NORTH CAROLINA v. WILL FRANK ROSS AND JOHN E. FULWILEY

No. 7927SC620

(Filed 18 December 1979)

Burglary and Unlawful Breakings § 5.9; Larceny § 7.5— breaking and entering store—larceny of goods—defendant present at crime scene—insufficiency of evidence to convict

In a prosecution for breaking and entering and larceny, the trial court erred in denying defendants' motions for nonsuit where the evidence tended to show that defendants were present at the scene at the time the crimes were committed, but one defendant was intoxicated throughout the events in question and there was no direct evidence that he was one of the perpetrators of the crimes; the other defendant stopped his car because he was having radiator trouble; his passengers, who had paid him to drive them to the city, left the car and broke into the store in question; and the fact that defendant jumped into his car when the store alarm went off was insufficient without more to show participation, assistance, or encouragement in the perpetration of the crimes.

APPEAL by defendants from *Burroughs, Judge.* Judgment entered 9 February 1979 and amended judgment enter 20 March 1979 in Superior Court, GASTON County. Heard in the Court of Appeals 28 November 1979.

Each defendant was charged in a bill of indictment for breaking and entering and larceny. The cases were consolidated for trial, and each defendant was convicted as charged. Defendants appealed from sentences of active confinement.

Attorney General Edmisten, by Special Deputy Attorney General John R. B. Matthis and Associate Attorney James C. Gulick, for the State.

Public Defender Curtis O. Harris, 27th A Judicial District, for defendant appellants.

ERWIN, Judge.

Defendants present one question on appeal: "Did the Court err in failing to dismiss the cases against the defendants in that the evidence presented by the State showed only that the defendants were present at the scene of the crime?" We answer, "Yes."

Upon motion for judgment as of nonsuit, the evidence must be considered in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom. When there is sufficient evidence, direct or circumstantial, by which the jury could find defendants had committed the offenses charged, then the motion should be denied. *State v. Hunter*, 290 N.C. 556, 227 S.E. 2d 535 (1976), *cert. denied*, 429 U.S. 1093, 51 L.Ed. 2d 539, 97 S.Ct. 1106 (1977); *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976); 4 Strong's N.C. Index 3d, Criminal Law, § 106, p. 547.

The State's evidence, when considered in the light most favorable to it, tended to show that near 10:00 p.m. on 3 October 1978, Officer Isenhour of the Mount Holly Police Department was driving a 1979 Ford Pickup and observed a car parked in front of Leader's Department Store in plain view from the police station 200 feet away. Defendant Ross, a Mr. Brown, a Miss Gillard, and defendant Fulwiley were standing outside the car. The hood and trunk of the vehicle were up, and defendant Ross was "under the hood." Isenhour drove to the police station and notified Officer McCumbee, who was on duty, about the car. As Isenhour came out of the station, he heard glass break and saw two subjects running from the store, one of whom was Mr. Brown, who got into the passenger side of the car. The department store alarm went off at the police department.

Other officers testified that they saw Brown run from the store, and when they heard a loud noise, three people jumped into the car. When officers arrived, defendant Ross was in the driver's seat, Mr. Brown, also known as Don Curatin, was in the right, front passenger seat, and Miss Gillard and defendant Fulwiley were in the back seat. Officer McCumbee testified that Brown, who gave the officer a false name, had carried a bundle of clothes toward the car. When officers arrived, the car motor was not running. Isenhour did not notice whether water had been poured around the radiator, although there was a thermos jug in the car

trunk. The bundle of clothing from Leader's Department Store valued at $500 was outside the car beside the front, passenger door.

Women's clothing in a plastic bag and trousers in a bed sheet were found in the trunk of the car. These items were identified as coming from a previous break-in. All of the glass in the front door of the store was broken out, and there was a towel inside the store wrapped around a piece of concrete. No one in the group had authority to enter the store.

Defendants' evidence tended to show that defendants had met Curatin and Gillard at Lynn's Smoke Shop in Charlotte. Defendant Ross had agreed for pay to carry Curatin and Gillard to Freedom Village Mall in Charlotte and had subsequently agreed to carry them to Mount Holly for five dollars. During the drive to Mount Holly, Curatin and Gillard did not discuss what was to happen in Mount Holly. Following Curatin's directions, Ross turned at the first red light in Mount Holly. His car was smoking, and he pulled over to the front of Leader's Department Store when the indicator light in his car indicated that his radiator was running hot. Ross opened the car hood, opened the trunk, and took out a thermos bottle filled with water, which he kept for such an occasion. Curatin had gotten out of the car when Ross was pouring the water in the radiator. He saw Curatin take a towel and hit the window in Leader's Department Store. He told Curatin not to do it, closed his hood, and jumped in the car after he saw Curatin throw the towel through the window.

Throughout the occurrence of these events, defendant Fulwiley, Ross' brother, was intoxicated, had taken valium, and did not remember any break-in or recall getting out of the car, although he did recall that "his brother may have been fixing on the car because . . . he told me [Fulwiley] his radiator was messed up." After the officers arrived, defendant Fulwiley was arrested and placed in the drunk tank.

In *State v. Ham*, 238 N.C. 94, 76 S.E. 2d 346 (1953), our Supreme Court held, in substance, that in order to render one who does not actually participate in the commission of the crime guilty of the offense committed, there must be some evidence tending to show that he, by word or deed, gave active encouragement to the perpetrator or perpetrators of the crime, or by his

conduct made it known to such perpetrator or perpetrators that he was standing by to render assistance when and if it should become necessary. The evidence in the record in the instant case does not present sufficient inferences to warrant verdicts finding defendants guilty of the alleged crimes.

In 4 Strong's N.C. Index 3d, Criminal Law, § 104, p. 543, the law as it relates to the consideration of defendants' evidence on appellate review of a motion to nonsuit is set forth in pertinent part as follows:

> "Defendant's evidence which explains or makes clear that which has been offered by the state may be considered, insofar as it is not in conflict therewith. This rule also permits the consideration of defendant's evidence which rebuts the inference of guilt when it is not inconsistent with the state's evidence, and exculpatory statements offered in evidence by the state are also properly considered on motion for nonsuit." (Footnotes omitted.)

See also State v. Evans and *State v. Britton* and *State v. Hairston*, 279 N.C. 447, 183 S.E. 2d 540 (1971). When properly viewed, defendants' evidence rebuts the inference of guilt arising from the State's evidence.

In *State v. Evans, supra*, three defendants had entered a fast-food restaurant. Defendant Britton had merely stood in front of the counter. Defendant Evans had proceeded into the kitchen and informed the employees of the restaurant that they were being held up. Defendant Hairston had entered the premises carrying a loaded shotgun. Our Supreme Court held that nonsuit should have been entered for defendant Britton, because his mere presence at the scene of the crime and at the time of the commission did not make him a principal in the second degree. In *State v. Evans, supra*, all of the defendants testified that Britton had been picked up by Evans and Hairston some five minutes earlier for the sole purpose of giving him a ride to his destination and that there was no conversation of consequence between Britton and the other defendants or between Evans and Hairston in his presence concerning any robbery of the business establishment.

In the present case, defendants' evidence indicates that they knew nothing of Curatin's and Gillard's intent to break into and enter the Leader's Department Store.

Miss Gillard testified that she and Curatin had not discussed their plans with the defendants but had used them as "patsies." She further stated that defendant Ross had stopped the car because the radiator was running hot and not for the purpose of assisting in the perpetration of the offenses charged. Defendants' evidence also indicates that Ross had carried Curatin and Gillard to Mount Holly only because he was paid to do so. This evidence does not conflict with the State's evidence, which tends to show that Ross was under the hood of the car but had jumped in his car when the store alarm went off. Ross' jumping into the car when the store alarm went off is insufficient without more to show participation, assistance, or encouragement in the perpetration of the crimes.

All the evidence indicates that defendant Fulwiley was intoxicated throughout the occurrence of the events in question.

The facts herein are sufficiently analogous to those in *State v. Evans, supra,* and are governed thereby. We hold that defendants' motions for nonsuit should have been allowed. *See State v. Aycoth,* 272 N.C. 48, 157 S.E. 2d 655 (1967).

The judgments in Case Nos. 78CRS23392 and 78CRS23393 are

Reversed.

Judges CLARK and ARNOLD concur.

LARRY EUGENE COBLE v. CHERYL BANKS COBLE (KLASSETTE)

No. 7926DC205

(Filed 18 December 1979)

1. Divorce and Alimony § 24; Parent and Child § 7— support of child—duties of father and mother

Under G.S. 50-13.4(b), the father has the primary duty to provide support for his minor children, but the mother may also have a duty of contribution upon proof of proper circumstances.

2. Divorce and Alimony § 24— child support—payment by mother to father

The trial court did not err in determining that plaintiff father is entitled to an award of $180.00 per month from defendant mother for the partial support of their children where plaintiff father was given custody of the children and the evidence supported the court's findings that plaintiff father is in need of financial assistance from defendant mother for the partial support of the children and that she is regularly employed and capable of providing it.

3. Divorce and Alimony § 24.2— child support—effect of separation agreement

A provision in a contract between parents relating to support of their children is only presumptively just and reasonable and is subject to change by the court upon a showing of need.

Judge MARTIN (Robert M.) dissents.

APPEAL by defendant from *Brown, Judge.* Order entered 21 December 1978 in District Court, MECKLENBURG County. Heard in the Court of Appeals 26 September 1979.

This action for divorce was brought on 16 January 1978 by plaintiff. In her answer defendant admitted the allegations of the complaint and prayed for custody of the two minor children born of the marriage, James Stephen Coble, then age 7, and Brandee Nicole Coble, then age 3. The parties were married on 6 September 1969 and lived together as husband and wife until their separation on 9 June 1976. Pursuant to the terms of a separation agreement, plaintiff-father had retained custody of the children. After a decree of absolute divorce was entered on 28 March 1978, plaintiff-father filed a motion in the cause alleging that the best interests of the minor children would be served by awarding custody to him. He further prayed for an award of child support.

At the hearing on the motion, plaintiff presented evidence that his net monthly income was $825.00 and his average monthly expenses, including those of the minor children, were $1,049.20. Defendant offered evidence that she had remarried, and that she was currently employed at a wage of $3.97 per hour on a forty-hour week, plus time-and-a-half for overtime which totalled as much as 32 hours in one week. During the parties' separation she bought the children clothes, shoes, toys, and other items which they needed and she was able to provide.

In its order of 21 December 1978, the trial judge awarded custody of the minor children to plaintiff-father, subject to visita-

tion rights of defendant on alternate week-ends, Christmases, and birthdays. The court also made findings of fact, in part, as follows:

> 12. Defendant has an average monthly net income of approximately $645.00 (LSB) $483.32, plus additional sums through her overtime wages. The additional amounts of income she derives from said overtime employment is not determinable at this time. Defendant's living expenses are approximately $510.00 per month.
>
> The Plaintiff's average net monthly income is approximately $825.00 and the average monthly financial needs of said minor children are approximately $432.00.
>
> * * *
>
> 16. Plaintiff is in need of financial assistance from the Defendant for the partial support and maintenance of said children. Defendant is an able-bodied person and is capable of providing child support as herein ordered.

Based on these findings of fact the court concluded that plaintiff was entitled to an award of child support and ordered defendant to pay the sum of $180.00 per month until the children's majority. Defendant appeals from this order.

Levine, Goodman & Pawlowski, by Paul L. Pawlowski for plaintiff-appellee.

Bryant, Hicks & Sentelle, by Richard A. Elkins, for defendant-appellant.

PARKER, Judge.

[1, 2] Defendant's assignments of error are directed to the trial court's finding of fact that the defendant is capable of providing child support and to its conclusion that the plaintiff is entitled to an award of $180.00 per month in child support. The initial question presented is whether defendant-mother has any legal duty to provide support for her children. G.S. 50-13.4(b) provides in part:

> In the absence of pleading and proof that circumstances of the case otherwise warrant, the father, the mother, or any person, agency, organization or institution standing in loco parentis shall be liable, in that order, for the support of a

> minor child. Such other circumstances may include, but shall not be limited to, the relative ability of all the above-mentioned parties to provide support or the inability of one or more of them to provide support, and the needs and estate of the child . . . .

Under the statute, the duty of the father to provide support is primary. *Tidwell v. Booker*, 290 N.C. 98, 225 S.E. 2d 816 (1976). However, the mother also may have a duty of contribution upon proof of proper circumstances. *See McKaughn v. McKaughn*, 29 N.C. App. 702, 225 S.E. 2d 616 (1976). Such circumstances have been shown in the present case. Plaintiff-father had exercised custody and control of the minor children since the parties' separation and, under the terms of the court's order of 21 December 1978, will continue to exercise such custody and control. The trial judge found as a fact that plaintiff-father is in need of financial assistance from defendant-mother for the *partial* support of the children, and that she is capable of providing it. He made specific findings of fact concerning the monthly expenses and average net income of defendant-mother, the average monthly financial needs of the children, and plaintiff-father's monthly net income. Although there was no finding as to plaintiff-father's monthly expenses, the court's finding that he was in need of financial assistance is supported by competent evidence in the record that monthly expenses for himself and the children totalled $1,049.20, which is $224.20 in excess of his average net income. Likewise, there is competent evidence in the record that defendant is regularly employed with a steady income, and that she has a working spouse. The finding of fact of defendant-mother's ability to pay, as well as of plaintiff-father's need of such payment, being supported by the evidence, is therefore conclusive. *Wyatt v. Wyatt*, 32 N.C. App. 162, 231 S.E. 2d 42 (1977). There is no indication in this case, contrary to defendant-mother's contention, that the trial court intended to shift the primary duty of support to defendant-mother. Having considered "relative ability" of the parties to provide support in view of their expenses and incomes, as required by G.S. 50-13.4(b), the trial judge merely determined that plaintiff-father should receive some assistance in bearing the cost of supporting the children in his custody.

The next question presented is whether the court erred in ordering defendant-mother to pay $180.00 per month in partial

support. The amount awarded for child support is in the sound discretion of the trial judge and will be disturbed only where abuse of discretion is shown. *Sawyer v. Sawyer*, 21 N.C. App. 293, 204 S.E. 2d 224 (1974). No such abuse of discretion has been shown in the present case. Although defendant-mother's expenses exceed her income even before the support payment is made, plaintiff-father is in no better financial position. It is apparent from the findings that the trial court took the needs of both parties into consideration, as well as the monthly needs of the children, and apportioned the duty of support accordingly.

[3] Defendant-mother has also presented the argument on this appeal that the 2 July 1976 separation agreement entered into between the parties precludes any award of child support. That question is not properly before this Court, since the agreement was not made a part of the record in this case. However, even if the parties did so contract, their agreement could not operate to remove the children completely from the protective supervision of the courts in regard to support. *Bunn v. Bunn*, 262 N.C. 67, 136 S.E. 2d 240 (1964); 2 Lee, North Carolina Family Law, § 189, pp. 395-396 (1963). A provision in a contract between the parents relating to support of their children would only be presumptively just and reasonable, subject to change by the court upon a showing of need. *Fuchs v. Fuchs*, 260 N.C. 635, 133 S.E. 2d 487 (1963).

For the reasons stated, the order appealed from is

Affirmed.

Chief Judge MORRIS concurs.

Judge MARTIN (Robert M.) dissents.

DOTTIE EILEEN KITCHEN v. WACHOVIA BANK & TRUST COMPANY, N.A.

No. 798SC404

(Filed 18 December 1979)

Trover and Conversion § 2— repossession of trailer—personalty wrongfully taken —no demand for return—no gratuitous bailment—summary judgment improper

In an action to recover for the wrongful conversion of personal property by defendant during the process of repossessing plaintiff's mobile home in which defendant had a security interest, the trial court erred in entering summary judgment for defendant where there was a genuine issue of fact as to whether plaintiff abandoned her personal property, and the fact that plaintiff failed to demand return of her property would not make summary judgment appropriate since a demand and refusal are merely one means of showing a conversion, and demand and refusal are unnecessary when there has been a wrongful taking. Furthermore, defendant's contention that its taking of the personal property under circumstances which led its agents to believe the property was abandoned constituted a gratuitous bailment was specifically contradicted by plaintiff's affidavit and therefore should have been resolved at trial.

APPEAL by plaintiff from *Stevens, Judge.* Judgment entered 8 March 1979 in Superior Court, WAYNE County. Heard in the Court of Appeals 4 December 1979.

Plaintiff brought suit against defendant in April 1976, alleging that during the process of repossessing plaintiff's mobile home in which defendant had a security interest, defendant wrongfully converted items of personal property owned by plaintiff to which the security interest did not apply. Plaintiff sought $635 in actual damages and $50,000 in punitive damages. On 10 June 1976 defendant filed motion for summary judgment, seeking dismissal of plaintiff's action. Supporting affidavits and answer to plaintiff's complaint were filed by defendant 28 February 1977 and 2 March 1979, respectively; plaintiff filed opposing affidavits 8 March 1979. The court granted defendant's motion after hearing arguments of counsel. Plaintiff appeals.

Duke & Brown, by John E. Duke, and Hulse & Hulse, by Herbert B. Hulse, for plaintiff appellant.

Taylor, Warren, Kerr & Walker, by Robert D. Walker, Jr., for defendant appellee.

MARTIN (Harry C.), Judge.

The rules governing the propriety or impropriety of granting summary judgment under Rule 56 are set forth in *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). It will serve no useful purpose to repeat them here. Reviewing the record on appeal before us in this case, we hold the entry of summary judgment was inappropriate, and reverse.

Plaintiff alleged that defendant wrongfully converted items of her personal property, including an air conditioner, a lawn mower, a ladder and a grill, located on the premises at the time her trailer was repossessed. Defendant offered affidavits from three men who were involved in the repossession. All three recited that "the mobile home did not appear to have been inhabited for several weeks." All three stated they found the items of personal property "on the location of P & D Mobile Home Park." James A. Starling, Jr., said he had kept the property in storage since the day the trailer was repossessed and was "willing and able to deliver those items to whomever the Court decides has possession of those items." In its answer defendant alleged as a defense that plaintiff had abandoned the property and that because of plaintiff's abandonment, defendant was "entitled to take immediate possession of said property." Defendant also alleged that because plaintiff had never made demand upon defendant for the return of her property, plaintiff's claim for relief based upon wrongful conversion was barred.

In plaintiff's affidavit, filed in opposition to defendant's motion for summary judgment, she testified that she moved her personal belongings out of the trailer on Wednesday and Thursday before the trailer was repossessed on Friday. She was pregnant and unable to move the heavier items. She told the manager of the trailer park that she would be back "the next day or over the weekend" to move the items she left behind. She found two friends who agreed to help her move the items on Saturday. When she returned to the trailer park, not only the trailer but also the personal property left outside the trailer in the yard was gone. "These items have never been returned to me, and I have never given Wachovia Bank & Trust Company permission to have them."

Intent to relinquish the property permanently is an essential element of abandonment of property; therefore, the question of abandonment is almost always a fact question for the jury. *Miller v. Teer*, 220 N.C. 605, 18 S.E. 2d 173 (1942); *Furniture Co. v. Cole*, 207 N.C. 840, 178 S.E. 579 (1935).

Clearly plaintiff's response to defendant's motion for summary judgment sets forth specific facts showing that there is a genuine issue for trial: whether plaintiff did abandon the personal property, as defendant maintains, or whether defendant wrongfully converted the property, as plaintiff contends.

Defendant contends that summary judgment was proper because plaintiff failed to demand return of her property. Plaintiff did not controvert this allegation. However, the general rule is that "where some other independent act of conversion can be shown, there is no necessity for a demand for personal property by the person claiming ownership or right to possession, and a refusal by the original taker thereof to deliver it, in order to show a conversion of the property." 89 C.J.S. Trover & Conversion § 55 (1955). A demand and refusal is merely one means of showing a conversion; a demand and refusal is unnecessary when there has been a wrongful taking. *Id.*

Defendant appellee argues in its brief that its taking the personal property into its possession under circumstances which led defendant's agents to believe the property was abandoned constituted a gratuitous bailment; therefore, it was in lawful and rightful possession of the property. Where a gratuitous bailment is established, there must be a demand by plaintiff bailor for return of the property followed by a refusal from defendant bailee to return the goods before an action for conversion will lie. *Herring v. Creech*, 241 N.C. 233, 84 S.E. 2d 886 (1954). But, as we have already stated, plaintiff's affidavit sets forth specific facts contradicting defendant's theory of gratuitous bailment which necessitate resolution at trial.

Defendant's attempt to create a gratuitous bailment out of an alleged abandonment by plaintiff is somewhat of a non sequitur. It is correct that personal property may be abandoned. 1 C.J.S. Abandonment § 5 (1936). But as a result of abandonment, ownership of personalty is lost; the former owner of the property is divested of title to the property. The original owner cannot

reassert his ownership rights after abandonment, to the prejudice of those who in the meantime appropriated the property. 1 Am. Jur. 2d Abandoned, Lost, Etc., Property § 24 (1962). Under the abandonment theory, plaintiff would have lost her property and would have no legal right to demand return of it.

Because a genuine issue for trial exists in this case, it was inappropriate that summary judgment be granted defendant.

Reversed.

Judges VAUGHN and WEBB concur.

ALMA ATKINS ROBERTSON, WIDOW OF THOMAS ROOSEVELT ROBERTSON, DECEASED v. SHEPHERD CONSTRUCTION COMPANY AND CONTINENTAL CASUALTY INSURANCE COMPANY

No. 7910IC250

(Filed 18 December 1979)

Master and Servant § 62— workmen's compensation—accident while driving employer's truck home from work

The death of an employee in an accident while driving his employer's pickup truck home from work did not arise out of and in the course of his employment where all the evidence showed that the employer did not provide transportation for the deceased employee as an incident of his contract of employment.

APPEAL by defendants from order of North Carolina Industrial Commission entered 14 November 1978. Heard in the Court of Appeals 13 November 1979.

On 16 July 1976 Thomas Roosevelt Robertson died as a result of injuries sustained in an automobile accident. Robertson was employed in a non-supervisory position as a fuel truck driver for Shepherd Construction Company. At the time of the accident Robertson was driving a pickup truck, not a fuel truck, owned by his employer. Robertson intended to use the pickup truck as

transporation to work the next day. As Robertson was going to his home at the end of the workday, the truck veered off the road surface and crashed. The accident involved no other vehicle.

The deceased's widow filed a claim for death benefits under the North Carolina Workmen's Compensation Act, on behalf of herself and the deceased's minor children. Commissioner Coy M. Vance heard the matter 26 January 1978; on 22 May 1978 he entered an opinion and award, ruling in favor of claimant. The full commission, one commissioner dissenting, affirmed the award. Defendants appeal.

Faw, Folger, Sharpe and White, by Fredrick G. Johnson, for plaintiff appellee.

Womble, Carlyle, Sandridge & Rice, by Allan R. Gitter, William C. Raper, and Frederick J. Murrell, for defendant appellants.

MARTIN (Harry C.), Judge.

The hearing commissioner and the full commission concluded that Thomas Robertson died from an injury by accident arising out of and in the course of his employment. This conclusion of law is based on two findings of fact:

> 15. Decedent was in the course of his employment with defendant-employer while driving the company-owned truck on July 16, 1976. There was no reason to use the company truck for transportation home because his wife was present with their personal car ready to take him home. Decedent was scheduled to work the next day, Saturday, July 17, 1976. He had permission to drive the company truck home and was traveling the route normally traveled going to and from work.
>
> 24. Decedent sustained an injury by accident arising out of and in the course of his employment on July 16, 1976 which resulted in his death. Decedent's death was not proximately caused by intoxication.

Defendants argue that there is no evidence in the record to support these crucial findings. We agree with defendants and therefore reverse the ruling of the full commission.

An absolutely essential element for recovery under the N.C. Workers' Compensation Act is that injuries be the result of an "accident arising out of and in the course of the employment, ..." N.C. Gen. Stat. 97-2(6). As a general rule, injuries sustained in accidents occurring while the employee is going to or coming from work are not compensable under the Act. *Hardy v. Small*, 246 N.C. 581, 99 S.E. 2d 862 (1957); *Insurance Co. v. Curry*, 28 N.C. App. 286, 221 S.E. 2d 75, *disc. rev. denied*, 289 N.C. 615, 223 S.E. 2d 396 (1976). There is, however, an exception to the general rule: injuries sustained by an employee while going to or from work are considered to have arisen in the course of his employment and are compensable if the employer is under a contractual duty to provide transportation for his employees. *Whittington v. Schnierson & Sons*, 255 N.C. 724, 122 S.E. 2d 724 (1961); *Smith v. Gastonia*, 216 N.C. 517, 5 S.E. 2d 540 (1939); *Insurance Co. v. Curry, supra.*

A further requirement under this exception is that this provision for transportation must be an incident to the contract of employment. *Lassiter v. Telephone Co.*, 215 N.C. 227, 1 S.E. 2d 542 (1939); *Harris v. Farrell, Inc.*, 31 N.C. App. 204, 229 S.E. 2d 45 (1976). The transportation must be provided as a matter of right; if it is merely permissive, gratuitous, or a mere accommodation, the employee is not in the course of employment. *Jackson, Long, Johnson, Evans, Swann v. Bobbitt*, 253 N.C. 670, 117 S.E. 2d 806 (1961); *Lassiter v. Telephone Co., supra; Insurance Co. v. Curry, supra.* In order to recover death benefits in this case, claimant must show that the deceased comes within the exception to the general rule.

There is no specific finding by the commission that deceased's employer had provided him transportation as an incident to his contract of employment. The absence of such a finding is not fatal to the decision; however, the absence of any competent evidence to support this fact does preclude recovery by claimant. In actuality, all the evidence directly contradicts a finding that transportation was provided the deceased as an incident to his employment contract. Michael Wayne Hancock, who was assistant superintendent for Shepherd Construction Company at the time of the accident, testified at the hearing. In response to a question concerning the policy of Shepherd regarding the use of company vehicles at that time, Hancock answered: "The only

people that operated the trucks were foremen, superintendents and myself, unless given permission those trucks were not operated." When asked whether the trucks were "used to have normal employees" drive to and from work, he replied, "No, not non-supervisory staff, no." This evidence was not contradicted by plaintiff.

Deceased's brother-in-law, Fox Atkins, testified that "[t]hree people out of 25 were given trucks to drive." Only the foremen and Mike Hancock were given trucks to go back and forth to work in. When Atkins was hired by Shepherd, he was not told that one of the benefits of employment was transportation to and from work; he was not offered a truck as transportation to and from work.

Testimony from the widow and daughter of the deceased revealed that the daughter routinely took him to work in the mornings and the wife picked him up in the afternoons. This arrangement was followed after Fox Atkins terminated his employment at Shepherd. Up until then, the deceased traveled to and from work with Fox in Fox's personal automobile. The widow stated that her husband "did not ever bring a Shepherd truck home for the sole purpose of transportation to and from work." There had been an occasion when he drove a Shepherd vehicle home because he was to go to Atlanta to pick up another vehicle. Again she stated that her husband had never brought the pickup home for himself, "[n]ever to get back and forth from work." We think this evidence clearly shows that Shepherd did not provide transportation for the deceased as an incident to his employment contract. The commission's finding that decedent was in the course of his employment is not supported by competent evidence.

Both parties discuss *Battle v. Electic Co.*, 15 N.C. App. 246, 189 S.E. 2d 788, *cert. denied*, 281 N.C. 755, 191 S.E. 2d 353 (1972), in their briefs. In *Battle*, an employee was crushed by his employer's dump truck while warming it up in the morning preparatory to going to his job site. We agree with defendants' contention that *Battle* should not be supportive of plaintiff's position in this case primarily because the employer in *Battle* regularly furnished the employee a truck for transportation to and from the work sites. This factor sufficiently distinguishes the two cases.

Defendants also argue there is no evidence to support the finding of fact that the deceased had permission to drive the company truck home the day of the accident. It is unnecessary that we resolve this question on appeal. Even if there were competent evidence in the record to support this finding, the permission given the deceased on this single, isolated occasion would not make the operation of the pickup truck an incident of his contract of employment. *Jackson v. Bobbitt, supra; Lassiter v. Telephone Co., supra.*

Defendants' remaining assignments of error are directed toward the issue of deceased's state of intoxication at the time of the accident. Because we hold that the commission erred in finding that the employee was in the course of his employment at the time of his death, it is also unnecessary that we discuss and resolve this controversy.

The order of the commission ruling in favor of plaintiff is reversed.

Reversed.

Judges VAUGHN and WEBB concur.

CAROLYN R. COX v. JAMES W. COX

No. 7910DC518

(Filed 18 December 1979)

1. Divorce and Alimony § 24.5; Social Security and Public Welfare § 2— mother receiving AFDC assistance—assignment of child support to county—right of county to make motion in pending action

Where plaintiff mother who received public assistance under the AFDC program assigned to Wake County her right to receive any support on behalf of her children, Wake County had standing to make a motion in an action between plaintiff mother and defendant father to modify a child support order to require that the support be paid to Wake County. G.S. 50-13.7(a).

2. Divorce and Alimony § 24; Social Security and Public Welfare § 2—mortgage payments as child support—mother receiving AFDC assistance—assignment of payments to State

Mortgage payments required to be made by defendant father constituted child support for the minor children of plaintiff mother and defendant where the children lived in the house subject to the mortgage and the required payments were to be reduced by one-third as each child reached age 18 and were to be completely stopped when the youngest child became age 18; therefore, where plaintiff mother received public assistance under the AFDC program, the mortgage payments were assigned to the State both by operation of law under G.S. 110-137 and by her written assignment to Wake County of her right to receive any support on behalf of her children.

APPEAL by plaintiff from *Parker, Judge.* Order signed 24 January 1979 in District Court, WAKE County. Heard in the Court of Appeals 27 November 1979.

Plaintiff began this action for divorce from bed and board, asking for child custody, support and possession of the home owned by plaintiff and defendant. The parties have three children: Lisa, born 6 May 1964; James, born 7 July 1967; and Amy, born 14 September 1973.

At hearing on 3 October 1975, plaintiff wavied her claims to alimony and the court entered an order, consented to by the parties, granting plaintiff custody of the children and possession of the home, and requiring defendant to pay the mortgage against the home. Defendant was to write a $50 check payable to North Carolina National Bank each week and deliver it to plaintiff for payment to the bank. As each of the three children attained the age of eighteen, this weekly payment would be reduced by one-third, no payments being required after the youngest child reached eighteen years of age.

Sometime thereafter, the plaintiff began receiving public assistance on behalf of the children under Aid to Families with Dependent Children (hereinafter AFDC) and on 3 Feburary 1976 she executed a written assignment to Wake County of the right to receive any support on behalf of the children.

On 8 December 1978, the attorney for Wake County filed notice of motion and motion alleging the Wake County Child Support Enforcement Agency (hereinafter Wake County) was an interested party in this case pursuant to N.C.G.S. 50-13.7, the minor children are receiving public assistance under AFDC, and

N.C.G.S. 110-135 makes a debt due the state by defendant arising upon the payments under AFDC, and requesting the court to order the weekly $50 payments be made to the North Carolina Department of Human Resources.

Defendant filed no response to this motion but plaintiff did, contending Wake County did not have standing to make the motion, no support payments were made by defendant for the children, only mortgage payments, and Wake County had not shown any change of condition to justify modifying the court's order.

The court, on 24 January 1979, signed an order after hearing on Wake County's motion, making findings of fact and conclusions of law, and ordering that "[a]ll child support payments made pursuant to" the order of 3 October 1975 shall be made to the Clerk of Superior Court of Wake County who shall transmit them to the North Carolina Department of Human Resources as prescribed in N.C.G.S. 110-132.

From this order, plaintiff appeals.

Brenton D. Adams for plaintiff appellant.

Wake County Attorney Michael R. Ferrell for appellee (Wake County Child Support Enforcement Agency).

MARTIN (Harry C.), Judge.

Under the law of North Carolina, when the people, through the state, provide support for minor children by AFDC, there arises a debt owed to the state by any parent obligated to support such minor children. N.C. Gen. Stat. 110-135. The county attorney shall represent the state in proceedings to collect such debts. N.C. Gen. Stat. 110-135. The recipient of such public assistance for minor children shall be deemed to have made an assignment to the state of the right to any child support, up to the amount of public assistance received. The state is subrogated to the right of the person having custody of such children to recover any payments ordered by the courts of this state. N.C. Gen. Stat. 110-137.

[1] Appellant contends the state in this case is not entitled to reimbursement of the funds paid for the support of her minor

children. We do not agree. Appellant's argument that Wake County could not make the motion for reimbursement because it was not a party to the action is without merit. The provisions of N.C.G.S. 50-13.7(a) allow "either party or anyone interested" to make a motion in the cause to modify an order for support. Obviously, if the legislature had intended that only parties could make such motions, it would have used "any party" rather than the language employed. By virtue of the assignment pursuant to N.C.G.S. 110-137, the state, or the county on its behalf, has an interest in the order for the support of plaintiff's children. Upon the making of such motion, the movant could be required to become a party to the action if deemed appropriate by the court. N.C. Gen. Stat. 1A-1, Rule 25(d). Plaintiff made no motion to join Wake County as a party. Under N.C.G.S. 110-135 the county attorney had a duty to represent the state in this proceeding. We hold the motion for modification of the support order was properly made by Wake County.

[2] Clearly, the mortgage payments required to be made by defendant constituted child support for the minor children of plaintiff and defendant. The children lived in the house subject to the mortgage lien; as each child attained the age of eighteen years, the required payments were reduced by one-third; when the youngest child became eighteen years old, the payments completely stopped.

Being child support payments, the weekly mortgage payments were assigned by operation of law, as well as by the written assignment to Wake County executed by plaintiff, to the state, and the court properly modified the order for support by directing that the weekly payments of $50 be paid by defendant to the Clerk of Superior Court of Wake County, to be transmitted by the clerk to the North Carolina Department of Human Resources.

The fact that plaintiff began receiving public assistance on behalf of the children, and executed the assignment on 3 February 1976, is sufficient change of circumstances to justify the modification of the previous order. The usual questions concerning modification of a support order are not present here. Wake County is entitled to the relief sought as a matter of law. While it does not appear of record, presumably the children receive more

benefit from the AFDC payments than from the defendant's weekly mortgage payments of $50.

The order of the district court is

Affirmed.

Judges VAUGHN and WEBB concur.

STATE OF NORTH CAROLINA v. EVELYN HORTON

No. 7910SC626

(Filed 18 December 1979)

1. **Robbery § 3.2; Searches and Seizures § 36— warrantless search incident to arrest—admissibility of knife in defendant's pocketbook**

In an armed robbery prosecution where the victim told investigating officers that defendant had held a knife to her throat during commission of the crime, the trial court did not err in admitting into evidence a knife taken from defendant's pocketbook without a warrant, since the officer who arrested defendant was preparing to return the pocketbook to her and had a right for his own protection to search it for weapons.

2. **Criminal Law § 91.7— absence of alibi witness—continuance properly denied**

The trial court did not abuse its discretion in denying defendant's motion to continue the case in order for her to obtain an alibi witness where defendant had issued a subpoena for the witness but did not know his address, and the deputy sheriff, in an attempt to serve the subpoena, went to the witness's last known address in two cities and tried to ascertain the witness's place of employment through the SBI, based on his social security number.

3. **Criminal Law § 34.4; Robbery § 3— armed robbery—accomplice's attempted sexual assault—admissibility of evidence**

In a prosecution for armed robbery, the trial court did not err in permitting the victim to testify that, during the course of the crime, defendant left the room and her accomplice attempted a sexual assault upon her, since the State was entitled to prove all the events integral to the incident for which defendant was charged, including a separate crime committed by defendant's accomplice during the course of the robbery.

4. **Criminal Law § 114.2— armed robbery—instruction on use of knife—no expression of opinion**

In a prosecution for armed robbery, the trial court did not express an opinion that the State had proved defendant used a knife when the court used the expression, "the manner in which the defendant used it or threatened to

use it," when instructing the jury on determining whether the knife introduced into evidence was dangerous to the life of the victim.

APPEAL by defendant from *Lee, Judge*. Judgment entered 8 February 1979 in Superior Court, WAKE County. Heard in the Court of Appeals 29 November 1979.

The defendant was charged with armed robbery. The State's evidence tended to show that Ella McLeod, a 72-year-old widow had known the defendant for approximately 30 months on 7 April 1978. On that date, defendant and a black male entered the home of defendant and robbed her. During the robbery, defendant held a knife at the throat of Mrs. McLeod. Mrs. McLeod told the investigating officers that the defendant was carrying a purse when she left Mrs. McLeod's home. The next day, Dennis Harrell, a detective with the City of Raleigh Police Department, went to the home of defendant and arrested her. Detective Harrell testified that at that time the defendant wanted to take her pocketbook with her to police headquarters, and he told her she could not carry it while she was handcuffed. As a convenience for defendant, he carried her pocketbook for her to the Investigative Division of police headquarters. At the Investigative Division, a detective was preparing to give the pocketbook to defendant. Mr. Harrell testified: "I told her that before I gave it back to her I had to search it for weapons for my own protection. I searched it and found the knife." The defendant moved to suppress the knife as evidence and a hearing was held prior to the trial on this motion. The court made findings of fact consistent with the testimony of Mr. Harrell and concluded the search of the pocketbook during which the knife was found was incident to a lawful arrest. The judge denied the motion to suppress.

The defendant was convicted and sentenced to prison. She has appealed.

Attorney General Edmisten, by Special Deputy Attorney General Charles J. Murray, for the State.

Samuel O. Southern for defendant appellant.

WEBB, Judge.

[1] The defendant's first assignment of error deals with the admission into evidence of the knife taken from defendant's pocket-

book. She contends it should have been suppressed because it was found as the result of an unlawful search. Defendant relies on *United States v. Chadwick*, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed. 2d 538 (1977). In that case, the United States Supreme Court affirmed the exclusion from evidence of marijuana taken from a footlocker belonging to defendant. The defendant was in custody at the time of the search and the officers had possession of the footlocker with probable cause to believe it contained marijuana. The Supreme Court held that this did not excuse the officers from obtaining a search warrant. The Court recognized that one exception to the rule requiring a search warrant is found in the situation when an officer has the right to search for weapons on the person or items within the immediate control of a person arrested. We hold the case sub judice falls within this exception. When Mr. Harrell was preparing to return the pocketbook to defendant, he had the right for his own protection to search it for weapons.

[2] The defendant's second assignment of error deals with the court's refusal to grant her motion to continue the case in order for her to obtain an alibi witness. The defendant had issued a subpoena for Bernard Estes, who she said would testify as an alibi witness for her. The defendant did not know the address of the witness. In an attempt to serve the subpoena, a deputy sheriff went to Mr. Estes' last known address in Raleigh and his last known address in Holly Springs. At each place, the deputy was told Mr. Estes had moved and left no forwarding address. The Sheriff's Department also tried to ascertain Mr. Estes' place of employment through the State Bureau of Identification, based on his social security number. No record of his being employed for the previous six months could be found. He had previously been a probation absconder. Based on these facts, we hold the court did not abuse its discretion in denying the motion for continuance. *See State v. Hailstock*, 15 N.C. App. 556, 190 S.E. 2d 376 (1972).

[3] The defendant's third assignment of error deals with the court's allowing Mrs. McLeod to testify that during the course of events which led to the charges against defendant, the defendant left the room and her accomplice attempted a sexual assault upon Mrs. McLeod. Defendant contends this evidence was irrelevant to the charge against defendant and it only served to prejudice the jury against her. This assignment of error is overruled. The State

was entitled to prove all the events integral to the incident for which defendant was charged. This would include a separate crime committed by defendant's accomplice during the course of the robbery. *See State v. Falk*, 33 N.C. App. 268, 234 S.E. 2d 768 (1977).

[4] The defendant's fourth assignment of error deals with the charge. Judge Lee instructed the jury in part as follows:

> "In determining whether the knife introduced into evidence in this case was dangerous to the life of Ella McLeod, you would consider the nature of the weapon or the knife, the manner in which the defendant used it or threatened to use it, and the size, age and strength of the defendant Evelyn Horton as compared to the size, age and strength of Ella McLeod."

The defendant contends this statement violates G.S. 15A-1232. She says this is so because the court expressed an opinion that the State had proved defendant used a knife when the judge used the expression: "the manner in which the defendant used it or threatened to use it." This part of the charge is in accord with the Pattern Jury Instructions. *See* N.C.P.I.—Crim. 217.30. Immediately prior to the portion of the charge set forth above, the court charged the jury that the State had to prove beyond a reasonable doubt that defendant had in her possession a dangerous weapon. Reading the charge contextually, we believe it is clear Judge Lee instructed the jury they must be satisfied beyond a reasonable doubt that defendant had a deadly weapon, and he did not express an opinion that the State had proved this fact.

No error.

Judges VAUGHN and MARTIN (Harry C.) concur.

HARRINGTON MANUFACTURING COMPANY, INC. v. POWELL MANUFACTURING COMPANY, INC.

No. 796SC295

(Filed 18 December 1979)

Venue § 7— counterclaim only unadjudicated claim—no removal as a matter of right

Where defendant's compulsory counterclaim is the only claim left to be adjudicated, defendant is not entitled under G.S. 1-83 to a change of venue as a matter of right from the county of plaintiff's residence to the county of defendant's residence, since the county of plaintiff's residence is a proper venue under G.S. 1-82. Furthermore, defendant waived objection to venue by failing to make a motion to remove prior to filing an answer to plaintiff's complaint.

APPEAL by defendant from *Peel, Judge.* Order entered 26 February 1979 in Superior Court, BERTIE County. Heard in the Court of Appeals on 15 November 1979.

This is the third appeal to this Court in this action which was filed, originally, on 12 September 1974 in the Superior Court of Bertie County, whereby plaintiff Harrington sought damages for alleged unfair trade practices by defendant. On 4 November 1974, prior to answering the plaintiff's complaint, defendant Powell filed an action in the Superior Court of Mecklenburg County asserting a claim against Harrington for unfair trade practices. On 10 January 1975, Powell filed an answer to the Bertie County complaint which it was allowed to amend on 4 November 1975, and in which it asserted numerous defenses and added a counterclaim based on "unfair trade competition." Thereafter, pursuant to various Orders of the Court of Appeals and the Supreme Court, the complaint filed by Powell in Mecklenburg County was dismissed, with leave to Powell to assert the claims contained therein as a "compulsory counterclaim" in the Bertie County action. This Powell did on 29 September 1976.

On 5 October 1976 plaintiff moved to dismiss defendant's counterclaims pursuant to Rule 12(b)(6), G.S. § 1A-1. On 28 January 1977 defendant moved for summary judgment against plaintiff. By a judgment dated 11 May 1977, the trial court allowed both motions, and both parties appealed to this Court. In an opinion reported at 38 N.C. App. 393, 248 S.E. 2d 739 (1978), *cert. denied,* 296 N.C. 411, 251 S.E. 2d 469 (1979), Judge Parker

for the Court affirmed the order granting summary judgment against plaintiff, affirmed the dismissal of three of defendant's counterclaims and reversed the dismissal of the remaining counterclaim.

Thereafter, on 16 January 1979 (amended 12 February 1979), defendant moved for a change of venue of its counterclaim from Bertie County to Mecklenburg County, contending that it was entitled to the transfer "as a matter of right and . . . within the equitable powers of the Court . . . ." Upon the denial of the motion on 26 February 1979, defendant appealed.

Pritchett, Cooke & Burch, by W. W. Pritchett, Jr. and Stephen R. Burch, for the plaintiff appellee.

Grier, Parker, Poe, Thompson, Bernstein, Gage & Preston, by Gaston H. Gage and William P. Farthing, Jr., for the defendant appellant.

HEDRICK, Judge.

Defendant Powell contends that the trial court erred in denying its motion for a change of venue for the reason that it has been "converted" into the plaintiff in this lawsuit since its counterclaim is the only claim left to be adjudicated, and, therefore, as a matter of right and "historical choice", it should choose the forum in which to try its claim. Powell concedes that it has been unable to find any authority to support its position.

We turn, then, to an examination of the pertinent sections of our venue statute and find that, at the outset, G.S. § 1-82 is applicable to this action. It provides in part:

> *Venue in all other cases.* —In all other cases the action must be tried in the county in which the plaintiffs or the defendants, . . . reside at its commencement, . . .

Clearly, Bertie County, the home of the plaintiff Harrington, is proper for venue, and defedant Powell frankly admits that fact. But, based upon its view of its present position in the suit, Powell argues that it is entitled to a change of venue pursuant to G.S. § 1-83, which in relevant part provides:

> *Change of venue.* —If the county designated for that purpose in the summons and complaint is *not* the proper one, the

action may, however, be tried therein, unless the defendant, before the time of answering expires, demands in writing that the trial be conducted in the proper county, . . .

The court may change the place of trial in the following cases:

(1) When the county designated for that purpose is not the proper use.

(2) When the convenience of witnesses and the ends of justice would be promoted by the change.

(3) When the judge has, at any time, been interested as party or counsel.

(4) When the motion is made by the plaintiff and the action is for divorce and the defendant has not been personally served with summons.

[Emphasis added.]

Defendant has neither alleged nor argued grounds for removal based on the interest of the judge, or the convenience of witnesses, and, obviously, defendant could not proceed under subsection (4) of § 1-83. Moreover, in ruling on defendant's motion below, the judge expressly excluded "any consideration of change of venue for convenience of witnesses and ends of justice, those grounds not being presented by Affidavit or argument." Even assuming, *arguendo,* that defendant had based its motion upon such grounds, removal on those grounds is addressed to the sound discretion of the trial judge. *Patrick v. Hurdle,* 6 N.C. App. 51, 169 S.E. 2d 239 (1969). His decision thereon is not reviewable, except upon a showing of abuse of discretion. *Causey v. Morris,* 195 N.C. 532, 142 S.E. 783 (1928); *Phillips v. Currie Mills, Inc.,* 24 N.C. App. 143, 209 S.E. 2d 886 (1974).

There are no other grounds under the statute upon which defendant can base a successful argument for a change of venue. It concedes that Bertie County is proper under G.S. § 1-82. Thus, removal as a matter of right from an improper county as provided for in § 1-83 is not at issue. If defendant's contention at this time is that Bertie is *not* proper, a position which could not be sustained, failure to follow the mandates of § 1-83, by not making such a motion "before the time of answering expires," results in a

waiver of defendant's "right" to a change. *Collyer v. Bell*, 12 N.C. App. 653, 184 S.E. 2d 414 (1971). Defendant made no motion to remove prior to filing an answer to plaintiff's complaint. It has, therefore, waived whatever "right" it now seeks to assert. Any motion for change thereafter is addressed to the sound discretion of the court. Defendant does not allege, much less prove, that the court abused its discretion in denying the motion.

Defendant's argument that it "should not be penalized because of the venue statutes' failure to address venue of compulsory counterclaims in such remote circumstances" is unsupported in law and in logic. Yet, the resolution of this "extraordinarily circuitous" case has been delayed for almost another year. We hold that Bertie County is the proper venue.

Therefore, the Order of the trial judge denying defendant's motion for change is

Affirmed.

Judges MARTIN (Robert M.) and WELLS concur.

SAMMY WARREN WOODRUFF v. JANET WALLACE WOODRUFF

No. 7921DC456

(Filed 18 December 1979)

Divorce and Alimony § 25.12— homosexual father—visitation rights with son not denied

The trial court did not err in granting plaintiff father who was a homosexual unsupervised overnight visitation rights with his minor son.

APPEAL by defendant from *Tash, Judge*. Order entered 7 March 1979 in District Court, FORSYTH County. Heard in the Court of Appeals 14 November 1979.

Plaintiff's complaint alleges that his wife, defendant, refused to allow him to visit with their minor son, born on 11 February 1976, in accordance with the terms of a 3 May 1978 separation agreement under which plaintiff was given "reasonable and

liberal rights of visitation." By letter dated 17 August 1978 from defendant to plaintiff, defendant set out certain limitations on plaintiff's visitation and indicated her concern that their son not be exposed to plaintiff's "open and gay life-style."

At a hearing on 19 January 1979, plaintiff's evidence tended to show: that plaintiff currently lives alone; that he is seeking increased visitation rights; that he is a homosexual; that prior to his separation, another homosexual was a frequent visitor at his home, and at times, he visited when defendant was absent, but their son was at home; that on at least one occasion when he was there, the door was locked, and the curtains pulled; that on one occasion, plaintiff and the other person took the parties' son on a walk in a secluded area near their home; that after the separation, plaintiff moved to an apartment with the other homosexual; and that plaintiff occasionally smokes marijuana.

Winston Stuart, an acquaintance of plaintiff and defendant, testified that plaintiff was a good father regardless of his homosexuality.

Dr. John Compere, who was found to be an expert in the field of clinical psychology, testified: that plaintiff disclosed his homosexuality to defendant during one of several counseling sessions they had with him; that plaintiff cared for his son over the past year while defendant worked; that to stop plaintiff's association with his son would be detrimental to the child's well-being; and that both plaintiff and defendant are fit parents.

Defendant's evidence tended to show that she is worried about plaintiff's having exposed their child to his lover and the detrimental effect plaintiff's homosexuality will have on the child in their community. Defendant had used marijuana three times but not around the minor child. Plaintiff took good care of the child until 31 March 1978 when he frequently began leaving him with his mother, mother-in-law, or at a day-care facility. After plaintiff and defendant separated, plaintiff and another homosexual lived in an apartment with only one bed and with bowls of marijuana openly displayed.

The court entered an order allowing plaintiff alternate weekend visitation pending a more complete review and hearing on the matter. On 2 March 1979, a hearing was held at which

plaintiff and his mother testified about plaintiff's visitations with his son since 19 January 1979. Defendant testified that their son's visits with plaintiff were very damaging, leaving him nervous and insecure, causing defendant to remove him from school, and retaining a child psychiatrist.

The court entered an order finding, *inter alia*: that plaintiff has admitted homosexual tendencies; that in Dr. Compere's opinion, plaintiff was the more "nurturing parent," and to sever this father-son relationship would be detrimental to the child's well-being, whereas to maintain it would be in the child's best interest; and that there was no evidence that plaintiff ever physically abused the child or showed affection for other men in the child's presence. The court concluded that both parties were fit and proper parents and ordered that plaintiff be allowed alternate weekend, summer, and holiday visitation. Defendant appealed.

Schramm & Frenck, by John J. Schramm, Jr., for plaintiff appellee.

White & Crumpler, by Fred G. Crumpler, Jr. and V. Edward Jennings, Jr., for defendant appellant.

ERWIN, Judge.

Did the trial court commit error in granting a father who is homosexual unsupervised overnight visitation rights with his minor son? On the record before us, we answer, "No."

Courts are generally reluctant to deny all visitation rights to parents of a child of tender age, but it is generally agreed that visitation rights should not be permitted to jeopardize a child's welfare. *Swicegood v. Swicegood*, 270 N.C. 278, 154 S.E. 2d 324 (1967). *Annot.*, 88 A.L.R. 2d 148 (1963). While the welfare of a child is always to be treated as the paramount consideration, the courts recognize that the wide discretionary power is necessarily vested in the trial courts in reaching decisions in particular cases. *Griffin v. Griffin*, 237 N.C. 404, 75 S.E. 2d 133 (1953).

The court found facts as follows:

> "[t]hat the plaintiff admitted having homosexual tendencies and experienced a feeling of love for a male person named Don Hall. That Don Hall, on occasions, visited with plaintiff

in their home during a period when plaintiff was unemployed and the defendant was at work. On one of these occasions, when the child was present, Don Hall visited with the plaintiff during an afternoon when the doors were locked and the window shades drawn. On another occasion, plaintiff and Don Hall, in the company of the minor child, went for a walk alone, in a park near Yadkin River. Subsequently, plaintiff and defendant were separated as were Don Hall and his wife, and plaintiff and Don Hall moved into an apartment where they lived together for some period of time.

* * *

Dr. Compere further stated that in his professional, expert opinion, there is no known cause of male homosexuality. He further testified that there is, however, a substantiated theory that a male child, raised by an extremely domineering mother, may pursue a homosexual lifestyle [sic]. Dr. Compere further stated that, in his professional expert opinion, the son of a homosexual father will not inherit that homosexuality.

The doctor further testified that in his professional expert opinion, a severance of the father-son relationship in this case would be detrimental to the child's wellbeing [sic] and that maintenance of the father-son relationship would be beneficial and in the child's best interest.

DEFENDANT'S EXCEPTION NO. 7

The Court further finds that there is no evidence that the minor child has ever been physically abused by the plaintiff; nor is there evidence that the plaintiff ever demonstrated any affection for other men in the presence of the minor child."

The evidence presented supports the court's findings of fact, and the conclusions of law entered by the court were proper. The primary custody of the child was placed with the defendant-mother. The court further ordered: "It is further ordered that the plaintiff shall not cause the minor child to be in the presence of his boyfriends, and shall not have boyfriends visit him in his home when he is with the child."

We concede that the trial court was faced with a very serious and difficult problem in this case. We note the order entered is not permanent in nature and may be changed from time to time if circumstances and conditions then and there existing warrant change in the visitation rights awarded. We do not find any evidence from the record that would lead us to reverse this case.

Judgment affirmed.

Judges CLARK and ARNOLD concur.

GEORGE D. HARDESTY III v. TED FERRELL, JR.

No. 7915SC368

(Filed 18 December 1979)

Partnership § 1.1— inadequate instructions on formation of partnership

The trial court's instructions on the law applicable to the formation of partnerships were inadequate where the court failed to instruct on the applicable statutory rules for determining the existence of a partnership which are set forth in G.S. 59-37.

APPEAL by defendant from *Battle, Judge*. Judgment entered 20 October 1978 in Superior Court, ORANGE County. Heard in the Court of Appeals 29 November 1979.

Plaintiff brought this action seeking, among other things, a formal account as to partnership affairs. At the close of plaintiff's evidence, and on motion of defendant, it was ordered that only the issue of whether a partnership existed would be submitted to the jury with reference to plaintiff's claim. That issue was as follows: "Did the plaintiff, George D. Hardesty III, and the defendant, Ted Ferrell, Jr., form a partnership for the operation of The Keg Nightclub in June of 1974?" The jury answered that issue in the affirmative.

No brief for plaintiff appellee.

Epting, Hackney and Long, by Joe Hackney, for defendant appellant.

VAUGHN, Judge.

Plaintiff offered evidence tending to show that on 17 June 1974, he and one Sammy Jackson agreed, in writing, to purchase defendant's business in Raleigh known as "The Keg." Revenue for the business came from a charge for admission to watch females dance and the sale of beer. Plaintiff paid defendant $10,000.00 as one-half of the purchase price. After several days it became apparent that Jackson was not going to contribute his part of the money and, consequently, could not participate in the venture. Since plaintiff was only 19 at the time, the plan had been to put the beer license in Jackson's name. Plaintiff and defendant then reached a new agreement on 21 June, whereby plaintiff and defendant would operate the business as a partnership with each partner having an equal interest in the business. Defendant was to keep the beer license in his name and to have operating control of the business. Plaintiff was to pay defendant $15,000.00 for a one-half interest in the business. Defendant was to retain the $10,000.00 already paid by plaintiff and the remaining $5,000.00 was to be paid in installments. It was expected that the business would lose money for the rest of the summer but would become profitable when the college students returned to Raleigh for the fall semester. Both plaintiff and defendant participated in the operation of the business. No bank record was maintained. Both of the parties took in cash, paid expenses in cash and used some of their personal funds in the business. At intervals, plaintiff paid defendant certain sums necessary to balance his cash contributions for business expenses with that of defendant. Plaintiff paid defendant $2,500.00 as his share of the losses during the summer and gave him an additional $1,000.00 toward the purchase of a pinball machine and jukebox. On 30 August 1974, defendant demanded an additional $1,300.00 from plaintiff to equalize their accounts and an additional sum for the purchase of new carpet. Plaintiff told defendant that he would pay him the $1,300.00 but said they should defer buying the carpet until the business began to show a profit. Defendant became very angry and made plaintiff go outside. He pushed plaintiff around and told him that if he did not come up with the carpet money he would have to leave. Defendant demanded plaintiff's keys and threatened him with severe injury if he did not leave. Defendant sent an employee for plaintiff's textbooks and a small box containing his personal

belongings. Plaintiff left and has never returned. Defendant did not return any part of the approximately $13,500.00 plaintiff invested in the partnership.

Defendant's evidence tended to show that there was a written contract for the sale of the business to plaintiff and Jackson for $20,000.00 of which he received $10,000.00 from plaintiff. He estimated that the physical assets of the business were worth about $9,000.00 on 17 June 1974 and that if the business name and good will were to be included, the value of the business would have been about $15,000.00. After plaintiff advised him that Jackson was not going through with his part of the bargain, defendant agreed to let the business operate under his beer license and supervision for which plaintiff was to pay him $100.00 weekly. He denied that he ever agreed or intended to participate in the creation of a partnership with plaintiff. Plaintiff was going to pay the balance of the purchase price in a lump sum. As of 30 August 1974, plaintiff had not paid him any part of the additional $10,000.00 which he felt he was entitled to receive under the original sales contract. On the evening of that day, he told plaintiff to either give him the money or to give him the keys to the business. Plaintiff elected to surrender the keys without being threatened and left the premises. Defendant continued to operate the business as his own until September, 1975, when his lease ran out and he sold the business.

Defendant complains that, in his jury instructions, the judge failed to give adequate instructions on the law applicable to the formation of partnerships. We agree. The instructions were limited to the following:

> "Now, members of the jury, I instruct you that a partnership is an association of two or more persons to carry on as co-owners a business for profit. A partnership may be formed by an oral agreement. However, it is necessary that both parties mutually agree to the formation of the partnership. In this case the plaintiff must satisfy you by the greater weight of the evidence that the plaintiff, George Hardesty, III, and the defendant, Ted Ferrell, Jr., mutually agreed to form a partnership and that they did so and operated The Keg as a partnership."

The definition given is correct as far as it goes but it is inadequate. It is the duty of the judge to declare and explain the law arising on the evidence given in the case then being tried. He must also apply the law to the various factual situations presented by the conflicting evidence. *Westmoreland v. Gregory*, 255 N.C. 172, 120 S.E. 2d 523 (1961). The court should have, among other things, given the jury the benefit of the applicable statutory rules for determining the existence of a partnership that are set out in G.S. 59-37.

All of defendant's remaining assignments of error have been carefully considered. They are expressly overruled.

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

New trial.

Judges WEBB and MARTIN (Harry C.) concur.

CLARENCE E. PATRICK AND WIFE, MAE JEAN PATRICK v. ED. P. MITCHELL

No. 7918DC185

(Filed 18 December 1979)

Contracts § 29.2— house constructed in unworkmanlike manner—computation of damages proper

In an action to recover for defendant's alleged breach of contract in failing to construct a house in a workmanlike manner, the trial court did not err in failing to determine damages by assessing the cost of labor and materials necessary to repair the house to meet contract specifications, and the court could properly determine damages by computing the difference between the value of the house as the parties agreed in the contract and its value as constructed by defendant.

APPEAL by defendant from *Alexander (Elreta M.), Judge*. Judgment entered 4 October 1978 in District Court, GUILFORD County. Heard in the Court of Appeals 19 October 1979.

Defendant received personal service of the summons and complaint in this action on 2 March 1978. Plaintiffs alleged in their verified complaint that defendant entered into a written

contract with plaintiffs for the construction of a residence on land owned by them in Guilford County and that defendant agreed to construct the residence in accordance with plans and specifications. Plaintiffs averred that they paid defendant in accordance with the contract, but that defendant failed to complete the construction of the house according to the plans and specifications or construct the house in a workmanlike manner, and that the house was in need of extensive repairs to correct the defects and make it suitable for habitiation. Plaintiffs alleged that after occupying the house they notified defendant of "said defects, insufficiencies, and states of ill repair" and that while defendant agreed to make the repairs, his failure to do so necessitated that plaintiffs pay for labor and materials for which they were not liable. Plaintiffs demanded damages for defendant's alleged breach of contract and failure to construct the house in a workmanlike manner in the sum of $5,000.

Defendant failed to answer or otherwise respond to plaintiffs' complaint. The matter came on to be heard before Judge Alexander on the issue of damages. Judge Alexander heard evidence for plaintiffs and defendant and thereupon found that the value of the house as the parties contracted was $65,000 while the value of the house constructed by defendant was only $50,000. The court entered judgment for plaintiffs in the amount of $5,000. Defendant appeals.

Hoyle, Hoyle & Boone, by Timothy G. Warner, for plaintiff appellees.

Edwards, Greeson, Weeks & Turner, by James B. Weeks, for defendant appellant.

WELLS, Judge.

Initially we note that defendant has failed to set out any exceptions in the record on appeal, although he lists five assignments of error. Those exceptions cannot be considered. Under Rule 10(b)(2) of the N.C. Rules of Appellate Procedure:

> ***An exception to the failure to . . . make a particular finding of fact or conclusion of law which was not specifically requested of the trial judge shall identify the omitted . . . finding, or conclusion by setting out its substance immediate-

> ly following the . . . findings or conclusions made. A separate exception shall be set out to the making or omission of each finding of fact or conclusion of law which is to be assigned as error.

Under Rule 10(a), "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." *See, Utilities Comm. v. Edmisten*, 30 N.C. App. 459, 227 S.E. 2d 593 (1976), *rev'd on other grounds*, 291 N.C. 451, 232 S.E. 2d 184 (1977).

Since defendant failed to answer the complaint, all of the allegations contained herein, with the exception of the amount of damage, are deemed admitted. G.S. 1A-1, Rule 8(d); *Bell v. Martin*, 43 N.C. App. 134, 258 S.E. 2d 403 (1979), *rev'd on other grounds*, --- N.C. ---, --- S.E. 2d --- (filed 1 April 1980).

Defendant argues that the trial court used an improper formula to compute plaintiffs' damages. Defendant contends that the court determined damages by computing the difference between the value of the house as the parties agreed in the contract and its value as constructed by defendant, instead of merely assessing the cost of labor and materials necessary to repair the house to meet contract specifications. The court made no findings as to the cost of making repairs or completing the house in a workmanlike manner in accordance with good building practices.

We find no error. The rule for the appropriate measure of damages for defects or omissions in the performance of a building or construction contract was set out by our Supreme Court in *Robbins v. Trading Post, Inc.*, 251 N.C. 663, 666, 111 S.E. 2d 884, 887 (1960):

> "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 circumstances 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." 9 Am. Jur., Building and Construction Contracts, sec. 152, p. 89; [citation 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 the owner.

Accord, Leggette v. Pittman, 268 N.C. 292, 150 S.E. 2d 420 (1966).

Defendant argues that the rule in *Robbins* entitles the plaintiffs in this action only to the cost of labor and materials required for completion of the contract, citing *Hartley v. Ballou*, 286 N.C. 51, 209 S.E. 2d 776 (1974) in support of his position. We do not agree. The principle set out in *Robbins* must obviously be applied with fidelity to the facts in each case, as was made clear by Justice Moore. *Hartley* concerned the effect of substantial repairs made by the contractor prior to trial, and is clearly distinguishable from the case *sub judice*, where no such repairs have been alleged.

The trial court found defects, *inter alia*, in the installation of plumbing, footings around the front of the house, and electrical system. In modern residential construction, wiring and plumbing systems are substantially concealed in the wall, floor and ceiling structure, and footing is poured below grade. Thus, from the facts in the case before her, the trial judge may have reasonably inferred that in order to conform the work to the contract, a substantial part of the work that had been done would have to be undone. It is not disputed that damages were measured from the point in time plaintiffs had taken possession of the house. Under such circumstances, Judge Alexander applied the measure of damages most appropriate under the facts admitted by the pleadings and found by her.

Affirmed.

Judges ARNOLD and WEBB concur.

FANNING MILES HEARON, BY HIS GUARDIAN AD LITEM, BAYLIES HEARON WILLEY v. ANN SCOTT HEARON

No. 7929SC384

(Filed 18 December 1979)

Insane Persons § 3; Rules of Civil Procedure § 25— substitution of general guardian—no collateral attack on competency hearing

Defendant could not collaterally attack a competency hearing and appointment of a general guardian for plaintiff upon motion for substitution of the general guardian as the plaintiff in an action against defendant, and the trial court erred in denying the motion for substitution on the ground that plaintiff was denied due process at the competency hearing. Rules of Civil Procedure 17.

APPEAL by plaintiff from *Riddle, Judge*. Order entered 8 February 1979 in Superior Court, POLK County. Heard in the Court of Appeals 30 November 1979.

On 10 May 1978, Baylies Hearon Willey was appointed guardian ad litem for her father, Fanning Miles Hearon, to prosecute an action on his behalf against Ann Scott Hearon. The complaint in this action, filed 10 May 1978, alleges that by duress and undue influence Ann Scott Hearon obtained from Fanning Miles Hearon a purported deed conveying to her all his interest in their jointly-owned real estate, and that she has claimed sole ownership of their jointly-owned personal property.

Following a hearing at which Fanning Miles Hearon was adjudged incompetent, Sarah Bartlett Hearon Bondy was appointed his general guardian on 4 December 1978. On 22 January 1979 the guardian ad litem moved to have the general guardian substituted as plaintiff in the present action. Defendant opposed this motion, arguing that Fanning Miles Hearon was denied due process of law at the competency hearing, with the result that the general guardian was not validly appointed. The trial court, finding the facts to be as defendant argued, denied plaintiff's motion for substitution. Plaintiff appeals.

Van Winkle, Buck, Wall, Starnes & Davis, by Roy W. Davis, Jr., for plaintiff appellant.

R. Stephen Camp, William C. Raper, and Daniel W. Donahue, for defendant appellee.

ARNOLD, Judge.

Plaintiff correctly argues that it was improper for the trial judge to collaterally review the competency proceeding, and that the defendant had no standing to attack the determination of incompetency.

Defendant's argument that her opposition to plaintiff's motion for substitution was not a collateral attack upon the order appointing a general guardian is untenable. Black's Law Dictionary 327 (Rev. 4th ed. 1968) defines a collateral attack upon a judicial proceeding as "an attempt to avoid, defeat, or evade it, or deny its force and effect, in some incidental proceeding not provided by law for the express purpose of attacking it." It is clearly the defendant's intention here to avoid the substitution of the real party in interest, see G.S. 1A-1, Rule 17(a), the general guardian, G.S. 1A-1, Rule 17(b)(1), by attacking the validity of the proceeding in which the general guardian was appointed. This she cannot do. Just as a stranger to a proceeding may not attack the judgment in the proceeding directly, *Card v. Finch*, 142 N.C. 140 (1906), he may not bring a collateral attack upon the judgment. The same reasoning applies in both instances. "Persons who are not parties or privies and do not, upon the record, appear to be affected, will not be heard upon a motion to vacate a judgment. They have no status in Court. No wrong has been done them *by the Court*." *Id.* at 148-49 (emphasis in original). "If the parties and privies are content to permit a judgment to stand, considerations of sound public policy require that strangers to the record or intermeddlers who have no justiciable grievance to be righted should not be permitted to assail the judgment." *Shaver v. Shaver*, 248 N.C. 113, 102 S.E. 2d 791 (1958).

The order appointing Sarah Bartlett Hearon Bondy as general guardian is regular on its face, and no reason appears why the general guardian should not be substituted as plaintiff. *See* G.S. 1A-1, Rule 17(b)(1). The trial court's order denying plaintiff's motion for substitution is error, and accordingly is

Reversed.

Judges CLARK and ERWIN concur.

JERRY SMITH AND WIFE, BETTY SMITH v. JOHNNIE RAY TAYLOR AND PHILLIP SUTTON, T/A SILVER HORSESHOE STABLES

No. 793DC429

(Filed 18 December 1979)

Uniform Commercial Code § 12— warranty that goods are free from security interest—sale of tractor—buyer's knowledge that lien existed—summary judgment improper

In an action to recover the price paid by plaintiffs to defendants for a tractor where plaintiffs alleged that the tractor was sold to satisfy a lien which existed at the time of the sale, summary judgment was improperly granted for plaintiffs where plaintiffs neither alleged nor offered evidentiary material to show that they had no knowledge of the existence of the lien. G.S. 25-2-312.

APPEAL by defendants from *Aycock, Judge*. Judgment entered 10 January 1979 in District Court, PITT County. Heard in the Court of Appeals 6 December 1979.

This is an action to recover $2800.00, the price paid to defendants on 7 July 1978 for the purchase by plaintiffs of a tractor from defendants.

Plaintiffs allege that they are now informed that the tractor was subject to a prior lien to Long Implement and Tractor Company, Inc. securing, in part, the sum of $16,900.00, and that the tractor is in the process of being repossessed. Defendants answered and, on information and belief, denied the material allegations of the complaint.

Plaintiffs moved for summary judgment. The motion was supported by an affidavit wherein they stated that the tractor they bought from defendants had been taken in claim and delivery proceedings in the case of *Long Implement and Tractor Company, v. Samuel D. Parker*, pending in the Superior Court of Craven County. An affidavit in the claim and delivery proceeding stated that Long Implement and Tractor Company, Inc. had a security interest in the property by virtue of a duly perfected purchase money security agreement, executed on 25 July 1977, and that the value of the property was $10,000.00. in response to plaintiffs' interrogatories, defendants admitted that they sold the tractor for $2800.00 but denied any knowledge of an existing lien. In response to the plaintiffs' question directing them to set forth in

detail any defense they might have to the suit, they answered, "caveat emptor."

The court allowed plaintiffs' motion for summary judgment.

James, Hite, Cavendish and Blount, by Robert D. Rouse III, for plaintiff appellees.

Willis A. Talton, for defendant appellants.

VAUGHN, Judge.

Defendants' argument that the complaint fails to state a claim upon which relief can be granted is without merit. It does not affirmatively appear on the face of the complaint that plaintiffs cannot recover under any state of facts which could be proved in support of the claim, and the complaint gives sufficient notice of the transaction that produced the claim to enable defendants to understand the basis of the claim, to enable them to file a responsive pleading and, by using appropriate discovery, get any additional information considered necessary. *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970).

Plaintiffs' motion for summary judgment was properly allowed only if the record at that stage of the proceeding disclosed that there were no genuine issues as to any material facts and that, on those facts, plaintiffs were entitled to judgment as a matter of law. G.S. 1A-1, Rule 56.

The appropriate section of the Uniform Commercial Code provides, in part, as follows:

> "(1) . . . there is in a contract for sale a warranty by the seller that . . . (b) the goods shall be delivered free from any security interest or other lien or encumbrances of which the *buyer* at the time of contracting *has no knowledge*." G.S. 25-2-312 (emphasis added).

In support of their motion for summary judgment, plaintiffs have shown that there are no genuine issues of material facts as to the sale of the tractor to plaintiffs for $2800.00 and existence of a lien on the property resulting in plaintiffs' loss of the property under that prior lien and, consequently, the loss of value for the purchase price paid. Moreover, defendants are not saved by their own alleged ignorance of the existence of the lien.

On this motion for summary judgment, however, the burden was on these plaintiffs, as movants, to produce evidence on every element necessary for them to prove in order to be entitled to judgment. *Tolbert v. Tea Co.*, 22 N.C. App. 491, 206 S.E. 2d 816 (1974). In order to recover on the warranty provided by this section of the code, plaintiffs must prove the presence of a lien or encumbrance of which they had no *knowledge*. Plaintiffs neither alleged nor offered evidentiary material to show that they had no knowledge of the existence of the lien. Summary judgment was, therefore, inappropriate and must be reversed.

Reversed and remanded.

Judges WEBB and MARTIN (Harry C.) concur.

LOWE'S OF SANFORD, INC., PLAINTIFF v. MID-SOUTH BANK AND TRUST COMPANY, DEFENDANT AND THIRD-PARTY PLAINTIFF v. BILLY T. GLADDEN, JR. AND BILLY T. GLADDEN, SR., FIRST THIRD-PARTY DEFENDANTS v. SOUTHERN NATIONAL BANK OF NORTH CAROLINA, SECOND THIRD-PARTY DEFENDANT v. HARRY E. WILSON, THIRD THIRD-PARTY DEFENDANT

No. 7911SC282

(Filed 18 December 1979)

Banks and Banking § 10; Uniform Commercial Code § 34— cashier's check by bank to pay depositor's check—depositor's check worthless—liability of bank on cashier's check

Where defendant bank issued its own cashier's check in payment of a check to plaintiff drawn on an account of defendant's depositor, and the depositor subsequently took action which rendered its check worthless, the bank's issuance of its cashier's check constituted a final acceptance and an engagement by the bank to honor the cashier's check as presented without any right by the bank or anyone else to countermand the check. G.S. 25-3-418.

APPEAL by defendant (Mid-South) from *Preston, Judge*. Judgment entered 27 March 1979 in Superior Court, LEE County. Heard in the Court of Appeals 14 November 1979.

This is an action to recover the amount of a cashier's check issued by Mid-South Bank and Trust Company (hereinafter Mid-South) to Lowe's in exchange for a check in the same amount

payable to the order of Lowe's and drawn on Mid-South by G and G Builders.

In 1976, G and G was involved in a Lee County construction project. On or about 28 April 1976, G and G issued a check for $12,378.01 to Lowe's as payment for building materials. Lowe's presented the check to Mid-South for payment on 4 May and on 10 May. Both times the check was returned for insufficient funds.

G and G had been in financial difficulty for some time. Its account at Mid-South was frequently overdrawn. Consequently, all cashiers and tellers had been instructed not to pay any check drawn on the G and G account without approval of a bank officer. Mid-South alleges that Lowe's was aware of the financial difficulty.

On Friday, 14 May 1976, G and G obtained a loan of $36,695.05 from Southern National Bank (hereinafter Southern National). The full amount was placed in G and G's account at Southern National. Subsequently, G and G wrote a check for $21,000 on the Southern National account and deposited it with Mid-South.

Lowe's again presented its check from G and G to Mid-South on Monday, 17 May 1976. Without consulting an officer, a teller issued Mid-South's official check in exchange for the G and G check. Then, the next day before any checks reached Southern National, G and G withdrew its funds from that bank and prepaid their loan.

By paying the loan and depleting its account at Southern National, G and G rendered its check to Mid-South worthless. Mid-South learned of these events on Wednesday, 19 May, and informed Lowe's that it would not make payment on its cashier's check.

From a judgment granting Lowe's motion for summary judgment as to Mid-South and ordering that the bank honor its cashier's check, defendant appealed.

McElwee, Hall, McElwee & Cannon, by William H. McElwee III, for plaintiff appellee.

McDermott & Parks, by O. Tracy Parks III, for defendant appellant.

HILL, Judge.

A cashier's check is a bill of exchange drawn by a bank upon itself and *accepted* in advance by the act of its issuance and not subject to countermand either by its purchaser or by the issuing bank. The bank's issuance of the cashier's check, which by definition is also an acceptance, constitutes an engagement by the bank to honor the check as presented extinguishing the right of the bank or anyone else to countermand the check. *State of Pa. v. Curtiss Nat. Bank of Miami Springs, Fla.*, 427 F. 2d 395 (5th Cir. 1970). Acceptance of any instrument is final in favor of a holder in due course. G.S. 25-3-418. Lowe's was a holder in due course as defined by G.S. 25-3-302.

Cases from other jurisdictions support our holding that issuance of the cashier's check constituted a final acceptance. In *Citizens and Southern National Bank v. Youngblood*, 135 Ga. App. 638, 219 S.E. 2d 172 (1975), the plaintiff bank issued its cashier's check to defendant in exchange for a check drawn on plaintiff by one of its depositors. A stop-payment order on depositor's account had been overlooked, and plaintiff bank tried to recover from defendant. The court ruled that defendant was entitled to receive funds from the cashier's check, stating that,

> It is, therefore, the general rule, sustained by almost universal authority, that a payment in the ordinary course of business of a check by a bank on which it is drawn under the mistaken belief that the drawer has funds in the bank subject to such check is not such a payment under a mistake of fact as will permit the bank to recover the money so paid from the recipient of such payment. (citations omitted) *Youngblood*, at p. 640.

Rosenbaum v. First National City Bank of New York, 11 N.Y. 2d 845, 182 N.E. 2d 280 (1962), *reargument denied* 11 N.Y. 2d 1017 (1962), is also similar to our case factually. The distinction is that in *Rosenbaum* payment was made despite a stop-payment order rather than for the reason that the customer had insufficient funds in its account. There, the court stated that,

> The weight of authority holds that when a bank pays a check after and despite receiving a stop-payment order from its depositor it cannot recover on the check from the payee of

the check. (citations omitted) The same rule should apply with equal or greater force when the bank in payment of the check has issued its own cashier's check to the holder. *Rosenbaum*, at p. 846.

For the reasons stated above, the judgment below is

Affirmed.

Chief Judge MORRIS and Judge PARKER concur.

COHEN NEAL CRAWFORD v. AETNA CASUALTY & SURETY COMPANY, AND MICHIGAN TOOL COMPANY, A DIVISION OF EX-CELL-O CORPORATION

No. 7927SC318

(Filed 18 December 1979)

Rules of Civil Procedure §§ 4, 15— service of process on corporation defective— amendment of complaint to substitute defendant improper

Complaint and summons directed to defendant named as "MICHIGAN TOOL COMPANY, A Division of Ex-Cell-O Corporation" was not service on the entity Ex-Cell-O Corporation, even if the complaint and summons reached the hands of someone obligated to receive service in behalf of Ex-Cell-O, since Ex-Cell-O was not a named party defendant; and plaintiff could not amend his complaint, claiming that the words, "MICHIGAN TOOL COMPANY, A Division of," were a misnomer or mere surplusage since such amendment would, in effect, substitute a party defendant that had never been properly served.

APPEAL by defendants from *Kirby, Judge*. Judgment entered 10 January 1979 in Superior Court, GASTON County. Heard in the Court of Appeals 27 November 1979.

On 6 August 1975, plaintiff was injured in an industrial accident involving a machine designed and manufactured by Michigan Tool Company, a Delaware corporation. Ex-Cell-O Corporation, a Michigan corporation, acquired all of the stock of Michigan Tool Company on 1 March 1955. Michigan Tool Company was dissolved on or about 6 November 1972. Five days before the three year mark from the occurrence of the accident, plaintiff filed a complaint against a defendant named in the caption as "MICHIGAN TOOL COMPANY, A Division of Ex-Cell-O Corporation." Throughout

the complaint which alleges causes of action for negligence and breach of warranty, the defendant is referred to as "Michigan Tool Company, a division of Ex-Cell-O Corporation." The summons was captioned

"COHEN NEAL CRAWFORD,
Plaintiff

Against

AETNA CASUALTY & SURETY COMPANY; and
MICHIGAN TOOL COMPANY, A Division of
Ex-Cell-O Corporation."

The summons was addressed

"To each of the defendants named below at the indicated addresses — GREETING:

Michigan Tool Company, A Division of Ex-Cell-O Corporation
C/O Mr. William J. Foster, III (Registered Agent)
2855 Coolidge Highway
Troy, Michigan 48084."

The summons and complaint according to the attached affidavit of service were served on William Foster's secretary on 24 August 1978. Foster is the secretary of Ex-Cell-O Corporation. He was also the secretary of Michigan Tool Company when it was dissolved in 1972. Michigan Tool Company, though wholly owned by Ex-Cell-O, was never a division of Ex-Cell-O.

On 5 October 1978, Ex-Cell-O Corporation made a special appearance and moved to dismiss the complaint for insufficiency of process, insufficiency of service of process and lack of personal jurisdiction. Plaintiff moved for leave to amend the complaint and summons served on William J. Foster III claiming that the words "Michigan Tool Company, A Division of" were a misnomer or mere surplusage. After hearing arguments of counsel, the trial court entered judgment denying Ex-Cell-O's motion and granting plaintiff's motion for leave to amend. Ex-Cell-O appeals.

Harris and Bumgardner, by Robert Dennis Lorance and Clayward C. Corry, Jr., for plaintiff appellee.

Womble, Carlyle, Sandridge and Rice, by William F. Womble, Jr., and James M. Stanley, Jr., for defendant appellants.

VAUGHN, Judge.

Ex-Cell-O Corporation was not served with sufficient legal process and the court did not, therefore, have jurisdiction over that particular entity. The trial court erred in denying Ex-Cell-O's motion to dismiss pursuant to Rule 12(b) of the North Carolina Rules of Civil Procedure. G.S. 1A-1, Rule 12(b)(2)(4)(5). Ex-Cell-O was not made a party to the action commenced by plaintiff.

In *Wiles v. Construction Co.*, 295 N.C. 81, 243 S.E. 2d 756 (1978), the Supreme Court, in overruling a long line of its cases, held that where the direction of the summons is to the corporation's registered agent rather than the corporation, and the corporate defendant is named in the complaint and the caption of the summons, the service is not defective even though the summons is not directed to the defendant as required by Rule 4(b). In the case before us, we are dealing with two separate legal entities, Michigan Tool Company and Ex-Cell-O Corporation. Complaint and summons directed to a defendant named as "MICHIGAN TOOL COMPANY, A Division of Ex-Cell-O Corporation" is not service on the entity Ex-Cell-O Corporation even if the complaint and summons reach the hands of someone obligated to receive service in behalf of Ex-Cell-O. Rule 4(b) provides in part that the summons "*shall* be directed to the defendant or defendants and shall notify each defendant to appear and answer. . . ." G.S. 1A-1, Rule 4(b) (emphasis added). Ex-Cell-O was not a named party defendant. *Wiles* did not adopt a concept of "actual notice" for this State. The statutory requirements and the rules of procedure are still to be followed. *See Hall v. Lassiter*, 44 N.C. App. 23, 260 S.E. 2d 155 (1979).

In *Wiles*, the Court reaffirmed the line of cases which held that no jurisdiction is obtained where neither the complaint nor the summons is directed to a corporation. Speaking for the Court, Justice Copeland said:

> "We wish to point out at this juncture that a number of decisions citing the cases overruled . . . involved situations in which the complaint as well as the summons were directed to the corporate officers or agents. SEE, *e.g. MCLEAN v. MATHENY*, 240 N.C. 785, 84 S.E. 2d 190 (1954); *HOGSED v. PEARLMAN*, 213 N.C. 240, 195 S.E. 789 (1938); *JONES v. VANSTORY*, 200 N.C. 582, 157 S.E. 867 (1931); *YOUNG v.*

BARDEN, 90 N.C. 424 (1884). Because the potential for confusion in such a situation is significantly greater, these latter holdings remain undisturbed by this decision." 295 N.C. at 86, 243 S.E. 2d at 759.

These cases cited and reaffirmed by the *Wiles* Court support Ex-Cell-O's position that no service or jurisdiction has been obtained on it. Plaintiff's amendment, in effect, substituted a party defendant that had never been properly served. It is not a correction of a misnomer. It adds a new, legal entity. This is not permitted. *See Jones v. VanStory, supra*, and *Hogsed v. Pearlman, supra*. Ex-Cell-O's motion should have been granted.

Reversed and remanded.

Judges WEBB and MARTIN (Harry C.) concur.

WILLIAM E. BENFIELD, PLAINTIFF v. FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF CATAWBA COUNTY, DEFENDANT v. FANNIE H. BENFIELD, THIRD PARTY DEFENDANT

No. 7925DC379

(Filed 18 December 1979)

Banks and Banking § 4— joint account—changing nature of account—signatures of all parties

Where plaintiff and his former wife executed a joint account agreement with right of survivorship pursuant to G.S. 41-2.1 for a certificate of deposit in a savings and loan association, the joint account could be changed only by the signatures of all the parties to the joint account agreement, and plaintiff's written instruction to the savings and loan association to permit withdrawals only upon signature of both joint tenants was void and not binding on plaintiff's former wife.

APPEAL by plaintiff from *Vernon, Judge*. Judgment entered 28 November 1978 in District Court, CATAWBA County. Heard in the Court of Appeals 30 November 1979.

On 17 January 1975, plaintiff and third-party defendant, then husband and wife, deposited $5,000 with defendant, First Federal Savings and Loan Association of Catawba County (Association), in

a four-year certificate. The parties executed a Joint Account Agreement with the Right of Survivorship, which entitled either to withdraw the total amount pursuant to G.S. 41-2.1. Plaintiff left the certificate of deposit in his home in a desk drawer to which he and third-party defendant had access. Third-party defendant withdrew the $5,000 less penalty for early withdrawal on 4 January 1978.

On 20 May 1976, plaintiff executed a suspension order with defendant which reads:

"TO: FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION

You are hereby instructed to suspend payment on Cert. Account No. 800221-2 and to permit withdrawals only on the signatures of all joint tenants, until such time as this order has been canceled in writing signed by all joint tenants and delivered to you.

SIGNATURE /s/ William E. Benfield"

Plaintiff alleged in his complaint that defendant had entered an agreement to permit withdrawal of the funds only on both signatures and requested $5,000 in damages. Defendant denied the agreement and filed a third-party complaint against the wife, who filed a cross-action against plaintiff. The case was tried without a jury, and motion pursuant to G.S. 1A-1, Rule 50, of the Rules of Civil Procedure was allowed at the close of all the plaintiff's evidence. Plaintiff appealed.

Gaither & Wood, by Allen W. Wood III, for plaintiff appellant.

Williams, Pannell & Lovekin, by Martin C. Pannell, for defendant appellee.

ERWIN, Judge.

Plaintiff presents one assignment of error: "Did the Trial Court err in allowing the Defendant's motion for a Directed Verdict at the close of the Plaintiff's evidence?" We find no error in the court's ruling on the merits of this case.

The account in question is controlled by the Joint Account Agreement with Right of Survivorship, which provides:

"FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF CATAWBA COUNTY, CONOVER, NORTH CAROLINA

CONOVER OFFICE

subject to the laws of North Carolina, the rules and regulations of the Federal Home Loan Bank Board and the charter and by-laws of the association as they now are or as they may hereafter be amended. It is understood and agreed that the shares hereby subscribed for are issued by the association, and all moneys paid or that may hereafter be paid thereon are paid by the undersigned, and such shares together with all accumulations thereon are held by the Association for our account, as joint tenants with right of survivorship and not as tenants in common, and that said shares may be resold subject to the by-laws of the Association, by either, before or after the death of either, and either is authorized to pledge the same as collateral security to a loan.

/s/ William E. Benfield Rt 6 Box 216 Statesville NC

Signature (Address—Street and Number) (City and State)

/s/ Fannie H Benfield

Signature (Address—Street and Number) (City and State)"

G.S. 41-2.1 provides in part:

"*Right of survivorship in bank deposits created by written agreement.*—(a) A deposit account may be established with a banking institution in the names of two or more persons, payable to either or the survivor or survivors, with incidents as provided by subsection (b) of this section, when both or all parties have signed a written agreement, either on the signature card or by separate instrument, expressly providing for the right of survivorship.

(b) A deposit account established under subsection (a) of this section shall have the following incidents:

(1) Either party to the agreement may add to or draw upon any part or all of the deposit account, and any withdrawal by or upon the order of either party shall be a complete discharge of the banking institution with respect to the sum withdrawn."

We hold that the suspension order failed to bind third-party defendant. A joint account may be changed only by the signatures of all the parties to the joint account agreement or by one party's withdrawing the complete account and opening a new account. G.S. 41-2.1 does not authorize the action taken in this case, to permit only one of the joint tenants of the account in question to change it from the original agreement executed by both parties to the detriment of the other. *See Badders v. Peoples Trust Company,* 236 Ind. 357, 140 N.E. 2d 235, 62 A.L.R. 2d 1103 (1957). Thus, any agreement between the Association and plaintiff contravening G.S. 41-2.1(b)(1) was void and unenforceable.

Defendant's motion should have been made pursuant to G.S. 1A-1, Rule 41(b) rather than Rule 50 of the Rules of Civil Procedure. Rule 50 has no application in a non-jury trial. This case is remanded to the trial court to enter an order dismissing this case pursuant to G.S. 1A-1, Rule 41(b), of the Rules of Civil Procedure.

Remanded for entry of proper order to dismiss the plaintiff's case.

Judges CLARK and ARNOLD concur.

STATE OF NORTH CAROLINA v. JOSEPH FERRELL

No. 798SC670

(Filed 18 December 1979)

Criminal Law § 146— sentence of ten years to life imprisonment—appeal to Supreme Court

A sentence of ten years to life imprisonment was a sentence of life imprisonment within the meaning of G.S. 7A-27(a) so that appeal should have been made directly to the Supreme Court rather than to the Court of Appeals.

Judge MARTIN (Robert M.) dissents.

ON certiorari to review defendant's trial before *Cowper, Judge.* Judgment entered 6 December 1978 in Superior Court, WAYNE County. Heard in the Court of Appeals on 6 December 1979.

Defendant was charged in a bill of indictment with the second degree murder of Leslie William Royals. He was found guilty as charged, and gave notice of appeal from a judgment imposing a prison sentence of "not less than ten (10) years nor more than life . . . ." Defendant failed to perfect his appeal within the prescribed time, and this Court on 26 February 1979 issued its writ of certiorari to review defendant's trial on the merits.

Attorney General Edmisten, by Assistant Attorney General Elisha H. Bunting, Jr., for the State.

Hulse & Hulse, by H. Bruce Hulse, Jr., for defendant appellant.

HEDRICK, Judge.

Initially, we must address the question of whether this Court has jurisdiction to hear this appeal. The defendant received a sentence of ten years to life in prison. G.S. § 7A-27 (1977 Supp.) provides in pertinent part:

> (a) From a judgment of a superior court which includes a sentence of death or imprisonment for life, unless the judgment was based on a plea of guilty or nolo contendere, appeal lies of right directly to the Supreme Court.

Our inquiry is thus narrowed to the question of whether a sentence of ten years to life is a sentence of life imprisonment so as to bring § 7A-27(a) into play, thereby divesting this Court of jurisdiction. It is our opinion, and we so hold, that any sentence under which the defendant may serve for life, as here, is a sentence to life imprisonment. *State v. Norwood,* 44 N.C. App. 174, 260 S.E. 2d 433 (1979). We have no jurisdiction to hear this case. Appeal lies directly to the Supreme Court.

Our holding will not be altered by the fact that this Court issued its writ of certiorari to review defendant's trial. It is elementary that the jurisdiction of the Court is established by statute, not the Court's own order. Our writ was improvidently granted, and the matter must be dismissed.

Dismissed.

Judge WELLS concurs.

Judge MARTIN (Robert M.) dissents.

DANNIE YOUNG, BY HIS GUARDIAN AD LITEM, JAMES W. YOUNG v. L. J. WOOD

No. 7911SC425

(Filed 18 December 1979)

Trial § 12— right of party to appear pro se

Defendant who elected to represent himself could not complain on appeal that the trial court erred in allowing him to elect to go to trial without the assistance of counsel.

APPEAL by defendant from *Preston, Judge.* Judgment entered 15 January 1979 in Superior Court, JOHNSTON County. Heard in the Court of Appeals 6 December 1979.

This is an action to recover for injuries sustained by the minor plaintiff. It is alleged in the complaint that defendant's agent negligently backed a tractor over the minor plaintiff causing a severe and permanent mangling injury to his right lower leg with comminuted fractures of the tibia and fibula together with extensive soft tissue loss.

The case was tried by the judge without a jury, and judgment was entered awarding damages of $25,000.00.

Bryan, Jones and Johnson, by Robert C. Bryan, for plaintiff appellee.

Mast, Tew, Nall, Moore and Lucas, by George B. Mast and Robert V. Lucas, for defendant appellant.

VAUGHN, Judge.

This is an appeal from the fourth trial of this lawsuit. After the case was first called for trial, a mistrial was declared because of a death in the family of plaintiff's counsel. The second trial ended in a mistrial because the jury could not agree. Defendant failed to pay his counsel and an order was entered allowing counsel to

withdraw. Defendant retained different counsel for the third trial which also ended in a mistrial because the jury could not agree. Again, an order was entered allowing counsel to withdraw because of defendant's failure to make the appropriate financial arrangements.

When the case was called for trial before Judge Preston, defendant appeared for trial without counsel. He advised the judge that he was ready for trial and advised the court that he did "agree to waive a jury trial in this matter and that the same be tried by the court without a jury, and that the court pass on all issues of fact and law which might arise at the trial, and to enter a verdict and judgment thereon."

After judgment was rendered against him, plaintiff retained present counsel (his third since suit was filed) to perfect this appeal. Despite the able efforts of counsel on appeal, no prejudicial error has been shown. There were no exceptions taken at trial. Defendant's arguments directed to the admission of evidence, among others, cannot be considered on appeal. No exceptions have been taken to any of the court's findings of fact except the finding of fact, "K", with respect to the nature of the minor plaintiff's injuries. There is ample support in the record for that finding of fact. The court's findings and conclusions support the judgment.

In defendant's eleventh assignment of error, he argues, in substance, that the court erred in allowing him to elect to go to trial without the assistance of counsel. The argument is without merit. The court could not force defendant to retain counsel. Defendant's procrastination in that and other respects had already delayed the trial to the possible prejudice of the minor plaintiff. Even in a criminal case, a defendant who elects to represent himself cannot, thereafter, complain of the quality of his own defense or be excused from his failure to comply with the relevant rules of procedural and substantive law. *See, e.g., Faretta v. California*, 422 U.S. 806, 45 L.Ed. 2d 562, 95 S.Ct. 2525 (1975).

The appeal fails to disclose prejudicial errors of law. The judgment is affirmed.

Affirmed.

Judges WEBB and MARTIN (Harry C.) concur.

MILLER GRADING AND CONSTRUCTION COMPANY v. MARIE LUCKEY

No. 7927DC394

(Filed 18 December 1979)

Appeal and Error § 30.2— exceptions not properly preserved

Exceptions not preserved and set forth as required by the Rules of Appellate Procedure are deemed abandoned.

APPEAL by defendant from *Bulwinkle, Judge.* Order filed 23 February 1979 in District Court, GASTON County. Heard in the Court of Appeals 4 December 1979.

Frank B. Rankin for plaintiff appellee.

Paul E. Hemphill for defendant appellant.

MARTIN (Harry C.), Judge.

Appellant violated Rule 9(c)(4) of the North Carolina Rules of Appellate Procedure by failing to number the pages of the record on appeal. She also violated Rule 10(a), (c), by failing to make her exceptions in the record the basis of assignments of error and failing to list the exceptions after the assignments of error with identification of the pages in the record where they appear. In her brief, defendant failed to refer to the assignments of error and exceptions pertinent to the questions argued and failed to refer to pages of the record where they appear. This violates App. R. 28(b)(3).

Exceptions not preserved and set forth as required by the Rules are deemed abandoned. For these reasons the appeal is subject to dismissal. The Rules of Appellate Procedure are mandatory. *Craver v. Craver,* 298 N.C. 231, 258 S.E. 2d 357 (1979); *State v. Brown,* 42 N.C. App. 724, 257 S.E. 2d 668 (1979).

Appeal dismissed.

Judges VAUGHN and WEBB concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 18 DECEMBER 1979

BOARD OF TRANSPORTATION v. FREEMAN No. 781SC354	Guilford (71CVS5224)	No Error
DAVIS v. COMR. OF MOTOR VEHICLES No. 798SC440	Wayne (78CVS1875)	No Error
GONZALEZ v. GONZALEZ No. 7921DC512	Forsyth (76CVD83)	Vacated
GRAHAM v. GRAHAM No. 7926DC367	Mecklenburg (78CVD3108)	Vacated and Remanded for New Trial
GRISSOM v. NOBLIN No. 7910DC382	Wake (78CVS5654)	Affirmed
HALL v. HALL No. 7920DC490	Anson (78CVD119)	Affirmed
JONES v. MAYO No. 792SC453	Beaufort (77CVS366)	No Error
ROBERTS v. PETERS No. 7923SC308	Wilkes (77SP239)	Affirmed
SANDLER & SONS v. WAHOO SPORTSMAN No. 791DC433	Dare (77CVD80)	Reversed
SIDES v. SIDES No. 7921DC716	Forsyth (73CVD3506)	Affirmed
STATE v. BARNETT No. 794SC598	Sampson (78CRS13555)	No Error
STATE v. BLACKWELL No. 7912SC424	Cumberland (78CRS45581)	New Trial
STATE v. BULLOCK No. 793SC630	Craven (78CRS11377)	No Error
STATE v. BUTLER No. 7912SC632	Cumberland (78CRS5830)	No Error
STATE v. EDWARDS No. 793SC654	Craven (79CR4714)	Dismissed

STATE v. EMANUEL No. 7916SC694	Robeson (79CR1302)	No Error
STATE v. HOBBS No. 797SC643	Nash (79CRS1390) (79CRS1391) (79CRS1399) (79CRS1400)	No Error
STATE v. LOWERY No. 7926SC715	Mecklenburg (79CRS003464)	No Error
STATE v. McLEAN No. 7912SC701	Cumberland (78CRS57646)	No Error
STATE v. O'QUINN No. 7912SC593	Cumberland (78CRS57397)	No Error
STATE v. PRINCE No. 791SC619	Camden (79CRS162)	No Error
STATE v. STALLINGS No. 794SC637	Duplin (78CR7988) (78CR8275)	No Error New Trial
STATE v. STANFORD No. 794SC627	Duplin (77CRS2906)	New Trial
STATE v. TAYLOR No. 7918SC612	Guilford (78CRS42826)	No Error
STATE v. VENABLE No. 7916SC621	Scotland (78CRS6876) (78CRS6982)	No Error
TEAGUE v. DRENNAN No. 7927DC444	Gaston (78CVD396)	Reversed and Remanded

CAROL C. McGINNIS v. KERMIT D. McGINNIS

No. 7926DC142

(Filed 8 January 1980)

1. **Appeal and Error § 16— abandonment of appeal—jurisdiction of trial court**

Defendant's notice of appeal from the trial court's order which vacated an earlier order did not divest the trial court of jurisdiction to enter further orders in the cause, since defendant's failure to perfect his appeal by the time judgment was entered almost three months later constituted an abandonment which reinvested the court with jurisdiction to render further orders in the cause.

2. **Appeal and Error § 6.2— interlocutory order affecting substantial right—appealability**

An order granting plaintiff's claim for $4225 in alimony and child support arrearages and granting full faith and credit to a New York decree imposing a continuing support obligation affected a substantial right of defendant and was reviewable by virtue of G.S. 1-277 and G.S. 7A-27(d), even though the trial court's order did not determine all the issues raised in the action.

3. **Divorce and Alimony §§ 21.8, 26.1— foreign decree—defect in authentication waived**

In an action to enforce a New York decree awarding child support and alimony to plaintiff, defendant waived any defect in authentication of the foreign judgment where plaintiff attached a copy of it to her complaint, and defendant, in his answer, admitted that the attached order was filed in the New York action.

4. **Divorce and Alimony §§ 21.8, 26.1— foreign alimony and child support order—defendant given notice and opportunity to be heard**

There was no merit to defendant's contention that a New York court issued an alimony and child support decree without giving him notice and an opportunity to be heard on the matter, thereby depriving him of his constitutional right to procedural due process, since defendant was personally served with process, filed pleadings and supporting documents in the New York court, and was given a reasonable opportunity to be heard.

5. **Divorce and Alimony §§ 21.8, 26.1— foreign alimony and child support order—defendant in contempt—no full faith and credit**

The portion of a New York alimony and child support decree which adjudged defendant in contempt and ordered his incarceration was properly denied full faith and credit recognition by the N. C. district court.

6. **Divorce and Alimony § 21.8— foreign alimony order—constitutionality of alimony statute—question improperly raised**

In an action to enforce a New York decree awarding child support and alimony to plaintiff, defendant could not properly raise a question as to the constitutionality of the New York statute providing for awards of alimony and

counsel fees, since the question was not raised in any of the pleadings or other papers filed in the New York action, nor was there any ruling by the New York appellate courts on the issue.

7. **Divorce and Alimony §§ 21.8, 26.1— alimony and child support—foreign decree—full faith and credit—determination without evidentiary hearing**

In an action to recover arrearages due under an alimony and child support decree entered in New York, the trial court did not err in denying defendant's oral motion for evidentiary hearings, since the court had before it the pleadings of the N. C. and N. Y. courts and memoranda of law submitted by both parties; the issue of full faith and credit enforcement of the N. Y. judgment for arrearages presented no question of fact; and the court acted properly in resolving that issue as a matter of law.

APPEAL by defendant from *Saunders, Judge.* Orders entered 25 August 1978 and 28 November 1978 in District Court, MECKLENBURG County. Heard in the Court of Appeals 24 September 1979.

This action was brought in district court in Mecklenburg County by plaintiff, a resident of Albany, New York, against defendant, her former husband, a resident of Mecklenburg County, seeking full faith and credit enforcement of certain New York decrees relating to alimony and child support. Plaintiff also sought to have defendant declared in contempt for failure to abide by the terms of the New York decrees. She attached to her complaint a copy of a 15 February 1977 order of the Supreme Court of New York in Rensselaer County which modified an earlier judgment of divorce by increasing the amount of alimony and child support to be paid by defendant. Also attached to the complaint was a copy of a judgment entered 28 October 1977 by the same court which adjudged defendant guilty of contempt for violation of the 15 February 1977 order and awarded plaintiff the sum of $4,225.00 which represented unpaid arrearages of alimony and child support. That order was issued in response to a motion filed by plaintiff. Defendant was personally served with notice of the motion, and he thereafter filed in the New York court a countermotion and affidavits in support thereof.

In his answer defendant admitted that the two decrees had been rendered by the New York court, but he denied that the decrees were entitled to full faith and credit. Defendant alleged that the 28 October 1977 judgment was entered without a hearing having been held, in violation of his right to due process of law,

and that the 15 February 1977 order was entered out of court and out of term and was, therefore, unenforceable. He prayed that if full faith and credit should be given to the award of arrearages, the amount should be reduced due to his inability to pay. In a countermotion, defendant prayed for modification of the New York order for alimony and child support on the basis of a substantial change in circumstances.

On 31 July 1978 the district court held a conference in chambers and ordered that both parties submit by 7 August 1978, memoranda of law on the issue of the validity and enforceability of the New York judgments. Defendant timely filed such a memorandum, but plaintiff failed to do so by 7 August 1978 as the district judge had ordered. On 15 August 1978, the district court judge, after determining that plaintiff had waived her right to be heard on the issues set out in defendant's memorandum of law, entered an order denying full faith and credit recognition to the 28 October 1977 order and granting recognition to the 15 February 1977 order. Further hearings in the cause were ordered.

After plaintiff filed a memorandum of law on 17 August 1978, the trial court entered an order on 25 August 1978 vacating its earlier order of 15 August 1978 and setting the matter for hearing. On 1 September 1978, defendant filed a notice of appeal from the 25 August 1978 order. Thereafter, he took no timely steps to perfect his appeal from that order.

On 18 September 1978, the matter came on for hearing before Judge Saunders. Defendant's attorney requested an evidentiary hearing as to all issues before the court. By order entered 28 November 1978, the court, based on the documents and arguments presented at the hearing, made detailed findings of fact. Based on these findings, it made the following conclusions of law:

> 1. The February 15, 1977, Order of the New York Court is entitled to full faith and credit.
>
> 2. The October 28, 1977, Order of the New York Court is entitled to full faith and credit, insofar as it awards plaintiff a money judgment for the sum of Four Thousand Two Hundred Twenty-five Dollars ($4,225.00).

3. The October 28, 1977, New York Court Order is not entitled to full faith and credit, insofar as it adjudges defendant to be in contempt of the New York Courts and orders his imprisonment.

4. A custodial parent's alleged interference with court-ordered visitation did not constitute a defense to claims for alimony and child support accruing prior to June 5, 1978, and does not constitute a defense to claims for child support accruing on or after June 5, 1978, under either New York or North Carolina law in a non-Uresa case, where the support and alimony provided in the Order are not expressly conditioned upon visitation.

5. Defendant has raised matters entitling him to a hearing on his claim for suspension or cancellation of alimony accruing on or after June 5, 1978, in accordance with Chapter 241 of the New York Domestic Relations Law, enacted and to take effect June 5, 1978.

6. This Court has the discretion under North Carolina General Statute Section 50-13.5(c)5 to refuse to exercise jurisdiction as to the custody and visitation matters between the parties where the courts of another state (in this case New York) have already assumed jurisdiction and determined those matters and where the best interests of the children and parties will be served by having the matter disposed of in that jurisdiction.

7. Defendant has raised matters entitling him to a full evidentiary hearing on his prayer for a modification of alimony and child support by reason of changed circumstances.

8. The garnishment hearing in this case was not heard within the time allowed by law and it is dismissed.

9. Except as to those matters resolvable and resolved herein as a matter of law based upon the pleadings and memorandums of law, all issues raised by the parties are referred for evidentiary hearing at such time and place as may be set upon the application of either party and due notice to both parties.

The court awarded plaintiff judgment for arrearages in the amount of $4,225.00 and ordered an evidentiary hearing on defendant's motion for modification of the 15 February 1977 decree of the New York court. Defendant appeals from the order of 25 August 1978 which vacated the earlier order of 15 August 1978, and from the order of 28 November 1978.

Durant Williams Escott for plaintiff-appellee.

Ellis M. Bragg for defendant appellant.

PARKER, Judge.

On this appeal defendant seeks to challenge both the 25 August 1978 order which vacated an order entered ten days earlier and the 28 November 1978 order which granted full faith and credit to portions of the New York decrees.

[1] On 1 September 1978 defendant-husband gave timely notice of appeal from the order of 25 August 1978. He now contends that this notice of appeal divested the trial court of jurisdiction to enter further orders in the cause and, therefore, that the order of 28 November 1978 was a nullity. We disagree. "As a general rule, an appeal takes a case out of the jurisdiction of the trial court. Thereafter, pending the appeal, the judge is *functus officio.*" *Sink v. Easter,* 288 N.C. 183, 197, 217 S.E. 2d 532, 541 (1975); *accord, Machine Co. v. Dixon,* 260 N.C. 732, 133 S.E. 2d 659 (1963). However, this rule does not apply where further proceedings in the trial court indicate that the appeal has been abandoned. *Sink v. Easter, supra.* The initial question for decision on this appeal is, therefore, whether defendant's appeal from the 25 August 1978 order was abandoned.

In *Sink v. Easter, supra,* plaintiff's action was dismissed for lack of jurisdiction, and on 28 March 1974, the trial judge denied plaintiff's motion to set aside the judgment under Rule 60(b) and plaintiff gave notice of appeal. On 1 April 1974 the court, on its own motion, set aside its order denying the motion, and on 9 May 1974, plaintiff submitted a "withdrawal and abandonment of appeal," which was allowed. On 16 May 1974 an order was entered allowing the Rule 60(b) motion, and defendant duly appealed. On appeal, our Supreme Court held that plaintiff's abandonment of the earlier appeal served to reinvest the trial court with jurisdic-

tion over the entire cause: "We construe the proceedings appearing in the record on 1 April 1974 to constitute an adjudication by the court that plaintiff's prior appeal from the denial of her Rule 60(b) motion had been abandoned and that plaintiff, by appearing at said hearing, gave proper notice of her intention to abandon the same." 288 N.C. at 198, 217 S.E. 2d at 542. In the later case of *Bowen v. Motor Co.*, 292 N.C. 633, 234 S.E. 2d 748 (1977), the court emphasized that *Sink* "should not be interpreted as holding that the mere filing of a motion directed to an order or judgment from which an appeal has previously been taken and the appearance at a hearing thereon constitutes an abandonment of the prior appeal, nothing else appearing." 292 N.C. at 636, 234 S.E. 2d at 750. The Court in *Bowen, supra*, held that plaintiffs who filed notice of appeal, and who thereafter filed a motion to take a voluntary dismissal, had not abandoned their appeal so as to reinvest the lower court with jurisdiction.

In the present case, defendant properly gave notice of appeal on 1 September 1978, but between that date and 28 November 1978 when judgment was entered, a period of 88 days, he took no steps to perfect that appeal. Contrary to the mandate of App. R. 11(a) defendant neither tendered a proposed record on appeal within 30 days, nor did he seek any extension of time to settle such a record as permitted by App. R. 27(c). Defendant did file a motion on 18 September 1978 requesting the court to decline to render further rulings pending disposition of the appeal from the 25 August 1978 order, and only thereafter did he participate in oral argument directed to the merits. Had defendant done nothing more than participate in the hearing on 18 September 1978, we would be compelled to conclude, under the authority of *Bowen v. Motor Co., supra*, that defendant had not abandoned his appeal of 1 September 1978. However, in our opinion his failure to perfect that appeal by the time judgment was entered on 28 November 1978 constituted an abandonment which reinvested the trial court with jurisdiction to render further orders in the cause. In effect, during the period September to November 1978 defendant was actively seeking to ensure a judgment on the merits in his favor, while at the same time purporting to pursue, but failing to perfect, an appeal from a previous order which had operated to his disadvantage. Having neglected for 88 days after giving notice of appeal on 1 September 1978 to take any further step to perfect

his appeal, defendant cannot now justly contend, merely because the 28 November 1978 order also disadvantaged him, that the court was without jurisdiction to render it.

We hold that the defendant's purported appeal from the 25 August 1978 order is not before this Court because defendant failed, after giving notice of appeal on 1 September 1978, to take any further timely step required by the Rules of Appellate Procedure to perfect his appeal from that order. Therefore, the only order which is now before this Court is that entered on 28 November 1978, from which defendant properly perfected an appeal.

[2] We note at the outset that the 28 November 1978 order did not determine all of the issues raised in this action. Although the trial court enforced the 28 October 1977 New York decree to the extent that it had awarded plaintiff judgment for $4,225.00 in alimony and support arrearages, and although the court granted full faith and credit to the alimony and child support provisions of the 15 February 1977 New York decree, it ordered evidentiary hearings on defendant's motion to modify the latter decree. The Court also ordered further hearings on the issue of defendant's entitlement to suspension of alimony accruing on or after 5 June 1978, based on an amendment to the New York Domestic Relations Law, effective 5 June 1978, which permits suspension of alimony where a custodial parent has wrongfully interfered with visitation rights of the non-custodial parent. Despite the interlocutory nature of the 28 November 1978 order, we conclude that the defendant's appeal therefrom can be presently maintained. Since the order granting plaintiff-wife's claim for $4,225.00 in arrearages and granting full faith and credit to a decree imposing a continuing support obligation affects a "substantial right" of defendant, it is reviewable by virtue of G.S. 1-277 and G.S. 7A-27(d). *See, Newton v. Insurance Co.*, 291 N.C. 105, 229 S.E. 2d 297 (1976); *Oestreicher v. Stores*, 290 N.C. 118, 225 S.E. 2d 797 (1976).

[3] Proceeding to the merits of defendant's appeal, we first consider whether the trial court erred in giving full faith and credit to that portion of the New York decree of 28 October 1977 awarding plaintiff judgment for $4,225.00 in alimony and child support arrearages. Although defendant argues in his brief that the trial court could not properly entertain an action to enforce a foreign

judgment without the introduction in evidence of a properly authenticated copy of that foreign judgment, we note that defendant, by his answer, has waived any defect in authentication of the judgment. *See* 2 Stansbury's North Carolina Evidence § 195 (Brandis Rev. 1973). Plaintiff attached to her complaint a copy of the 28 October 1977 New York judgment which she sought to enforce, and defendant, in his answer, admitted that the attached order was filed in the New York action.

[4] Defendant also contends that the New York court issued the decree without giving him notice and an opportunity to be heard on the matter, thereby depriving him of his constitutional right to procedural due process. Article IV, § 1 of the Constitution of the United States, provides: "Full Faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." In a suit brought to enforce the judgment of a sister state, that judgment may be collaterally attacked only upon the following grounds: (1) lack of jurisdiction; (2) fraud in procurement; or (3) that it is against public policy. *Howland v. Stitzer*, 231 N.C. 528, 58 S.E. 2d 104 (1950).

Defendant does not contend that the New York court entering the 28 October 1977 decree lacked jurisdiction or that there was fraud in the procurement of the decree. His contention is that the order, entered without notice and without an evidentiary hearing, was in violation of his due process rights and is contrary to the public policy of this state. If in fact defendant's right to due process was denied, the New York decree would not be entitled to full faith and credit. There is, however, no question in the present case that defendant had proper notice of the proceedings in the New York court which led to the judgment of which he complains. Defendant was personally served with process, and he filed pleadings and supporting documents in the New York Court. The question remaining, then, is whether defendant was given a reasonable opportunity to be heard. "If the defendant was denied a reasonable opportunity to be heard, a judgment rendered against him will be void in the State of rendition itself, if this state is a State of the United States, and in any event will not be recognized or enforced in other states." Restatement (Second) of Conflict of Laws § 25, Comment h (1971). We conclude that defendant was in fact afforded a "reasonable opportunity to

be heard" and that enforcement of the judgment against him is not, therefore, against the public policy of this state.

[5] The 28 October 1977 decree of the New York court was given full faith and credit recognition in the judgment now appealed from only to the extent that judgment for arrearages was awarded. The portion of the New York decree adjudging defendant in contempt and ordering his incarceration was denied enforcement. The district court in Mecklenburg County was correct in denying full faith and credit to the contempt portion of the New York decree. The validity and effect of a judgment of another state must be determined by reference to the laws of the state wherein the judgment was rendered. *See, Marketing Systems v. Realty Co.*, 277 N.C. 230, 176 S.E. 2d 775 (1970). Under New York law, where a party asserts financial inability to pay a prior judgment, he may not be held in contempt and ordered incarcerated without a full evidentiary hearing. *Singer v. Singer*, 52 A.D. 2d 774, 382 N.Y.S. 2d 793 (1976); *Walker v. Walker*, 51 A.D. 2d 1029, 381 N.Y.S. 2d 310 (1976); *Comerford v. Comerford*, 49 A.D. 2d 818, 373 N.Y.S. 2d 148 (1975). As to proceedings to recover a money judgment for arrearages, the requirements are less strict. In *Pecukonis v. Pecukonis*, 49 A.D. 2d 985, 374 N.Y.S. 2d 382 (1975), a New York appellate court explained the function of Section 244 of the Domestic Relations Law, the same statute under which plaintiff-wife in the present action obtained judgment for arrearages in the New York court:

> Section 244 of the Domestic Relations Law was designed to eliminate the burden of plenary or protracted litigation to enforce the wife's established rights under a matrimonial decree. It is intended to afford summary relief for the nonpayment of alimony (*McCanliss v. McCanliss*, 268 App. Div. 138, 49 N.Y.S. 2d 289). It is, in effect, a motion for summary judgment (*Salvati v. Salvati*, 37 A.D. 2d 858, 326 N.Y. 2d 156). Therefore, if there are material issues of fact, judgment cannot be granted (*Poitier v. Poitier*, 42 A.D. 2d 645, 345 N.Y. 2d 154; *Salvati v. Salvati, supra*).
>
> In the instant proceeding, it was incumbent upon the moving party to present evidentiary facts showing the validity of her contentions and that there was no defense. This she did. Conversely, the defendant husband was required to present facts

> having probative value sufficient to demonstrate an unresolved, material issue, which could be determined only by a plenary hearing. He failed to do so. Conclusory allegations are insufficient.

49 A.D. 2d at 985, 374 N.Y.S. 2d at 384.

Thus, it is clear that under New York law, the party opposing a motion for judgment on arrearages due under a decree for alimony and support must initially make a showing by affidavit. Unless the New York court determines that the opposing affidavits raise genuine issues of material fact, there is no requirement that a full evidentiary hearing be held. *See, Hickland v. Hickland,* 56 A.D. 2d 978, 393 N.Y.S. 2d 192 (1977); *Gibb v. Gibb,* 49 A.D. 2d 886, 372 N.Y.S 2d 743 (1975); *Gagliardi v. Gagliardi,* 18 A.D. 2d 788, 236 N.Y.S. 2d 510 (1963).

In the present case, both plaintiff, who was the movant in the New York court, and defendant filed affidavits in the New York court in support of their motions. The New York judgment recites that the matter came on for hearing at a Special Term of the Supreme Court of Rensselaer County in New York on 23 September 1977, and that at that hearing defendant moved to refer the matter to the judge who had previously issued orders in the cause, which motion was granted. When the trial judge to whom the matter was referred entered judgment, that judgment was based upon the pleadings and affidavits which both parties had filed in the action. Defendant had the right under New York law to submit those affidavits opposing plaintiff's motion and supporting his own cross-motion, and he cannot now justly complain that he was denied due process merely because those affidavits were found to raise no meritorious defense which warranted a full evidentiary hearing. Assuming *arguendo* that there were genuine issues of fact which should have been resolved at an evidentiary hearing, and that the judgment was voidable upon direct attack in the courts of New York, defendant cannot collaterally attack the judgment on that ground. *See, Marsh v. R.R.,* 151 N.C. 160, 65 S.E. 911 (1909). "A foreign judgment cannot be impeached by showing that it was based on an error of law." *Ring v. Whitman,* 194 N.C. 544, 140 S.E. 159 (1927). *See also,* 47 Am. Jur. 2d Judgments, § 1238, p. 239. Having previously submitted to the jurisdiction of the New York courts, defendant was free to appeal

from the order and challenge its validity on direct attack in the appellate courts in New York. This he failed to do.

[6] Defendant also attempts on this appeal to raise for the first time a question as to the constitutionality of the New York statute which provides for awards of alimony and counsel fees, §§ 236 and 237 of the Domestic Relations Law. We do not reach the issue of the constitutionality of that statute on this appeal since it was neither raised in any of the pleadings or other papers filed in the New York action, nor has there been any ruling by the appellate courts of New York on the issue. Further, had defendant wished to raise this question in New York, he would have been required under N.Y. Civ. Prac. § 1012(b) to give notice to the State Attorney General, whose duty it would then have been to defend the statute.

[7] Finally, defendant contends that the trial court erred in its order of 28 November 1978 in denying defendant's oral motion for evidentiary hearings on the issues resolved therein, and he contends that such denial violated his due process right to produce evidence and cross-examine witnesses. This contention is without merit. At the hearing held in this matter on 18 September 1978, the court had before it the pleadings of the North Carolina and New York courts, and memoranda of law submitted by both parties. As previously stated, the 28 November 1978 order was partially interlocutory in that it withheld final determination on issues as to which the 18 September 1978 hearing revealed there were questions of fact to be determined. The issue of full faith and credit enforcement of the New York judgment for arrearages presented no questions of fact, and the trial court acted properly in resolving that issue as a matter of law.

The judgment appealed from is

Affirmed.

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

W. C. KOURY v. JOHN MEYER OF NORWICH, A CORPORATION; CASEY, DALY & BENNETT, P.A., A PROFESSIONAL ASSOCIATION; AND HUGH G. CASEY, JR., AND WALTER H. BENNETT, JR., INDIVIDUALLY

No. 7826SC57

(Filed 8 January 1980)

1. **False Imprisonment § 1— order of arrest erroneous but not void—action for false imprisonment improper**

An order of a superior court judge under which plaintiff was arrested, although erroneous, was not void, and it protected against an action for false imprisonment both the officer who made the arrest and the defendants who procured the order.

2. **Process § 18— arrest order—no abuse of process**

Summary judgment was properly entered dismissing plaintiff's claim for abuse of process since there is no cause of action for abuse of process when the process, even though maliciously obtained, is used only for the purpose for which it was intended and the result accomplished was warranted by the writ; and in this case, the arrest order for plaintiff issued by a superior court judge was used for the purpose for which it was intended, and no improper act of the defendants after issuance of the arrest order was shown.

3. **Arrest and Bail § 12; Malicious Prosecution § 13.2— arrest in civil case—failure to show lack of probable cause—no malicious prosecution shown**

The trial court properly granted defendants' motions for summary judgment on plaintiff's claim for malicious prosecution where the evidence tended to show that defendant corporation employed defendant attorneys to collect a balance owed defendant by plaintiff's corporation for goods sold under an express contract; pursuant to that employment, the attorneys brought a civil action against plaintiff's corporation; plaintiff testified in that action that he sent a check to defendant with "payment in full" language on the back which defendant cashed, while plaintiff in fact typed the language on the back of the check after it had cleared the bank and was returned to him; defendant filed an amended complaint seeking a judgment for punitive damages; defendant attorneys also moved that plaintiff be joined as an additional party and that an order be issued for his arrest; when defendants filed the amended complaint to recover punitive damages for plaintiff's fraud, they had probable cause to seek his arrest under G.S. 1-410(4); and plaintiff therefore failed to show a lack of probable cause which is an essential element of malicious prosecution.

APPEAL by plaintiff from *Lewis, Judge.* Judgments entered 28 October 1977 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 19 October 1978.

Plaintiff, W. C. Koury, instituted this civil action on 9 February 1976 seeking to recover compensatory and punitive

damages from the defendants on allegations stating alternative claims for false imprisonment, malicious prosecution, and abuse of process. The case arose out of the following facts, which are not in dispute. In 1972 the corporate defendant, John Meyer of Norwich (Meyer), employed the firm of Casey and Daly, P.A. (later Casey, Daly & Bennett, P.A.), attorneys at law, to collect a balance of $6,658.66 which Meyer claimed was owed it under an express contract for goods sold and delivered by Meyer to Libby's Village Shop, Ltd. (Libby's), a corporation of which the plaintiff in the present action, W. C. Koury, was president and sole stockholder. Pursuant to that employment the attorneys brought a civil action on behalf of Meyer against Libby's in the Superior Court in Mecklenburg County. The case came on for trial in November 1974 before Judge B. T. Falls, Jr., and a jury, the hearing at that session of court ending in a mistrial and an order for compulsory reference when Judge Falls determined that the case involved extensive accounting. Prior to entry of the order declaring a mistrial and while the case was being presented to the jury, Koury testified as a witness for Libby's concerning a check dated 28 December 1970 in the amount of $1593.00 which he had drawn in the name of Libby's to the order of Meyer and which Meyer had cashed. This check, which was introduced in evidence, bore on its back the typed statement that "endorsement of this check gives complete and total relief of all obligations past and present to Libby's Village shop—W. C. Koury yes indeed transactions are complete." Koury testified under oath before the jury that this typed statement on the back of the check had appeared thereon at the time he sent the check to Meyer.

After declaration of the mistrial and while the case was pending before the referee, Walter H. Bennett, Jr., one of the attorneys representing Meyer, undertook to have the typed notation on the back of the check examined by an expert to determine if it had been placed on the check after it had been endorsed and cashed by Meyer. He also sought to take the deposition of an officer of the bank on which the check was drawn and to subpoena records of the bank to determine whether the typed statement appeared on the back of the check at the time it cleared the bank. Following these efforts by Bennett, Koury informed the attorney then representing Libby's that he had typed the statement on the back of the check after it had cleared the bank. The attorney

representing Libby's thereupon promptly informed the court and Bennett of this development at a meeting in chambers before Judge Falls at which Koury was also present. Judge Falls expressed the view that the matter should be reported to the grand jury.

By letter dated 12 February 1975, Hugh G. Casey, Jr., one of the attorneys representing Meyer, informed his client of what had occurred and, speaking of Judge Falls's stated intention to send the matter to the grand jury to consider returning an indictment against Koury for perjury, said:

> I don't see what good that would do and with the condition of the criminal docket here I doubt the defendant would ever be convicted. So I went over to Judge Falls and suggested we amend our pleadings to put in a count for fraud, file an affidavit and have the civil court (Judge Falls) issue an order for civil arrest so the defendant can be imprisoned for civil contempt.
>
> The defendant has offered to pay about $953, which is what he offered a long time ago. The defendant's new lawyer said defendant will go into bankruptcy before paying. I told defendant's new lawyer I would do my best to see the defendant's principal goes to jail under civil arrest. Defendant's new lawyer then wanted to know what amount we would want to settle.

On 3 March 1975 Meyer's attorneys moved to be permitted to amend the complaint filed in the action brought by them on behalf of Meyer against Libby's to allege, as "a second cause of action," that Libby's, through its agent Koury, had written the payment in full language on the check after it had cleared the bank and that this constituted a fraud on Meyer and on the court. The amended complaint contained a prayer for judgment for punitive damages. Meyer's attorneys also moved that Koury be joined as an additional party and that an order be issued for his arrest. In support of these motions, the attorneys filed an affidavit of Walter H. Bennett, Jr., in which the facts concerning Koury's sworn testimony and the subsequent revelation as to its falsity were stated. By order filed 19 March 1975 Judge Falls granted the motions to amend the complaint and join Koury as an additional party. In addition, he directed Koury to appear on 1 April

1975 to show cause why an order for his arrest should not issue. A summons for Koury was issued 19 March 1975 and served on him on 21 March 1975.

In response to the show cause order, Koury and his attorney appeared for a hearing before Judge Falls on 1 April 1975. Attorney Casey, representing Meyer, also appeared and presented the affidavit of Bennett and argued in support of the motion for Koury's arrest. At the conclusion of the hearing, Judge Falls signed an order dated 1 April 1975 directing the sheriff of Mecklenburg County to arrest Koury and hold him to bail in the amount of $12,000.00. Pursuant to this order Koury was arrested on 1 April 1975. Later on the same day, he was released after posting the required bond.

On 18 April 1975 Koury moved under G.S. 1A-1, Rule 12(b)(6) to dismiss the amended complaint for failure to state a claim on which relief can be granted. This motion was heard before Judge Frank W. Snepp, who, by order dated 19 August 1975, granted the motion, dismissed the amended complaint, dissolved the arrest order, and directed that the $12,000.00 bail bond he returned to Koury. No appeal was taken from Judge Snepp's order.

On 9 February 1976 Koury filed the present action against Meyer and against its attorneys, Casey, Daly & Bennett, P.A., and Hugh G. Casey, Jr. and Walter H. Bennett, Jr., individually, alleging alternative claims for false imprisonment, malicious prosecution, and abuse of process. Both Meyer and the attorney-defendants filed answers in which they denied that they had acted maliciously, alleged that they had acted in good faith and with probable cause, and in which they pled the facts concerning Koury's perjured testimony as a bar to his right to maintain this action against them. Meyer also pled as a defense that it had acted in good faith reliance upon the advice of its attorneys, and Meyer filed a crossclaim against the attorneys to be indemnified for all sums which Koury might recover of Meyer in this action.

Both Meyer and the attorney-defendants filed motions for summary judgments to dismiss all of Koury's claims against them. After considering the pleadings, admissions of the parties, answers to interrogatories, depositions, affidavits, and oral testimony presented at the hearing on the motions for summary judgment, the court allowed the motions and entered judgments

dismissing all of plaintiff's claims against all defendants. From these judgments, plaintiff appeals.

T. LaFontine Odom, L. Holmes Eleazer, Jr., and Weinstein, Sturges, Odom, Bigger, Jonas & Campbell for plaintiff appellant.

William C. Livingston and Kennedy, Covington, Lobdell & Hickman for John Meyer of Norwich, defendant-appellee.

John G. Golding and Golding, Crews, Meekins, Gordon & Gray for Casey, Daly & Bennett, P.A. and Hugh G. Casey, Jr. and Walter H. Bennett, Jr., defendant appellees.

PARKER, Judge.

[1] Summary judgments dismissing plaintiff's claim for false imprisonment were properly entered. The order of Judge Falls under which plaintiff was arrested, although erroneous, was not void, and it protects against an action for false imprisonment both the officer who made the arrest and the defendants who procured the order to be entered. *Bryan v. Stewart*, 123 N.C. 92, 31 S.E. 286 (1898); *Tucker v. Davis*, 77 N.C. 330 (1877).

[2] Summary judgments were also properly entered dismissing plaintiff's claim for abuse of process. "Abuse of process consists in the malicious misuse or perversion of a civil or criminal writ to accomplish some purpose not warranted or commanded by the writ." *Barnette v. Woody*, 242 N.C. 424, 431, 88 S.E. 2d 223, 227 (1955). "It consists in the malicious misuse or misapplication of that process *after issuance* to accomplish some purpose not warranted or commanded by the writ." *Melton v. Rickman*, 225 N.C. 700, 703, 36 S.E. 2d 276, 278 (1945); *accord, Stanback v. Stanback*, 297 N.C. 181, 254 S.E. 2d 611 (1979). There is no cause of action for abuse of process when the process, even though maliciously obtained, is used only for the purpose for which it was intended and the result accomplished was warranted by the writ. *Fowle v. Fowle*, 263 N.C. 724, 140 S.E. 2d 398 (1965); *Benbow v. Caudle*, 250 N.C. 371, 108 S.E. 2d 663 (1959). Here, the arrest order issued by Judge Falls was used for the purpose for which it was intended, and no improper act of the defendants after the issuance of the arrest order has been shown.

[3] This brings us to the principal question presented by this appeal, which is whether the trial court was correct in granting

defendants' motions for summary judgments dismissing plaintiff's claim for malicious prosecution. We hold that it was.

"The common law action for malicious prosecution was originated as a remedy for unjustifiable criminal prosecutions. However, in North Carolina and many other states, the right of action has been extended to include the malicious institution of civil proceedings which involve an arrest of the person or seizure of property or which result in some special damage." *Carver v. Lykes*, 262 N.C. 345, 351-52, 137 S.E. 2d 139, 144 (1964); *accord, Ely v. Davis*, 111 N.C. 24, 15 S.E. 878 (1892). Since plaintiff here was subjected to a civil arrest, his action will lie if he can show the other esential elements of an action for malicious prosecution. To maintain an action for malicious prosecution, a plaintiff must show (1) that the defendant instituted or caused to be instituted against him a criminal proceeding (or, as here, a civil proceeding resulting in some special damage), (2) with malice, (3) without probable cause, and (4) that such proceeding has been terminated in favor of the plaintiff who asserts the claim for malicious prosecution. *Taylor v. Hodge*, 229 N.C. 558, 50 S.E. 2d 307 (1948); *see* Byrd, *Malicious Prosecution in North Carolina*, 47 N.C.L. Rev. 285 (1969). Since plaintiff must prove all of these elements in order to maintain his claim, a defendant will be entitled to summary judgment dismissing plaintiff's action if the record discloses that there is no genuine issue as to the material facts which establish the nonexistence of any one of them. In considering the record for the purpose of making that determination, however, the court must view all material furnished in support of and in opposition to the motion for summary judgment in the light most favorable to the plaintiff as the party opposing the motion, since the movant for summary judgment "always has the burden of showing that there is no triable issue of fact and that movant is entitled to judgment as a matter of law." *Pitts v. Pizza, Inc.*, 296 N.C. 81, 86, 249 S.E. 2d 375, 378 (1978).

Applying these principles in the present case, it is undisputed that defendants instituted the proceeding in which plaintiff was subjected to civil arrest and that the proceeding terminated in favor of the plaintiff when Judge Snepp dissolved the arrest order and dismissed the amended complaint under Rule 12(b)(6). Although defendants deny that they acted with malice, the record discloses that a genuine issue exists for jury deter-

mination as to whether this is so, and aside from express malice, which plaintiff might or might not be able to prove at trial, "implied malice may be inferred from want of probable cause in reckless disregard of plaintiff's rights." *Pitts v. Pizza, Inc., supra* at 86-7, 249 S.E. 2d at 379. Thus, determination of this appeal turns upon whether the record discloses that there is no genuine issue as to the material facts which establish that defendants acted with probable cause.

> In cases grounded on malicious prosecution, probable cause "has been properly defined as the existence of such facts and circumstances, known to him at the time, as would induce a reasonable man to commence a prosecution." *Morgan v. Stewart,* 144 N.C. 424, 430, 57 S.E. 149, 151 (1907). The existence or nonexistence of probable cause is a mixed question of law and fact. *Cook v. Lanier,* 267 N.C. 166, 147 S.E. 2d 910 (1966); *Taylor v. Hodge, supra.* If the facts are admitted or established it is a question of law for the court. *Carson v. Doggett,* 231 N.C. 629, 58 S.E. 2d 609 (1950). Conversely, when the facts are in dispute the question of probable cause is one of fact for the jury."

Pitts v. Pizza, Inc., supra, at 87, 249 S.E. 2d at 379.

In the present case, the facts are not in dispute. In their amended complaint which defendants filed in the action brought by Meyer against Libby's, defendants based their claim that they were entitled to have Koury arrested upon the following allegations:

> (6) That the defendant [Libby's] denied owing for the goods on the grounds that it had tendered to the plaintiff [Meyer] a check with payment in full language and that the plaintiff had knowingly accepted this check.
>
> (7) That the defendant, through its agent, W. C. Koury, had written the payment in full language after the check had been accepted by the plaintiff and cleared the bank and returned to the defendant.
>
> (8) That the foregoing acts of the defendants [Libby's and Koury, who was joined as an additional party defendant] constitute a fraud on the plaintiff and the court.

At the time the amended complaint was filed there was no dispute, nor is there any now, concerning the truth of the allegations contained in paragraphs 6 and 7. Plaintiff Koury has admitted that he typed the "payment in full" language on the back of the check after it was cashed by Meyer. He has admitted that he gave false testimony under oath when he testified that the typed language was on the check when it was first presented to Meyer. Koury's obvious purpose in adding the typed statement to the back of the check and then committing perjury concerning it was to perpetrate a fraud by having the check operate as a bar to defeat Meyer's claim. The question thus becomes whether knowledge of these undisputed facts[1] furnished the defendants, at the time they undertook to have Koury subjected to civil arrest, probable cause to have him arrested. This is a question of law for the court.

The North Carolina statute which specifies the causes for which a defendant in a civil action may be subjected to prejudgment arrest is G.S. 1-410. For purposes of this appeal the pertinent portions of G.S. 1-410 are as follows:

> G.S. 1-410. *In what cases arrest allowed.*—The defendant may be arrested, as hereinafter prescribed, in the following cases:
>
> * * *
>
> (4) When the defendant has been guilty of a fraud in contracting the debt or incurring the obligation for which the action is brought, in concealing or disposing of the property for the taking, detention or conversion of which the action is brought, *or when the action is brought to recover damages for fraud or deceit.* (Emphasis added.)

1. At the hearing before Judge Falls on return of the show cause order, attorney Hugh G. Casey, Jr., one of the defendants in the present action, appearing for Meyer, stated to Judge Falls that he had information that Libby's had transferred all its inventory and fixtures to another corporation owned by Koury and that this corporation had in turn given a security interest to the bank. He presented this as justification for holding Koury on "a bond sufficient to the judgment that we may obtain." On this appeal, defendant-appellants point out that the record shows that when Meyer later obtained judgment in the amount of $2700.00 against Libby's, the sheriff returned execution reporting no assets to be found, and they argue that this shows that Libby's assets had in fact been disposed of. We do not consider these matters relevant to the present appeal, since the question here is not whether defendants in this action had other grounds, such as those set forth in subsection (5) of G.S. 1-410, which could have furnished them with probable cause to have Koury arrested, but whether the grounds which they utilized by stating them in their amended complaint furnished probable cause.

This statute has been in effect for more than a century, appearing as § 149, subsection 4, of the Code of Civil Procedure of 1868. The breadth of its language suggests that it was designed to authorize civil arrests to the full extent permitted by our North Carolina constitutional provision against imprisonment for debt "except in case of fraud." Art. I, Sec. 28, N.C. Constitution. Speaking of this constitutional exception permitting imprisonment in case of fraud, our Supreme Court long ago expressed the view that the exception comprehended "fraud in attempting to hinder, delay and defeat the collection of a debt by concealing property and other fraudulent devices." *Melvin v. Melvin*, 72 N.C. 384, 386 (1875). In our opinion Koury's activities in adding the "payment in full" language to the check after it had been cashed by Meyer, and in then attempting to use the check to defeat Meyer's claim, constituted fraud within the intent of G.S. 1-410(4) and within the North Carolina constitutional exception permitting imprisonment in case of fraud. Therefore, we hold that when Meyer and its attorneys filed the amended complaint seeking to recover punitive damages for Koury's fraud, they had probable cause to seek his arrest under G.S. 1-410(4). This, apparently, was the view adopted by Judge Falls when he issued his order of 1 April 1976 directing that Koury be arrested. That order in itself, even though subsequently set aside by Judge Snepp, is conclusive in favor of the defendants in the present action on the question of probable cause so that they may not now be held liable for malicious prosecution. *Overton v. Combs*, 182 N.C. 4, 108 S.E. 357 (1921); *Baranan v. Kazakos*, 125 Ga. App. 19, 186 S.E. 2d 326 (1971); *see* Annot., 58 A.L.R. 2d 1422 (1958).

We note that some two years after Judge Falls entered his order of 1 April 1975 directing Koury's arrest, a three-judge federal court considered a case in which the constitutionality of G.S. 1-410 was challenged on the grounds that it violates the due process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution. *Grimes v. Miller*, 429 F. Supp. 1350 (1977), *aff'd* 434 U.S. 978, 98 S.Ct. 600, 54 L.Ed. 2d 473 (1977). Although the court in that case expressly declined to pass on the constitutionality of G.S. 1-410, holding that the plaintiff lacked standing to challenge the North Carolina pre-judgment arrest statutes and confining its decision to a consideration of G.S. 1-311 which provides for post-judgment civil arrest, the reasoning of

the opinion of the court, written by Craven, Circuit Judge, raises a serious question as to whether G.S. 1-410 violates the due process and equal protection clauses of the Fourteenth Amendment. That question is not presently before us. Even if G.S. 1-410 should ultimately be declared unconstitutional, defendants would have been entitled to rely upon it when they caused Koury's arrest in 1975. *See, Powell v. Duke University,* 18 N.C. App. 736, 197 S.E. 2d 910 (1973); *cert. denied* 284 N.C. 122, 199 S.E. 2d 660 (1973).

The summary judgments dismissing all of plaintiff's claims against all defendants are

Affirmed.

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

MARTHA ANDREWS JOHNSON WING AND JANE VIRGINIA ANDREWS POWER PHILBRICK v. WACHOVIA BANK & TRUST COMPANY, N.A., SUCCESSOR TRUSTEE, AND AUGUSTA ANDREWS YOUNG, JULIA MARKS DOZIER, ALEXANDER A. MARKS, LAURENCE H. MARKS, ALEX B. ANDREWS III, JULIA ANDREWS PARK, MARY S. ANDREWS WORTH, GRAHAM H. ANDREWS, JR., F. M. SIMMONS ANDREWS, AUGUSTA YOUNG MURCHALL, ELEANOR YOUNG BOOKER, SANDRA JOHNSON WALKER, RICHARD T. DOZIER, JR., JANE DOZIER HARRIS, WILLIAM M. MARKS III, RALPH STANLEY MARKS, FRANCES MARKS BRUTON, JULIA MARKS YOUNG, ELIZABETH MARKS GREEN, JANE MARKS CLINE, HAL V. WORTH III, JULIA WORTH RAY, SIMMONS HOLLADAY WORTH, JOHN W. ANDREWS, SARA SIMMONS ANDREWS JOHNSTON AND MARY GRAHAM ANDREWS. ADDITIONAL PARTIES: JESSICA ANNE MURCHALL EDGMON, MELINDA SUSAN MURCHALL, JOHN ALEXANDER MURCHALL, ROBERT ANDREWS BOOKER, PAUL CURTIS BOOKER, PAUL CURTIS BOOKER, MINOR, WILLIAM CONRAD WALKER, JR., MINOR, JAMES ALEXANDER WALKER, MINOR, TIMOTHY TODD WALKER, MINOR, SHARON VIRGINIA WALKER, MINOR, ANNE GILCHRIST DOZIER, MINOR, PATRICIA JANE DOZIER, MINOR, LAURA CROMWELL DOZIER, MINOR, JULIA MARKS HARRIS, CHARLES ANDREW HARRIS III, WILLIAM MARK HARRIS, MINOR, WILLIAM M. MARKS IV, MINOR, ANN ELVA MARKS, MINOR, RALPH STANLEY MARKS, JR., MINOR, RICHARD HUGHES MARKS, MINOR, ALEXANDER ANDREWS GRANT BRUTON, MINOR, EDWARD MACCAULEY BRUTON, MINOR, FRANCES BRINKLEY BRUTON, MINOR, HAL VENABLE WORTH IV, MINOR, KELLY ANDREWS WORTH, MINOR, FRED C. RAY III, MINOR, GRAHAM ANDREWS RAY, MINOR, MABLE Y. ANDREWS, SHERMAN YEARGAN, TRUSTEE, HOWARD E. MANNING, TRUSTEE, WILLIAM HENRY CLARKSON, JR., OUR LADY OF LOURDES CATHOLIC CHURCH, JOHN A. MCALLISTER, GUARDIAN AD LITEM, S. LEIGH PARK, BRUCE R. PARK, MABEL Y. ANDREWS, A. B. ANDREWS IV, GEORGE HAMILTON ANDREWS, JAMES ROSE ANDREWS

No. 7910SC201

(Filed 8 January 1980)

Trusts §§ 8, 10.2 — testamentary trusts — silence of will on distribution of corpus — no gift by implication — right to income upon death of beneficiary

Where testator's will provided that a small portion of the income of a testamentary trust should be paid to testator's brothers and sister for life, another small portion of the income should be paid to testator's nieces and nephews for life, 80% of the income should be paid to testator's great nieces and great nephews alive at his death or born within 21 years after his death, and the 20% of net income enjoyed for life by testator's brothers, sister, nieces and nephews would eventually be added to the income received by the great nieces and nephews, the will provided that the trust would terminate at the death of the last survivor of testator's brothers, sister, nieces, nephews, great nieces and great nephews alive at his death, but the will made no provi-

sion as to the ultimate distribution of the trust corpus following termination of the trust, and the testator was an attorney trained in the law, it was *held* that (1) the will did not create a gift by implication of the trust corpus to the great nieces and great nephews or to their estates, but the corpus passed by intestate succession to testator's heirs at law at the time of his death with possession postponed until the termination of the trust, and (2) upon the death of a great niece or great nephew, the income share of such beneficiary should be paid to the beneficiary's estate until the trust terminates.

APPEAL by defendants Alex B. Andrews III, James Rose Andrews, Minor, by his Guardian Ad Litem, Howard E. Manning, Trustee, and William H. Clarkson, Jr., from *Braswell, Judge.* Judgment entered 10 January 1979 in Superior Court, WAKE County. Heard in the Court of Appeals 23 October 1979.

The testator, Alexander B. Andrews II, a Wake County lawyer, died on 21 October 1946. He left a will dated 21 November 1945 which was duly probated and recorded in the office of the Clerk of Superior Court of Wake County.

Testator was survived by a sister, two brothers, eleven nieces and nephews and twelve great nieces and great nephews. One brother and a nephew had predeceased him.

By 21 October 1967, twenty-one years after testator's death, five more great nieces and great nephews had been born into the Andrews family. In addition, two children were adopted by a nephew and two were adopted by a niece prior to 21 October 1967 but subsequent to testator's death. The same nephew also adopted two more children subsequent to 21 October 1967. All six adopted children were born before 21 October 1967.

The will left the bulk of the estate in trust for the benefit of his family. The trust was to be administered by J. H. Andrews and G. H. Andrews, brothers of the testator. Wachovia Bank and Trust Company, N.A., is the successor trustee. The income after expenses of the trust was to be divided into twenty equal parts and to be annually distributed to testator's brothers and sister, nieces and nephews and great nieces and great nephews alive at his death and such additional great nieces and great nephews as might be born within twenty-one years after his death. The distribution was in the following manner.

His sister was to receive one share (five percent) of the net income "for and during her natural life." Each of his two brothers

was to receive a share (five percent) of the net income "for and during his natural life." A fourth share (five percent) of the net income was to be divided equally among the eleven named nieces and nephews "for and during their lifetime." Upon the death of either his sister or brothers, his or her life share was to be added to the one share "to be divided among the eleven (11) living nieces and nephews." Eventually, the fifteen percent going to siblings would increase the net income share for life going to nieces and nephews to twenty percent. A nephew or niece was to receive a share only during his or her life. On death of a niece or nephew, the division of net income was to be to those remaining alive. Testator further provided:

> "When the number of nieces and nephews shall be reduced by death down to four, then the annual share of any one dying thereafter shall not be divided among those surviving, but then such share or shares shall be added to the sixteen shares to be divided among my great nieces and great nephews."

Eventually, the twenty percent of net income enjoyed for life by the brothers, sister, nieces and nephews would be added to the eighty percent of net income which was distributed annually in the following manner:

> "The income from the sixteen shares shall be equally divided among my great nieces and nephews, now twelve (12) in number, and those who hereafter may be born within twenty-one (21) years after my death, they to share equally with the others."

Testator expressly provided for the increase of the class of great nieces and great nephews who were born within twenty-one years of his death but did not provide any instructions to the trustee as to distribution of the net income following the death of a great niece or great nephew. The will is also silent as to any express provisions or direction to the trustee as to the ultimate distribution of the trust corpus following termination of the trust. The will expressly provides a time for termination of the trust. Testator listed by name all brothers and his sister, nieces and nephews and great nieces and great nephews living at the time he executed the will and provided the trust "shall extend for, and

during, the joint and several lives . . . ." He further provided that the trust would extend

> "for and during the joint and several lives of any other nieces or nephews or great nieces or great nephews born prior to, and alive at the time of my death, and until the death of the last survivor of my brothers and sister, and the last survivor of my nieces and nephews, and the last survivor of my great nieces and nephews (alive at my death), as just referred to, and no longer."

By these provisions of the will, the trust terminates at the death of the last survivor of testator's brothers, sister, nieces and nephews and great nieces and great nephews alive at his death.

The will has been before the courts of this State before. In *Trust Co. v. Andrews*, 264 N.C. 531, 142 S.E. 2d 182 (1965), the Supreme Court held that by the express wording of his will which provided for increase to the class of great nieces or great nephews *born* within twenty-one years of his death, testator did not intend adopted great nieces and great nephews to take a share of the trust income. A decade later, the will was again the subject of litigation when certain members of the Andrews family sought through a declaratory action to have the trust established in the will void for violation of the rule against perpetuities. This Court held the trust did not violate the perpetuities rule. *Wing v. Trust Co.*, 35 N.C. App. 346, 241 S.E. 2d 397, *cert. den.*, 295 N.C. 95, 244 S.E. 2d 263 (1978). At the time the perpetuities suit was brought, all the necessary parties were joined and the successor trustee asserted a claim for affirmative declaratory relief in the form of instructions on how to distribute income properly in the future event of the death of a great niece or great nephew and how to distribute the corpus at the termination of the trust.

The trust was valued as of 20 October 1978 in excess of two million dollars. In the year 1977, the income distribution was $2,174.57 to a niece or nephew resident in North Carolina, $2,251.72 to a nonresident niece or nephew, $4,604.97 to a great niece or great nephew resident in North Carolina and $4,768.73 to a nonresident great niece or great nephew. Seventeen great nieces and great nephews share equally in the trust income provided for them. One great nephew testified that it would make quite a difference to him in his estate planning and the life in-

surance he carried if he knew what vested interest he had in the corpus of the estate. The great nieces and great nephews range in age from the mid-twenties to about age fifty. A vice-president of the successor trustee testified that the trustee would be forced to seek instructions from the court on how to distribute the income of the trust when the first great niece or great nephew of testator dies.

The trial judge concluded as a matter of law that the claim for declaratory relief was properly before the court. He concluded that the adopted children of nieces and nephews of testator have no interest in either the income or corpus of the trust and that the seventeen natural great nieces and great nephews alive at the death of testator or who were born within twenty-one years thereafter own by operation of law the entire equitable interest in the twenty shares of the trust income subject to the outstanding lifetime income of nieces or nephews. He further concluded that upon the death of a great niece or great nephew, the share of annual net income going to him or her would be payable to his or her testamentary beneficiaries or intestate heirs, pending termination of the trust in accordance with its terms. The trial judge ordered that following the death of a great niece or great nephew, the annual income distribution that would have gone to such person, if living, would be paid to the estate or the testamentary beneficiaries or the intestate heirs of that person. The distribution of trust corpus was to be in seventeen equal shares to the testamentary or intestate heirs of each deceased great niece or great nephew and to those great nieces and great nephews who may be alive at the termination. The ultimate distribution was to be made upon the death of the last of testator's nieces and nephews and great nieces and nephews alive at his death.

Certain of the defendants appealed from these conclusions, orders and the specific findings of fact of the trial judge that it was testator's intent to benefit only the class of natural born great nieces and great nephews alive at or born within twenty-one years of his death with both the income of his trust estate and the entire interest in the corpus of the trust estate.

Vaughan S. Winborne, for plaintiff appellees.

Emanuel and Thompson, by W. Hugh Thompson, for defendant appellant, Alex B. Andrews III.

Manning, Fulton & Skinner, by Howard E. Manning, Jr., for defendant appellants, Howard E. Manning, Trustee and William H. Clarkson, Jr.

Smith, Debnam, Hibbert & Pahl, by J. Larkin Pahl, for defendant appellant, James Rose Andrews, Minor, by Guardian Ad Litem.

Joyner & Howison, by Henry S. Manning, Jr., for defendant appellee, Wachovia Bank and Trust Company, N.A.

John A. McAllister, for defendant appellees, minor children by Guardian Ad Litem.

Maupin, Taylor & Ellis, by W. W. Taylor, Jr., and G. Palmer Stacy III, for defendant appellees, Augusta Andrews Young, Alexander A. Marks, Laurence H. Marks, Mary S. Andrews Worth, Graham H. Andrews, Jr., F. M. Simmons Andrews, William M. Marks III, Ralph Stanley Marks, Frances Marks Bruton, Julia Marks Young, Elizabeth Marks Green, Jane A. Marks (formerly designated as Jane Marks Cline), Hal V. Worth III, Julia A. Worth Ray, Simmons Holladay Worth, John W. Andrews, Sara Simmons Andrews Johnston and Mary Graham Andrews.

VAUGHN, Judge.

This is a proper case for declaratory relief in the form of instructions to the trustee under the Uniform Declaratory Judgment Act, G.S. Chap. 1, Art. 26. "This article is declared to be remedial, its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and it is to be liberally construed and administered." G.S. 1-264; *see also* G.S. 1-256. A trustee can obtain a declaration of rights concerning any question arising in the administration of a trust. G.S. 1-255(3). Litigation of the issues now raised before us is unavoidable once a great niece or great nephew of testator dies. The income beneficiaries and potential ultimate takers of the corpus are handicapped in making financial and estate planning decisions because of the uncertainty in the ultimate distribution of the trust corpus. The beneficiaries of both the income and corpus of the trust are harmed each time litigation occurs because the trust bears much of the cost of such litiga-

tion. All parties who have an interest in the decision of this case, who are now above sixty in number, are now within the jurisdiction of the Court. None of the diverse parties to the current action has raised on appeal in his or her brief or on oral argument any objection that our ruling on the merits of this action is unnecessary or premature. The relief given by the Uniform Declaratory Judgment Act as adopted in this State is appropriately invoked in this case where litigation appears to be unavoidable. *Consumers Power v. Power Co.*, 285 N.C. 434, 206 S.E. 2d 178 (1974); *Insurance Co. v. Bank*, 11 N.C. App. 444, 181 S.E. 2d 799 (1971).

We must not only try to determine the testamentary intent but must apply the proper rules of law to the dispositive provisions of the will. We must determine testator's intent in two respects: (1) what is to be the ultimate distribution of the trust corpus and (2) what is to happen to the distribution of net trust income to seventeen great nieces and great nephews who qualify for its receipt, once one of them dies. "Probing the minds of persons long dead as to what they meant by words used when they walked this earth in the flesh is, at best, perilous labor." *Gatling v. Gatling*, 239 N.C. 215, 221, 79 S.E. 2d 466, 471 (1954).

I. Distribution of the Trust Corpus

To aid us in determining what testator intended for the distribution of corpus, we are confronted with two alternative theories of law. On one hand, we could construe the silence of the will to indicate that testator did not intend the will to dispose of the trust corpus after the termination of the trust and conclude that it passed by intestate succession to his heirs at law at the time of his death with possession postponed until the termination of the trust. The property would then be vested with the takers by intestacy at his death as provided by the laws of North Carolina on 21 October 1946 and their respective heirs. This is the theory of the case put before us by those appellants who have adopted children. On the other hand, the will might be construed to create a gift by implication of the corpus of the estate to the great nieces and great nephews or to their estates in the proportion of their income interests at the time of termination of the trust. This is the theory of the case put to us by appellees who

now receive the trust income and who do not have adopted children.

The doctrine of bequest or gift by implication is a doctrine long recognized in this State. *Finch v. Honeycutt*, 246 N.C. 91, 97 S.E. 2d 478 (1957); *Efrid v. Efrid*, 234 N.C. 607, 68 S.E. 2d 279 (1951); *Burney v. Holloway*, 225 N.C. 633, 36 S.E. 2d 5 (1945); *Burcham v. Burcham*, 219 N.C. 357, 13 S.E. 2d 615 (1941); *Ferrand v. Jones*, 37 N.C. 633 (1843); 4 Bowe-Parker, Page on Wills, § 30.18 (4th ed. 1961). Quoting in part from Underhill on Wills, our Supreme Court has said:

> " 'If a reading of the whole will produces a conviction that the testator must necessarily have intended an interest to be given which is not bequeathed by express or formal words, the court may supply the defect by implication, and so mould the language of the testator as to carry into effect, so far as possible, the intention which it is of opinion that he has on the whole will sufficiently declared.' 1 Underhill on Wills, section 463. It is generally held that a devise of the use, income, rents, profits, etc., of property, amounts to a devise of the property itself, and will pass the fee unless the will shows an intent to pass an estate of lesser duration." *Burcham v. Burcham*, 219 N.C. at 359, 13 S.E. 2d at 616.

Along with the doctrine of gift by implication, there is the presumption that a testator does not intend to die intestate as to any portion of his estate. *Poindexter v. Trust Co.*, 258 N.C. 371, 128 S.E. 2d 867 (1963). The intent of the testator is the polestar in our analysis of a will. *Wilson v. Church*, 284 N.C. 284, 200 S.E. 2d 769 (1973).

Those parties seeking to have the corpus of the trust estate vest in the hands of those seventeen great nieces and great nephews now receiving income contend there is sufficient evidence on the face of the will to indicate this is the manifest intent of testator. At no point does he express what these parties contend was his intent. They would imply his intent from the following factors. (1) The gifts of income from the trust to siblings, nieces and nephews were expressly limited to life estates by phrases "for and during [his/her] natural life" or "for and during their lifetime." The gift of income to great nieces and great nephews on the other hand has no income for life only restric-

tions. A survival requirement is never implied. Thus, the income until termination of the trust will go in proportion to the estate or heirs of a great niece or great nephew dying before termination of the trust. (2) The trust income was initially eighty percent directed to the great nieces and great nephews and the remaining twenty percent eventually is to benefit this class. This was a residuary trust holding the great bulk of the estate. The appellees would imply that as all of the income went, so went all of the corpus in the mind of testator. (3) The gifts of income to great nieces and great nephews were to a class which he wanted treated equally. It was a per capita distribution and not per stirpes. By intestacy, there would be a per stirpes division of the property in the generation of great nieces and great nephews inconsistent with the per capita distribution of income to that generation. (4) Intestacy would place an interest in the estates of testator's brothers and sister and the children of one brother who predeceased him which would be inconsistent with the trust income provision to these parties. (5) This is a residuary trust into which the entire estate was placed after taxes, expenses and specific bequests.

All of these arguments for implying a gift of corpus come from express treatment of the income. The simple fact is that nothing is said by testator about the corpus. The silence we think is controlling in this case.

We must remember that we are dealing with the will of a man lettered in the law and familiar with the technical sense the law gives to words. Where the doctrine of bequest by implication is applied, courts are generally involved with a different set of circumstances. We do not have here a case where a testator is under an erroneous impression as to the state or quality of his property holdings. *See, e.g., Efrid v. Efrid, supra.* It is not a case of a layman misusing legal words or inartfully expressing himself. *See, e.g., Burcham v. Burcham, supra.* It is not a case of construing words in their lay or legal meanings. *See, e.g., Poindexter v. Trust Co., supra.*

In certain cases, a trust beneficiary has been given the entire beneficial interest of the trust even though the instrument speaks only of income to him. *Poindexter v. Trust Co., supra.* "[T]he devise of all the income and profits from the property, nothing

else appearing, carries with it the corpus." *Burney v. Holloway*, 225 N.C. at 637, 36 S.E. 2d at 7-8. "Where there is a gift of income *without limitation of time*, express or implied, there is a gift of the entire beneficial interest." 2 Scott, The Law of Trusts, § 128.2, p. 1013 (3d ed., 1967) (emphasis added). In testator's will, there is something else. It is an express termination of the trust at the death of the last of his brothers, sister, nieces and nephews, great nieces and great nephews alive at his death. While the income may be paid well into the next century, it is not without limitations.

To apply the doctrine of bequest by implication, the probability that this was the intention of the testator "must be so strong that a contrary intention 'cannot reasonably be supposed to exist in testator's mind,' and cannot be indulged merely to avoid intestacy." *Burney v. Holloway*, 225 N.C. at 637, 36 S.E. 2d at 8; *see also Ravenal v. Shipman*, 271 N.C. 193, 155 S.E. 2d 484 (1967). In this case, a contrary intention can be reasonably supposed that this lawyer-testator intended a partial intestacy. By adopting the judicial doctrine of bequest by implication, we would be adding words to the will that he neither expressed nor implied to the point that we would express them for him. We would be rewriting his will.

Testator made no further distribution of the property after the termination of the trust and its income. The rule is sometimes expressed to the effect "that a testamentary gift of the income or interest of a fund without limitation as to time is, where no other distribution is made thereof, a gift of the principal." 80 Am. Jur. 2d Wills § 1389, p. 464. Clearly in this case there is a time limitation. We do not make as much of the failure to make further distribution in the case of this will as we would in that of a person not of testator's profession. The silence of this testator, trained in the law, implies more than any judicial construction tacked on to his express words might imply. The absence of express provision on the distribution of the corpus leads us to conclude that he intended it to pass by intestate succession at the termination of the trust.

> "[W]here a will is reasonably susceptible of two constructions, the one favorable to complete testacy, the other consistent with partial intestacy, in application of the presumption,

> the former construction will be adopted and the latter rejected. This does not mean, however, that one must choose between a will or no will. A testator may elect to dispose of part of his property by will and leave the remainder for disposition as in case of intestacy." *Ferguson v. Ferguson*, 225 N.C. 375, 377-78, 35 S.E. 2d 231, 232-33 (1945) (citations omitted); *see also Kidder v. Bailey*, 187 N.C. 505, 122 S.E. 22 (1924); *McCallum v. McCallum*, 167 N.C. 310, 83 S.E. 250 (1914); *Galloway v. Carter*, 100 N.C. 111, 5 S.E. 4 (1888).

We hold that the remainder interest in the corpus of the trust, which was the bulk of the estate, passed by intestate succession to the heirs of testator with possession postponed until termination of the trust. The disposition of property of a person dying intestate is governed by the statutes in force at his death. *Wilson v. Anderson*, 232 N.C. 212, 59 S.E. 2d 836 (1950). Thus, under the rules of descent and distribution, then in effect, the three living siblings each inherited one quarter of the corpus. The three children of the brother who predeceased testator inherited the remaining quarter. G.S. 28-149, Rule 5 and G.S. 29-1 (repealed 1959 N.C. Sess. Laws c. 879); *In Re Estate of Poindexter*, 221 N.C. 246, 20 S.E. 2d 49 (1942). Whether adopted great nieces or great nephews share in the corpus of the trust depends on the disposition made for them by the intestate takers of testator from whom they inherit.

II. Distribution of Trust Income on the Death of an Income Beneficiary

In the judgment appealed from, the trial judge concluded as a matter of law that the death of a great niece or great nephew should not terminate his or her right to income but that such should continue to his estate, intestate heirs or testamentary beneficiaries until the termination of the trust. This portion of the order has not been briefed or argued by appellants.

> "Where by the terms of the trust the income is payable to two or more beneficiaries for life, and it is provided that on the death of the survivor of the life beneficiaries, or on the happening of some other event, the trust shall terminate, and the principal shall be distributed among designated persons, but there is no express provision as to the disposition of the income payable to a life beneficiary in the event of his

> death prior to the time fixed for the termination of the trust, the question arises what disposition should be made of such income. The answer ultimately depends upon the manifestation of intention of the settlor. Four possible dispositions might be made of the share of the income of the deceased beneficiary: (1) it might be paid to the surviving life beneficiaries; (2) it might be paid to the estate of the deceased beneficiary; (3) it might be paid to the estate of the settlor as property not disposed of by his will; (4) it might be accumulated and on the termination of the trust paid to the persons entitled to the principal of the trust estate." 2 Scott, The Law of Trusts, § 143 p. 1097.

The trial judge's order picked the second of these four alternatives and, in this, he was correct.

Testator provided for increase to the class of great nieces and great nephews receiving income from the trust within the limits of the rule against perpetuities but established no survivorship requirement. *Wing v. Trust Co.*, 35 N.C. App. 346, 241 S.E. 2d 397, *cert. den.*, 295 N.C. 95, 244 S.E. 2d 263 (1979). We will not imply a condition of survivorship. Simes, Law of Future Interests, § 103 (2d ed. 1966). He also gave an express time to terminate the trust. In light of these provisions, testator intended that income could be paid to the estate of a deceased beneficiary until the trust terminated. *See Thompson v. Martin*, 281 Mass. 41, 183 N.E. 51 (1932); *contrast In re Hicks' Estate*, 345 Mich. 448, 75 N.W. 2d 819 (1956). The handling of the trust income going to brothers, sister, nieces and nephews reinforces this reading of the will. In providing for these parties, testator meticulously provided for conditions of survivorship and how income was to be paid over in the event of a death. The fact that he has not done so with the distributions to great nieces and great nephews is an indication that the income should not pass to other life beneficiaries on the death of any income beneficiary or to the corpus beneficiaries until the trust terminates.

In conclusion, the trustee should be governed by the following.

(1) Until termination of the trust, the trust income, in a portion which should ultimately reach one hundred percent, is to be paid equally to the seventeen great nieces and great nephews

during their natural lives and, on death, to their respective heirs or beneficiaries.

(2) When the last niece, nephew, great niece or great nephew alive at testator's death dies, the trust will terminate and the assets will be distributed to the intestate takers of Alexander B. Andrews II, or those who take through these intestate takers.

Reversed and remanded.

Judges PARKER and HILL concur.

FIRST CITIZENS BANK AND TRUST COMPANY, LINCOLNTON, NORTH CAROLINA v. NORTHWESTERN INSURANCE COMPANY AND GUY A. MELTON

No. 7927SC86

(Filed 8 January 1980)

1. **Rules of Civil Procedure § 56.3— summary judgment—supporting affidavits—timeliness of filing—sworn or certified papers required**

The trial court did not err in allowing supplemental affidavits, which were filed four days before hearing on a summary judgment motion, to be considered on the day of the hearing, but the trial court erred in considering a portion of an affidavit which was not supported by sworn or certified copies of papers to which the affidavit referred.

2. **Insurance § 77— theft of boat—timeliness of notice to insurer—genuine issue of fact**

In an action by plaintiff to recover on a promissory note executed by individual defendant and to recover as the loss payee in a policy of insurance issued by defendant insurance company to individual defendant to cover loss or damage to a boat purchased by individual defendant in which plaintiff held a security interest, a genuine issue of fact existed as to whether individual defendant gave notice to defendant insurer "as soon as practicable," as required by the insurance policy, concerning the theft of the boat, and the trial court therefore erred in entering summary judgment for plaintiff.

APPEAL by defendant, Northwestern Insurance Company, from *Friday, Judge*. Judgment entered 6 December 1978 in Superior Court, LINCOLN County. Heard in the Court of Appeals 27 September 1979.

This is an appeal from a summary judgment rendered in favor of plaintiff, First Citizens Bank and Trust Company, Lincolnton, North Carolina (Bank), and against Northwestern Insurance Company (Company). The Bank filed a complaint against defendant, Melton, seeking recovery for default on a promissory note and breach of a security agreement and against the Company, seeking to recover as the loss payee in a policy of insurance issued by the Company to Melton to cover loss or damage to a boat purchased by Melton in which the Bank held a security interest. In the complaint, the Bank alleged that on 30 March 1977, Melton executed a promissory note in the principal sum of $9,409.01 plus interest, and a security agreement to the Bank wherein he pledged as security a 1977 Sea Ray Boat identified in the combination note and security agreement as 220-HT-SER-650 4M 0976-220 HT010. The complaint alleged that Melton had defaulted on the note and breached the security agreement; and that as of 27 July 1977, the balance due on the note was $9,390.30 plus interest. As to the Company, the complaint alleged that on 30 March 1977, the Company issued a policy to Melton wherein the boat pledged as security in the security agreement was insured against loss and damage. The Bank was listed as loss payee in the policy, which had a liability limit of $9,500. The complaint further alleged that on 20 September 1977, Melton discovered that his boat had disappeared from the slip where it had been stored. The insurance policy was alleged to have been in effect at the time the boat was discovered missing, and the Company refused payment under the policy after demand for payment had been made on it.

Melton filed an answer and a cross claim on 30 May 1978 wherein he admitted the execution of the note and security agreement and offered a general denial as to the amount owed on the note. In his cross claim against the Company, Melton alleged that the Company was fully liable for the loss of the boat held as security by the Bank.

The Company alleged in its answer: that it was not liable to the Bank; that there had not been a loss sustained under the terms of the policy; that no proof of loss had been filed as required by the policy; that notice of loss had not been given to the Company as soon as practicable; and that there had not been compliance with the provisions of the policy. The Company admitted

execution of the note and security agreement as alleged in the complaint and the issuance of an insurance policy.

On 24 July 1978, the Company filed answer to Melton's cross claim, wherein the issuance of an insurance policy was admitted, but liability on the policy was denied on the same grounds as set out in the answer to the Bank's complaint. The Bank filed an amendment to its complaint with consent of both defendants on 4 October 1978, wherein it was alleged that Melton executed and delivered the note and security agreement on 30 March 1977 to Lincoln Marine, Inc. (Lincoln), the seller of the boat. The amendment also alleged that Lincoln subsequently assigned the note and security agreement to the Bank on 30 March 1978. The Company filed answer to the amendment, wherein the execution and delivery of the note and security agreement were once again admitted.

The Company took the deposition of Melton, who testified: that the boat, which he financed through the Bank and insured through the Company, was discovered missing on 20 September 1977; that he told law enforcement officers about the disappearance on the day he discovered the boat missing; that the officers told him to wait a couple of days before calling the Company; and that on 25 September 1977, he telephoned an agent of the Company to report the missing boat.

On 9 November 1978, the Bank filed a motion for summary judgment against the Company along with an affidavit of a bank officer, stating that several proofs of loss were submitted to the Company but that the Company refused to make payment under the policy. Melton stated in his affidavit that he notified the Company's agent of the loss within a few days after 25 September 1977, that the balance due on his debt to the Bank was $9,569.34 on 20 September 1977, and that he had submitted proofs of loss to the Company on 14 December 1977, 23 December 1977, and 2 February 1978. Each proof of loss was rejected by the Company.

On 29 November 1978, the Company filed a motion for summary judgment against the Bank. In his affidavit, K. W. Duncan, an officer of the Company, stated that the Company was not informed of the loss of the property until a number of days after its alleged disappearance and that an acceptable proof of loss was not filed with the Company within 90 days from day of loss as re-

quired by the insurance policy. E. C. Dean, a claims adjuster, stated in his affidavit that the serial number of the boat insured by the Company was different from the serial number alleged in the Bank's complaint. Charles Cox, an agent of the Company, stated in his affidavit that he was notified of the loss on 14 October 1977.

On 30 November 1978, the Bank filed an affidavit of F. B. Grigg, President of Lincoln; Merle Beal, Grigg's secretary; and Melton. Said affiants alleged that Melton purchased one 1977 Sea Ray Boat from Lincoln, that if there were any variation in the motor number or serial number, the variation arose through an inadvertent error; and that the policy should cover and insure the boat which Melton purchased from Lincoln on 30 March 1977.

The court allowed the Bank to correct two alleged typographical errors to change the serial number of the boat from 650 4M 0976-220 to 650 4M 0976-220HT010-7 and the motor number to W566684. The date the note and security agreement were assigned to the Bank by Lincoln was changed from 30 March 1978 to 30 March 1977.

Summary judgment was allowed ordering the Company to pay the Bank $9,500 with interest. The Company appealed.

M. T. Leatherman and Daniel Wilson Barefoot, for plaintiff appellee.

Frye, Booth & Porter, by R. Michael Wells and John P. VanZandt III; and Don M. Pendleton, for defendant appellant, Northwestern Insurance Company.

ERWIN, Judge.

G.S. 1A-1, Rule 56(c), of the Rules of Civil Procedure limits entry of summary judgment to situations where no genuine issue as to a material fact exists, and a party is entitled to a judgment as a matter of law. G.S. 1A-1, Rule 56(c); *Zimmerman v. Hogg & Allen,* 286 N.C. 24, 209 S.E. 2d 795 (1974).

If a genuine issue of a material fact does exist, the motion for summary judgment must be denied. *Bank v. Evans,* 296 N.C. 374, 250 S.E. 2d 231 (1979); *Zimmerman v. Hogg & Allen, supra.*

> " ' "The determination of what constitutes a 'genuine issue as to any material fact' is often difficult. It has been said that an issue is material if the facts alleged are such as to constitute a legal defense or are of such nature as to 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 . . . . It has been said that a genuine issue is one which can be maintained by substantial evidence . . . ." ' *McNair v. Boyette*, 282 N.C. 230, 192 S.E. 2d 457."

Zimmerman v. Hogg & Allen, 286 N.C. 24, 29, 209 S.E. 2d 795, 798 (1974).

Appellant contends that a genuine issue of material fact exists as to whether the boat insured under its insurance policy is the one in which plaintiff had a security interest.

In moving for summary judgment, appellant relied on the discrepancy between the serial number identifying the boat in plaintiff's security instrument and the serial number of the boat covered by its insurance policy. However, four days prior to the hearing on the parties' respective summary judgment motions, plaintiff served on appellant a joint affidavit and a Manufacturer's Statement of Origin. The joint affidavit stated in pertinent part:

> "On March 30, 1977, Guy A. Melton purchased from Lincoln Marine, Inc., a new 1977 Model 220 hardtop Sea Ray inboard-outboard boat, 235 Horsepower, bearing Motor No. W566684 and manufacturer's Serial No. 6504M0976-220HT010-7, as shown on manufacturer's statement of origin and bill of sale, photocopies of which are hereto attached. Immediately following the sale, Merle P. Beal, secretary for Mr. Grigg of Lincoln Marine, Inc., telephoned Mr. Charles Cox, of Charles Cox Insurance Agency, Gastonia, N. C., and ordered an insurance policy covering said boat and gave the serial number and motor number over the telephone.
>
> Shortly thereafter, Northwestern Insurance Company Policy No. BOP 4325 was written by Charles Cox Insurance Agency, showing Motor No. W566684 and Serial No. 77220-HT010 for said boat as indicated on a photocopy of the policy which is hereto attached."

The Manufacturer's Statement of Origin identified the boat as follows:

"YEAR 1977 MODEL 220 HARDTOP

Hull Length 21 Ft. 7 In. Beam 8 Ft. 0 In.

Motor No. W566684 HP 235 OMC

Mfg. Serial No. HIN# SER6504M0976-220HT010-7"

These two items, if properly admitted and when viewed collectively, clearly indicate that the boats were one and the same, and it would be incumbent upon appellant to come forward with some evidence to show that a genuine issue of material fact still existed.

Appellant contends that the joint affidavit was improperly considered by the court at the hearing on the motions for summary judgment, because (1) the affidavit was filed on the day of the hearing of the motion, and (2) the affidavit was not based on competent evidence.

In *Insurance Co. v. Chantos*, 21 N.C. App. 129, 203 S.E. 2d 421 (1974), we held that where a party had filed a motion for summary judgment but had waited until the day of the hearing of the motion to file and serve his supporting affidavits with the motion as required by G.S. 1A-1, Rule 6(d), of the Rules of Civil Procedure, the trial court erred in considering the affidavits supporting the motion for summary judgment.

In the instant case, plaintiff had properly served its original affidavits in support of its motion for summary judgment but had subsequently offered a supplemental joint affidavit as provided for in G.S. 1A-1, Rule 56(e), of the Rules of Civil Procedure. Thus, the situation is clearly distinguishable from that presented in *Insurance Co. v. Chantos, supra.*

In *Insurance Co. v. Chantos, supra*, we noted:

"[A]ccording to the date of the defendant's affidavit, and the date of the verification thereof, it was signed on the same day that counsel certified that notice of the motion for summary judgment was mailed to plaintiff's counsel. It seems clear, therefore, that the affidavit was available for service

with the notice of motion for summary judgment. If this practice were permitted, affidavits in support of a motion for summary judgment could always come as a surprise to the opposing party and would effectively deny the opposing party a chance to present affidavits in opposition to the motion.

Undoubtedly, Rule 56(e) grants to the trial court wide discretion to permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. However, this provision presupposes that an affidavit or affidavits have already been served. The rule speaks only of supplementing or opposing. Clearly, it does not intend to authorize filing, on the day of the hearing, the only affidavits supporting the motion for summary judgment."

Id. at 131, 203 S.E. 2d at 423-24.

[1] Here, appellant was served with the *supplemental* affidavits four days prior to the hearing, and it had ample time to present opposing affidavits. Thus, the trial court did not err in allowing the affidavits to be considered on the day of hearing the motions for summary judgment.

G.S. 1A-1, Rule 56(e), of the Rules of Civil Procedure provides in pertinent part: "Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith." Plaintiff failed to comply with the dictates of G.S. 1A-1, Rule 56(e), of the Rules of Civil Procedure. It did not submit "sworn or certified copies of all papers or parts thereof" referred to in its joint affidavit. Therefore, the court erred in considering the Manufacturer's Statement of Origin and the bill of sale. That portion of the affidavit based thereon as well as the conclusions of law contained therein should have been disregarded in considering the propriety of summary judgment.

Even without the evidence contained in the Manufacturer's Statement of Origin and the bill of sale, plaintiff's forecast of evidence is sufficient if considered alone to compel entry of a directed verdict in its favor.

[2] However, a genuine issue of fact exists as to whether notice was given "as soon as practicable" as required by appellant's in-

surance policy assuming that the boat missing and the boat covered by the policy are the same one.

Justice Parker, in his concurring opinion in *Muncie v. Insurance Co.*, 253 N.C. 74, 82-83, 116 S.E. 2d 474, 480 (1960), stated:

> "[T]he policy requires that notice of the accident shall be given by the insured to the insurer 'as soon as practicable.' That means to give such notice within a reasonable time, for the word 'practicable' means 'capable of being put into practice, done, or accomplished; feasible.' Webster's New International Dictionary, 2nd Ed.; *Unverzagt v. Prestera*, 339 Pa. 141, 13 A. 2d 46; *Callaway v. Central Surety & Ins. Corp.*, 107 F. 2d 761; *London Guarantee & Accident Co. v. Shafer*, 35 F. Supp. 647; *American Lumbermen's Mutual Casualty Co. v. Klein*, 63 F. Supp. 701; *Young v. Travelers Ins. Co.*, 119 F. 2d 877; Anno. 18 A.L.R. 2d p. 462, § 14.
>
> What is a reasonable time, when the facts are not in dispute, as here, is a question of law to be decided by the Court. *Depot Cafe v. Century Indemnity Co.*, 321 Mass. 220, 72 N.E. 2d 533; *Unverzagt v. Prestera, supra.*"

Here, there is a dispute as to when defendant Melton notified appellant of the alleged theft. The corollary of the above rule established in *Muncie* is that when the facts are in dispute, as here, the question as to whether or not notice was given "as soon as practicable" is for the jury. *See Freshman v. Stallings*, 128 F. Supp. 179 (E.D. N.C. 1955); *Muncie v. Insurance Co., supra* (J. Parker, concurring).

Also, a dispute exists as to the amount of the indebtedness owed plaintiff by defendant Melton which must be resolved in order to ascertain plaintiff's insurable interest under the policy, if any.

Appellant's other assignments of error need not be considered.

The judgment entered below is

Reversed.

Judges VAUGHN and HILL concur.

JAMES KEITH SMITH v. FIBER CONTROLS CORPORATION

No. 7922SC151

(Filed 8 January 1980)

1. **Sales § 22— defect in product design—strict liability not applicable**

A manufacturer is not strictly liable for injuries resulting from a defect in product design; rather, a manufacturer's duty to those who use his product is tested by the law of negligence.

2. **Sales § 22— alleged negligent design of machine—improper alteration or maintenance by purchaser—instructions**

In an action to recover for injuries received by plaintiff at his employer's textile plant while trying to unclog a machine designed and manufactured by defendant, the trial court did not err in instructing the jury that a product may be improperly and materially altered, or improperly maintained, by the purchaser so as to relieve the manufacturer of liability for an injury resulting from such improper alteration or maintenance.

Judge WELLS dissenting.

APPEAL by plaintiff from *Hairston, Judge.* Judgment entered 30 September 1978 in Superior Court, IREDELL County. Heard in the Court of Appeals 17 October 1979.

Plaintiff brings this action against the defendant manufacturer to recover for serious injuries to his hand received in trying to unclog a "fine opener" machine at his employer's textile mill. The fine opener was designed and manufactured by defendant. Defendant moved for summary judgment, which was granted in part, and only plaintiff's First Claim for Relief—that defendant was negligent—went to trial. The affidavits presented on the motion reveal the physical circumstances in which the accident occurred, and can be summarized as follows:

Raw fibers are fed into the fine opener between two feeder rollers. Inside the machine is a heavy cylinder covered with sharp, wire-wound teeth, a "beater roller," which spins at a high rate of speed, blending the fiber. The beater roller continues to rotate on its axle for a few minutes after the power to the machine is shut off. The axle of the beater roller extends to the outside of the machine on both ends. One end, on the back side of the machine very close to a wall, is connected to the drive wheel by a pulley. The other end, on the side on which plaintiff ap-

proached the machine, is small and the same dark color as the rest of the machine. The beater roller makes some noise as it continues to turn.

The plaintiff testified at trial that on 6 August 1975 he was 19 years old, and had been employed at Carolina Mills for three months, working at a machine called a "picker." That morning the plant's other fine opener had gotten clogged, and plaintiff had been sent to work on it. The beater roller had stopped moving when he got there, and he had no idea it had "coasted down," as he had no experience with the fine openers. When he subsequently noticed a clog, or "wrap-up," on the feeder rollers of the machine on which he was injured, he told a Mr. Mahaley that he would unstop it if Mahaley would shut the power off. When Mahaley pushed the stop button, "the conveyor belt, the four hoppers, the big arms . . . inside the hoppers, the aprons, a wooden conveyor belt outside the hoppers, and the chains to the feeder rollers, and the feeder rollers stopped moving." Plaintiff "took the fibers on the conveyor belt side of the feeder rollers, . . . and got it [sic] out. I got it off the front side of the feeder rollers . . . . I noticed there was still some wrapped around the feeder rollers and reached in . . . to get that on the back side of the feeder rollers and I just couldn't get my hand out." At the time plaintiff placed his hand over the top of the feeder roller he knew there was a beater roller inside because he had seen the one on the other fine opener that morning, but he did not know the beater roller was continuing to spin. He could not hear the beater roller, since the other machines in the room were very noisy, and he did not know where the roller's axle came out on the side of the machine. There were no warnings of any kind on the machine. When defendant was released from the machine, 30 to 45 minutes later, he was taken to the hospital where most of his hand was amputated.

David Hullett, who designed the fine opener for defendant, testified that he did not design it to comply with the Textile Safety Code of the National Safety Council then in effect. He was not familiar with the use of an interlock to prevent the machine cover from being raised while the cylinder was in motion, and he did not consider the use of any braking device for the cylinder, though such devices were available. At the time he designed the fine opener, Hullett had no background in safety design. The beat-

er roller as designed coasts to a stop some three to four minutes after power to the machine has been cut off.

Gary Robinson, who qualified as an expert in machine guarding, testified that the fine opener in which plaintiff was injured did not meet standards of machine guarding that had been known for many years, because it had no barrier guards, interlock or braking system to prevent access to the moving beater roller. Guards sufficient to make the fine opener safe could have been installed for under $100.

At the close of plaintiff's evidence, defendant moved for a directed verdict, which was denied. Defendant offered no evidence. The jury found that defendant was negligent and that plaintiff was contributorily negligent. Plaintiff appeals.

Homesley, Jones, Gaines, Dixon & Fields, by Edmund L. Gaines, for plaintiff appellant.

James P. Crews and Rodney A. Dean for defendant appellee.

The North Carolina Academy of Trial Lawyers, by C. Frank Goldsmith, Jr. and Tim L. Harris, as amicus curiae.

ARNOLD, Judge.

[1] Plaintiff and amicus curiae argue that contributory negligence should not have been available as a defense in this action, and that defendant should have been held strictly liable. It has long been the rule in North Carolina, however, that a manufacturer's duty to those who use his product is tested by the law of negligence. *See Corprew v. Chemical Corp.*, 271 N.C. 485, 157 S.E. 2d 98 (1967); *Wilson v. Hardware, Inc.*, 259 N.C. 660, 131 S.E. 2d 501 (1963); *Fowler v. General Electric Co.*, 40 N.C. App. 301, 252 S.E. 2d 862 (1979). Any decision that a manufacturer be held strictly liable for injuries resulting from a defect in product design would be a matter of public policy to be decided by the legislature.

Plaintiff also assigns error to the charge to the jury. He argues first that the court erred in failing to give his requested instructions nos. 18 and 19. As to no. 19 we find no error, since there was no evidence to support such an instruction. The plaintiff himself testified that he volunteered to unclog the fine

opener, and his supervisor testified that it was not plaintiff's job to take care of wrap-ups on the fine opener. The evidence, therefore, would not support an instruction that plaintiff was acting at his employer's bidding at the time he was injured.

Requested instruction No. 18 would have called to the jury's attention certain of the surrounding circumstances they could have considered in determining whether plaintiff was contributorily negligent, *e.g.*, plaintiff's age at the time as well as his experience at Carolina Mills, and his knowledge of the fine opener machine. We find no error in the court's failure to give the instruction as requested, since the parts of No. 18 which the jury could appropriately consider were given in substance in the court's charge. *See* 12 Strong's N.C. Index 3d, Trial § 38.1.

[2] In his next argument plaintiff asserts that the court erred by instructing the jury that the product may be improperly and materially altered, or improperly maintained, by the purchaser so as to relieve the manufacturer of liability for an injury resulting from such improper alteration or maintenance. Plaintiff's position is that such a material alteration or improper maintenance would be a defense by the manufacturer to an action brought by the *purchaser* of the machine, or product, but not as to this plaintiff, the *user* of the machine. The instruction, according to plaintiff, gave defendant manufacturer the improper defense of contributory negligence by the purchaser.

The contested statement of law by the court is correct. Moreover, it was given during the charge as to negligence, an issue which was answered in plaintiff's favor, not contributory negligence. Thus, no prejudicial error to plaintiff can be discerned.

We do not find that the trial court expressed an opinion or incorrectly summarized the evidence in his charge, as plaintiff contends in his arguments 6 and 9. Nor do we find any prejudicial error in plaintiff's remaining assignments of error.

No error.

Judge WEBB concurs.

Judge WELLS dissents.

Judge WELLS dissenting.

The facts of this case drive me to the conclusion that there could not have been contributory negligence on the part of the plaintiff because the danger he was exposed to was a hidden danger, the knowledge of which he cannot be charged with. The machine in question was designed in such a way as to conceal the latent danger. The design was such that it in no way furnished warning to plaintiff—and that therefore he could not foresee—that the feeder rollers would continue to turn with force after their source of motive power was cut off.

In the words of Justice Ervin, plaintiff's conduct "must be judged in the light of the general principle that the law does not require a person to shape his behavior by circumstances of which he is justifiably ignorant, and the resultant particular rule that a plaintiff cannot be guilty of contributory negligence unless he acts or fails to act with knowledge and appreciation, either actual or constructive, of the danger of injury which his conduct involves." *Chaffin v. Brame*, 233 N.C. 377, 380, 64 S.E. 2d 276, 279 (1951).

By inverse reasoning, my position is supported by *Clark v. Roberts*, 263 N.C. 336, 139 S.E. 2d 593 (1965). There, plaintiff's hand was injured when he inserted it into a corn field chopper. In holding that the plaintiff was guilty of contributory negligence as a matter of law, Justice Parker carefully emphasized that the plaintiff had grown up and worked on a farm and was familiar with the type of machinery by which he was injured; plaintiff knew that the shaft on which the knives were mounted would continue to turn for several minutes after the power was cut off; and that when he put his hand in, he did not know whether the knives were moving or not. In other words, Justice Parker carefully established that the plaintiff in *Clark* was clearly aware of the danger which caused his injury. It is only reasonable to assume that had all the evidence been to the contrary, as it is here—that the plaintiff had no knowledge of the danger—contributory negligence could not have been an issue.

Central to the existence of contributory negligence is knowledge on the part of the plaintiff of the presence of the danger:

> In order that the plaintiff's conduct may be contributory negligence . . . the plaintiff must know of the physical condi-

> tion created by the defendant's negligence and must have knowledge of such facts that, as a reasonable man, he should realize the danger involved. Furthermore, the plaintiff must intentionally expose himself to this danger. He must have the purpose to place himself within reach of it. It is not enough that his failure to exercise reasonable attention to his surroundings prevents him from observing the danger, or that lack of reasonable preparation or competence prevents him from avoiding it when the condition created by the defendant is [un]known to him.

RESTATEMENT (SECOND) OF TORTS § 466, Comment *c*. Since it is undisputed in the present case that the machine gave no indication from its outward appearance of the danger that lurked within, no reasonable man would have notice of the danger. Therefore, plaintiff cannot, as a matter of law, be charged with exposing himself to the danger.

It is my opinion that the plaintiff here was entitled to an instruction to the jury to answer the issue of contributory negligence in his favor, and that the trial court's failure to so charge constitutes reversible error. I would grant plaintiff a new trial on the sole issue of damages.

DOROTHY HYLER SHIELDS, ON BEHALF OF HERSELF AND ALL OTHER PERSONS SIMILARLY SITUATED v. BOBBY MURRAY CHEVROLET, INC.

No. 7910DC54

(Filed 8 January 1980)

Uniform Commercial Code § 46— sale of repossessed automobile—dealer's repurchase agreement—transfer of title to dealer—valid public sale—no duty to account for surplus on resale

A lender conducted a valid public sale of a repossessed automobile pursuant to a purchase money security agreement where the lender duly sent notice to plaintiff debtor concerning the sale; the sale was held at the advertised time; no third persons bid at the sale; and the lender, pursuant to a guaranty and repurchase agreement with defendant automobile dealer, treated defendant dealer as having placed a bid in the amount due under the debtor's contract and transferred title of the automobile to defendant dealer for such amount. Therefore, the transaction did not constitute a mere transfer of collateral under G.S. 25-9-504(5) and defendant dealer had no obligation to account

to plaintiff debtor for any surplus proceeds received through its subsequent resale of the automobile.

Judge MARTIN (Robert M.) dissenting.

APPEAL by plaintiff from *Barnette, Judge*. Judgment entered as amended 3 October 1978 in District Court, WAKE County. Heard in the Court of Appeals 24 September 1979.

The undisputed facts are as follows: On 3 July 1975, plaintiff, Dorothy Hyler Shields, purchased a 1973 Ford automobile from defendant and executed a purchase money security agreement for an amount financed of $1,744.80, having made a down payment of $1,500. Defendant assigned its security interest to First Citizens Bank and Trust Company (First Citizens). At all times relevant to this appeal, defendant and First Citizens were operating under a Retail Protection Agreement for Automobile Dealers (repurchase agreement), which provided that if a buyer defaulted on a contract, First Citizens had the right to repossess the automobile, return it to defendant, and receive from the defendant the balance owed under the contract at that time.

Pursuant to the purchase money security agreement, plaintiff made payments to First Citizens totaling $789.84 but subsequently defaulted in her payment obligations. On 6 July 1976, First Citizens repossessed the automobile and on 7 July 1976, by certified mail, sent to plaintiff at the address at which repossession had been effected a notice of sale of collateral, advertising a public sale of the repossessed automobile at 12:00 noon on 19 July 1976 at the Wake County Courthouse. In addition, notice of sale was posted by First Citizens at the Wake County Courthouse door and two other places. The notice by certified mail was returned to First Citizens by the United States Post Office with notations of notice on 8 July, 13 July and 23 July and marked "Unclaimed".

On 19 July 1976, First Citizens held a sale as advertised. There being no bidders at the sale, First Citizens transferred title to the vehicle to defendant and received $1,255.39, the balance due upon default. Defendant thereafter made certain repairs to the automobile totaling $294.57 and eventually sold the automobile to P & S Auto Service (P & S) for $1,550 after incurring a salesman's commission expense of $100.

Plaintiff filed this action, individually and as representative of a class, on 8 July 1977 seeking recovery of amounts she alleged reflected surplus proceeds received by defendant from its sale of the automobile to P & S. Plaintiff also sought treble damages under G.S. 75-1.1 due to defendant's allegedly unfair and deceptive trade practices in concealing the surplus and not returning the funds to her. Plaintiff further alleged her entitlement to damages under G.S. 25-9-507(1) due to defendant's failure to give notice of its sale of the automobile to P & S.

Defendant filed a motion for summary judgment on 18 August 1978. The trial court granted defendant's motion, based on findings of fact which, in pertinent part, follow:

> "20. On July 19, 1976, the sale advertised was held by the Bank and no third persons bid; at such sales the Bank, because of the Retail Protection Agreement, treats the dealer as having placed a bid in the amount due upon the contract; the fact that the Bank transferred title to the automobile to Defendant through the N.C. Department of Motor Vehicles, rather than merely reassigning the Purchase Money Security Agreement to Defendant bears out the fact the Bank treated Defendant as having placed a bid in the amount of the balance due. Defendant paid the Bank the balance due of $1,255.39 and the Bank transferred title to Defendant as a purchase[r] at the sale . . .
>
> 21. There is no evidence that the sale held on July 19, 1978, was not a public sale and that any person could have entered a bid on the automobile for more than the balance due."

The court concluded that First Citizens held a valid public sale of the automobile, complying with the provisions of both the security agreement and G.S. 25-9-504(3) in that First Citizens sent reasonable notification of the time and place of the sale to plaintiff.

From the court's dismissal by summary judgment of plaintiff's action with prejudice and the class action without prejudice, plaintiff appeals.

Wake-Johnston-Harnett Legal Services, Inc., by Leonard G. Green and Marcia L. Stein, for plaintiff appellant.

Gulley, Barrow & Boxley, by Jack P. Gulley, for defendant appellee.

MORRIS, Chief Judge.

This appeal concerns the effect of a guaranty and repurchase agreement on a secured party's right to dispose of collateral upon default under Article 9, Chapter 25 of the North Carolina General Statutes.

G.S. 25-9-503 provides that "[u]nless otherwise agreed a secured party has on default the right to take possession of the collateral." Under G.S. 25-9-504, "[a] secured party after default may sell, lease, or otherwise dispose of any or all of the collateral. . . ." Furthermore, "[d]isposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts." G.S. 25-9-504(3). Such disposition operates to transfer to a purchaser for value "all of the debtor's rights therein". G.S. 25-9-504(4). Upon the sale of collateral subject to an Article 9 security interest, "the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency." G.S. 25-9-502(2). Under G.S. 25-9-504(5), there is excluded from the above stated provisions transfers that are mere assignments of collateral, as opposed to private or public sales under G.S. 25-9-504(3). G.S. 25-9-504(5), relied upon by plaintiff in this action, provides as follows:

> "(5) A person who is liable to a secured party under a guaranty, indorsement, repurchase agreement or the like and who receives a transfer of collateral from the secured party or is subrogated to his rights has thereafter the rights and duties of the secured party. Such a transfer of collateral is not a sale or disposition of the collateral under this article."

Plaintiff argues that the transactions resulting in defendant's ownership and possession of the repossessed automobile do not constitute a "public sale" in that G.S. 25-9-504(5) specifically excludes from that concept transfers of collateral pursuant to a repurchase or guaranty agreement. Defendant, on the other hand, argues that the sale by First Citizens was a valid public sale

because the repurchase agreement treats the dealer as having placed a bid in the amount due under the contract, and that all the requirements for a public sale were fulfilled.

It is our opinion that First Citizens conducted a valid public sale when it held its auction and subsequently transferred the automobile to defendant. "A 'public sale' is one made at auction to the highest bidder and at which all persons have a right to come in and bid. It must be held in a public place, upon proper notice, so that the public is given full opportunity to bid upon a competitive basis for the property placed on sale." *Johnson Cotton Co. v. Cannon*, 242 S.C. 42, 51, 129 S.E. 2d 750, 755 (1963). *See generally* 77 C.J.S. Sales § 1(d) (1952). The key element, then, in a public sale is the opportunity for competitive bidding. *See* 7 C.J.S. *Auctions and Auctioneers* § 1(a) (1937). The purpose of the requirement of the opportunity for competitive bidding is to insure that the sale of repossessed collateral is measured by a bona fide market value, and not by an artificial value. G.S. 25-9-504(5) encourages this result in that persons obtaining collateral under a guaranty or repurchase agreement are subject to the debtor's rights in the collateral when a subsequent disposition of the property is made under Article 9. *See, e.g., Reeves v. Associates Financial Services Co.*, 197 Neb. 107, 247 N.W. 2d 434 (1976).

In the case before us, all the materials presented on motion for summary judgment indicate that First Citizens conducted a public sale. Upon exercising its right as a secured creditor under G.S. 25-9-503 to repossess the automobile, First Citizens duly sent notice to plaintiff concerning sale of the collateral. *See* G.S. 25-9-504(3), -9-602, -9-603. The sale was held as scheduled, at which time any person had the right to enter a bid on the automobile. Hence, the elements of proper notice and opportunity for competitive bidding were satisfied.

Plaintiff contends, nevertheless, that the sale was invalidated by the fact that no third persons bid at the sale. We find no requirement that the collateral actually be sold. All that is required is that there be an opportunity for competitive bidding. Under G.S. 25-9-605(1)(a), the sale need not be postponed because of the lack of bidders:

"§ 25-9-605. *Postponement of public sale.*—(1) Any person exercising a power of sale or conducting a public sale hereunder

may postpone the sale to a day certain not later than six days, exclusive of Sunday, after the original date for the sale:

(a) When there are no bidders. . . ." (Emphasis added.)

That the presence of bidders does not control is more apparent when we note that a secured party may buy at any public sale. G.S. 25-9-504(3).

Moreover, it is apparent from the record that in this case the public sale held by First Citizens was consummated by the transfer of title to the automobile to defendant. William E. Smith, Assistant Vice President of First Citizens, stated by way of affidavit that at all public sales held by the bank, First Citizens, pursuant to the repurchase agreement, treats retail dealers as having placed a bid in the amount due upon the contract. He stated further that in this instance, First Citizens considered defendant as having placed a bid of the amount due, and as there were no outside bids, title was transferred to defendant. We note at this point that First Citizens' authority to enter a bid for defendant is not disputed.

In addition, we hold that G.S. 25-9-504(5) is inapplicable to the facts of this case. First, as discussed above, although defendant is a person "who is liable to a secured party under a guaranty, indorsement, repurchase agreement or the like", in this case defendant did not receive a "transfer of collateral" from First Citizens under that section. It is clear that First Citizens executed a change of title, and not an assignment of its rights as a secured creditor. In addition, at the time defendant gained possession of title, the automobile no longer qualified as "collateral" under G.S. 25-9-504(5) in that it was not "subject to a security interest", as required by G.S. 25-9-105(1)(c). Indeed, "[w]hen collateral is disposed of by a secured party after default, the disposition transfers to the purchaser for value all of the debtor's rights therein, *discharges the security interest under which it is made* and any security interest or lien subordinate thereto." (Emphasis added.) G.S. 25-9-504(4). Finally, we feel that the rationale underlying G.S. 25-9-504(5) is inapplicable to the present case. In *Rangel v. Bock Motor Co.*, 437 S.W. 2d 329 (Tex. Civ. App. 1969), the Court construed § 9.504(e), Texas Business & Commerce Code Annotated, which is in language identical to that contained in G.S. 25-9-504(5), as follows:

> "There is no sale or disposition of the collateral under these provisions when a party other than a debtor who is liable to the secured party takes a transfer or is subrogated to the rights of the secured party. For example, in the common situation where the automobile dealer has agreed with the finance company that it will repurchase certain paper after the default of the prospective purchaser, a transfer of the *paper, or of the repossessed automobile by the finance company to the dealer pursuant to their agreement, will not be a disposition of collateral* under the provisions of the Code and the dealer will still have to comply with the provisions of Part 5 of Article 9." 437 S.W. 2d at 332, quoting Loiseaux, "*Default Proceedings Under The Texas Uniform Commercial Code*," 44 Tex. L. Rev. 702, 709 (1966).

Although we concur in that reasoning, it is clear that in this case First Citizens complied with the North Carolina provisions for disposition of collateral in Part 5 and Part 6 of Article 9, Chapter 25, General Statutes of North Carolina. A public sale having been conducted prior to the transfer of title to defendant, to subject any further disposition of the automobile to the requirements of these provisions would be superfluous.

We hold that upon obtaining title to the repossessed automobile, defendant had no obligation to account to plaintiff for any surplus proceeds received through sale of the automobile to P & S. Although it is unfortunate that there were not higher bids placed on the automobile at the public sale by First Citizens, the fact remains that plaintiff was afforded an opportunity to realize a surplus in the sale of the car. The law requires no more.

The trial court, therefore, properly entered summary judgment in favor of defendant, and upon the facts of this case, we reject plaintiff's arguments concerning defendant's liability for unfair trade practices and for failing to serve proper notice of its sale of the automobile.

Affirmed.

Judge PARKER concurs.

Judge MARTIN (Robert M.) dissents.

Judge MARTIN (Robert M.), dissenting.

I dissent. The defendant in this case was obligated in any event to take back the automobile and tender the balance due on the note to the lender under the repurchase agreement. Under these circumstances, the fiction of deeming the dealer to have made a bid at the purported public sale in the amount of the balance due on the note makes the entire "public sale" a sham. The bank is protected from losing any of its money, the seller is always able to retake the car, and is free to resell it without having to account for any surplus that may result to the person from whom the car was repossessed. I am of the opinion that a public sale has not taken place in this instance, and, therefore, I respectfully decline to join the judgment of the majority.

TEX R. HASSELL AND WIFE, PHRONIA LOY HASSELL v. J. KENYON WILSON, JR., TRUSTEE; ALBEMARLE SAVINGS & LOAN ASSOCIATION; AND JAMES AUBREY HUDSON AND WIFE, HELEN B. HUDSON

No. 791SC369

(Filed 8 January 1980)

1. **Judgments § 30— attack on judgment—independent suit improper**

Plaintiffs improperly brought an independent action seeking to attack directly a judgment entered by the clerk of superior court wherein she ordered the foreclosure on plaintiffs' land to proceed, since plaintiffs made no allegations of fraud to entitle them to proceed by independent action, nor did they allege or demonstrate that service of process was irregular on its face so as to allow them to proceed in this fashion; rather, plaintiffs' proper remedy to set aside the clerk's order was by motion in the original foreclosure proceeding before the clerk.

2. **Mortgages and Deeds of Trust § 40.1— action to set aside foreclosure—court's ordering issuance of writ of possession improper**

In an action to have an order of forclosure entered by the clerk of court set aside where defendants counterclaimed for damages for wrongful occupancy of their property, the trial court erred in determining that, because plaintiffs' action was dismissed, the foreclosure proceedings were in all respects confirmed and adjudicated lawful and proper, and the court's order directing the clerk of court to issue a writ of possession was unauthorized. G.S. 45-21.29(k).

Hassell v. Wilson

APPEAL by plaintiffs from *Walker (Ralph A.), Judge.* Judgment entered 12 December 1978 in Superior Court, PASQUOTANK County. Heard in the Court of Appeals on 29 November 1979.

Plaintiffs instituted this action seeking to have an order of foreclosure entered by the Clerk of Superior Court of Pasquotank County set aside, and to have a trustee's deed conveying certain real property to the defendants Hudson, in accordance with a sale of the property pursuant to the foreclosure order, declared null and void and set aside. In a verified complaint filed 27 January 1978, plaintiffs alleged that they had owned, as husband and wife, the subject property; that, on 1 September 1977, their balance on a note secured by a deed of trust on the property stood at $5,035.62, together with interest at eight percent; and that the foreclosure order and trustee's deed issued sometime after that date were void and should be set aside "because the plaintiff [husband] Tex R. Hassell had no service of notice of hearing on the proposed order for foreclosure and received no actual notice of the proceeding for foreclosure until January 2, 1978."

Answering, defendants averred that plaintiffs had made no payments on the note and deed of trust after the 1 February 1977 payment; that, because of their failure to pay, the holder of the note, Albemarle Savings and Loan Association, elected to accelerate the entire unpaid indebtedness and to institute foreclosure proceedings pursuant to the terms of the note and deed of trust; and that the plaintiff Tex R. Hassell had been lawfully served with notice of the foreclosure proceedings, as provided by Rule 4(j)(1)(a), G.S. § 1A-1, "by leaving copy thereof at Tex R. Hassell's dwelling house or usual place of abode . . . with Phronia Loy Hassell, Tex R. Hassell's wife and a person of suitable age and discretion then residing in said dwelling house or usual place of abode on September 16, 1977", all as shown by the officer's return of service. Defendants Hudson also asserted a counterclaim for rent at a rate of $65.00 per month allegedly due them for the plaintiffs' "wrongful possession and occupation of [the] premises" since the execution of the trustee's deed.

Prior to trial the parties entered into a stipulation which, except where quoted, is summarized as follows:

Plaintiffs acquired the subject property, a house and lot, by a duly recorded deed dated 22 March 1972. They executed a promis-

sory note to Albemarle Savings and Loan Association in the original principal amount of $6,000.00, payable in monthly installments of $58.00 on the first day of every month from 1 April 1972, and secured by a deed of trust to defendant Wilson, trustee. Plaintiffs have failed to make any monthly payments since 1 March 1977. Such failure authorized the holder of the note and deed of trust to accelerate the total unpaid debt and to bring foreclosure proceedings.

Thereafter, the trustee [defendant Wilson] filed notice of hearing on the foreclosure action with the Clerk of Superior Court of Pasquotank County, whereupon the Clerk issued an order of service which, together with the notice of hearing, was personally served on plaintiff Phronia Loy Hassell on 16 September 1977 by Deputy Sheriff James R. Staley. Pursuant thereto, the officer's return recited that he had served the order of service and notice of hearing on plaintiff Tex R. Hassell "by leaving copies with Phronia Loy Hassell who is a person of suitable age and discretion and who resides in the designated recipient's dwelling house or usual place of abode, . . ." Plaintiff Phronia Loy Hassell participated, along with the attorney for the trustee, at the subsequent hearing before the Clerk on 14 October 1977. At the close of the hearing, the Clerk issued a foreclosure order, authorizing the trustee to proceed with a sale of the property in accordance with Chapter 45 of the North Carolina General Statutes. Pursuant to the order, notice of sale of the property was duly posted and advertised as required by law. On 14 November 1977 defendants Hudson, as high bidders, purchased the property from the defendant Wilson at public auction for $6,300.00. No upset bids were received, and upon payment of the Hudsons' bid amount, defendant Wilson executed and delivered to the Hudsons a trustee's deed dated 1 December 1977, which was duly recorded.

The parties also stipulated that plaintiffs have brought a "companion action" which raises "the identical issues" and seeks "the same relief" as does the present action, by filing on 27 January 1978 a motion in the cause in the foreclosure proceedings with the Clerk of Superior Court of Pasquotank County. That action is pending, and the parties have "consented" that "the final result and judgment reached in the present action shall likewise finally determine said companion litigation . . . . "

The present action was tried in superior court before a judge without a jury. Plaintiffs offered evidence tending to show that they have been married for approximately 20 years and have resided at the subject premises for six years with their seven children; that the plaintiff Tex R. Hassell worked for a construction company which necessitated his staying away from home during the week; that he returned home every weekend if possible, or at least every two weeks; that the plaintiff Phronia Loy Hassell worked part time for a local restaurant; and that she was responsible for all the household duties, including paying all the bills with the money her husband gave her. She testified that she had been making the house payments to Albemarle Savings and Loan since they bought the house; that she knew she was "behind" in the payments, but did not tell her husband; that she received the notice of the foreclosure proceedings, and thereafter attended the hearing before the Clerk; that she "hid the copy of the notice of foreclosure which the sheriff served on me in September of 1977 under the mattress on the bed" and "never delivered those papers to my husband". It was her intention, she said, to "try and meet the obligation before the foreclosure became final." Although her husband continued to give her money to pay the bills, and she realized that she was responsible for doing so, she took no action to try to prevent the foreclosure.

The plaintiffs also offered evidence tending to show that Mrs. Hassell was depressed during the period immediately preceding the foreclosure; that she did not discuss the matter with anyone; and that she left home for a week in late December 1977 without telling her family where she was. It was during the time that she was gone, on 1 January 1978, that her husband discovered the foreclosure papers under the mattress. He testified that, prior to that time, he had no knowledge from any source that foreclosure proceedings had been brought against his property or that it had been sold to the Hudsons.

The plaintiffs remained on the property pending the outcome of their claim that Mrs. Hassell was not a person of "suitable age and discretion" through whom process could be effectively served on her husband. They have offered to buy the property back from the Hudsons and have deposited $6,300.00 with the Clerk of Superior Court to cover the purchase price paid.

At the close of the plaintiffs' evidence, the judge, without making any findings of fact, granted the defendants' motion for involuntary dismissal pursuant to Rule 41(b), G.S. § 1A-1. With respect to the defendants' counterclaim, he made findings of fact and conclusions of law, and entered a judgment that defendants Hudson recover from plaintiffs the fair rental value of the property at a rate of $65.00 per month from 1 December 1977 until such time as the plaintiffs vacated the premises. Plaintiffs appealed.

Cherry, Cherry & Flythe, by Joseph J. Flythe, for plaintiff appellants.

White, Hall, Mullen, Brumsey & Small, by Gerald F. White, for defendant appellees.

HEDRICK, Judge.

Plaintiffs argue on appeal that the judge erred in entering the judgment of involuntary dismissal. They contend that the evidence establishes invalid service on Mr. Hassell. Defendants strenuously contend the contrary. The question, however, is not before us. Nor was it before the Superior Court judge in the posture in which it was presented.

[1] It is an elementary principle of law that a judgment which is regular and valid on its face may be set aside *only* by a motion in the original cause in the court wherein the judgment was rendered. 8 Strong's N.C. Index 3d, *Judgments* § 30 (1977). *Accord, East Carolina Lumber Co. v. West*, 247 N.C. 699, 102 S.E. 2d 248 (1958); *Davis v. Brigman*, 204 N.C. 680, 169 S.E. 421 (1933). The judgment may not be attacked collaterally. *Robinson v. United States Casualty Co.*, 260 N.C. 284, 132 S.E. 2d 629 (1963); *Horton v. Davis*, 12 N.C. App. 592, 184 S.E. 2d 601 (1971). Neither may a direct attack thereon be maintained in an independent action. *Davis v. Brigman, supra; Jordan v. McKenzie*, 199 N.C. 750, 155 S.E. 868 (1930). [*Cf. Downing v. White*, 211 N.C. 40, 188 S.E. 815 (1936), which held that a judgment *irregular on its face* may be attacked by independent action.]

Plaintiffs in the case before us have brought this independent action seeking to directly attack the judgment entered by the Clerk of Superior Court wherein she ordered the foreclosure to

proceed, pursuant to G.S. § 45-21.16 (1977 Supp.). They have made no allegations of fraud to entitle them to proceed by independent action. Strong's N.C. Index, *supra* at § 30.1. They have neither alleged nor demonstrated that service was irregular on its face so as to allow them to proceed in this fashion, *Downing v. White, supra*, and evidence *aliunde* the record of service is incompetent for such a purpose. *Williams v. Trammell*, 230 N.C. 575, 55 S.E. 2d 81 (1949). To the contrary, the record and the plaintiffs' own stipulations establish beyond question that service was *prima facie* valid. As was stated in *Davis v. Brigman, supra* at 682, 169 S.E. at 421:

> This Court has repeatedly held that when it appears from the officer's return that a summons has been served as required by law, when in fact it has not been served, the remedy is a motion in the cause to set aside the judgment and not an independent action.

See also Harrington v. Rice, 245 N.C. 640, 97 S.E. 2d 239 (1957); *Jordan v. McKenzie, supra.*

Jurisdiction of the original cause in this case lies with the Clerk of Superior Court of Pasquotank County. No appeal having been taken from the order of foreclosure as provided in § 45-26.16(d), plaintiffs' remedy to set aside that order is by motion in that action. The parties' effort to incorporate in this independent action a motion in the cause apparently filed in the original proceeding before the Clerk is feckless, since, under the statute, the Superior Court would have only appellate jurisdiction over the original foreclosure proceeding, and over the clerk's ruling on a motion in the cause. *Cf. Galer v. Auburn-Asheville Co.*, 204 N.C. 683, 169 S.E. 642 (1933). That portion of the judgment wherein plaintiffs' action is dismissed under Rule 41(b) must, therefore, be vacated.

[2] Defendants' counterclaim is essentially an ejectment proceeding, and an action for damages for wrongful occupancy of their property. The allegations in plaintiffs' purported claim hereinbefore discussed would be no defense to the defendants' proceeding for ejectment. *Horton v. Davis, supra.* If defendants prevail upon their counterclaim, they would be entitled to a judgment "that the defendant [plaintiffs herein] be removed from, and the plaintiff [defendants herein] be put in possession of, the . . .

premises". G.S. § 42-30. They would also be entitled to recover the reasonable rental value of the premises for such time as the plaintiffs wrongfully occupy such premises.

While the trial court made findings and conclusions which would support a judgment for defendants on their counterclaim, it clearly predicated its judgment on its erroneous finding and conclusion that

> by virtue of the dismissal of plaintiffs' action set forth in the complaint filed in the above entitled action, the foreclosure proceedings and trustee's deed dated December 1, 1977 from J. Kenyon Wilson, Jr., trustee to James A. Hudson and wife, Helen B. Hudson attacked by plaintiffs were in all respects confirmed and adjudicated lawful and proper.

However, a more serious error appears in the judgment for the defendants. The trial judge ordered that

> the plaintiffs, . . . be and are hereby directed to leave and vacate the subject property on or before January 15, 1979 and if said parties fail to so leave and vacate the subject property . . ., the Clerk of Superior Court of Pasquotank County is hereby directed to issue writ or order of possession after said date of the subject property in favor of James A. Hudson and wife, Helen B. Hudson . . . pursuant to N C Gen Stat Section 45-21.29(k).

In our opinion, the trial judge had no authority to order the Clerk to issue a writ of possession pursuant to G.S. § 45-21.29 since the Clerk is authorized by that statute to issue the writ only upon "application" by the mortgagee, the trustee or the purchaser of the property, and only after notice to the parties in possession. The judge in the present case, upon proper findings and conclusions, might have ordered the plaintiffs removed and the defendants put in possession, but that he did not do. Therefore, since the trial court clearly predicated its judgment for defendants upon its erroneous conclusion with respect to plaintiffs' attempt to set aside the foreclosure proceedings, and because the order directing the Clerk to issue a writ of possession is unauthorized, the judgment for defendants on their counterclaim must be vacated.

The result is: The judgment of involuntary dismissal as to the plaintiffs' action is vacated, and the matter is remanded to the Superior Court for the entry of an Order dismissing the complaint pursuant to Rule 12(b)(6), G.S. § 1A-1. With respect to defendants' counterclaim, the judgment is likewise vacated, and the cause remanded for further proceedings not inconsistent with this Opinion.

Vacated and remanded.

Judges MARTIN (Robert M.) and WELLS concur.

WILLIAM H. BURGESS AND ALMA A. BURGESS v. NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY

No. 799SC243

(Filed 8 January 1980)

1. Insurance § 127— provision against other insurance—no ambiguity

There was no merit to plaintiffs' contention that the "other insurance" forfeiture provisions in an insurance policy covering their farm dwelling were void for ambiguity, since the language of the policy was plain and clear and prohibited the policyholder from obtaining other insurance on the dwelling only; other provisions would permit the policyholder to take out insurance on other property covered by the policy if a written endorsement to that effect was added; and such other insurance, approved by endorsement, would be subject to the pro-rata liability provision of the policy.

2. Insurance § 128— other insurance provision—no waiver

There was no merit to plaintiffs' argument that acceptance of premiums by defendant with knowledge of the existence of other insurance constituted a waiver of the "other insurance" forfeiture clause, since defendant's agent who sold plaintiffs the insurance informed them of the "other insurance" provision and its consequences; there were no facts or circumstances from which knowledge of plaintiffs' continued maintenance of another insurance policy could be imputed to defendant; and defendant's agent had no duty to investigate to determine whether plaintiffs had in fact cancelled their other insurance policy.

3. Husband and Wife § 3.1— husband's release of insurer—husband as wife's agent

Plaintiffs' contention that payment by defendant insurer to the male plaintiff pursuant to the contents and living expense provisions of the insurance policy did not discharge defendant's obligation to the female plaintiff under the

policy was without merit since the evidence tended to show that, in signing the proof of loss and release forms and in accepting defendant's check, the male plaintiff was acting as agent for his wife, the female plaintiff, and that she ratified his acts in accepting the use of the funds.

APPEAL from *Allen (C. Walter), Judge*. Judgment entered 31 October 1978 in Superior Court, WARREN County. Heard in the Court of Appeals 26 October 1979.

Plaintiffs' home and its contents were destroyed by fire on 3 November 1976. On 9 April 1975, defendant issued to plaintiffs its policy of insurance on their home and its contents, providing $20,000 coverage on the dwelling, $10,000 coverage on contents, and $2,000 coverage for additional living expenses. The policy issued was a standard farmowners policy, approved by the North Carolina Fire Insurance Rating Bureau for use in North Carolina.

At the time defendant issued its policy, plaintiffs had in effect another policy on their home and contents with Iowa Mutual Insurance Company, insuring the dwelling for $20,000 and contents for $4,000. Plaintiffs paid premiums as due on both policies until the date of the fire. After the fire, defendant learned that the Iowa Mutual policy was in effect and denied coverage on the dwelling under its policy. Defendant later paid plaintiffs $10,900 under the contents and living expense clauses of its policy. Iowa Mutual settled plaintiffs' claim on its policy by paying plaintiffs $16,024 on the dwelling loss and $4,000 on the contents loss. Plaintiffs presented evidence which tended to show that at the time of the fire, their dwelling had a replacement cost or fair market value of between $34,000 and $45,000. In their complaint, they had alleged a value of $39,500.

Plaintiffs sought to recover the sum of $20,000 for loss of the dwelling. They also set forth a claim for relief wherein they alleged that defendant's acts in selling, issuing, and denying coverage under the dwelling loss provisions of the policy constituted unfair and deceptive trade practices in violation of G.S. 75-1.1. Plaintiffs sought treble damages and attorney's fees pursuant to G.S. 75-16 and 75-16.1.

The case was heard before Judge Allen, sitting in the absence of a jury. The court entered judgment ordering defendant to refund plaintiffs $136.96, representing that proportion of

the premiums paid for insurance on the dwelling. The court denied plaintiffs any further recovery or relief. From that judgment, plaintiffs have appealed.

Perry, Kittrell, Blackburn & Blackburn, by George T. Blackburn II, for plaintiff appellants.

Zollicoffer & Zollicoffer, by John H. Zollicoffer, Jr., for defendant appellee.

WELLS, Judge.

Our consideration of this case was hampered by the fact that the insurance policy in issue was not included in the record or received as an exhibit. Nevertheless, the parties do not, in their briefs, disagree as to the material portions of the policy which they have set out.

Defendant denies coverage under the "other insurance" provision in the policy issued to plaintiffs, which states:

> 4. OTHER INSURANCE: Other insurance covering the described farm dwelling building is not permitted. Unless otherwise provided in writing added hereto, other insurance covering on any property which is the subject of insurance under Coverages E and F of Section 1 of this policy is prohibited. If during the term of this policy the insured shall have any such other insurance, whether collectible or not, and unless permitted by written endorsement added hereto, the insurance under this policy shall be suspended and of no effect.

[1] Plaintiffs first argue that the "other insurance" forfeiture provisions in the policy are void for ambiguity. In support of this argument, they point to the "pro-rata liability" section of the policy which provides:

> PRO-RATA LIABILITY. This Company shall not be liable for a greater proportion of any loss than the amount hereby insured shall bear to the whole insurance covering the property against the peril involved, whether collectible or not.

We note that the courts of our State have long given validity to such "other insurance" clauses for insurance covering property. *Roper v. Insurance Cos.*, 161 N.C. 151, 76 S.E. 869 (1912).

Questions concerning ambiguity in insurance policies have been considered frequently by our courts. The guiding principle was put succinctly by Chief Justice Sharp in *Woods v. Insurance Co.*, 295 N.C. 500, 505-506, 246 S.E. 2d 773, 777 (1978), as follows:

> As with all contracts, the goal of construction is to arrive at the intent of the parties when the policy was issued. Where a policy defines a term, that definition is to be used. If no definition is given, non-technical words are to be given their meaning in ordinary speech, unless the context clearly indicates another meaning was intended. The various terms of the policy are to be harmoniously construed, and if possible, every word and every provision is to be given effect. If, however, the meaning of words or the effect of provisions is uncertain or capable of several reasonable interpretations, the doubts will be resolved against the insurance company and in favor of the policyholder. Whereas, if the meaning of the policy is clear and only one reasonable interpretation exists, the courts must enforce the contract as written; they may not, under the guise of construing an ambiguous term, rewrite the contract or impose liabilities on the parties not bargained for and found therein.

We find no ambiguity here. The language with respect to coverage on the dwelling is plain and clear. It prohibits the policyholder from obtaining other insurance on the dwelling only. The remaining language of paragraph four would allow a policyholder to take out insurance on other property covered by the policy if a written endorsement to that effect was added. Such other insurance, approved by endorsement, would clearly be subject to the pro-rata liability provision.

[2] Plaintiffs next argue that acceptance of the premiums by defendant with knowledge of the existence of other insurance constituted a waiver of the "other insurance" forfeiture clause. There is no question that an insurer may waive a policy provision inserted for its benefit. *Bray v. Benefit Association*, 258 N.C. 419, 128 S.E. 2d 766 (1963). However, in the absence of knowledge of the breach, or facts to put it on inquiry, there can be no waiver or duty to investigate. *Swartzberg v. Insurance Co.*, 252 N.C. 150, 113 S.E. 2d 270 (1960). Whether an insurer has waived an "other insurance" clause is ordinarily an issue for the trier of fact. *Laughinghouse v. Insurance Co.*, 200 N.C. 434, 157 S.E. 131 (1931).

The trial judge made the following finding of fact:

> 8. That on April 9, 1975 at the time Plaintiffs made application for the insurance policy with North Carolina Farm Bureau Mutual Insurance Company, the Defendant's agent advised Plaintiffs that the proposed North Carolina Farm Bureau Mutual Insurance Company policy prohibited other insurance on the farm dwelling and that the Plaintiffs must cancel said insurance with Iowa Mutual Insurance Company for said policy of North Carolina Farm Bureau Mutual Insurance Company to be effective as insuring the farm dwelling.

The testimony of the agent of defendant who sold plaintiffs the policy that he informed them of the "other insurance" provision and its consequences is sufficient to support the above finding. We are therefore bound by this finding, even though there is evidence to the contrary. *Henderson County v. Osteen*, 297 N.C. 113, 254 S.E. 2d 160 (1979). There was no evidence introduced at trial supporting plaintiffs' contention that they had been deliberately misinformed or misled by defendant.

Plaintiffs argue that defendant's collection and retention of plaintiffs' premium payments caused it to waive forfeiture of the policy. Plaintiffs cite *Hicks v. Insurance Co.*, 226 N.C. 614, 39 S.E. 2d 914 (1946) in support of this argument. The decision in *Hicks* hinged on the fact that the two life insurance policies purchased by the plaintiff were issued by the same company. The Court held that under such circumstances, knowledge of the existence of the prior policy issued by the defendant would have to be imputed to the defendant, resulting in the waiver of its prohibition against other coverage in policies subsequently issued by *that company* covering the same property. In the case before us, the insured purchased two insurance policies covering the same dwelling, *each issued by a different company.* There were no facts or circumstances from which knowledge of plaintiffs' continued maintenance of the Iowa Mutual policy could be imputed to defendant.

Plaintiffs insist that defendant's agent had a duty to investigate to determine whether they had in fact cancelled the Iowa Mutual policy, as he informed them they should. We do not agree. To place such a burden on insurance agents would

manifestly inhibit the opportunity for the public to change insurance companies or agents. What plaintiffs urge would be detrimental, not beneficial to the public's interest which would be best served by promoting competition among insurers.

[3] Plaintiffs argue that payment by defendant to William Burgess pursuant to the contents and living expense provisions of the policy did not discharge defendant's obligation to Alma Burgess under the policy. William Burgess signed the proof of loss and release forms and accepted defendant's check. Judge Allen found that in these transactions, William Burgess was acting as agent for his wife, Alma Burgess, and that she ratified his acts in accepting the use of the funds.

> Agency of the husband for his wife may be shown by evidence of facts and circumstances which authorize a reasonable inference that he was authorized to act for her.

Passmore v. Woodard, 37 N.C. App. 535, 540, 246 S.E. 2d 795, 800 (1978). Alma Burgess testified that the insurance proceeds were used to restore the house, title to which was held by both husband and wife. She stated that she left collection of the insurance proceeds to her husband. It seems clear that Judge Allen's finding, that William Burgess was acting as agent for his wife and for her benefit in accepting payment from defendant, was supported by sufficient evidence.

Judge Allen concluded that plaintiffs are not entitled to any recovery under Chapter 75 of the General Statutes. We agree. The evidence in this case simply does not suggest that defendant's agent engaged in any deceitful or fraudulent activities or trade practices. As noted earlier in this opinion, we see no evidence of any attempt on the part of defendant's agent to misinform or mislead plaintiffs about their insurance coverage.

We find plaintiffs' other assignments of error to be without merit.

Affirmed.

Judges ARNOLD and WEBB concur.

THE NORTH CAROLINA STATE BAR v. WILLIAM T. COMBS, JR.

No. 7910NCSB581

(Filed 8 January 1980)

1. **Appeal and Error § 30— absence of objections to admission or exclusion of evidence—alleged errors not assignable on appeal**

Where no objections were made at an attorney's disciplinary hearing, alleged errors in the admission or exclusion of evidence at the hearing are not assignable as error on appeal unless the evidence sought to be excluded is forbidden by statute.

2. **Attorneys at Law § 12— disbarment—failure to advise of encumbrances on lands conveyed**

A complaint was sufficient to support disbarment of defendant attorney for dishonesty, fraud, deceit or misrepresentation that adversely reflects on his fitness to practice law in violation of DR 1-102(A)(4) and (6) of the Code of Professional Responsibility where it alleged that defendant contracted to sell certain lands and failed to advise the purchasers that the lands were subject to liens and encumbrances; defendant thereafter conveyed the property in question to his son; defendant later delivered to the purchasers a warranty deed from his son for the lands in question; and defendant had knowledge that the lands were subject to liens and encumbrances totaling over $448,600.

APPEAL by the defendant from an Order of the Disciplinary Hearing Commission of the North Carolina State Bar entered 19 January 1979. Heard in the Court of Appeals 26 November 1979.

An unverified complaint was filed by the North Carolina State Bar against William T. Combs, Jr., a practicing attorney, on 25 September 1978 alleging conduct involving dishonesty, fraud, deceit or misrepresentation that adversely reflects upon his fitness to practice law. Combs allegedly violated Disciplinary Rule 1-102(A)(4) and (6) of the Code of Professional Responsibility which reads as follows:

A lawyer shall not:

****

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

****

(6) Engage in any other professional conduct that adversely reflects on his fitness to practice law.

Summons in the cause, along with a copy of summons and complaint, was served on the defendant on 2 October 1978 notifying him that every allegation would be taken as true if no answer should be filed within 20 days from the date of service. The defendant failed to file an answer or otherwise plead. On 13 October 1978, a Hearing Committee was appointed to hear the matter, and the time and place of the hearing were set out. The case was continued until 5 January 1979, after proper notice, at which time neither the defendant nor his counsel appeared. Plaintiff's witnesses were present, however, and the Hearing Committee took evidence concerning the alleged misconduct of the defendant.

As a result, the Hearing Committee made Findings of Fact and Conclusions of Law and ordered that defendant be suspended from the practice of law for three years.

The FINDINGS OF FACT AND CONCLUSIONS OF LAW of the Hearing Committee (filed 23 January 1979) are as follows:

> This cause coming on to be heard and being heard before the undersigned hearing committee of the Disciplinary Hearing Commission of The North Carolina State Bar at a regularly scheduled hearing held on January 5, 1979, in the office of The North Carolina State Bar, 107 Fayetteville Street Mall, Raleigh, North Carolina, and said hearing committee having heard the evidence and arguments and contentions of counsel, make the following findings of fact:
>
> 1. The plaintiff, The North Carolina State Bar, is a body duly organized under the laws of North Carolina, and is the proper party to bring this proceeding under the authority granted it in Chapter 84 of the General Statutes of North Carolina.
>
> 2. The defendant, William T. Combs, Jr., is a citizen and resident of Rockingham County, North Carolina and was admitted to The North Carolina State Bar in 1951 and is, and was at all times relevant to this proceeding, an attorney at law licensed to practice law in the State of North Carolina and was and is subject to the Rules, Regulations, Canons of Ethics and Code of Professional Responsibility of The North Carolina State Bar and the laws of the State of North Carolina.

3. J. W. Gilbert, father of Janice G. Shreve, paid $4,500.00 in July, 1976 and $10,500.00 in September, 1976, to William T. Combs, Jr., for the purchase of six acres of real property. On October 21, 1976, William T. Combs, Jr. conveyed 36 acres, including the six acres previously purchased by J. W. Gilbert for Janice G. Shreve, to his son, Anthony R. Combs. In January, 1977, William T. Combs, Jr. delivered to Janice G. Shreve a warranty deed from Anthony R. Combs to Janice G. Shreve for the six acres previously purchased.

4. All negotiations for the sale of the property had been between Janice G. Shreve, Tony W. Shreve and William T. Combs, Jr., who had represented in June, 1976, to the Shreves that the property was free and clear of encumbrances. All negotiations for the sale of the property were handled as if William T. Combs, Jr., were the owner of the property, and only upon receipt of the deed in January, 1977, did the Shreves determine that Anthony Combs had any interest in the property. At no time during the negotiations for the sale of the property did William T. Combs, Jr. inform the Shreves of any encumbrances against the property.

5. William T. Combs, Jr. had previously served as attorney for the Gilbert family and was considered by the Shreves to also be their attorney and the parties relied on William T. Combs, Jr.'s statements to their financial detriment that he would provide good title to the property for them.

6. Construction on a residence for the Shreves on the six acres was interrupted in March, 1977, when Janice G. Shreve determined that the property was encumbered.

7. During the summer of 1977, the extent of the encumbrances was discovered when Janice G. Shreve retained an attorney to examine the title of the property. It was determined that the six acres were subject to a Deed of Trust executed by William T. Combs, Jr. to North Carolina National Bank in the face amount of $250,000.00, a Deed of Trust executed by William T. Combs, Jr. to Southern National Bank in the face amount of $48,669.12, and a United States Internal Revenue Service lien in the face amount of $73,821.79, all of which were duly recorded prior to June, 1976.

8. The Shreves have been unable to continue construction on their home because a loan is not available from any lending institution while the property purchased from William T. Combs, Jr. is encumbered. Having been made aware of this situation by the Shreves and their attorney, William T. Combs, Jr. has failed to provide title to the property free and clear of all encumbrances.

9. William T. Combs, Jr. has not made any refund of the money paid him by J. W. Gilbert and has displayed by his actions and attitude toward the parties a complete disregard for the attorney-client relationship and has taken advantage of that relationship for his own financial gain at the expense of his clients, the Shreves.

10. William T. Combs, Jr. has failed to appear at the hearing and has failed to file Answer in this matter or to offer any evidence in his behalf.

Based upon the foregoing findings of fact, the Hearing Committee hereby makes the following CONCLUSIONS OF LAW:

1. The defendant, a duly licensed attorney in the State of North Carolina subject to the Code of Professional Responsibility and of the laws of the State of North Carolina made false representations in negotiating for the sale of property and fraudulently prepared and delivered a warranty deed for the property when he knew the property was not free and clear of all encumbrances, and that such acts involved professional conduct prejudicial to the administration of justice and professional conduct that adversely reflects upon his fitness to practice law, all in violation of Disciplinary Rules 1-102(A)(4) and (6) of the Code of Professional Responsibility of The North Carolina State Bar.

Based upon the foregoing Findings of Fact and Conclusions of Law and pursuant to Section 9 of Article IX, Discipline and Disbarment of Attorneys, the Hearing Committee, on the same date, issued its order decreeing:

. . . that the defendant, William T. Combs, Jr., be suspended from the practice of law in the State of North Carolina for a period of three years.

On 5 Feburary 1979, the defendant made objections to the Findings of Fact and Conclusions of Law and gave notice of appeal. As a part of the record on appeal, the appellant and appellee entered into the following stipulation:

> It is stipulated by and between counsel for the respective parties that the Complaint in this cause was filed on the 25th day of September, 1978, and that Summons and Notice was issued on the 25th day of September, 1978, and served on the defendant, William T. Combs, Jr., on the 2nd day of October, 1978, and that Summons was filed with B. E. James, Secretary of the North Carolina State Bar on the 9th day of October, 1978.
>
> It is further stipulated that hearing was held in this cause before Mr. Colon Byrd, Mr. Max [sic] Boxley and Mr. Warren C. Stack, who was acting as chairman. It is further stipulated and agreed by and between counsel for the parties that the hearing commenced at 10:05 a.m. on the 5th day of January, 1979.
>
> It is further stipulated that the defendant filed no answer to the unverified Complaint filed as aforesaid. It is further stipulated and agreed by and between counsel for the parties that the State Bar, through its attorney, C. Christopher Bean, moved for entry of default judgment and that the motion was granted.
>
> It is further stipulated and agreed that although the motion for default was entered and granted, the three members of the Committee hearing this cause heard evidence from the complainants, Janice Gilbert Shreve and Tony Shreve and J. W. Gilbert.

McElwee, Hall, McElwee & Cannon, by John E. Hall, for defendant appellant.

H. D. Coley, Jr., for plaintiff appellee.

HILL, Judge.

The defendant attempts to bring forward nine questions for review on appeal.

Rule 10(b)(1) of the Rules of Appellate Procedure provides that:

> Any exception which was properly preserved for review by action of counsel during the course of proceedings in the trial tribunal by objection noted or which by rule or law was deemed preserved or taken without any such action, may be set out in the record on appeal and made the basis of an assignment of error.

Absent proper preservation of exceptions, the only questions which may be presented for review in this case are whether the judgment is supported by the findings of fact and conclusions of law and whether the court had subject matter jurisdiction. Rule 10(a), North Carolina Rules of Appellate Procedure.

Ordinarily, any objection to the admission of evidence must be made at the time such evidence is introduced. 1 Strong's N.C. Index 3d, Appeal and Error § 30.1, p. 259. Any objection not taken at the time a question is asked and the answer given is waived, and failure to raise timely objection to such testimony will result in a waiver of the right to contest its admissibility. *State v. Hensley*, 29 N.C. App. 8, 222 S.E. 2d 716 (1976), *cert. denied*, 290 N.C. 95, 225 S.E. 2d 325 (1976); *State v. Hunt*, 223 N.C. 173, 25 S.E. 2d 598 (1943).

[1] The defendant failed to appear at the disciplinary hearing either in person or by counsel, although timely notice was given. Since no objections were made at the hearing below, alleged errors in admission or exclusion of evidence are not assignable as error on appeal unless the evidence sought to be excluded is forbidden by statute. *Eaton v. Klopman Mills, Inc.*, 2 N.C. App. 363, 163 S.E. 2d 17 (1968); *State v. McKethan*, 269 N.C. 81, 88, 152 S.E. 2d 341 (1967). Admittedly, there may be rare instances when the appellate court *ex mero motu* may review a case on its merits, overlooking procedural defects. This case does not come within any of the exceptions.

[2] Appellant Combs contends the judgment of disbarment entered by the Disciplinary Hearing Committee should be reversed, in any event, contending that "the complaint filed in this cause fails to state a claim upon which relief may be granted when the complaint attempts to allege a cause for fraud and

deceit when there are no allegations as to specific acts of alleged fraud and/or deceit"; and that, therefore, it was error to enter the judgment upon a complaint which fails to state a cause of action. Appellant was tried for *misconduct* as defined by Disciplinary Rule 1-102 of the Code of Professional Responsibility.

The complaint filed against the defendant appellant states substantially that said defendant negotiated to sell certain lands to Janice G. Shreve, et vir; that at no time during said negotiations did the defendant advise Janice G. Shreve of the liens and encumbrances against the property; that believing the defendant was acting in good faith, Janice G. Shreve paid and delivered to the defendant the sum of $15,000 in June, 1976; that defendant thereafter in October, 1976 delivered a deed including the property offered to Janice G. Shreve to Anthony R. Combs; that on 10 January 1977, Anthony R. Combs delivered to Janice G. Shreve the tract contracted for by Janice G. Shreve with the defendant; that said tract was subject to liens and encumbrances totalling $448,644.32, of which the defendant had knowledge; that such conduct involved dishonesty, fraud, deceit or misrepresentation that adversely reflects on his fitness to practice law in violation of Disciplinary Rule 1-102(A)(4) and (6) of the Code of Professional Responsibility of the N. C. State Bar. Based on these allegations, we hold the complaint stated a claim upon which relief may be granted.

The "broadside" objection presents only questions of whether the facts, as found, support the judgment and whether errors of law appear on the face of the record. *Mayhew Electric Co. v. Carros*, 29 N.C. App. 105, 223 S.E. 2d 536 (1976). Unless the facts are unsupported by any competent evidence, the court is bound by the findings of fact and will review only the trial court's application of the law to those facts. *Hinson v. Jefferson*, 287 N.C. 422, 215 S.E. 2d 102 (1975).

In this case, the parties stipulated that the defendant failed to file answer to the complaint served on him. The record reflects that the defendant did not appear in person or through counsel at the hearing. Under Rule 14(6) of the Rules and Regulations of the North Carolina State Bar, the allegations of the complaint were deemed admitted.

The committee at the time of hearing, in an abundance of precaution, received evidence in support of the complaint, which evidence was uncontroverted at that time and may not be the subject of exception now. We hold that the findings of fact were based on competent evidence and that there were no errors of law. The conclusions entered subsequent to the hearing support the order of suspension.

For the reasons set out above, the decision of the Hearing Committee is

Affirmed.

Chief Judge MORRIS and Judge PARKER concur.

HUGH R. BROWN v. COASTAL TRUCKWAYS, INC., A CORPORATION

No. 7926DC254

(Filed 8 January 1980)

Uniform Commercial Code § 3— deposit of check under reservation of rights—rights not preserved

A disputed claim for compensation for employment is extinguished when the debtor employer tenders to the creditor employee a check marked "account in full" and the creditor deposits the check after striking these words from the check and notifying the debtor that he is reserving his right to contend for the balance of the claim, and G.S. 25-1-207 was inapplicable to preserve creditor's claim.

APPEAL by plaintiff from *Bennett, Judge.* Order entered 23 October 1978 in District Court, MECKLENBURG County. Heard in the Court of Appeals 13 November 1979.

Plaintiff appeals from the entry of summary judgment against him. It appears from the pleadings and other papers filed in this case that at the time of the entry of the judgment, the following facts were not in dispute. Plaintiff had worked as a salesman for defendant and was paid a commission on business he generated for defendant. His employment was terminated, and there was a dispute as to the amount of commission owed to the plaintiff. In May 1971, the defendant mailed a check to plaintiff in

the amount of $1,162.08 with the notation in the lower left hand corner "account in full." On 20 May 1971, the plaintiff wrote to defendant, notifying the defendant that the check did not pay the account in full and that he would strike the words "account in full" from the check before depositing it. Plaintiff struck the words from the check and deposited it on 26 May 1971. Plaintiff sued defendant for the balance of the commissions he claimed were due. On this state of facts the court held there was not a genuine issue as to any material fact and entered judgment for defendant.

Plaintiff appealed.

Harkey, Faggart, Coira, Fletcher and Lambert, by Charles F. Coira, Jr., for plaintiff appellant.

Joslin, Culbertson, Sedberry and Houck, by William Joslin, for defendant appellee.

WEBB, Judge.

There being no dispute as to the facts as stated in this opinion, the entry of summary judgment was proper if the defendant is entitled to judgment as a matter of law based on these facts. G.S. 1A-1, Rule 56. *Atkinson v. Wilkerson*, 10 N.C. App. 643, 179 S.E. 2d 872 (1971). The case sub judice poses the following question. Is a disputed claim extinguished when the debtor tends to the creditor a check marked "account in full" and the creditor deposits the check after striking these words from the check and notifies the debtor he is reserving his right to contend for the balance of the claim? Prior to the adoption of the Uniform Commercial Code, this would be an accord and satisfaction and the claim would be extinguished. When the debtor tendered the check to the creditor, the creditor had to take the check on the terms offered by the creditor or not take it at all. The acceptance of the check constituted an accord and satisfaction in spite of any characterization of it by the creditor. *See Rosser v. Bynum & Snipes*, 168 N.C. 340, 84 S.E. 393 (1915); *Phillips v. Construction Co.*, 261 N.C. 767, 136 S.E. 2d 48 (1964), and *Barger v. Krimminger*, 262 N.C. 596, 138 S.E. 2d 207 (1964). 1 Am. Jur. 2d, Accord and Satisfaction, § 21, p. 319 (1962).

Plaintiff contends the rule in this state has been changed by G.S. 25-1-207 which provides:

> A party who with explicit reservation of rights performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved. Such words as "without prejudice," "under protest" or the like are sufficient.

This section is a part of the Uniform Commercial Code. It has been interpreted in several cases. *See Baillie Lumber Co. v. Kincaid Carolina Corp.*, 4 N.C. App. 342, 167 S.E. 2d 85 (1969); *Scholl v. Tallman*, --- S.D. ---, 247 N.W. 2d 490 (1976); *Fritz v. Marantette*, 404 Mich. 329, 273 N.W. 2d 425 (1978), and *Jahn v. Burns*, Wyo., 593 P. 2d 828 (1979). It has also been the subject of several articles. *See* Rosenthal, *Discord and Dissatisfaction: Section 1-207 of the Uniform Commercial Code*, 78 Colum. L. Rev. 48 (1978); Hawkland, *The Effect of U.C.C. § 1-207 on the Doctrine of Accord and Satisfaction by Conditional Check*, 74 Com. L. J. 329 (1969), and McDonnell, *Purposive Interpretation of the Uniform Commercial Code: Some Implications for Jurisprudence*, 126 U. Pa. L. Rev. 795, 824 (1978).

The underlying obligation in this case for which the check was given involved an employment contract. Employment contracts are not ordinarily covered by the Uniform Commercial Code, and the first question we face is whether this case is brought within the coverage of the Code because a check was given in payment of a claim on an employment contract. G.S. 25-3-802 provides in part:

> (1) Unless otherwise agreed where an instrument is taken for any underlying obligation
>
> * * *
>
> (b) in any other case the obligation is suspended pro tanto until the instrument is due or if it is payable on demand until its presentment. If the instrument is dishonored, action may be maintained on either the instrument or the obligation; discharge of the underlying obligor on the instrument also discharges him on the obligation to the extent of his discharge on the instrument.

The Official Comment indicates this section is intended to settle conflicts as to the effect of an instrument as payment of the obligation for which it is given. This section provides that if a check is given in payment of a claim, and the underlying obligor is discharged on the check, he is also discharged on the underlying claim. Since a check is governed by the Uniform Commercial Code, we hold that whether the defendant is discharged on the plaintiff's claim depends on the extent to which he is discharged on the check. The employment contract is subject to the Uniform Commercial Code to this extent.

We must next determine whether G.S. 25-1-207 applies to a full payment check given in satisfaction of a disputed account. If it does apply, it would be for the reason that plaintiff assented to "performance in a manner . . . offered by" the defendant while plaintiff reserved his rights. The defendant offered a check in full settlement of the plaintiff's claim. When the plaintiff struck from the check the words "for account in full" and notified defendant he would not accept the check in full payment, he did not assent to "performance in a manner . . . offered by" the defendant. This would make G.S. 25-1-207 inapplicable to the case sub judice.

Some help in interpreting the statute comes from the Official Comment which reads:

> 1. This section provides machinery for the continuation of performance along the lines contemplated by the contract despite a pending dispute, by adopting the mercantile device of going ahead with delivery, acceptance, or payment "without prejudice," "under protest," "under reserve," "with reservation of all our rights" and the like. All these phrases completely reserve all rights within the meaning of this section. This section therefore contemplates that limited as well as general reservations and acceptance may be made "subject to satisfaction of our purchaser," "subject to acceptance by our customers," or the like.

From reading the Official Comment, it would appear that this section applies when one party desires to continue performance under a contract without waiving any rights in a pending dispute. The plaintiff in this case did not propose to continue to perform but did want to preserve his right to collect his claim in full. This

was apparently not within the coverage of the section as contemplated in the Official Comment.

The law review articles cited above also provide some help in interpreting G.S. 25-1-207. Hawkland points out that the Official Comments, as a practice, indicate when there is a change in the common law. The Official Comment to G.S. 25-1-207 does not indicate it changes the common law. This is some evidence this section was not intended by the drafters of the Code to change the common law as to full payment checks. Dean Rosenthal in his well-reasoned article states that in its drafting stages, the Code contained a proposed section, later withdrawn, specifically covering full payment checks. No Official Comment ever suggested the two sections dealt with the same subject matter.

Based on the plain words of the statute, we hold that G.S. 25-1-207 does not apply to a check tendered in full payment of a disputed claim. We believe the Official Comment and the history of the Uniform Commercial Code support this holding. When the defendant tendered a check to plaintiff in full payment of the claim, the plaintiff, by depositing the check, accepted the defendant's offer of settlement. This made it an accord and satisfaction.

There is some language in *Baillie Lumber Co. v. Kincaid Carolina Corp., supra,* which would support a different result. That case involved a fully liquidated claim. It is not precedent for this case.

Affirmed.

Judges VAUGHN and MARTIN (Harry C.) concur.

TOWN OF BLADENBORO v. HOWARD McKEITHAN AND WIFE, LILLIE MAE McKEITHAN, DARRELL D. McDONALD AND WIFE, GUSSIE DEAVER McDONALD, AND FERRIS GERALD HESTER AND WIFE, VIVIAN S. HESTER

No. 7913DC449

(Filed 8 January 1980)

Taxation § 41— action to obtain tax lien—failure to allege specific defense—judgment on pleadings

The trial court properly entered judgment on the pleadings for plaintiff town in an action to obtain and foreclose a tax lien against defendants' property where defendants' answers generally denied that they owe taxes to the town for certain years but failed to assert any defense as provided by G.S. 105-381(a)(1) and failed to allege that defendants have made a demand to the town for release of the taxes by submitting a written statement of their defense to payment or enforcement of the taxes pursuant to G.S. 105-381(a)(2).

Judge CLARK dissenting.

APPEAL by defendants from *Wood, Judge*. Judgment entered 6 December 1978 in District Court, BLADEN County. Heard in the Court of Appeals 7 December 1979.

The Town of Bladenboro (Town) filed three complaints against the six defendants, husbands and wives and citizens of Bladen County, alleging that the Town is a body politic having authority to levy taxes against real and personal property; that all defendants owned real property in Bladenboro Township; that each defendant listed taxes for the years 1971 through 1975; and that the taxes levied during that period are unpaid. The Town sought to obtain tax liens against the properties and sought to have a commissioner appointed to sell the properties.

An answer was filed by each defendant, husband and wife, admitting the Town's authority to levy taxes; admitting that each defendant was a citizen and resident of the county; but denying that each owed taxes for 1971, 1972, and 1973. Each answer admitted that each defendant owed taxes for 1974 and 1975.

A hearing was held on the Town's motion for judgment upon the pleadings or, alternatively, for summary judgment. The court reviewed the complaint, answers, and affidavit of the Town's attorney (which does not appear of record), and applicable statutes

and cases. The trial court entered judgment in favor of the Town against defendants. Defendants appealed.

Chandler, Hill & Womble, by Joseph B. Chandler, Jr., for plaintiff appellee.

John C. B. Regan III, for defendant appellants.

ERWIN, Judge.

Defendants contend the trial court erred by granting the motion for summary judgment or judgment on the pleadings in plaintiff's favor. We do not agree and affirm the judgment entered.

Where a motion for summary judgment is made along with a motion for judgment on the pleadings and the record on appeal contains no affidavits, answers to interrogatories, or anything else other than the pleadings upon which to base the decision, the court's entry of judgment will be deemed to have been made under G.S. 1A-1, Rule 12(c), of the Rules of Civil Procedure. *Reichler v. Tillman*, 21 N.C. App. 38, 203 S.E. 2d 68 (1974).

Justice Huskins stated for our Supreme Court in *Ragsdale v. Kennedy*, 286 N.C. 130, 136-37, 209 S.E. 2d 494, 499 (1974):

> "Motion for judgment on the pleadings is authorized by Rule 12(c) of the North Carolina Rules of Civil Procedure. G.S. 1A-1, Rule 12(c) (1969). The motion operates substantially the same as under the code system before adoption of the new rules of civil procedure. *See Powell v. Powell*, 271 N.C. 420, 156 S.E. 2d 691 (1967); *Reidsville v. Burton*, 269 N.C. 206, 152 S.E. 2d 147 (1967); *Edwards v. Edwards*, 261 N.C. 445, 135 S.E. 2d 18 (1964); 6 Strong, North Carolina Index 2d, Pleadings, § 38 (1968).
>
> North Carolina's Rule 12(c) is identical to its federal counterpart. The rule's function is to dispose of baseless claims or defenses when the formal pleadings reveal their lack of merit. A motion for judgment on the pleadings is the proper procedure when all the material allegations of fact are admitted in the pleadings and only questions of law remain. When the pleadings do not resolve all the factual issues, judgment on the pleadings is generally inappropriate. 5

Wright and Miller, Federal Practice and Procedure, § 1367 (1969).

Judgment on the pleadings is a summary procedure and the judgment is final. *See* James, Civil Procedure § 6.17 (1965). Therefore, each motion under Rule 12(c) must be carefully scrutinized lest the nonmoving party be precluded from a full and fair hearing on the merits. The movant is held to a strict standard and must show that no material issue of facts exists and that he is clearly entitled to judgment. *Southern Ohio Bank v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 479 F. 2d 478 (6th Cir. 1973).

The 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 and all contravening assertions in the movant's pleadings are taken as false."

Accepting defendants' factual allegations as true, we, nevertheless, affirm the trial court's entry of judgment.

G.S. 105-381(a)(1), (2), and (3) provide:

"*Taxpayer's remedies.*—(a) Statement of Defense.—Any taxpayer asserting a valid defense to the enforcement of the collection of a tax assessed upon his property shall proceed as hereinafter provided.

(1) For the purpose of this subsection, a valid defense shall include the following:

a. A tax imposed through clerical error;

b. An illegal tax;

c. A tax levied for an illegal purpose.

(2) If a tax has not been paid, the taxpayer may make a demand for the release of the tax claim by submitting to the governing body of the taxing unit a written statement of his defense to payment or enforcement of the tax and a request for release of the tax at any time prior to payment of the tax.

(3) If a tax has been paid, the taxpayer, at any time within three years after said tax first became due or within six months from the date of payment of such tax, whichever is the later date, may make a demand for a refund of the tax paid by submitting to the governing body of the taxing unit a written statement of his defense and a request for refund thereof."

The answers of defendants failed to raise any defenses as provided by G.S. 105-381(a)(1). Defendants did not allege that they, as taxpayers, have made demand for release of the taxes claimed by submitting to the Town of Bladenboro a written statement of their defense to payment or enforcement of the taxes. *See* G.S. 105-381(a)(2).

Justice Barnhill (later Chief Justice) stated for our Supreme Court in *Development Co. v. Braxton*, 239 N.C. 427, 429, 79 S.E. 2d 918, 920 (1954): "Ordinarily the sovereign may not be denied or delayed in the enforcement of its right to collect the revenue upon which its very existence depends. This rule applies to municipalities and other subdivisions of the State Government."

The General Assembly, through the enactment of G.S. 105-381(a), has directed the course a taxpayer must follow in a case where the governing body of a taxing unit has instituted an action to enforce its right to collect taxes.

The trial court, in reviewing the answers in the light most favorable to defendants and giving defendants all permissible inferences, correctly concluded that plaintiff's Rule 12(c) motion should have been allowed. We are aware that defendants denied owing the taxes for the years 1971, 1972, and 1973; however, such general denials were not sufficient to withstand plaintiff's motion in light of the above statutory restrictions. Defendants did not elect to amend their answer prior to a hearing on the motion of plaintiff by the trial court. If defendants had paid the taxes in question, they were under a duty pursuant to G.S. 1A-1, Rule 8(c), of the Rules of Civil Procedure to allege payment as an affirmative defense.

The trial court considered the statute in question, compared defendants' answer with the statute, and found that no statutory defenses or payment were alleged. The Town met the standard of

Rule 12(c) that no material issue of fact existed and that it was entitled to judgment.

Judgment affirmed.

Judge ARNOLD concurs.

Judge CLARK dissents.

Judge CLARK dissenting.

Since the majority opinion concedes that the appeal is from a judgment on the pleadings rather than summary judgment, the sole question is whether defendants were required to allege an affirmative defense under G.S. 1A-1, Rule 8(c). Defendants in their answer, responding to an averment in the complaint, "specifically denied that defendants owe any taxes to the Town of Bladenboro for the years of 1971, 1972, and 1973." The majority takes the view that defendants were required by G.S. 105-381(a)(1), (2), and (3) (quoted in the opinion) to allege as an affirmative defense any *valid defense* to plaintiff's claim.

G.S. 105-381(a) and (b) provide to the taxpayer a pretrial remedy for contesting a tax claim, both before and after the tax has been paid, and action of the governing body in response thereto. Subsections (c) and (d) of the statute relate to taxpayer suits for recovery of property taxes. None of the subsections deal with standards for pleading in contested actions for tax liability.

It is my opinion that G.S. § 105-381 simply provides a remedy to taxpayers as well as procedures for pursuing the remedy. The statute was not intended to, and does not, require that a taxpayer assert all defenses as affirmative defenses in an answer to the complaint filed by a taxing unit. Nor, in fact, is a denial to an allegation of tax liability an affirmative defense. In Shuford, N.C. Civil Practice and Procedure, Sec. 8-7, at 71, the author explains: "Generally a defense which contests one of the material allegations of the complaint is not an affirmative defense, since it involves an element of plaintiff's prima facie case."

The trial court's action in effect, in one fell swoop, established a lien on the property and directed that foreclosure be car-

ried out. Yet when defendants in their answer denied taxes due for 1971, 1972, and 1973, an issue was raised concerning the validity of allegations in the complaint. In my mind the dismissal of the action at this stage contravened G.S. § 105-374(j), which relates to foreclosure of tax liens, and which specifically contemplates providing for a trial where there is "an answer raising an issue requiring trial."

Whether it is an issue "requiring trial" is another question. In this case the issue as to whether taxes were due for the years 1971, 1972, and 1973 may have been determined by summary judgment if plaintiff had properly offered supporting material for its motion. Plaintiff, however, did not serve the affidavit upon defendants. Defendants never had an opportunity to properly argue their position as to why taxes were not due in 1971, 1972 and 1973. Consequently, I have some difficulty in giving weight to plaintiff's argument that no issue was raised by the pleadings after he moved for summary judgment rather than judgment on the pleadings.

I vote to reverse and remand for determination of the issue raised.

HARLEY H. HENDRIX v. ALL AMERICAN LIFE AND CASUALTY COMPANY

No. 7923SC363

(Filed 8 January 1980)

1. **Appeal and Error § 32— failure to object to issue submitted—no consideration of issue on appeal**

In an action to recover under a disability insurance policy, defendant could not complain that the trial court erred in failing to instruct the jury that plaintiff's disabling condition must be one that has lasted or would last 24 months under the terms of the policy, since defendant did not raise that issue in the trial court and did not object to the issue submitted.

2. **Insurance § 44— disability insurance—plaintiff's employment record—inadmissibility of evidence**

In an action to recover under a disability insurance policy where the sole issue presented to the jury was whether plaintiff was completely and continuously disabled from March 1976 through March 1977, evidence of plaintiff's

discharge from employment in August 1975 and of an allegation in a lawsuit that plaintiff was a good employee through the summer of 1975 was properly excluded by the trial judge.

3. Insurance § 38.2— disability insurance—evidence of extent of disability

In an action to recover under a disability insurance policy, the trial court did not err in permitting plaintiff's medical witness to give his opinion that plaintiff was unable to engage in any occupation, business or profession during the time in question, since the policy defined disability in terms of plaintiff's "regular occupation," and such testimony was evidence that plaintiff could not engage in his regular occupation.

APPEAL by defendant from *Rousseau, Judge.* Judgment signed 11 December 1978 in Superior Court, WILKES County. Heard in the Court of Appeals 29 November 1979.

Plaintiff commenced an action against defendant insurance company in March 1977, seeking recovery under a disability policy issued by defendant. Plaintiff alleged that he was accidentally injured on 4 April 1975, that he had been totally disabled since 15 August 1975 and was unable to engage in any gainful employment, that he had complied with the terms of the policy in all respects, that defendant had in fact made total disability payments of $200 per month through 15 March 1976, and that defendant had refused to make total disability payments since that date. Plaintiff sought $2400 for total disability currently owed by defendant from 15 March 1976 to 23 March 1977 and $71,688 for future total disability payments, based on his allegation of permanent, total disability for the remainder of his life. In a second cause of action, which was dismissed 15 December 1977 by Judge Kivett, plaintiff sought punitive damages of $150,000.

Defendant answered, denying any obligation to plaintiff for either current or future total disability payments and specifically denying that plaintiff "has at any time been considered totally disabled." Defendant admitted, however, that it made monthly payments to plaintiff under the partial disability provisions of the policy.

A pretrial order noted defendant's stipulation that plaintiff's claims had been paid through 15 March 1976 and that proper forms had been filed. Both parties put on evidence, after which defendant moved for a directed verdict. The court denied this motion.

A conference was held in the judge's chambers prior to oral argument of counsel. The issue, formulated by the court and submitted to the jury, was phrased as follows: "Was the Plaintiff, Harley Hendrix, completely and continuously disabled so that he was unable to engage in his regular occupation from March 1976 through March 1977?" The jury answered yes. Defendant's motion that the verdict be set aside and for judgment notwithstanding the verdict was denied. Judgment was entered in favor of plaintiff for $2400, and defendant appealed.

Vannoy, Moore and Colvard, by J. Gary Vannoy, and Gregory and Joyce, by Dennis Joyce, for plaintiff appellee.

McElwee, Hall, McElwee & Cannon, by William C. Warden, Jr., for defendant appellant.

MARTIN (Harry C.), Judge.

[1] Defendant argues on appeal, *inter alia*, that the trial court erred in failing to instruct the jury that plaintiff's disabling condition must be one that has lasted or would last twenty-four months under the terms of the policy. Defendant's basic position is that as a matter of law plaintiff failed to prove total disability under the policy. We hold defendant is precluded from raising this objection on appeal.

After a lengthy conference prior to oral argument, the trial court formulated the issue: "Was the Plaintiff, Harley Hendrix, completely and continuously disabled so that he was unable to engage in his regular occupation from March 1976 through March 1977?" Immediately following in the record is the statement, "The Defendant did not tender a different issue to the Court." Later in the record, under the caption "Omitted Instruction" appears the following:

> The trial Court should have instructed the jury substantially as follows:
>
> "Ladies and gentlemen of the jury, the policy defines disability as 'the complete inability of the insured to engage in his regular occupation, business or profession for 24 months.' Therefore, the Plaintiff must prove to you by the greater weight of the evidence that the Plaintiff's condition disabling him was a condition that had lasted or would last

for 24 months and prevent him from engaging in his regular occupation for 24 months."

The record before us does not show that defendant requested such instruction to be included in the charge. Requests for special instructions must be submitted in writing to the judge prior to the charge to the jury. Written requests for special instructions are to be filed as a part of the record. N.C. Gen. Stat. 1A-1, Rule 51(b). It is incumbent upon the party desiring a more thorough or detailed charge to request it. *Prevette v. Bullis*, 12 N.C. App. 552, 183 S.E. 2d 810 (1971). In the absence of such a request, an assignment of error based on the failure of the court to instruct in a particular manner is untenable. *Woods v. Roadway Express, Inc.*, and *Swann v. Roadway Express, Inc.*, 223 N.C. 269, 25 S.E. 2d 856 (1943). This assignment of error is overruled.

In arguing that in order for plaintiff to recover under the insurance policy he must prove a disabling condition that had lasted or would last for twenty-four months, defendant in effect is attempting to urge this Court to recognize an issue different from that submitted to the jury by Judge Rousseau. Defendant cannot succeed in this effort. A party who is dissatisfied with the form of the issues or who desires an additional issue should raise the question at once, by objecting or by presenting the additional issue. If a party consents to the issues submitted, or does not object at the time or ask for a different or an additional issue, he cannot make the objection later on appeal. *Baker v. Construction Corp.*, 255 N.C. 302, 121 S.E. 2d 731 (1961); 1 McIntosh, North Carolina Practice and Procedure (2d ed. 1956), § 1353. Because defendant neither objected to the issue submitted to the jury nor asked for a different issue, as the record unequivocally reveals, it cannot do so on this appeal.

[2] Two of defendant's remaining assignments of error relate to evidentiary matters. On cross-examination of plaintiff and on direct examination of one of its own witnesses, defendant attempted to put into evidence the fact that plaintiff had been dismissed from his job by his employer in August 1975. Similarly, defendant tried to elicit from plaintiff on cross-examination testimony that plaintiff had initiated a lawsuit against his former employer, alleging that through the summer of 1975 he was a "dutiful employee and performed valuable services." Defendant

argues that the court erred in refusing to allow this evidence. We disagree. In light of the fact that the sole issue presented to the jury was whether plaintiff was completely and continuously disabled from March 1976 through March 1977, we think evidence of plaintiff's discharge in August 1975 and of an allegation in a lawsuit that plaintiff was a good employee through the summer of 1975 was properly excluded from the jury by the trial judge. This evidence was not relevant to the issue in dispute. There is only a remote or conjectural connection between the evidence excluded and the fact to be proved by it. 1 Stansbury's N.C. Evidence (Brandis rev. 1973), § 78.

[3] Defendant also assigns as error the court's overruling its objection to a question asked of plaintiff's witness, Dr. John Bond, by plaintiff. The question was whether, in Bond's opinion, plaintiff was able to engage in any occupation, business or profession during the period from 16 March 1976 to 16 March 1977. Dr. Bond's answer was no. Defendant argues that the doctor's opinion as to *any* occupation was irrelevant and prejudicial to defendant, as the policy defines disability in terms of plaintiff's "regular occupation."

The record shows that immediately before Dr. Bond was asked this question, he was asked whether, in his opinion, plaintiff could have "engaged in his regular occupation, business or profession during the period of time from March 16, 1976, until March 16, 1977?" Defendant did not object to this question. After Dr. Bond answered no, he was then asked the question objected to.

We disagree with defendant's argument that the only purpose for the question was to "create sympathy" in the jurors' minds. We agree with plaintiff's contention that evidence that Hendrix was unable to engage in any occupation is, a fortiori, evidence that he could not engage in his regular occupation. Therefore, the evidence is relevant.

Defendant's final assignment of error is directed toward the court's overruling his motions for directed verdict and judgment notwithstanding the verdict. Defendant insists that in order for plaintiff to take his case to the jury, he must have presented sufficient evidence of his disability to show that he was or would be prevented from working at his regular occupation for twenty-four months. However, because we have held there was no error in the

submission to the jury of the sole issue whether plaintiff was disabled only from March 1976 to March 1977, we find no merit in defendant's position.

Defendant was afforded a jury trial, and the jury decided in favor of plaintiff. In the trial we find

No error.

Judges VAUGHN and WEBB concur.

CENTRE DEVELOPMENT COMPANY AND COZART, EAGLES & CO., INC. v. THE COUNTY OF WILSON, NORTH CAROLINA AND JOHN D. WILSON, C. CHARLES BARNES, ROY L. CHAMPION, ONNIE R. COCKRELL, JR., DARYL G. SIMPSON, H. DAVID GLOVER AND W. D. P. SHARPE III, CONSTITUTING THE WILSON COUNTY BOARD OF COMMISSIONERS

No. 797SC138

(Filed 8 January 1980)

Injunctions § 2; Eminent Domain § 1 — injunction not available to prohibit condemnation

Plaintiff landowners could not invoke the aid of a court of equity to enjoin a county from condemning their land for a public purpose pursuant to G.S. Ch. 160A, Art. 11 where plaintiffs have an adequate remedy at law since they may appeal the condemnation proceeding pursuant to G.S. 160A-255 and may raise on such appeal all issues which they have raised in their action for an injunction.

APPEAL by plaintiffs from *Brown, Judge.* Judgment entered 17 November 1978 in Superior Court, WILSON County. Heard in the Court of Appeals 16 October 1979.

Plaintiffs filed a complaint against defendants (County and Board) alleging that on 9 October 1978, the Board adopted a resolution pursuant to "G.S. 160A-248(b)"[sic] for the acquisition through condemnation of ten acres of property owned by Centre Development Company and located in the City of Wilson. Cozart, Eagles & Company is a tenant of the land owner. Plaintiffs attempted to enjoin Wilson County from proceeding with the condemnation of their land. Simultaneously with the filing of the action, a temporary restraining order was entered against defend-

ants and a show cause hearing set to determine whether the temporary restraining order should be continued and a preliminary injunction issued pending final determination.

On 17 November 1978, Judge Brown denied plaintiff's request for a preliminary injunction and dissolved the temporary restraining order previously entered. Plaintiffs appealed.

Lucas, Rand, Rose, Meyer, Jones & Orcutt, by Z. Hardy Rose and R. Michael Jones, for plaintiff appellants.

Moore, Weaver & Beaman, by George A. Weaver, for defendant appellees.

ERWIN, Judge.

Plaintiffs contend that the trial court erred as a matter of law by declaring the constitutionality of a statute at a preliminary hearing on an order to show cause and by failing to defer such question until a final hearing upon the merits after answer had been filed and when all of the facts could be shown.

Before we determine the merits of this case, we must determine whether plaintiffs may invoke the aid of a court of equity to enjoin Wilson County, which has power of eminent domain pursuant to G.S. Chap. 160A, Art. 11 to condemn land for public purposes. Equity will not lend its aid in any case where the party seeking it has a full and complete remedy at law. *In re Estate of Daniel*, 225 N.C. 18, 33 S.E. 2d 126 (1945); *Zebulon v. Dawson*, 216 N.C. 520, 5 S.E. 2d 535 (1939).

Wilson County has the power of eminent domain pursuant to G.S. 153A-159. This statute authorizes Wilson County to use the procedures of G.S. Chap. 160A, Art. 11. There is no question that Wilson County proceeded under the statutes stated.

Plaintiffs contend that the statutory procedure being used by Wilson County to condemn their land is unconstitutional since the adoption of the preliminary condemnation resolution by Wilson County was tantamount to the taking of plaintiffs' land for which they were not paid any compensation pending a final determination of the County's right to condemn. The procedure as applied to the facts in the instant case raises serious constitutional ques-

tions, and plaintiffs contend that they violate normal standards of procedural due process.

In this State, there are two constitutional limitations on the exercise of the power of eminent domain: (1) the taking of private property must be for a public use or purpose. *Highway Commission v. Batts*, 265 N.C. 346, 144 S.E. 2d 126 (1965); (2) just compensation must be paid to the owner of the property taken or condemned. *Highway Commission v. Batts, supra; Power Co. v. King*, 259 N.C. 219, 130 S.E. 2d 318 (1963); *Mount Olive v. Cowan*, 235 N.C. 259, 69 S.E. 2d 525 (1952).

The General Assembly, subject to constitutional limitations, may authorize the taking of private property for public use or purpose. *Durham v. Rigsbee*, 141 N.C. 128, 53 S.E. 531 (1906). Statutes granting the power of eminent domain must be strictly construed and followed. *State v. Club Properties*, 275 N.C. 328, 167 S.E. 2d 385 (1969); *Mount Olive v. Cowan, supra.* The right of eminent domain is granted by the General Assembly to a public agency or quasi-public corporation, because the public interest and welfare require that private property shall be taken, from time to time, for public uses or purposes designated by statute and in a manner prescribed by the statute. *R. R. v. Manufacturing Co.*, 166 N.C. 168, 82 S.E. 5 (1914). What is a public use is a judicial question to be determined by the court as a matter of law, reviewable on appeal. *Highway Commission v. Batts, supra.*

If G.S. Chap. 160A, Art. 11 protects the plaintiffs in all the areas hereinabove set out, then the plaintiffs would have a remedy at law, and the instant case should have been dismissed. On the other hand, if any of the plaintiffs' rights are not protected, then we must determine whether the trial court committed error as alleged by plaintiffs.

G.S. Chap. 160A, Art. 11 may be used by cities and counties to condemn land. We find the use of this authority is limited in its use, and we have found only one case decided in our appellate division relating to this article, *In re Condemnation by Greensboro*, 21 N.C. App. 124, 203 S.E. 2d 325 (1974).

G.S. 160A-246 provides:

"§ 160A-246. *Preliminary condemnation resolution.*—(a) Condemnation shall begin with the city council's adoption of

a preliminary condemnation resolution containing substantially the following:

(1) A description of each lot, tract, parcel of land, or body of water in which property rights are to be acquired;

(2) The nature of the right, title, or interest to be acquired in the property, including a description of the location of any easement or other right in property that can be located on the ground, but is less than an estate in fee;

(3) A statement of the purpose for which the property is to be acquired;

(4) A statement as to whether the owner will be permitted to remove all or a specified portion of any buildings, structures, permanent improvements, or fixtures situated on or affixed to the property;

(5) The name and address of the owner of the property and all other persons known to have an interest in the property, including the holders of vested or contingent future interests, the holders of liens, options, judgments, or other encumbrances on the title to the property; the holder of the equity of redemption under a mortgage; and the grantor and third party beneficiary under a deed of trust. Persons known to have an interest in the property but whose names or addresses cannot be ascertained with reasonable diligence and expense may be named as 'unknown persons' or addressed as 'address unknown.' A person's interest in property shall be deemed known if it appears of record, or could or would be discovered by the exercise of reasonable diligence and expense.

(6) A statement and notice as to the composition, method of selection, time and place of first meeting, and general duties of the board of appraisers;

(7) The name of the member of the board of appraisers appointed by the city.

(b) Unless the preliminary condemnation resolution specifically provides otherwise, the description of a parcel of land and the statement of intention to acquire title to it in fee simple absolute shall be deemed to include all buildings, structures, permanent improvements, and fixtures situated on or affixed to the land, and all privileges, appurtenances, and other property rights running with the land.

(c) The preliminary condemnation resolution shall initiate condemnation against all property described and all parties named therein. It shall not be necessary to initiate separate proceedings against each individual lot, tract, or parcel of land or each individual owner, but the resolution shall be limited to condemnation for a single project or purpose, and to property under common ownership."

The resolution adopted by the Board of Commissioners of Wilson County on 9 October 1978 followed the mandates of the statute. A copy of the resolution was duly served on plaintiffs as provided by law on 10 October 1978. The case *sub judice* was filed on 25 October 1978, and defendants were restrained and enjoined by a temporary restraining order on the same date. The resolution was filed in the Office of Register of Deeds of Wilson County on 17 October 1978 as provided by G.S. 160A-247.

G.S. 160A-255 provides:

"§ 160A-255. *Appeal to General Court of Justice.*—Any party to a condemnation proceeding, including the city, may appeal the proceeding to the appropriate division of the General Court of Justice, but the city may appeal only as to the issue of compensation. Notice of appeal shall be given within 30 days from the date that the final resolution of condemnation is adopted, and shall be served on all parties to the proceeding by registered mail to their last known address. An appeal shall not delay the vesting in the city of title to the property or hinder the city in any way from proceeding with the project or improvement for which the property was acquired, except that if the appeal is by a party described in G.S. 160A-243(b) or (c), vesting of title in the city

shall be suspended until the court has rendered final judgment on the power of the city to acquire the property and the amount of compensation to be paid. *In an appeal by a party described in G.S. 160A-243(b), the court may, in its discretion, reduce the amount of property that may be acquired by the city.*" (Emphasis added.)

Our study of the statutes in question leads us to conclude that plaintiffs have an adequate remedy at law in the case *sub judice* and that it was error for the trial court to proceed in equity. If the County condemns plaintiffs' property as proposed, plaintiffs have the right of appeal pursuant to G.S. 160A-255. In the event of such appeal, plaintiffs may raise all issues set out in the case *sub judice*, and the trial court may pass on each of them at that time.

The order entered is vacated and remanded to the trial court with instructions to dismiss the plaintiffs' case. all restraining orders entered are vacated.

Judges VAUGHN and HILL concur.

W. OSMOND SMITH III v. JACK MITCHELL AND WIFE, LAURA MITCHELL, AND THOMAS G. BARBER AND WIFE, SANDRA M. BARBER

No. 7917SC323

(Filed 8 January 1980)

Deeds §§ 19, 21 — fee simple estate conveyed — subsequent sale by grantee — grantor's right of first refusal — restriction void

Any restriction on a landowner's right freely to alienate his property, even though limited as to time and certain as to price, is void as an invalid restraint on alienation; therefore, a provision of restrictive covenants requiring grantees, who wished to sell, to give grantor the first opportunity to purchase "at a price no higher than the lowest price he is willing to accept from any other purchaser" was void.

APPEAL by plaintiff from *Reid, Judge*. Judgment entered 12 February 1979 in Superior Court, CASWELL County. Heard in the Court of Appeals on 27 November 1979.

Plaintiff brought this suit seeking to compel the conveyance to him of a piece of property previously owned by the defendants Mitchell and sold by them to the defendants Barber. In the alternative, he asserted a claim for damages, and alleged in his complaint that he had conveyed the property in question to the defendants Mitchell by a duly recorded deed dated 30 August 1974; that he had acquired the subject property, by will and by deed, from W. O. Smith, Jr., and was the sole owner prior to conveying a parcel of it to the defendants Mitchell; and that all of the property, including the lot conveyed to the Mitchells, was covered by certain restrictive covenants, duly recorded on 14 July 1967, and containing the following paragraph entitled ARTICLE XIV:

> If any future owner of lands herein described shall desire to sell the lands owned by him, he shall offer the parties of the first part the option to repurchase said property at a price no higher than the lowest price he is willing to accept from any other purchaser. Parties of the first part agree to exercise said option or to reject same in writing within 14 days of said offer. This covenant shall be binding on the parties of the first part and their heirs, successors, administrators, and executors or assigns for as long as W. Osmond Smith, Jr. shall live and for 20 years from the date of his death unless sooner rescinded.

Plaintiff further averred that the defendants Mitchell, by deed recorded 23 July 1975, had conveyed their lot to the defendants Barber, without first notifying plaintiff and giving him the "option to repurchase the property. . . ." On information and belief, he alleged that the Mitchells sold to the Barbers for $3,500.00.

Answering, defendants Mitchell and Barber admitted the conveyances as described in plaintiff's complaint and the due recordation of certain restrictive covenants, but contended that Article XIV thereof was void as an illegal restraint on alienation and was, therefore, contrary to public policy and unenforceable. Each defendant also counterclaimed for damages in the amount of $5,000.00, charging that plaintiff's actions in bringing suit was a breach of the warranties in their respective deeds and that such actions had cast a cloud on the title to the property in question.

On 3 January 1979 defendants moved for summary judgment on the basis that the verified pleadings filed in the action, together with the pertinent documents at issue, demonstrated that no genuine issues of material fact existed to support a judgment for plaintiff. Plaintiff thereafter moved for summary judgment in his favor. On 12 February 1979 the trial court filed its judgment granting the defendants' motion.

The court further ruled that the defendants' counterclaims were rendered moot by its judgment against plaintiff. Plaintiff appealed.

W. Osmond Smith III, and Ramsey, Hubbard & Galloway, by Mark Galloway, for plaintiff appellant.

Latham, Wood & Balog, by B. F. Wood, for defendant appellees.

HEDRICK, Judge.

This case presents squarely for our resolution the question of whether *any* restriction on a landowner's right to freely alienate his property, even though limited as to time and certain as to price, is void as an invalid restraint on alienation. We hold that it is. Summary judgment, therefore, was properly entered for defendants.

We are cognizant that, in so holding, we stand in apparent opposition to the jurisprudence of a number of jurisdictions which recognize so-called "pre-emptive rights" whereby the grantee, if he wishes to sell, must first offer the property to the grantor at a given price or at a price which can be determined according to a prearranged formula. *See* Annot., 40 A.L.R. 3d 943 (1971) and cases cited therein. Plaintiff urges that such is the law in North Carolina and that the restrictive provision in question here constitutes such a pre-emptive right in his favor. We reject plaintiff's view of the rule in our State. Moreover, we are confident that the long-standing principles laid down in *Hardy v. Galloway*, 111 N.C. 519, 15 S.E. 890 (1892), represent the better-reasoned and more enlightened view.

In *Hardy*, vendors of a tract of land sought to retain for themselves, their heirs and assigns, the right to repurchase the land "when sold." The trial court found the provision void, and

our Supreme Court affirmed. Pointing out that the right of alienation is "an inseparable incident to an estate in fee", the Court held as follows:

> The provision, . . . can . . . take effect, if at all, as a condition subsequent, and viewed in this light we cannot hesitate in deciding that the restriction upon alienation attempted to be imposed after the grant of the fee, is repugnant to the nature of the estate granted, contrary to the policy of the law, and therefore inoperative. . . . [T]he law does not recognize or enforce *any* condition which would directly *or indirectly* limit or destroy [the] privilege [of free alienation] . . .

Id. at 523, 15 S.E. at 890. [Our emphasis.]

Plaintiff insists that *Hardy* is different from and does not control the resolution of this case for the reason that, in *Hardy*, no amount was fixed as purchase-money, nor was the right to repurchase definite as to time. While we recognize that the two cases are distinguishable on those grounds, we do not agree that the holding of *Hardy* is so narrow. We interpret *Hardy* to establish for this State the sound policy that a grant of the estate in fee vests the owner with the inseparable and unlimited right of free alienation. No restraint, however slight, whether direct or indirect, express or implied, may be imposed to frustrate or diminish that right. As was noted in *Christmas v. Winston*, 152 N.C. 48, 67 S.E. 58, 59 (1910), restraining the right of "free and unlimited alienation" for even a single day is repugnant to the fee, unreasonable and void.

Our interpretation of the law as established by *Hardy* is bolstered by the fact that numerous opinions of our Courts, as well as the observations of annotators and legal commentators, have construed the case to so hold. *See*, for example, Annot., 40 A.L.R. 3d 942 (1971) which cites *Hardy* as a successful attempt "to invoke the common-law rule concerning restraints on alienation to invalidate pre-emptive rights contained in deeds." Professor Webster has noted that North Carolina law, as laid down by *Hardy*, rejects restraints on alienation disguised as "pre-emptive rights." Webster, *Real Estate Law in North Carolina* § 346 (1971). A survey of North Carolina case law in 1955 cited *Hardy* as holding "void a right reserved in the grantor and his heirs to repurchase the land when sold." *Third Annual Survey of North*

Carolina Case Law, 34 N.C.L. Rev. 1, 72 (1955). *See also* Christopher, *Spendthrift and Other Restraints in Trusts: North Carolina*, 41 N.C.L. Rev. 49 (1962). *Accord, Norwood v. Crowder*, 177 N.C. 469, 99 S.E. 345 (1919); *Lee v. Oates*, 171 N.C. 717, 88 S.E. 889 (1916) [quoting approvingly from *Dick v. Pitchford*, 21 N.C. 480, where Justice Gaston observed: "The capricious regulations which individuals would fain impose on the enjoyment and disposal of property must yield to the fixed rules which have been prescribed by the supreme power as essential to the useful existence of property."]; *Schwren v. Falls*, 170 N.C. 251, 87 S.E. 49 (1915); *Latimer v. Waddell*, 119 N.C. 370, 26 S.E. 122 (1896).

As recently as 1974, this Court confirmed the principle that any restraint on alienation is void. *Jenkins v. Coombs*, 21 N.C. App. 683, 205 S.E. 2d 728 (1974) [citing with approval *Hardy v. Galloway*]. In our opinion, public policy dictates that we reconfirm the rule today. To allow the "pre-emptive right" which the plaintiff herein proposes obviously would deprive the owner of the fee from selling it to whomever he wishes, or from selling at a low price to family or friends, or from giving the land away if he chooses. The inescapable conclusion follows that such a deprivation frustrates his right of free and *unlimited* alienation, and thereby contravenes public policy.

We hold that the "pre-emptive right" contained in Article XIV of the restrictive covenants sought to be imposed by plaintiff is repugnant to the fee, unreasonable and void. Accordingly, the judgment of the trial court granting the defendants' motion for summary judgment is

Affirmed.

Judges MARTIN (Robert M.) and WELLS concur.

STATE OF NORTH CAROLINA v. WARREN HART

No. 797SC304

(Filed 8 January 1980)

1. **Homicide § 21.8— second degree murder—sufficiency of evidence**

The State's evidence was not all exculpatory and was sufficient to support a conviction of defendant for second degree murder of his wife where it tended to show that defendant told an officer that his wife came toward him with a knife and that he pulled his pistol and shot her; the officer did not observe any knife in the room where the shooting occurred; deceased suffered four wounds caused by three bullets; and the gun was very close to deceased's head when the wounds were inflicted.

2. **Criminal Law § 112.6— instructions that insanity defense not raised**

Where defendant filed a notice of intent to raise the defense of insanity and, pursuant to G.S. 15A-1213, the judge informed prospective jurors of the possibility that defendant might rely on the defense of insanity, it was proper for the court to inform the jury in the charge that the defense of insanity had not been raised at the trial and that it should not be considered in the jury's deliberations.

3. **Criminal Law § 112.6; Homicide § 24.3— self-defense—instructions on burden of proof**

The trial court's instruction that "the burden is upon the state to satisfy the jury from the evidence in the case that the killing was not justified on the grounds of self-defense" did not constitute prejudicial error where the charge as a whole placed the burden on the State to prove "beyond a reasonable doubt" that defendant did not act in self-defense.

4. **Criminal Law § 113.4— failure to define "altercation"**

The trial court did not err in failing to define "altercation" since it is a word of common usage and no request was made for a special instruction.

APPEAL by defendant from *Fountain, Judge.* Judgment entered 7 December 1978 in Superior Court, EDGECOMBE County. Heard in the Court of Appeals 12 November 1979.

On 24 July 1978, at approximately 5:00 a.m., Warren Hart shot and killed his wife, Bessie Hart. Rocky Mount policemen, in response to a call, were in defendant's neighborhood the morning of the shooting. Officer Frank Villalobos testified at trial that he was driving down the street, preparing to clear the area, when he saw defendant rush out of his home, shouting for help and saying that he had killed his wife. The officer parked his car, took the gun that defendant was carrying, and accompanied defendant into his home. Villalobos found Bessie Hart lying on the bedroom floor

between the bed and a baby's crib. The deceased's head was toward the back of the room, and her feet toward the door. Villalobos testified that, "The bed was a pool of blood and seemed like the body marked as the body fell off the bed. It made marks in the position or form in which the body fell off the bed." Defendant told Villalobos that his wife lunged at him with a knife and he had to shoot her. The officer did not observe any knife at that time anywhere in the room.

Officer William Davis was also in defendant's neighborhood on the morning of the killing and responded to Officer Villalobos' call for assistance. Davis entered defendant's home, viewed the body and then advised defendant of his constitutional rights.

Later, in the kitchen, the defendant told Officer Davis that his wife had made threats at him, cursing and taunting. Defendant stated he went into the bedroom to kiss his wife goodbye and that she lunged at him and he jumped back, pulled a revolver and shot her. Defendant further told Officer Davis that when he went into the bedroom to put on his shirt and jacket, his wife slashed at him, and he jumped back, pulled a .32 caliber revolver from the waistband of his pants, and shot the victim. Defendant further stated his wife said previously if the police did not take care of Mr. Hart, she would.

Defendant was taken to the police station where he signed a waiver of rights form. While at the police station, immediately after the shooting, defendant gave an account of the events surrounding the shooting to Lieutenant James Hoell as follows: Defendant and his wife went to bed around 1:00 o'clock the morning of the shooting. Defendant had wanted to have sexual relations, but his wife refused. The couple argued briefly, and then Bessie Hart went into the kitchen. She returned with a butcher knife wrapped in a towel and went into the couple's bedroom. Bessie Hart slept in the bedroom. Defendant spent the night on the couch in the front room. At some point, while defendant was on the couch, Bessie Hart returned to the kitchen, stayed there for approximately five minutes and then returned to the bedroom. While she was passing through the front room, Bessie Hart told defendant she was going, in Hoell's words, " . . . to get rid of his damn ass."

Defendant told [Lieutenant] Hoell that he got up around 5:30 the morning of the shooting. Defendant is a veteran and was going to the V. A. Hospital in Durham for treatment. He went out to a cinder block pile at the back of his house, got his .32 caliber pistol and returned to the house. Defendant stated that he kept the gun for protection. He said that he wanted to kiss his wife goodbye because he was going to be gone for several days and felt that a man ought to kiss his wife when he was going to leave.

Ed Williford of the Rocky Mount Police Department testified that defendant stated to him that after his wife refused to kiss him goodbye she told defendant to get away from her; that she wanted nothing to do with him; that she came up from the bed with a knife in her hand and came toward him. Defendant then shot his wife, and she fell back on the bed.

Bessie Hart's body was examined by a pathologist. Four wounds, caused by three bullets, were identifed. One bullet was found in the midline of the head, above the nose. The bullet was flattened and lay between the skin and the skull. A second wound was found near the opening of the right ear. A third wound was in the palm of the left hand and a fourth wound was found on the deceased's forehead. The bullet that caused the fourth wound was found flattened against the back of the skull. According to the pathologist, this was the bullet that caused death. The pathologist further surmised that the bullet that caused the wound in Bessie Hart's hand was the one that was found lodged on the outside of her skull.

Further facts are set forth in the opinion.

From a verdict of guilty of murder in the second-degree, defendant appealed.

Attorney General Edmisten, by Associate Attorney Thomas G. Meacham, Jr., for the State.

Don Evans for defendant appellant.

HILL, Judge.

[1] Defendant first assigns as error the trial court's refusal to allow his motion to dismiss. Defendant asserts that all of the State's evidence was exculpatory, and for that reason the motion

to dismiss should have been allowed. *See State v. Johnson*, 261 N.C. 727, 136 S.E. 2d 84 (1964). We agree with defendant's analysis of *Johnson*, but find the facts in this case distinguishable.

Officer Villalobos testified that defendant exclaimed to him that he had shot and killed his wife; that he removed a .32 caliber pistol from defendant's hand; that the bed in the room where the victim was killed was a pool of blood; that he saw the victim lying with her head away from the door; that he did not observe any scratches or stab wounds on defendant; and that at no time did he see a knife in the bedroom where Bessie Hart died. Officer Davis testified that defendant told him the deceased lunged at him and that the defendant jumped back, pulled his pistol, and shot his wife.

Lieutenant Hoell interviewed defendant the day of the shooting. Hoell testified that defendant told him he went outside the morning of the shooting to get his pistol. Defendant then entered the room where his wife was sleeping to kiss her goodbye. Defendant told him he saw the knife in his wife's hand, but that defendant never did say Bessie Hart came at him with the knife.

Dr. Emerson Scarborough, the pathologist, testifying for the State, described Bessie Hart's wounds. Dr. Scarborough conjectured that the wound in Bessie Hart's hand and the superficial wound in her head were caused by the same bullet. The pathologist stated that it was possible that the wounded hand was in contact with the head, that the hand was close to the muzzle of the gun; and that the muzzle of the gun was very close to the hand if not actually touching it. The doctor further opined that the gun was "several inches" away from Bessie Hart when the wound near her ear and the fatal wound were inflicted.

Taken as a whole, the State's evidence was inculpatory. Defendant's first assignment of error is overruled.

[2] Defendant asserts by his second assignment of error that the trial judge erred when, in his charge to the jury, he mentioned that defendant had filed pretrial notice that he might rely on the insanity defense. The judge told the jury that the defense had not been raised at trial and instructed them to disregard insanity as a

defense in their deliberations. This assignment of error is also without merit and overruled.

G.S. 15A-959 requires pretrial notice by a defendant if he intends to raise the defense of insanity. Defendant filed such notice and, pursuant to G.S. 15A-1213, the judge informed prospective jurors of the possibility that defendant might rely on the affirmative defense of insanity. It was proper at the close of all the evidence for the trial judge to inform the jurors that the insanity defense indeed had not been presented in order to eliminate any idea the jury might have had that they were still to consider the defense.

[3] Defendant relied on self-defense at trial. Therefore, the burden of disproving self-defense beyond a reasonable doubt was placed upon the State. *Mullaney v. Wilbur*, 421 U.S. 684, 44 L.Ed. 2d 508, 95 S.Ct. 1881 (1975); *State v. McCoy*, 34 N.C. App. 567, 239 S.E. 2d 300 (1977). The judge, in his instruction, stated that,

> . . . where the question of self-defense arises in the case, the burden is upon the state to satisfy the jury from the evidence in the case that the killing was not justified on the grounds of self-defense.

We agree with defendant that the burden on the State is to prove beyond a *reasonable doubt* that the killing was not justified on the grounds of self-defense. Considering the charge as a whole, we find that it fairly and correctly presents the law and that there is no ground for reversal. *See State v. Tomblin*, 276 N.C. 273, 171 S.E. 2d 901 (1970). At the beginning of his charge, the judge told the jury that the State's burden was to prove defendant's guilt beyond a reasonable doubt. Furthermore, the jury was told that the defendant had no burden of proving self-defense. Finally, the judge instructed the jury that the State's burden of proof in seeking a conviction for first-degree murder, second-degree murder, or manslaughter was to satisfy them beyond a *reasonable doubt* that the defendant committed the proscribed acts, with the requisite *mens rea*, and did not do so in defense of his own person. We find no prejudicial error in the judge's charge.

Additionally, we find that the judge did not err in his explanation to the jury that the plea of self-defense is not available

to an aggressor. The law was explained in light of the evidence in the particular case and not upon a set of hypothetical facts. G.S. 1-180, G.S. 15A-1232.

[4] There was no error in the judge's failure to define "altercation", as contended by the appellant. It is a word of common usage, and no request for a special instruction was made. *See State v. Jennings*, 276 N.C. 157, 171 S.E. 2d 447 (1970).

For the reasons stated above, we find in the judgment below

No error.

Chief Judge MORRIS and Judge PARKER concur.

RONNIE GENE CHESNUTT, PETITIONER v. ELBERT L. PETERS, JR., COMMISSIONER OF NORTH CAROLINA DIVISION OF MOTOR VEHICLES, RESPONDENT

No. 7910SC290

(Filed 8 January 1980)

Automobiles § 2.2— driver's license—epileptic—blackout while driving—insufficient evidence of uncontrolled seizures

The evidence in the record as a whole did not support a determination by the Medical Review Board cancelling the driving privilege of petitioner, who takes medication to prevent seizures and suffered a blackout while driving, on the ground that he has an uncontrolled seizure disorder which prevents him from exercising reasonable and ordinary control over a motor vehicle while operating it on the highway. Furthermore, the appellate court refused to adopt a standard that one must be free of seizures for a year before the illness may be considered adequately controlled. G.S. 20-9.

Judge WEBB dissenting.

APPEAL by respondent from *Braswell, Judge.* Judgment entered 10 January 1979 in Superior Court, WAKE County. Heard in the Court of Appeals 15 November 1979.

Ronnie Gene Chesnutt is a single, twenty-five-year-old male who has suffered seizures since age seventeen. In 1976 he went to Duke University Medical Center for examination and prescription of medication. Prior to that time, he had been taking Dilantin and

phenobarbital; the Duke physicians also prescribed Mysoline and he has taken the recommended medications since the examination. Ronnie has been licensed to drive for eight years and was never involved in an accident until 7 May 1978 when he blacked out while driving on U.S. 421 and ran off the road. No one was injured or any property damaged.

The state highway patrolman who investigated the accident recommended that Ronnie be given a reexamination to determine whether he should continue to be licensed to drive. He was examined by Dr. Neil A. Worden. On 25 August 1978 the petitioner's driving privilege was cancelled by respondent. Petitioner requested review by a reviewing board. The Medical Review Board conducted a hearing on 26 September 1978 and thereafter entered order finding petitioner was examined by Dr. Worden and setting out his findings, making the conclusion that Ronnie was afflicted by an uncontrolled seizure disorder that prevents him from exercising reasonable and ordinary control over a motor vehicle while operating it upon the highways and sustaining the order of respondent withdrawing petitioner's driving privilege. The Board further ordered that petitioner not be licensed "until it has been demonstrated that his seizures are likely to remain controlled, by his having remained totally free of seizures" and blackouts for a period of at least twelve months.

Petitioner appealed to the superior court, and Judge Braswell, upon review of the whole record before him, found the evidence did not support the conclusion of the Medical Review Board that petitioner's condition was not controlled and reversed the Board's decision, restoring petitioner's driving privilege to him. From this judgment, respondent appeals.

A. Maxwell Ruppe for petitioner appellee.

Attorney General Edmisten by Deputy Attorney General William W. Melvin, Assistant Attorney General Mary I. Murrill and Assistant Attorney General William B. Ray, for the respondent appellant.

MARTIN (Harry C.), Judge.

The pertinent portions of the statute governing this proceeding are:

(e) The Division shall not issue an operator's or chauffeur's license to any person when in the opinion of the Division such person is afflicted with or suffering from such physicial or mental disability or disease as will serve to prevent such person from exercising reasonable and ordinary control over a motor vehicle while operating the same upon the highways, ...

. . . .

(g)(4) Whenever a license is denied by the Commissioner, such denial may be reviewed by a reviewing board upon written request of the applicant filed with the Division within 10 days after receipt of such denial. . . .

. . . .

f. Actions of the reviewing board are subject to judicial review as provided under Chapter 150[A] of the General Statutes.

N.C. Gen. Stat. 20-9(e), (g)(4), (g)(4)f.

The Medical Review Board based its decision upon a report and letter of Dr. Neil A. Worden, setting out Dr. Worden's findings in two places in its order. He found that petitioner "apparently has grand mal seizures—have been fairly controlled except when patient does not take prescriptions." There is no evidence in the record that petitioner has failed to take his medicines as prescribed. Dr. Worden further found petitioner's latest electroencephalogram was normal. In his letter, Dr. Worden stated that following petitioner's examination at Duke University Hospital in 1976, "he has been very well controlled." Petitioner apparently had a seizure in May of 1978 that precipitated this litigation but has had no such episodes since then. Dr. Worden recommended that petitioner "should drive at slow speeds."

The Board's decision is based upon its conclusion that petitioner has an *uncontrolled* seizure disorder that prevents him from exercising reasonable and ordinary control over a motor vehicle while operating it upon the highways. The record on appeal, including the letter and report of Dr. Worden, contains no evidence that petitioner suffered from an "uncontrolled seizure

disorder." Dr. Worden's evidence, the only medical evidence before the Board, is to the contrary.

It is true that the record shows petitioner has suffered seizures from time to time. But this is a far cry from being sufficient to support the statutory requirements when the whole record test is applied. The application of the whole record test is discussed by Justice Copeland in *Thompson v. Board of Education*, 292 N.C. 406, 410, 233 S.E. 2d 538, 541 (1977):

> This standard of judicial review is known as the "whole record" test and must be distinguished from both *de novo* review and the "any competent evidence" standard of review. [Citations omitted.] The "whole record" test does not allow the reviewing court to replace the Board's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*, ... [Citation omitted.] On the other hand, the "whole record" rule requires the court, in determining the substantiality of evidence supporting the Board's decision, to take into account whatever in the record fairly detracts from the weight of the Board's evidence. Under the whole evidence rule, the court may not consider the evidence which in and of itself justifies the Board's result, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn.

Applied here, the whole record does not support the required finding that petitioner is suffering from a mental or physical disability that prevents him from exercising reasonable and ordinary control in the operation of a motor vehicle on the highways. *Ormond v. Garrett, Comr. of Motor Vehicles*, 8 N.C. App. 662, 175 S.E. 2d 371 (1970), 38 A.L.R. 3d 448 (1971).

Respondent in his brief urges us to adopt a standard that one must be free of seizures for a year before the illness may be considered adequately controlled, relying upon a publication by the North Carolina Department of Human Resources, Division of Health Services, the United States Public Health Service Guidelines, and the American Medical Association's Physician's Guide for Determining Driver Limitation. This is trial by pamphlet, rather than law, and we reject the suggestion.

The judgment of the superior court is

Affirmed.

Judge VAUGHN concurs.

Judge WEBB dissents.

Judge WEBB dissenting.

I dissent. There is evidence in the record that respondent suffers from epilepsy and that he had an epileptic seizure while driving which caused him to have an automobile accident. The Medical Review Board found:

> "It is the collective opinion of this Board that Mr. Ronnie Gene Chesnutt is afflicted with or suffering from such physical or mental disability or disease as would serve to prevent such person from exercising reasonable and ordinary control over a motor vehicle while operating the same upon the highways . . . ."

I believe this finding by the Medical Review Board is supported by the evidence. I vote to reverse the judgment of the superior court.

CORNELIA H. LOWE v. RICHARD J. MURCHISON AND ANNA P. MURCHISON

No. 7914SC263

(Filed 8 January 1980)

Trusts § 14.2— promise to lend money for repurchase of land—land bought by lender—breach of confidence—constructive trust

Where a church deacon promises to a church member, who is elderly, illiterate and in poor health, a loan to allow her to repurchase property she has lost through foreclosure, the church member is entitled to have a constructive trust impressed upon the land if the deacon purchases it for himself rather than abiding by his promise to make the loan.

Lowe v. Murchison

APPEAL by plaintiff from *Farmer, Judge.* Judgment entered 14 February 1979 in Superior Court, DURHAM County. Heard in the Court of Appeals 14 November 1979.

Plaintiff's complaint may be summarized as follows: Plaintiff failed to keep current the payments on her residence, which resulted in foreclosure and public sale of her property. Mechanics & Farmers Bank was the highest bidder. Plaintiff did not repurchase the property within the time allowed to her, so she was evicted. She applied to the pastor of her church for help in repurchasing the property, and the pastor, plaintiff, and defendant, a deacon in the church, met to discuss the matter. When the pastor explained that the procedures required by the church would mean a long delay, defendant "volunteered to supply plaintiff with the necessary funds in the form of a loan to her so the plaintiff could repurchase the house." By arrangement, plaintiff met defendant on two consecutive mornings at Mechanics & Farmers Bank, and at the second meeting she executed documents which defendant represented to her as, and which she believed to be, a deed of trust or other papers evidencing a loan from defendant of the $8,000 purchase price. In fact, defendant purchased the property in his and his wife's names. On the afternoon of that day plaintiff moved back into the house, and remained there for nearly two years, until she received a notice to vacate. At about the time plaintiff reentered the property she received from a realty company, defendants' agent, notice to begin payments of $100 per month as "rent." She made these payments until the time of the notice to vacate, when her tendered payment was refused. Plaintiff seeks to have a constructive trust placed upon the property.

Defendant denied that he had told the plaintiff that he was making a loan to her and that she had ever executed any papers in his presence. Defendants moved for summary judgment, which was granted. Plaintiff appeals.

Grover C. McCain, Jr., and Frances D. Cooke for plaintiff appellant.

Eric C. Michaux and Robert Brown, Jr., for defendant appellees.

ARNOLD, Judge.

Plaintiff contends that the court erred in granting summary judgment for the defendants. The test on a motion for summary judgment is whether there exists any genuine issue of material fact. G.S. 1A-1, Rule 56(c). Defendants here moved for summary judgment, and it appears from the face of their motion and the court's order granting summary judgment that affidavits were presented and considered in support of the motion. The content of these affidavits does not appear in the record, however. As a result, we can consider only the pleadings in determining whether defendant met his burden of showing that no genuine issue of material fact exists. As it is clear from the pleadings that there are genuine issues of fact—the main one being whether defendant promised to loan plaintiff the money to repurchase her property—the question for our determination is whether these issues are material.

Plaintiff contends that defendant offered to loan her the money to repurchase her house, and that he represented to her during their meeting at the bank that she was signing loan papers. Defendant denies this. These issues are only material if resolution of them in plaintiff's favor would entitle her to judgment as a matter of law. For purposes of this discussion, then, we will assume that the facts are as plaintiff alleges them to be.

The narrow question on this appeal may be set out as follows: "Where a church deacon promises to a church member who is elderly, illiterate and in poor health, a loan to allow her to repurchase property she has lost through foreclosure, is the church member entitled to have a constructive trust impressed upon the land if the deacon purchases it for himself rather than abiding by his promise to make the loan?" We find that the answer to this question is yes.

"A constructive trust is . . . imposed by courts of equity to prevent the unjust enrichment of the holder of title to, or of an interest in, property which such holder acquired through . . . some . . . circumstance making it inequitable for him to retain it against the claim of the beneficiary of the constructive trust. . . . [A] constructive trust is . . . brought into operation to prevent unjust enrichment." *Wilson v. Crab Orchard Development Co., Inc.*, 276 N.C. 198, 211, 171 S.E. 2d 873, 882 (1970). A constructive

trust may be imposed in a virtually unlimited variety of situations, the common element being some wrongdoing by the holder of title to the property. *Id.*

Two early North Carolina cases are closely analogous to the situation now before us, and control our decision here. In *Mulholland v. York*, 82 N.C. 510 (1880), the defendant bought the plaintiff's lands at an execution sale under an agreement with the plaintiff that when he was reimbursed the purchase money and interest he would reconvey the land to the plaintiff. The court found that on these facts a trust in the plaintiff's favor attached, since "the debtor, trusting to the good faith of the party promising and lulled into a false security, may have desisted, in consequence of the assurance, from making other efforts to prevent the sale and sacrifice of his property, and it would be a fraud in the purchaser to take advantage of the confidence and hold it, thus acquired, for his own use and to the injury of the owner." *Id.* at 514-15. Similarly, in the present case plaintiff's reliance upon the defendant's promise may have caused her to cease looking elsewhere for a loan with which to repurchase her property. In *Vestal v. Sloan*, 76 N.C. 127 (1877), likewise, the plaintiff purchased defendant's land at an execution sale, having agreed that he would reconvey the land to defendant upon payment of the purchase price and certain pre-existing debts. The court said simply, "This constituted the relation of trustee and *cestui que trust*." *Id.* at 129.

We hold that if the facts are found to be as plaintiff alleges, she would be entitled to a constructive trust in her favor. Therefore, the issues of fact are material, and summary judgment for defendants was improper. The order of the trial court is

Reversed.

Judges CLARK and ERWIN concur.

STATE OF NORTH CAROLINA v. GLORIA ANN BOOKER

No. 7921SC656

(Filed 8 January 1980)

Searches and Seizures § 8— probable cause for arrest— absence of formal arrest— search incident to arrest

An officer's warrantless search of a brown leather purse worn by defendant at her waist was lawful as an incident of defendant's arrest for possession of cocaine where the officer had probable cause to arrest defendant based upon information from a confidential informant who had proved reliable in the past that defendant would be at a certain restaurant selling cocaine out of a brown pouch around her waist; the officer approached defendant at the restaurant, explained to her the information he had received, and told her he intended to search the brown leather purse strapped around her waist; defendant resisted and the officer placed her under arrest for delaying an officer; and the officer then searched the purse worn by defendant, since the officer's failure formally to place defendant under arrest for possession of cocaine before announcing his intention to search her did not remove the situation from the search incident to arrest exception.

APPEAL by defendant from *Walker (Hal H.), Judge.* Judgments entered 23 February 1979 in Superior Court, FORSYTH County. Heard in the Court of Appeals 5 December 1979.

Defendant was charged with possession of marijuana, LSD, PCP and cocaine, and with resisting arrest. The cases were consolidated for trial. Defendant moved to suppress evidence and the court held a voir dire, at which the following evidence was presented:

On 6 October 1978 at 4:20 p.m. Officer Minter of the Winston-Salem police received a call from a confidential informant who had proved reliable in the past. The informant told him that between 4:45 and 5:00 that day defendant and another female would be at the Chicken and Honey Restaurant. They would be driving a green Vega, license number RB-1713, and defendant would be selling cocaine out of a brown pouch around her waist.

Officer Minter did not think there was time to get a search warrant, which usually takes from an hour to an hour and a half, so he proceeded to the restaurant where he saw a green Vega. He had known defendant for a year, and he saw her 40 or 50 yards away, sitting on the hood of a car. She had a brown purse

strapped around her waist. When two other officers had arrived at the scene Minter approached the defendant, told her the information that he had received from the informant, and explained to her that he had a right to search her but that at the scene he would not search anything but the brown leather purse. Defendant yelled and cursed him, saying he wasn't going to search her. He told her he was placing her under arrest for delaying a police officer, and he struggled with her in order to subdue her and put handcuffs on her. He then took the purse and searched it, and he also searched a brown paper bag handed to him by Officer Yokley. The purse was found to contain cocaine, and the paper bag to contain marijuana, PCP, and LSD.

Officer Yokley testified that as defendant got off the hood of the car "she took her foot and shoved a paper bag beneath the left front wheel of the vehicle." It was this bag which he gave to Officer Minter.

The court denied defendant's motion to suppress. Defendant was found guilty on all charges and given active sentences. She appeals.

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

Tanis & Tally, by David R. Tanis, for defendant appellant.

ARNOLD, Judge.

Defendant argues that the warrantless search of the brown leather purse she wore at her waist was unreasonable. She relies upon *Katz v. United States*, 389 U.S. 347, 357, 19 L.Ed. 2d 576, 585, 88 S.Ct. 507, 514 (1967), where the United States Supreme Court indicated that "searches conducted outside the judicial process, without prior approval by Judge or Magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions." However, among the approved exceptions is that made for searches incident to a lawful arrest, *see Coolidge v. New Hampshire*, 403 U.S. 443, 29 L.Ed. 2d 564, 91 S.Ct. 2022, *reh. denied* 404 U.S. 874, 30 L.Ed. 2d 120, 92 S.Ct. 26 (1971), and we find that this exception applies to justify the search in the instant case.

The sequence of events here is not the usual one which appears in "search incident" cases. Most often, an officer with probable cause to arrest does so, and conducts a contemporaneous search of the arrestee's person and the area within his immediate control. *E.g. State v. Roberts*, 276 N.C. 98, 171 S.E. 2d 440 (1970). Here, however, the officer, with sufficient probable cause to arrest, approached defendant and, without arresting her, explained to her the information he had received and told her that he intended to search her. She resisted, he placed her under arrest for delaying an officer, and he then conducted a search of the pouch she wore at her waist.

In determining whether this search was incident to a lawful arrest, we are aided by the decision in *Peters v. New York*, 392 U.S. 40, 20 L.Ed. 2d 917, 88 S.Ct. 1889 (1968). There the officer, having probable cause to arrest, pursued the defendant, caught him, and patted him down. While the officer never formally announced that defendant was under arrest, the Court referred to the fact that probable cause for the arrest existed before the defendant was seized, and concluded that "the arrest had, for purposes of constitutional justification, already taken place before the search commenced." *Id.* at 67, 20 L.Ed. 2d 937, 88 S.Ct. 1905. Here, as in *Peters*, probable cause to arrest existed before the search commenced, and we do not find that the officer's failure to formally place defendant under arrest for possession of cocaine before announcing his intention to search her removed the situation from the "search incident" exception and made the search unreasonable. *See* C. Whitebread, Constitutional Criminal Procedure 147 (1978) ("When the justification for the stop reaches the threshold level of probable cause to arrest, the . . . jurisprudence of 'search incident to a lawful arrest' governs the nature of a permissible search. . . .").

Defendant's further argument that the arrest was without probable cause has no merit. On very similar facts probable cause has been found to exist. *See State v. Roberts, supra.* Here, sufficient evidence was presented to show the reliability of the informant, and the information which he gave was corroborated by the officer's own observation.

We find no error in the search of the brown paper bag, which was in plain view. *See Coolidge v. New Hampshire, supra.* Nor is

there merit in defendant's further assignment of error. We find that defendant received a fair trial, free from prejudicial error.

No error.

Judges CLARK and ERWIN concur.

HAZEL C. WILKES, COY C. PRIVETTE, GEORGE F. WOODRUFF, JR. AND MELVIN G. SLOAN, JR. v. THE NORTH CAROLINA STATE BOARD OF ALCOHOLIC CONTROL, AN AGENCY OF THE STATE OF NORTH CAROLINA; MARVIN SPEIGHT, CHAIRMAN, ZEBULON ALLEY AND CLARK BROWN, MEMBERS; THE NORTH CAROLINA STATE BOARD OF ELECTIONS, AN AGENCY OF THE STATE OF NORTH CAROLINA; R. KENNETH BABB, CHAIRMAN, MRS. CHARLES L. HERRING, JOHN L. STICKLEY, SR. AND DR. SYDNEY BARNWELL, OFFICERS AND MEMBERS; RUFUS EDMISTEN, ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA; AND THAD EURE, SECRETARY OF STATE OF THE STATE OF NORTH CAROLINA

No. 7910SC460

(Filed 8 January 1980)

Constitutional Law § 4— statute authorizing mixed drink referendum—plaintiffs not injured—no standing to challenge constitutionality of statute

Plaintiffs had no standing to bring an action challenging the constitutionality of Chapter 1138 of the 1977 Session Laws (incorporated into G.S. Chapter 18A) providing for city and county referendums on mixed drinks, since plaintiffs failed to allege a direct injury to any of them resulting from such supposed unconstitutionality.

APPEAL by plaintiffs from *Bailey, Judge.* Order entered 22 March 1979 in Superior Court, WAKE County. Heard in the Court of Appeals 7 December 1979.

On 15 June 1978 the General Assembly of North Carolina ratified Senate Bill 735, Chapter 1138 of the 1977 Session Laws (Second Session 1978), entitled "AN ACT TO ALLOW CITIES AND COUNTIES WITH ABC STORES TO VOTE ON THE SALE OF MIXED BEVERAGES IN SOCIAL ESTABLISHMENTS AND RESTAURANTS SEATING AT LEAST 36." This act is now incorporated into Chapter 18A of the General Statutes. Plaintiffs, citizens and taxpayers, seek a declaratory judgment that the act is unconstitutional.

Defendants moved for dismissal under G.S. 1A-1, Rule 12(b)(6), and their motion was granted. Plaintiffs appeal.

David H. Wagner and James C. Fuller, Jr. for plaintiff appellants.

Attorney General Edmisten, by Assistant Attorney General James Wallace, Jr., for the State.

ARNOLD, Judge.

The trial court's order of dismissal purported to find that Chapter 1138 is constitutional. Plaintiffs are correct in their contention that such a ruling on the merits cannot be made on a motion to dismiss. The trial court also found, however, that plaintiffs are without standing to bring this action, and in this we find the trial court is correct.

"Only one who is in immediate danger of sustaining a *direct injury* from legislative action may assail the validity of such action. It is not sufficient that he has merely a general interest common to all members of the public." *Charles Stores Co., Inc. v. Tucker*, 263 N.C. 710, 717, 140 S.E. 2d 370, 375 (1965), quoted in *Nicholson v. Education Assistance Authority*, 275 N.C. 439, 447, 168 S.E. 2d 401, 406 (1969) (emphasis added). An example of such a direct injury was given in *Wynn v. Trustees*, 255 N.C. 594, 601, 122 S.E. 2d 404, 409 (1961). There the plaintiffs, as citizens and taxpayers, attacked the constitutionality of a bond issue and special increase in county taxes which would be used to construct new campuses for two segregated colleges. The court found that the plaintiffs had no standing, and continued, "It is noted that plaintiffs do not allege that any qualified prospective student has been or will be excluded from attending either . . . College solely on the basis of race. Suffice it to say if and when the constitutional rights of any person . . . are denied, a remedy is available *to such person* for the vindication and enforcement of such rights." (Emphasis added.)

The plaintiffs in the present case allege that Chapter 1138 is unconstitutional upon a number of grounds, but they fail to allege a direct injury to any of them resulting from such supposed unconstitutionality. For example, they allege that the act "creates unreasonable, arbitrary and discriminatory classifications of social

establishments and restaurants," apparently a reference to the fact that the act allows the privilege of deciding to sell mixed beverages only to social establishments and restaurants seating at least 36. However, the plaintiffs do not allege that any of them is the owner of a restaurant or social establishment seating less than 36, or is otherwise in such a position as to be directly injured by this portion of the act. Similarly, the plaintiffs allege that Chapter 1138 "denies the right to vote and equal protection of the laws to the aged, infirmed [sic] and severely handicapped citizens of the state," apparently referring to the fact that G.S. 18A-51, which is incorporated into the act by reference, at the time this suit was filed provided that no absentee ballots be used in the elections held under the act. (Absentee ballots are now permitted. Chapter 140, 1979 Session Laws.) No plaintiff has alleged, however, that he has in fact been denied the right to vote in elections held under the act.

Plaintiffs argue in their brief that plaintiff Melvin Sloan, alleged in the complaint to be 20 years old, is directly injured by the act because, while he is an adult for all other purposes, Chapter 1138 denies him the privilege of buying mixed beverages until he reaches age 21. Whatever may be the merits of this claim of unconstitutionality, we find no allegation of it in the complaint. Motions to dismiss for failure to state a claim for relief are determined on the basis of the pleadings. G.S. 1A-1, Rule 12(b). The mere incorporation by reference of Chapter 1138 into plaintiffs' complaint is not an allegation that plaintiff Sloan is injured by Sec. 2 of the act, which makes unlawful the sale of mixed beverages to those under 21.

Neither does plaintiffs' further allegation that as taxpayers they will be injured by the use of public funds for holding the elections provided for by the act give them standing. *See Hill v. Comrs. of Greene*, 209 N.C. 4, 182 S.E. 709 (1935). Since the trial court correctly found that plaintiffs have no standing to bring this action, the dismissal by the trial court is

Affirmed.

Judges CLARK and ERWIN concur.

STATE OF NORTH CAROLINA v. JAMES MILLER GOODE, JR.

No. 7910SC617

(Filed 8 January 1980)

1. **Constitutional Law § 48; Criminal Law § 175.2— denial of recess—effective assistance of counsel**

Defendant was not denied the right to effective assistance of counsel by the court's denial of his motion for a recess at the close of the State's evidence in order to make a decision as to whether to present evidence.

2. **Criminal Law § 99.9— inappropriate question by court—absence of prejudice**

Where an officer testified that defendant was on foot and that he pursued defendant in his car, and defense counsel asked the officer a question pertaining to the speed of his car, the court's question, "You weren't planning to pull him for speeding, were you?" was inappropriate but was not sufficiently prejudicial to require a new trial.

3. **Constitutional Law § 46— refusal to permit counsel to withdraw—effective assistance of counsel**

Defendant was not denied the effective assistance of counsel by the court's refusal to permit defendant's retained counsel to withdraw unless and until defendant employed other counsel or by the court's denial of a continuance.

4. **Constitutional Law § 48— effective assistance of counsel—failure of counsel to obtain recording of police radio communication**

Defendant was not denied the effective assistance of counsel by the failure of his attorneys to obtain recordings of the police radio communication on the night of defendant's arrest for breaking and entering a restaurant and larceny of property therefrom where defendant could not have been materially aided by such transmission in light of the overwhelming evidence of defendant's guilt, including an officer's positive identification of defendant as the man he saw run out of the restaurant.

APPEAL by defendant from *Bailey, Judge.* Judgment entered 8 March 1979 in Superior Court, WAKE County. Heard in the Court of Appeals 27 November 1979.

Defendant was indicted for feloniously breaking and entering Swain's Charcoal Steak House in Raleigh and the larceny of wine having a value of $108.00. He was convicted by a jury on both counts and sentenced to consecutive sentences in prison. Defendant appealed.

Attorney General Edmisten by Associate Attorney Lucien Capone III, for the State.

Loflin, Loflin, Galloway & Acker, by Thomas F. Loflin III and James R. Acker, for the defendant.

MARTIN (Robert M.), Judge.

[1] In his first argument, defendant contends that the court erred in failing to grant defendant a recess at the close of the State's evidence. He contends the denial of his motion for recess deprived him of the effective assistance of counsel and of a fair trial. We disagree.

The record shows the following exchange occurred:

COURT: Will there be evidence for the defense?

MR. RATLIFF: Your Honor, we have motions first, and then we—

COURT: They are denied. Will there be evidence for the defense?

MR. RATLIFF: Your Honor, we ask for a short recess.

COURT: Sir.

MR. RATLIFF: We ask for a recess.

COURT: Will there be evidence for the defense? Answer my question and I will answer yours.

MR. RATLIFF: Your Honor, I need to make that decision during recess, Your Honor.

COURT: Proceed.

MR. RATLIFF: The defendant's counsel offers no evidence, Your Honor.

COURT: The defendant will have the opening and the closing.

MR. GOODE: No. I'd like to testify in my behalf.

COURT: You said that he was offering no evidence.

MR. RATLIFF: That was my statement, Your Honor.

COURT: Well, then, have him sit down.

MR. GOODE: I want to testify in my own behalf.

COURT: Ladies and gentlemen, I will let you go out of the room.

The same rule applicable to continuances would apply to recesses. *State v. Hailstock*, 15 N.C. App. 556, 190 S.E. 2d 376 (1972). A motion for continuance of a trial is addressed to the sound discretion of the trial judge and his ruling thereon is not subject to review on appeal except in a case of manifest abuse. *State v. Phillip*, 261 N.C. 263, 134 S.E. 2d 386 (1964); *State v. Hailstock, supra.* However, when the motion is based on a right guaranteed by the federal and State constitutions, the question presented is one of law and not discretion, and the decision of the trial court is reviewable. *State v. Cradle*, 281 N.C. 198, 188 S.E. 2d 296 (1972); *State v. Phillip, supra.* The right to the effective assistance of counsel, guaranteed by both the Constitution of the United States and the Constitution of North Carolina, includes the right of the accused to consult with his counsel. Thus, the question presented by this appeal is whether the denial of a recess deprived defendant of a constitutional right.

The judge and defendant's counsel share the twofold responsibility of enforcing defendant's right of a fair trial and of keeping the trial moving at a reasonable speed. Courts cannot keep trials moving at a reasonable speed when interrupted by unnecessary recesses for counsel and litigants to decide on trial tactics. The judge is in charge of the proceedings and must be given sufficient discretion to meet the circumstances of each case. *See State v. Bass*, 280 N.C. 435, 186 S.E. 2d 384 (1972); *also see State v. Britt*, 285 N.C. 256, 204 S.E. 2d 817 (1974). Ordinarily, a quiet conference between attorney and client, seated at the same table, is sufficient to enable counsel to proceed with the defense of his client in an orderly fashion. In *State v. McFadden*, 292 N.C. 609, 616, 234 S.E. 2d 742, 747 (1977), Justice Branch (now Chief Justice) stated:

> We wish to make it abundantly clear that we do not approve of tactics by counsel or client which tend to delay the trial of cases. Our clogged court dockets and the tortoise-like progress of cases through our courts have caused criticism

> of, and disrespect for, the entire court system. The public is demanding and the legal profession should be searching for means to expedite the trial of criminal and civil cases without depriving litigants of a fair trial.

Moreover, we do not perceive what more could have been accomplished by a recess for counsel and defendant to resolve their differences. The court explained to defendant his right to testify and the consequences if he chose to do so. Defendant has not shown that the denial of a recess deprived him of any constitutional right and no abuse of discretion has been shown. The assignment of error is overruled.

[2] In defendant's second argument, he contends the court erred in expressing an opinion on the evidence and credibility of the witnesses. The officer had testified that defendant was on foot and he pursued him in his car. The court interjected as follows:

> MR. RATLIFF: All right, he was going fast enough to keep ahead of you in the car and you were doing 10 miles/hour?
>
> OFFICER HOLLOWAY: I was behind him. I didn't you know, try to run over him or anything. I mean—
>
> COURT: You weren't planning to pull him for speeding, were you?
>
> A. No, he wasn't speeding enough that I should give him a citation for anything.

The question posed to Officer Holloway by the court apparently was made in a spirit of levity. While it was inappropriate, and we do not approve such questions, the asking of it was not sufficiently prejudicial to defendant to require a new trial. *State v. Harper*, 21 N.C. App. 30, 202 S.E. 2d 795 (1974).

Defendant has assigned error to portions of the trial judge's summary of the evidence and instructions to the jury. We have carefully considered and conclude that, when read contextually, as we are required to do, *State v. Lee*, 277 N.C. 205, 176 S.E. 2d 765 (1970), the challenged portions of the instructions and summary are free from prejudicial error. We therefore overruled the assignments of error.

[3] We disagree with defendant that his constitutional rights were abridged by action of the court in denying counsel's motion to withdraw and refusing a continuance. By his third argument, defendant argues that the denial of his motion deprived him of the effective assistance of counsel. An attorney's motion to withdraw is subject to leave of the court. *State v. Penley,* 6 N.C. App. 455, 170 S.E. 2d 632, *cert. denied,* 276 N.C. 85 (1970). Defendant possessed the exclusive power to hire or discharge his retained counsel. *State v. McFadden, supra.* In denying counsel's motion to withdraw, Judge Lee made it clear that Mr. Ratliff would be allowed to withdraw at such time as defendant employed other counsel. Defendant was told that he could retain other counsel. He was even offered court-appointed counsel, which offer was refused by defendant. He was told he had the right to represent himself. Despite all of this, defendant appeared at trial with Mr. Ratliff and Mr. Shyllon, an associate of Mr. Ratliff. Neither Judge Lee's refusal to grant counsel's motion to withdraw until defendant had obtained new counsel nor the denial of the motion for continuance was an abuse of discretion. Defendant has utterly failed to demonstrate how or even if he was prejudiced thereby. The assignment of error is overruled.

[4] By his fifth argument, defendant contends that the failure of counsel to obtain the recordings of the police radio communication the night of defendant's arrest resulted in ineffective assistance of counsel. We disagree. We cannot see how defendant would have been materially aided by such a transmission as he claims to have heard in light of the overwhelming evidence of his guilt including the positive identification of defendant by Officer Holloway as the man he saw run out of the restaurant. Defendant's claim of incompetence of counsel is meritless under the standard enunciated in *State v. Sneed,* 284 N.C. 606, 201 S.E. 2d 867 (1974).

Defendant's remaining assignments of error are without merit and are overruled. In the trial defendant has not shown prejudicial error.

No error.

Judges HEDRICK and WELLS concur.

STATE OF NORTH CAROLINA v. VERNON WILLIAM WOMBLE

No. 7915SC657

(Filed 8 January 1980)

1. **Criminal Law § 29— mental capacity—failure to make findings—no error**

Though it would have been the better practice for the trial court to make findings of fact with respect to defendant's mental capacity to proceed, such error was harmless inasmuch as the evidence would have compelled the trial court to find against defendant.

2. **Escape § 4— indictment—time of escape not essential element**

The trial court did not err in denying defendant's motion to dismiss at the close of the State's evidence on the grounds the warrant did not set out the exact date and time of the alleged escape and further failed to state the period of time was in excess of the 24-hour time limitation found in G.S. 148-45(g)(2), since an exact time is not an essential element of the offense of escape as set out in G.S. 148-45(g)(1), and the 24-hour exception provided in G.S. 148-45(g)(2) is a defense which defendant in this case could have raised had the evidence warranted.

APPEAL by defendant from *McLelland, Judge.* Judgment entered 16 November 1978 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 5 December 1979.

Defendant was indicted for felonious escape (first offense), convicted, and sentenced to six months of imprisonment to be served at the expiration of the sentence imposed on 16 December 1975 for larceny of an automobile, a felony.

At trial, State's evidence tended to show that defendant was an inmate at a unit of the Department of Correction in Graham. He was involved in work adjustment training at Vocational Trades of Alamance County. On 22 June 1978, defendant did not return to camp at his scheduled time around 4:00 p.m. He returned on 24 June 1978 between 8:30 a.m. and 9:00 a.m.

Two officers at the camp testified that they knew defendant was taking medication for seizures or blackouts during the six months he had been there. However, neither had seen defendant have a seizure or blackout. A cab driver testified that on 22 June 1978, he picked up defendant and a woman in Graham and transported them to the Bus Station in Chapel Hill. In the cab driver's opinion, defendant appeared to be normal.

Defendant testified that he was presently serving a sentence for auto theft. On 3 July 1972, he was mugged and hit on the head with a piece of concrete. He was unconscious for more than two months. Since that time, he has had medical problems and has been unable to hold a job. He continues to suffer seizures, blackouts, restlessness, depression, and incontinence. Since being in the custody of the Department of Correction, he has undergone surgery to put a plate in his head, received treatment for an ulcer, and has continuously received medication for both. On 22 June 1978, while at Vocational Trades, defendant was in pain from a blow on his head he had received a few days earlier. The pain caused him to have a seizure, and he was unable to control his actions. A young woman, who was supposed to help him, called a cab and took him to Chapel Hill. When defendant arrived in Chapel Hill, he regained control of himself and called his son. Defendant's son and uncle picked him up and returned him to his unit 24 June 1978.

Attorney General Edmisten, by Assistant Attorney General Jane Rankin Thompson, for the State.

Robert F. Steele, for defendant appellant.

ERWIN, Judge.

[1] Defendant's first assignment reads: "That the trial court Judge abused his discretion in denying the defendant's motion suggesting incapacity to proceed by not appointing an impartial medical expert to examine the defendant or by not committing the defendant to a State mental health facility pursuant to NC GS 15A-1002."

Prior to trial, defendant filed a motion suggesting incapcity to proceed under G.S. 15A-1002 based on two grounds: (1) the defendant had suffered extensive head injuries on 3 July 1972, and took medication for these injuries, and (2) the Head Psychiatrist at the Veterans Hospital in Fayetteville found the defendant to be incompetent in March 1974. At the hearing on the motion 9 October 1978, defendant merely reiterated the grounds set out in his motion and presented a list of the medication defendant was taking and a Veterans Hospital Report of the defendant by T. H. Gridley, M.D., transcribed 26 March 1974. The State responded

that defendant had been examined by many doctors and had been found to be competent. The court denied his motion.

Our Supreme Court held in *State v. Willard*, 292 N.C. 567, 575, 234 S.E. 2d 587, 592 (1977):

> "The test of a defendant's mental capacity to proceed to trial is whether he has the capacity to comprehend his position, to understand the nature and object of the proceedings against him, to conduct his defense in a rational manner, and to cooperate with his counsel to the end that any available defense may be interposed. *State v. Cooper*, 286 N.C. 549, 213 S.E. 2d 305 (1975); *State v. Jones*, 278 N.C. 259, 179 S.E. 2d 433 (1971); *State v. Propst*, 274 N.C. 62, 161 S.E. 2d 560 (1968); *State v. Sullivan*, 229 N.C. 251, 49 S.E. 2d 458 (1948); 4 Strong's N.C. Index 3d, Criminal Law § 29 (1976). The issue may be determined by the trial court with or without the aid of a jury. *State v. Cooper, supra; State v. Propst, supra; State v. Sullivan, supra.* When the trial judge conducts the inquiry without a jury, the court's findings of fact, if supported by competent evidence, are conclusive on appeal. *State v. Cooper, supra; see State v. Thompson, supra.*"

The trial court considered all the evidence presented by defendant. The record does not reveal that defendant had any other evidence available to him that he did not introduce or that he had witnesses who were unavailable to him. Defendant had the burden of persuasion on his motion. From the evidence presented, the court concluded that defendant had not shown a *lack* of capacity to comprehend his position, to understand the nature and object of the proceedings against him, to conduct his defense in a rational manner, and to cooperate with counsel to the end that any available defense may be interposed. We hold that the trial court did not abuse its discretion in this case and that the hearing on the motion met the requirement of G.S. 15A-1002(b)(3). *State v. Woods*, 293 N.C. 58, 235 S.E. 2d 47 (1977); *State v. Williams*, 38 N.C. App. 183, 247 S.E. 2d 620 (1978). Better practice requires the trial court to make findings of fact in its order on a motion suggesting incapacity to proceed under G.S. 15A-1002. In the case *sub judice*, the court did not make findings of fact; however, such was harmless error inasmuch as the evidence presented would have compelled the trial court to find against defendant.

[2] Defendant contends that the trial court erred in denying his motion to dismiss at the close of the State's evidence on the grounds the warrant did not set out the exact date and time of the alleged escape and further failed to state the period of time was in excess of the 24 hour time limitation found in G.S. 148-45(g)(2). We find no error.

G.S. 148-45(g)(2) provides that a person (inmate) who would otherwise be guilty of a first violation of G.S. 148-45(g)(1) and who voluntarily returns to his place of confinement within 24 hours of the time at which he was ordered to return shall not be charged with escape but will be subject to administrative action of the Department of Correction. We hold that an exact time is not an essential element of the offense of escape as set out in G.S. 148-45(g)(1) and that the 24-hour exception provided in G.S. 148-45(g)(2) is a defense which defendant may have raised had the evidence warranted such defense, or he could have moved for a bill of particulars to obtain more definite information. *State v. Best*, 5 N.C. App. 379, 168 S.E. 2d 433 (1969).

We have carefully considered defendant's other assignments of error and find no merit in them.

Defendant's trial is free of prejudicial error.

No error.

Judges CLARK and ARNOLD concur.

CITY OF THOMASVILLE v. LEASE-AFEX, INC.

No. 7922SC406

(Filed 8 January 1980)

Sales § 22.2— fire suppressant system on bulldozer—alleged negligent design and installation—summary judgment for defendant

Summary judgment was properly entered for defendant in plaintiff's action to recover for damages to its bulldozer allegedly caused by defendant's defective design, construction and installation of a fire suppressant system on the bulldozer where plaintiff's evidence did no more than raise a mere speculation as to the existence of a malfunction within the suppressant system.

Judge WELLS dissenting.

City of Thomasville v. Lease-Afex, Inc.

APPEAL by plaintiff from *McConnell, Judge.* Judgment entered 26 January 1979 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 4 December 1979.

Richard M. Pearman, Jr., for the plaintiff.

Hudson, Petree, Stockton, Stockton & Robinson, by W. Thompson Comerford, Jr., for the defendant.

MARTIN (Robert M.), Judge.

Plaintiff seeks recovery for damages to a bulldozer owned by it, those damages having been allegedly caused by the defective design, installation and operation of a fire suppressant system placed by defendant on plaintiff's bulldozer. The claims for damages were pled under theories of breach of express and implied warranties and negligence. After substantial discovery, defendant moved for and got summary judgment entered in its favor. Plaintiff appealed, contending that there were material issues of fact which should have been submitted to the jury. We do not agree. The facts surrounding this case are almost identical with the facts of *City of Thomasville v. Lease-Martin Afex, Inc.*, 38 N.C. App. 737, 248 S.E. 2d 766 (1978), in which a similar fire involving the same questions of liability was the subject of litigation culminating in summary judgment for defendant. In the instant case, plaintiff's evidence, from the operators of the bulldozer and from their expert mechanical engineer, does no more than raise speculation as to the existence of any malfunction within the system and provides no proof from which the trier of fact could infer that there was any defect in the design, construction or installation of the system, even though that evidence be viewed in the light most favorable to plaintiff. The system *did* function, and even plaintiff's expert did not assert as a fact that the system had malfunctioned or provide any concrete theories as to causation of the hypothetical malfunction, other than speculation as to a leak in the seal of the CO_2 cannister which powered the system. Accordingly, we affirm the entry of summary judgment below. *See City of Thomasville v. Lease-Martin Afex, Inc., supra.*

Affirmed.

Judge HEDRICK concurs.

Judge WELLS dissents.

Judge WELLS dissenting.

We view the forecast of plaintiff's evidence as sufficient to withstand defendant's motion for summary judgment. Our courts have consistently held that summary judgment is a drastic remedy and should be used cautiously. *Koontz v. City of Winston-Salem*, 280 N.C. 513, 186 S.E. 2d 897 (1972), *rehearing denied*, 281 N.C. 516 (1972); *Holley v. Coggin Pontiac, Inc.*, 43 N.C. App. 229, 259 S.E. 2d 1 (1979), *disc. rev. denied*, 298 N.C. 806, 261 S.E. 2d 919 (1979). The papers of the moving party are to be closely scrutinized, while those of the opposing party are to be indulgently regarded. *Singleton v. Stewart*, 280 N.C. 460, 186 S.E. 2d 400 (1972). Proceedings on summary judgment are not intended to operate as a substitute for trial, but only to determine if there are genuine issues to be tried. *Kidd v. Early*, 289 N.C. 343, 222 S.E. 2d 392 (1976).

In the case before us plaintiff has raised the issues of breach of express and implied warranties and negligent design. Plaintiff's expert witness, Daniel W. Smith, testified that in his opinion the charge in the CO_2 cannister had a tendency to leak and did in fact leak in the bulldozer in question. Due to the leak, there was not a sufficient quantity of propellant to disperse the fire extinguishing chemical powder to effectively suppress or extinguish the fire. The expert's testimony was sufficient for the trier of fact to conclude the fire suppression system was unmerchantable or negligently designed.

The majority rests its decision on *City of Thomasville v. Lease-Martin Afex, Inc.*, 38 N.C. App. 737, 248 S.E. 2d 766 (1978). In that case the plaintiff offered nothing beyond its bare allegation that the fire suppressing system did not activate. The fact that the system did not work was held insufficient *by itself* to show a forecast of evidence that defendant negligently designed the device or breached express or implied warranties. In the present case, the testimony of plaintiff's expert satisfies the deficiency.

The judgment of the trial court should be reversed.

RICHARD E. BYRD v. ROBERT B. HODGES

No. 7810SC487

(Filed 8 January 1980)

Constitutional Law § 74; Rules of Civil Procedure § 8— alienation of affections and criminal conversation—privilege against self-incrimination asserted—allegations of complaint not deemed admitted

A defendant may plead his privilege against self-incrimination in a civil action where the plaintiff asks for punitive damages, and the privilege applies to protect a party from self-incrimination at the pleadings stage of an action; therefore, in an action to recover compensatory and punitive damages for alienation of affections and criminal conversation where defendant refused to answer the allegations of plaintiff's complaint, claiming his constitutional privilege against self-incrimination, the trial court erred in deeming the allegations as admitted pursuant to G.S. 1A-1, Rule 8(d) and in entering judgment for plaintiff.

Judge MITCHELL concurs in the result.

Judge MARTIN (Robert M.) dissents.

APPEAL by defendant from *McLelland, Judge.* Order entered 28 March 1978 in Superior Court, WAKE County. Heard in the Court of Appeals 2 March 1979.

This is a lawsuit founded on claims for alienation of affections and criminal conversation. At the time the summons was filed, an order was entered extending the time for filing a complaint. Before filing the complaint, the plaintiff attempted to depose the defendant, but the defendant refused to answer questions at the taking of the deposition on the ground the answers might tend to incriminate him. The plaintiff then filed a complaint in which he alleged in seven separate paragraphs specific times and places at which the plaintiff contended the defendant had sexual intercourse with the plaintiff's wife. The plaintiff prayed for $100,000.00 in compensatory damages and $100,000.00 in punitive damages. The defendant refused to answer the allegations of the complaint, claiming his constitutional privilege against self-incrimination. The superior court held that the allegations of the complaint would be treated as admitted in light of the defendant's failure to plead to them. Judgment for the plaintiff was entered on all issues except damages. Defendant appealed.

Boyce, Mitchell, Burns and Smith, by G. Eugene Boyce and Lacy M. Presnell III, for plaintiff appellee.

Cheshire, Bruckel and Swann, by Joseph B. Cheshire V, for defendant appellant.

WEBB, Judge.

G.S. 1A-1, Rule 8(d) provides that if a defendant does not deny an allegation in a complaint it is deemed admitted. The question posed by this appeal is whether a defendant who has been sued for punitive damages may assert his privilege against self-incrimination by refusing to plead without suffering the stricture of Rule 8(d). A defendant may plead his privilege against self-incrimination in a civil action where the plaintiff asks for punitive damages. *Allred v. Graves*, 261 N.C. 31, 134 S.E. 2d 186 (1964). *Allred v. Graves* involved the defendant's refusal to answer questions when his deposition was taken. We must decide whether the privilege applies to protect a party from self-incrimination at the pleadings stage of an action. We hold that it does so protect the defendant.

The privilege against self-incrimination is basic to our law. It is contained in the United States Constitution and the North Carolina Constitution, Art. I, § 23. We can see no reason why a party should be required to incriminate himself by pleading if he is not required to do so by deposition in a civil action. The plaintiff argues that the defendant could deny the allegations, which would not be taken as a waiver of his privilege against self-incrimination. The difficulty with this argument is that the defendant and his attorney might not be able in good conscience to deny an allegation. We should not put a party and his attorney in the dilemma of either admitting evidence of a crime and possibly suffering punitive damages or filing a pleading which either of them know to be false.

We hold that in this case Rule 8(d) must yield to the constitutional right of the defendant not to incriminate himself. We reverse and remand this case to the Superior Court of Wake County with the direction that a hearing be had on the defendant's plea of self-incrimination. If the court should find that the defendant's answers would tend to incriminate him, it shall

enter an order that the allegations to which the defendant does not plead are deemed denied.

Reversed and remanded.

Judge MITCHELL concurs in the result.

Judge MARTIN (Robert M.) dissents.

FIRST PEOPLES SAVINGS & LOAN ASSOCIATION AND AMERICAN MORTGAGE INSURANCE COMPANY v. CARL CYNDYN COGDELL, MARTHA JOHNSON COGDELL, JAMES E. COGDELL AND ROSA B. COGDELL

No. 7916DC264

(Filed 8 January 1980)

Guaranty § 1; Contracts § 4.1— installment sales contract—sufficient consideration to obligate guarantors

In an action to recover on an installment sales contract where two defendants contended that they were not purchasers under the contract but merely guarantors, there was nevertheless sufficient consideration to support their obligation under the contract where the evidence showed both a benefit to the alleged principal debtor and a detriment to the promisee.

APPEAL by plaintiffs from *Britt, Judge.* Judgment entered 14 November 1978 in District Court, ROBESON County. Heard in the Court of Appeals 14 November 1979.

In 1972 defendants entered into an installment sales contract with the assignor of plaintiff First Peoples Savings & Loan for the purchase of a mobile home. Plaintiff American Mortgage Insurance Co. (AMI) insured First Peoples against losses resulting from defaults on such contracts. In May 1975 defendants defaulted, and First Peoples was paid by AMI. AMI, subrogated to First Peoples' rights, then sold the mobile home, and now seeks to collect the difference between the proceeds of sale and the amount it paid out under the insurance policy.

The jury found that the obligations of defendants James and Rosa Cogdell under the installment sales contract were not supported by consideration, and that plaintiffs were entitled to

recover $2,413.75 from defendants Carl and Martha Cogdell. Plaintiffs appeal.

Allen, Steed and Allen, by Noah H. Huffstetler III, for plaintiff appellants.

No counsel for defendant appellees.

ARNOLD, Judge.

The first issue submitted to the jury was, "Were the obligations of Defendants James and Rosa Cogdell under the installment sales contract supported by consideration?" Plaintiffs contend that they were entitled to a directed verdict on this issue, and that the court's charge on the issue was incorrrect.

The installment sale contract was signed by all four defendants, as follows:

Buyer

Signs s/Carl Cyndyn Cogdell (Seal)

s/Martha Johnson Cogdell

Buyer

Signs s/James Eddie Cogdell (Seal)

s/Rosa B. . . Cogdell

Defendants James and Rosa Cogdell (defendants) aver by their third defense that there was no consideration for them to enter into any contract with the seller. Plaintiffs' Exhibit B, the certificate of title, is made out in the names of Carl and Martha Cogdell only, and defendants contend that they were not purchasers under the contract, but merely guarantors.

Assuming without deciding that defendants were guarantors only, we still do not find that consideration was lacking. "It is not necessary that the promissor receive consideration or something of value himself in order to provide the legal consideration sufficient to support a contract . . . . In a guaranty contract . . . [t]he promise is enforceable if a benefit to the principal debtor is shown or if detriment or inconvenience to the promisee is disclosed." *Investment Properties v. Norburn,* 281 N.C. 191, 196,

188 S.E. 2d 342, 345 (1972). The facts here clearly show both a benefit to the alleged principal debtor and a detriment to the promisee, affording sufficient consideration for defendants' promise to pay.

Furthermore, consideration for the defendant James Cogdell's promise is imported by the fact that the contract was executed under seal. *Mobil Oil Corp. v. Wolfe*, 297 N.C. 36, 252 S.E. 2d 809 (1979). (Whether Rosa Cogdell intended to adopt the seal would be a question for the jury. *Id.*)

Failure of consideration is an affirmative defense, G.S. 1A-1, Rule 8(c), upon which defendants bear the burden of proof. The defendants here did not meet this burden. Therefore a directed verdict in plaintiffs' favor against defendants on this issue would have been proper. *Roberts v. Reynolds Memorial Park*, 281 N.C. 48, 187 S.E. 2d 721 (1972).

We need not reach plaintiffs' argument that the jury instruction was incorrect.

Plaintiffs were entitled to a directed verdict on the first issue. The cause is therefore remanded for entry of judgment accordingly.

Reversed and remanded.

Judges CLARK and ERWIN concur.

STATE OF NORTH CAROLINA v. GEORGE THOMAS WARD

No. 7926SC660

(Filed 8 January 1980)

Criminal Law § 112.6— defense of insanity—instruction on burden of proof—"reasonable satisfaction" of jury

The trial court erred in instructing the jury that defendant had the burden of proving his defense of insanity to the "reasonable satisfaction" of the jury, since he was merely required to prove his insanity to the satisfaction of the jury.

APPEAL by defendant from *Friday, Judge*. Judgment entered 23 February 1979 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 6 December 1979.

Defendant was convicted of assault with a deadly weapon with intent to kill inflicting serious bodily injury and assault with a deadly weapon upon a law enforcement officer while the officer was performing a duty of his office. These offenses arose when the victim, D. A. Mills, a state highway patrolman, stopped defendant for reckless driving. The evidence tended to show defendant made an unprovoked assault on Trooper Mills, seized his four-cell flashlight and beat him to the ground by hitting him on the head with it. Defendant attempted to get the officer's pistol and in the ensuing struggle, defendant was shot twice. Both defendant and Officer Mills required medical treatment. Defendant introduced evidence tending to show that he was insane at the time, the medical expert witnesses concluding that he had a mental condition called paranoid schizophrenia and chronic undifferentiated schizophrenia. From judgment of imprisonment, defendant appeals.

Attorney General Edmisten, by Special Deputy Attorney General W. A. Raney, Jr., for the State.

Marnite Shuford for defendant appellant.

MARTIN (Harry C.), Judge.

Defendant excepted to the following portion of the court's charge on insanity: "He [the defendant] must prove the defendant's insanity to you to your *reasonable* satisfaction." (Emphasis added.)

Earlier in the charge the court defined reasonable doubt:

> Now, members of the jury, a reasonable doubt is a doubt based on reason and common sense arising out of some or all of the evidence that has been presented, or lack or insufficiency of the evidence, as the case may be. Proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you of the defendant's guilt.

In applying the law to the evidence with respect to insanity, the court again instructed the jury that the standard of proof re-

quired by the defendant was to the "reasonable satisfaction" of the jury.

Later in the charge, the court instructed: "However, he [the defendant] need not prove beyond a reasonable doubt that he was insane, but only to your reasonable satisfaction."

In North Carolina insanity is an affirmative defense which must be proved to the satisfaction of the jury by every defendant who relies upon it. *State v. Caldwell*, 293 N.C. 336, 237 S.E. 2d 742 (1977), *cert. denied*, 434 U.S. 1075 (1978). The standard of proof required is to the satisfaction of the jury. *Id.* A proper instruction on the burden of proof of insanity follows:

> Since soundness of mind is the natural and normal condition of men, everyone is presumed to be sane until the contrary is made to appear. This presumption of sanity applies to persons charged with crime, but it is rebuttable. [Citations omitted.] These considerations give rise to the firmly established rule that the burden of proof upon a plea of insanity in a criminal case rests upon the accused who sets it up. But he is not obliged to establish such plea beyond a reasonable doubt. He is merely required to prove his insanity to the satisfaction of the jury.

State v. Swink, 229 N.C. 123, 125, 47 S.E. 2d 852, 853 (1948). *See also* N.C.P.I. Crim. 304.10 (1977).

By charging the jury that defendant had the burden to prove his insanity to the "reasonable satisfaction" of the jury, the court imposed upon the defendant a higher degree of proof than that required by law. *State v. Swink, supra.*

This prejudicial error was further compounded by the definition of "reasonable doubt" given the jury, opening the probability that the jury applied this definition to "reasonable satisfaction" in its deliberations.

For this error in the charge, there must be a new trial. Other assignments of error are made in the record on appeal, but as they may not occur in a retrial of the case, we refrain from discussing them.

New trial.

Judges VAUGHN and WEBB concur.

STATE OF NORTH CAROLINA v. LONZO McKOY

No. 7912SC650

(Filed 8 January 1980)

Criminal Law § 18.1— failure to show jurisdiction of superior court—appeal dismissed

Where defendant was charged with the misdemeanors of destroying city property, using profanity, and assaulting a police officer who was discharging his duties, his appeal from conviction on the assault charge is dismissed where he failed to show how the superior court obtained jurisdiction of the case.

APPEAL by defendant from *Brewer, Judge*. Judgment entered 16 February 1979 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals on 4 December 1979.

Defendant was tried in the superior court on warrants charging him with destruction of city property, using "loud, vulgar and obscene language in the presence of two or more persons . . . in a public place", and assaulting a police officer while the officer was attempting to discharge a duty of his office, namely, arresting defendant for profanity. He pleaded not guilty to all charges. At the end of the State's evidence, the court, upon motions made by defendant, dismissed the charges of destruction of city property and profanity. His motion to dismiss the charge of assaulting a police officer was denied, and the jury found him guilty as charged as to that offense. From a judgment imposing a prison sentence of 12 to 14 months, defendant appealed to this Court.

Attorney General Edmisten, by Assistant Attorney General Elizabeth C. Bunting, for the State.

Assistant Public Defender Rebecca J. Bosley for the defendant appellant.

HEDRICK, Judge.

The warrants issued against defendant in this case charged misdemeanor offenses. The offense for which he was convicted is a violation of G.S. § 14-33(b)(4) (1977 Cum. Supp.), a misdemeanor. It is fundamental that the district courts of this State have exclusive original jurisdiction of misdemeanors. G.S. § 7A-272. The jurisdiction of the superior court is derivative and arises only upon an appeal from a conviction of the misdemeanor in the district court. *State v. Caldwell*, 21 N.C. App. 723, 205 S.E. 2d 322 (1974); *State v. Parks*, 20 N.C. App. 207, 200 S.E. 2d 837 (1973); *State v. Byrd*, 4 N.C. App. 672, 167 S.E. 2d 522 (1969).

Although neither party has raised the question of jurisdiction, "[t]he Court of Appeals will take notice *ex mero motu* of the failure of the record to show jurisdiction in the court entering the judgment appealed from." *State v. Parks, supra* at 208, 200 S.E. 2d at 838. The record before us discloses absolutely nothing of the proceedings, if any, in the district court. There is, thus, nothing in the record to disclose how the superior court obtained jurisdiction of the case.

It is the duty of the defendant appellant to see that the record on appeal is properly made up and transmitted to this Court. *State v. Parks, supra*; *State v. Marshall*, 11 N.C. App. 200, 180 S.E. 2d 464 (1971). For the failure of the record in this case to show jurisdiction, the appeal must be dismissed. *State v. Byrd, supra.*

Appeal dismissed.

Judges MARTIN (Robert M.) and WELLS concur.

BRIAN FLIPPIN, BY HIS GUARDIAN AD LITEM, MELVIN F. WRIGHT, JR., AND SANDRA FLIPPIN v. DR. WILLIAM ERIC JARRELL

No. 7921SC336

(Filed 8 January 1980)

Physicians, Surgeons and Allied Professions § 13— malpractice action—statute of limitations

Plaintiff mother's suit for medical expenses and loss of services of her son based on defendant physician's alleged negligent failure to discover that plaintiff's son had a condition at birth known as phenylketonuria was barred under both the one-year rule and the four-year rule set forth in G.S. 1-15(c).

APPEAL by defendant from *Walker (Hal Hammer), Judge.* Order entered 5 January 1979 in Superior Court, FORSYTH County. Heard in the Court of Appeals 28 November 1979.

This medical malpractice action was instituted by the minor plaintiff, Brian, and his mother, Sandra Flippin. Plaintiff alleges that the defendant negligently failed to discover that Brian had a condition at birth known as phenylketonuria ("PKU"), which is an inborn or inherited error of metabolism which may result in mental retardation, and that defendant negligently failed to discover and treat Brian's condition. The defendant filed an answer denying all negligence and pleading the bar of the statute of limitations N.C. Gen. Stat. § 1-15(c), as to all claims of plaintiff, Sandra Flippin for medical expenses and loss of services of Brian. Defendant later moved for summary judgment based on the aforesaid statute of limitations as applied to the claim of Sandra Flippin. This motion was denied by Judge Walker on 5 January 1977. Defendant now appeals from this order.

This relevant chronology is as follows:

(1) March 11, 1972. Brian was born;

(2) July 8, 1972. The last time the defendant saw, treated, examined, or in any way rendered professional treatment to Brian;

(3) October 14, 1975. Sandra Flippin was aware prior to this time that something was wrong with Brian; on this date, she took Brian to the Child Guidance Clinic for examination;

(4) February 1976. The Child Guidance Clinic issued a report stating that Brian was only one-half as mentally alert as he should be;

(5) November 22, 1976. A report on Brian's condition was issued by Duke University Medical Center, and Brian's condition was definitely diagnosed as PKU; and

(6) December 19, 1977. This action was commenced.

White and Crumpler by Fred G. Crumpler, Harrell Powell, Jr., G. Edgar Parker and V. Edward Jennings, Jr., for plaintiff appellees.

Womble, Carlyle, Sandridge & Rice by H. Grady Barnhill, Jr., and William C. Raper for defendant appellant.

CLARK, Judge.

The suit by Sandra Flippin for medical expenses and for the loss of services of her son, Brian, is barred by N.C. Gen. Stat. § 1-15(c), both under the one-year rule and the four-year rule set forth therein. *Stanley v. Brown*, 43 N.C. App. 503, 259 S.E. 2d 408 (1979); *Johnson v. Podger*, 43 N.C. App. 20, 257 S.E. 2d 684 (1979). The *Johnson* and *Stanley* cases outline in sufficient detail the legislative history of this provision and it is not necessary that we repeat it here.

The order of the trial judge denying defendant's motion for summary judgment is

Reversed.

Judges ARNOLD and ERWIN concur.

WURLITZER DISTRIBUTING CORPORATION v. JOHN C. SCHOFIELD AND WIFE, VICTORIA R. SCHOFIELD, JOHN S. SCHOFIELD AND WIFE, CHARLOTTE M. SCHOFIELD

No. 7922SC12

(Filed 15 January 1980)

1. **Fraudulent Conveyances § 3.4— consideration —pre-existing debt—insufficiency of evidence**

In an action to have set aside as fraudulent deeds from defendant son and his wife to defendant father and mother, evidence was sufficient to support the trial court's finding that the conveyances were voluntary, that is, without consideration, and that there was no valid, existing debt which was paid by the transfers of property, where such evidence tended to show that no money passed from father to son at the time of the conveyances; the father could not recall how much money, if any, his son owed him at the time of the transfers; the first time the father ever attempted to determine the amount owed him by his son was in response to interrogatories served upon him by plaintiff; the son never signed a promissory note to reflect the monies owed to his father; the son's wife never owed the father any amount; the father never demanded any payment of the amount allegedly owed from his son; and no writing reflecting a $15,000 loan from father to son was ever produced at trial, though the father stated in his deposition that he had found such a writing.

2. **Fraudulent Conveyances § 3.4— grantee's assumption of liens—grantee's inability to pay—insufficient consideration**

In an action to have set aside as fraudulent deeds from defendant son and his wife to defendant father and mother, evidence was sufficient to support the trial court's finding that the conveyances were not supported by consideration, though the son argued that the father assumed the liens upon the property when it was conveyed to him, and the assumption of a mortgage by a grantee generally constitutes consideration for the conveyance of property from an insolvent grantor, since the evidence tended to show that the father was unable to pay the debts assumed and that the son was in fact the one actually making payments on the property in question.

3. **Fraudulent Conveyances § 3.4— fraudulent intent—sufficiency of evidence**

In an action to have set aside as fraudulent deeds from defendant son and wife to defendant father and mother, evidence was sufficient to support the trial court's finding that the transfers were made with fraudulent intent where such evidence tended to show that the transfers were made at a time when the son owed plaintiff a $60,000 debt; the transfers were made while a suit by plaintiff to recover the debt was pending; the son continued to live in the home on one of the pieces of property after its transfer to the father; the son was unable to show that he retained property sufficient to pay the debt to plaintiff on which he certainly knew he was potentially liable; and the father concurred in the son's fraudulent intent in that he knew of his son's financial difficulties.

4. Fraudulent Conveyances § 3.4— consideration—retention of other property to pay debts—no fraudulent conveyance

In an action to have set aside as fraudulent a deed from defendant son and his wife to defendant father and mother, evidence was sufficient to support the trial court's conclusion that there was sufficient consideration to support the transfer and that defendant son and his wife did not divest themselves of all their property at that time where such evidence tended to show that the father and son were jointly obligated on a note secured by the property in question; the son had made some of the mortgage payments out of the rental proceeds from the property; during a period in 1974 six checks written by the son in payment of that obligation were returned for lack of sufficient funds; the mortgagee notified the father that the property would be foreclosed unless full payment of the amount in arrears was made immediately; the father paid the amount in arrears; thereafter the property was transferred to the father and mother in December 1974; the father made all payments thereafter; at the time of the transfer defendant son and his wife owned other property sufficient to pay other debts; and there was no evidence that, as of the date of the transfer, a default had occurred with respect to defendants' obligation to plaintiff.

APPEAL by both plaintiff and defendants from *Hairston, Judge.* Judgment entered 31 August 1978 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 18 September 1979.

Plaintiff seeks to set aside as fraudulent three real estate transfers by the defendants, John C. Schofield and his wife Victoria R. Schofield, to John S. Schofield and his wife Charlotte M. Schofield, the parents of defendant John C. Schofield. The transfers which are the subject of this appeal are as follows: (1) a transfer dated 10 December 1974 and recorded 15 May 1975 conveying an one-half undivided interest in certain property situate in Rowan County, North Carolina; (2) a transfer dated and recorded 6 April 1976 conveying a house and lot located in Davidson County, North Carolina; and (3) a second transfer dated and recorded 6 April 1976 conveying an one-half undivided interest in other property situate in Rowan County.

On 24 January 1975, plaintiff Wurlitzer filed an action against defendants John C. Schofield and Victoria R. Schofield in Superior Court of Davidson County seeking to recover amounts allegedly due Wurlitzer under a guaranty agreement executed by these defendants on 17 August 1973. Wurlitzer utlimately obtained a judgment for $60,398.28 against defendants on 1 September 1976. Prior to Wurlitzer's obtaining judgment, the action was originally

scheduled for trial the week of 5 April 1976, but was continued by order of court. On 6 April 1976, defendants John C. Schofield and Victoria R. Schofield made two of the transfers complained of in this action. Defendant John C. Schofield was adjudicated a bankrupt on 21 December 1976, as the result of his voluntary petition.

The present action was instituted by Wurlitzer on 16 April 1976, with the two transfers made on 6 April 1976 as the subject of the suit. Wurlitzer subsequently amended its complaint on 8 October 1976 to include the transfer made on 10 December 1974. Wurlitzer prosecuted its action on the following grounds: that the conveyances were voluntary (without adequate consideration) and executed with the purpose and intent to defraud plaintiff and evade payment of any judgment that might have been entered against defendants; that the transfers were made at a time when defendants were unable to pay their debts; and that defendants did not retain sufficient assets to pay their debts then existing. All of the defendants asserted by way of defense that the transfers were for valuable consideration and that the applicable statute of limitations barred any recovery by plaintiffs. Victoria R. Schofield asserted a lack of knowledge of the transactions herein, and that she signed the deeds at the direction of her husband without such knowledge.

At trial, Wurlitzer offered as evidence certain stipulations, admissions in the pleadings, and the deposition of John S. Schofield. Defendants offered testimony of John S. Schofield. After considering the evidence presented and the arguments of counsel, the trial court, sitting as a jury, made findings of fact, which, in pertinent part, provided:

> "7. At the time of the two transfers [on 6 April 1976] described above, Wurlitzer's debt was in existence and was unpaid, and said debt remains unpaid at the present time. The above two conveyances were voluntary, that is, without consideration, and the grantors did not retain property fully sufficient and available to pay their debts then existing. The defendant John C. Schofield was voluntarily adjudicated a bankrupt on December 21, 1976, and Carl Gray was duly appointed and is presently serving as Trustee in Bankruptcy. As early as December, 1974, the defendant John C. Schofield

was having financial difficulties in that his father had to cover six worthless checks which he wrote to Rowan Savings and Loan in repayment of a loan on the property described below. Although the defendants alleged considerable debt owed to John C. Schofield's father, John S. Schofield, the Court finds that there was no valid, subsisting debt which was paid by these two transfers of property occurring on April 6, 1976. Furthermore, they were made at a time when there was a large debt outstanding to Wurlitzer, a pending lawsuit with Wurlitzer, a trial scheduled the very week the two deeds were executed, a close relationship between the parties to the transaction, namely father and son, retention of actual possession of the Lakewood Hills property by the son, John C. Schofield, no taxable consideration shown on the face of the deeds, no debt owed by the defendant Victoria R. Schofield to John S. Schofield, and notice on the part of John S. Schofield of John C. Schofield's intent to protect his property from his creditors. Therefore, the Court finds that, not only were the transfers without consideration, but they were made with the actual intent to hinder, delay, and defraud creditors on the part of the grantors, John C. Schofield and Victoria R. Schofield, which intent was participated in by the grantees, John S. Schofield and Charlotte M. Schofield.

. . .

9. With respect to the December 10, 1974 transfer, the Court finds that there was considerable consideration for this transfer in that the defendant John S. Schofield paid six bad checks which John C. Schofield had written to the Rowan Savings and Loan in the amount of $157.73 each, thereby assisting his son to avoid a criminal prosecution and a foreclosure action by Rowan Savings and Loan. Furthermore, the defendant John C. Schofield and wife, Victoria R. Schofield, did not divest themselves of all their property at that time and there was a reasonable prospect of creditors being paid out of the remaining property."

The court thereafter concluded that the two transfers on 6 April 1976 were invalid as to all creditors of John C. Schofield and his wife Victoria R. Schofield, and that Wurlitzer was entitled to have those deeds set aside and declared void. The court concluded

further that the transfer on 10 December 1974 was valid, and that Wurlitzer was entitled to no relief with respect to that transfer.

From a judgment declaring the two 1976 transfers invalid, defendants appeal. From a judgment declaring the 1974 transfer valid, plaintiff appeals.

Brinkley, Walser, McGirt, Miller & Smith, by G. Thompson Miller, for plaintiff appellee and plaintiff appellant; and Stoner, Bowers & Gray, by Carl W. Gray, for Trustee in Bankruptcy for John C. Schofield.

Wilson, Biesecker, Tripp & Wall, by Joe E. Biesecker and Roger S. Tripp, for John C. Schofield defendant appellant and defendant appellee.

Robert M. Davis for John S. Schofield defendant appellant and defendant appellee.

MORRIS, Chief Judge.

Under G.S. 39-15, a conveyance made with the intent to defraud creditors is void. A claim seeking to set aside a deed as a fraudulent conveyance can be established in accordance with legal principles set out in the landmark case of *Aman v. Walker*, 165 N.C. 224, 81 S.E. 162 (1914), as applied in the recent case of *North Carolina National Bank v. Evans*, 296 N.C. 374, 250 S.E. 2d 231 (1979):

> "(1) If the conveyance is voluntary, and the grantor retains property fully sufficient and available to pay his debts then existing, and there is no actual intent to defraud, the conveyance is valid.
>
> (2) If the conveyance is voluntary, and the grantor did not retain property fully sufficient and available to pay his debts then existing, it is invalid as to creditors; but it cannot be impeached by subsequent creditors without proof of the existence of a debt at the time of its execution, which is unpaid, and when this is established and the conveyance avoided, subsequent creditors are let in and the property is subjected to the payment of creditors generally.
>
> (3) If the conveyance is voluntary and made with the actual intent upon the part of the grantor to defraud creditors, it is

void, although this fraudulent intent is not participated in by the grantee, and although property sufficient and available to pay existing debts is retained.

(4) If the conveyance is upon a valuable consideration and made with the actual intent to defraud creditors upon the part of the grantor alone, not participated in by the grantee and of which intent he had no notice, it is valid.

(5) If the conveyance is made upon a valuable consideration, but made with the actual intent to defraud creditors on the part of the grantor, participated in by the grantee or of which he has notice, it is void." 296 N.C. at 376-77, 250 S.E. 2d at 233.

Those principles relating to the doctrine of fraudulent conveyances have been approved and applied in many recent decisions. *See, e.g., North Carolina National Bank v. Evans, supra; Everett v. Gainer*, 269 N.C. 528, 153 S.E. 2d 90 (1967); *Nytco Leasing, Inc. v. Southeastern Motels, Inc.*, 40 N.C. App. 120, 252 S.E. 2d 826 (1979); *Edwards v. Northwestern Bank*, 39 N.C. App. 261, 250 S.E. 2d 651 (1979); *Tuttle v. Tuttle*, 38 N.C. App. 651, 248 S.E. 2d 896 (1978), *cert. denied*, 296 N.C. 589, 254 S.E. 2d 32 (1979). Under the foregoing, in order to have the deeds in question set aside, the following must be shown:

(1) that the transfers were voluntary, and defendants either (a) did not retain property sufficient to pay their debts then existing or (b) made the transfers with the intent to defraud creditors; or

(2) that although the transfers were upon valuable consideration, they were made with the intent to defraud creditors on the part of the grantor, which was participated in by the grantee or of which the grantee had notice.

Applying these principles to the case at bar, we now consider specifically the question of whether the evidence presented at trial is sufficient to sustain the findings of fact and conclusions of law made by the trial court.

The question of the sufficiency of the evidence to support findings of fact made by the trial court is a proper subject for review on appeal. G.S. 1A-1, Rule 52(c) of the North Carolina Rules of Civil Procedure; *Brooks v. Brooks*, 12 N.C. App. 626, 184

S.E. 2d 417 (1971). Nevertheless, "[i]n that setting, the court's findings of fact have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary." *Williams v. Pilot Life Insurance Co.*, 288 N.C. 338, 342, 218 S.E. 2d 368, 371 (1975); *Immanuel Baptist Tabernacle Church of the Apostolic Faith v. Southern Emmanuel Tabernacle Church, Apostolic Faith*, 27 N.C. App. 127, 218 S.E. 2d 223, *cert. denied*, 288 N.C. 730, 220 S.E. 2d 350 (1975); *Worthington v. Worthington*, 27 N.C. App. 340, 219 S.E. 2d 260 (1975), *cert. denied*, 289 N.C. 142, 220 S.E. 2d 801 (1976). A judgment based on such findings will not be disturbed on appeal, absent error of law appearing on the face of the record. *Wall v. Timberlake*, 272 N.C. 731, 158 S.E. 2d 780 (1968); *Fletcher v. Fletcher*, 23 N.C. App. 207, 208 S.E. 2d 524 (1974).

Defendants' Appeal

[1] As to the transfers on 6 April 1976, the trial judge found that the two conveyances were "voluntary, that is, without consideration", and that "there was no valid, subsisting debt which was paid by these transfers of property occurring on April 6, 1976." In North Carolina, a conveyance is deemed to be voluntary when it is without adequate consideration; i.e., "when the purchaser does not pay a reasonably fair price such as would indicate unfair dealing and be suggestive of fraud." *L & M Gas Co. v. Leggett*, 273 N.C. 547, 549, 161 S.E. 2d 23, 25 (1968); *Bank v. Evans, supra*; *Supply Corp. v. Scott*, 267 N.C. 145, 148 S.E. 2d 1 (1966); *Nytco Leasing, Inc. v. Southeastern Motels, Inc., supra*. The evidence presented revealed that no money was passed from John S. Schofield and wife to John C. Schofield and wife at the time of the conveyances. Defendants argue that consideration did nevertheless exist in that the transfers served to satisfy a pre-existing debt owed by John C. Schofield to his father in the amount of approximately $83,000. On this point, the evidence shows that John S. Schofield could not recall how much money, if any, his son owed him at the time of the transfers; that the first time he ever attempted to determine the amount owed him by his son was in response to interrogatories served upon him by plaintiff; that John C. Schofield never signed a promissory note to reflect the monies owed to his father; that John C. Schofield's wife, Victoria

R. Schofield, never owed John S. Schofield any amount; that John S. Schofield never demanded any payment of the amount allegedly owed from his son. In his deposition, John S. Schofield stated that he had found a writing that reflected a $15,000 loan to his son, but such a document was never produced at trial. We view such evidence as sufficient to support the finding that a debt did not exist. Defendants rely on the case of *Hafner v. Irwin*, 23 N.C. 490 (1841), in which a conveyance to certain creditors was allowed to stand, the Court stating:

> "Every conveyance of property by an insolvent or embarrassed man, to the exclusive satisfaction of the claims of some of his creditors, has necessarily a tendency to defeat or hinder his other creditors in the collection of their demands. But if the *sole* purpose of such a conveyance be the discharge of an honest debt, it does not fall under the operation of the statute against fraudulent conveyances." 23 N.C. at 496.

In *Hafner*, the validity of the debt in question was not at issue. Indeed, it was admitted that the alleged debts were valid. In our case, however, the issue before the trial judge was specifically whether a debt existed sufficient to constitute consideration for the transfers in question. The trial judge considered the evidence and found facts accordingly. We conclude that there was sufficient evidence upon which the trial judge could have concluded that no honest debt existed.

[2] Defendants argue in addition that there was consideration to support the 1976 conveyances in that John S. Schofield assumed the liens upon property when conveyed to him. It is generally held that the assumption of a mortgage by a grantee constitutes consideration for the conveyance of property from an insolvent grantor, and in the absence of fraudulent intent, such a conveyance is binding. *See generally* 37 Am. Jur. 2d, Fraudulent Conveyances, § 22 (1968). The evidence on this point is at best confusing and contradictory. In any event, even assuming *arguendo* that the alleged assumption of mortgage constitutes consideration, we reject defendants' argument in light of the following.

Although an assumption can in other respects be considered adequate consideration for a conveyance, the grantee's inability to pay the mortgage debt assumed is generally sufficient to set aside the conveyance. *See Citizens Bank & Trust Co. v. White*, 12

Tenn. App. 583, --- S.W. --- (1930); *see generally*, Annot., 6 A.L.R. 2d 270 (1949). In this case, John S. Schofield's inability to pay the debts assumed is evidenced by his testimony as to his financial condition:

> "Well, the fact is: I'm all but practically busted myself. I had to spend a quarter of a million dollars myself in the last—let's see—since 1962; and being 67 February 2 coming up and I had retired, got broke, had to go back to work, and when you start getting up on a little bit of age, it's gotten to the point where you've got to get a little bit of protection on ourselves. The old bucket had run dry so to speak."

John S. Schofield's inability to assume the mortgages in question is supported also by the fact that John C. Schofield was the one actually making the payments on Davidson County property, as evidenced by this passage:

> "Johnny is living there in the home. Yes, he's paying me rent. He takes care of my payments and all. He takes care of the payments for me. I mean, he gives me enough to take care of the payments. Uh huh, he gives me enough so that I can pay the bank."

There are other possible inferences which could be drawn from the evidence presented at trial. However, the duty of this Court upon review of the sufficiency of evidence is a limited one. We are of the opinion that the evidence was supportive of the court's findings.

[3] Defendants argue next that there was no evidence of fraudulent intent sufficient to set aside the conveyances. Under *Aman*, although a conveyance is made by a debtor for valuable consideration, it is fraudulent and may be set aside when the conveyance is (1) made with the intent to defraud creditors, and (2) the grantee either participated in the intent or had notice of it. *Aman v. Walker, supra*; *Edwards v. Bank, supra.* The trial court found as a fact that the two transfers were made with fraudulent intent, and that the grantees participated in this intent. We view the evidence supportive of this finding as to John C. Schofield in that the transfers were made at a time when he owed a $60,000 debt to Wurlitzer; the transfers were made while a suit by Wurlitzer to recover the debt was pending; and John C. Schofield continued

to live in the home in Davidson County after the transfer of that property. This conclusion is bolstered by the fact that John C. Schofield was unable to show that he retained property sufficient to pay the debts to Wurlitzer, on which he certainly knew he was potentially liable. Intent to defraud creditors may be presumed when the debtor does not retain property sufficient to pay his then existing debts. *Edwards v. Bank, supra.* Moreover, we view the evidence supportive of a finding that John S. Schofield concurred in this fraudulent intent. The evidence showed that he had notice of his son's financial difficulties. Given the close relationship between the grantor and grantee evidenced in the record, and the circumstances surrounding the transfers, it is impossible for us to conclude that no inference could be drawn that would indicate knowledge and participation on the part of John S. Schofield. In a closely analogous case, *Morris v. Holland,* --- Mo. ---, 529 S.W. 2d 948 (1975), judgment creditors sought to set aside as fraudulent certain conveyances of real property from the defendant and his wife to defendant's father. The father testified that the consideration for the deed consisted of the cancellation of a pre-existing debt, the total of which represented a series of loans made to the son over a two-year period. After hearing the evidence, the trial court found that the property conveyed constituted virtually all of the son's property; that before and after the property was conveyed, the son was insolvent; that the father knew of the son's insolvency and accepted the deed in an attempt to "salvage" the property and to "get some of [the son's] indebtedness off me." The court, therefore, deemed the conveyance fraudulent and void. The Missouri Court of Appeals affirmed, holding that the record manifested several indicia of fraud:

> "The conveyance was made from son to father; the supposed consideration was forgiveness of or security for a debt which was at best merely a moral obligation to repay, and supposed assumption of a mortgage debt upon which the grantor continued to make payment after the transfer; defendant . . . testified that the land conveyed represented all the property he owned except a 'couple of thousand' equity in a home . . .; and . . . defendants failed to produce available evidence tending to prove that the grantee was a bona fide creditor of the grantor. A strong inference of fraud arises from the concurrence of these circumstances." 529 S.W. 2d at 953.

Upon the foregoing, we affirm the court's ruling in the present case that the transfers on 6 December 1976 constituted fraudulent conveyances and that those transfers be set aside.

Plaintiff's Appeal

[4] Plaintiff Wurlitzer contends on appeal that the transfer of realty on 10 December 1974 was not based upon adequate consideration and should be deemed fraudulent. The trial court held that there was sufficient consideration for the transfers and that defendants John C. Schofield and his wife did not divest themselves of all their property at that time, there being a reasonable prospect of creditors being paid out of their remaining property.

The evidence presented at trial indicates that John S. Schofield and his son were jointly obligated on a note secured by the property in question; that John C. Schofield had made some of the mortgage payments out of the rental proceeds from the property; that during a period of 1974, six checks written by John C. Schofield in payment of that obligation were returned for lack of sufficient funds; that the mortgagee notified John S. Schofield that the property would be foreclosed unless full payment of the amount in arrears was made immediately; that John S. Schofield paid the amount in arrears; that thereafter the property was transferred to John S. Schofield and his wife in December, 1974; and that John S. Schofield made all payments thereafter.

There is conflicting testimony concerning the amount of equity in the property at the time it was transferred and as to the amount of consideration actually passing at the time of the conveyance. Nevertheless, we sustain the trial court's finding with respect to this transfer in that there was evidence that at the time of the transfer on 10 December 1974, there was a reasonable prospect on the part of defendants John C. Schofield and wife that there was sufficient property available out of which other debts could have been paid. At that time, John C. Schofield and wife still owned their home in Davidson County and an one-half interest in the Rowan County property. Further, there is no evidence to indicate that, as of 10 December 1974, a default had occurred with respect to defendants' obligation to Wurlitzer on the guaranty agreement entered into in 1973. Therefore, based on

the authority cited herein, we view the evidence as sufficient to sustain the trial court's findings of fact and conclusions of law as to the transfer on 10 December 1974.

Because there is competent evidence to support the trial court's findings of fact, and the findings support the conclusions of law, the judgment is

Affirmed as to plaintiff's appeal and

Affirmed as to defendants' appeal.

Judges PARKER and MARTIN (Robert M.) concur.

STATE OF NORTH CAROLINA v. DAVID JONES HUNNICUTT

No. 7929SC457

(Filed 15 January 1980)

1. **Criminal Law § 80.1— admissibility of computer billing printout for telephone**

In this prosecution for first degree murder, the State provided a sufficient foundation for the introduction of a computer billing printout showing that a telephone call had been made from defendant's phone to a hospital where the manager of the local Southern Bell office testified that the printout was made as a part of the business records regularly kept by Southern Bell, that the entries were recorded as each call was made and were thereafter made available for billing in the form of printed sheets, that the system had been in operation in his office for two years, that he was familiar with the interpretation of computer records as well as how the information was gathered, stored and utilized, and that the records were based on what he understood to be a reliable and accurate information system.

2. **Criminal Law § 80.1— note sent by defendant—authentication**

The State properly identified and authenticated a note found by a jailer in a deck of cards sent by defendant to another inmate while in jail to permit testimony as to the contents of the note where the note was identified as the note handed to the jailer in the deck of cards, and the jailer testified that defendant was the only person in the jail at that time whose name or initials included the letters by which the note was signed, that he had seen defendant write his name, and that the deck of cards was in his exclusive possession from the time defendant gave it to him until he examined it and discovered the note.

3. Criminal Law § 42.5— truck similar to defendant's car near crime scene—admissibility

A witness's testimony that he observed a truck similar to that of defendant in the vicinity of two murder victims' house on the date of their deaths was not inadmissible because of its lack of specificity and positiveness, since such factors go to the weight and not the admissibility of the testimony.

4. Criminal Law § 48— no implied admission by silence—Miranda warnings not necessary

An officer's testimony that after serving murder warrants on defendant, defendant stated, "You mean you are saying that I went down there and shot those people?" did not constitute failure to deny an accusatory statement and was not inadmissible because defendant had not been given the Miranda warnings, since defendant was not questioned regarding his guilt or innocence, no interrogation took place prior to the statement, and defendant's statement was a denial and not an implied admission.

5. Criminal Law § 165— impropriety in jury argument—waiver of objection

Defendant waived his right to complain of alleged impropriety in the district attorney's jury argument by failing to object thereto.

6. Homicide § 21.5— first degree murder—sufficiency of evidence

The State's evidence was sufficient to be submitted to the jury on the issue of defendant's guilt of first degree murder and to support his conviction of second degree murder where it tended to show that defendant visited the victims' residence armed with a pistol; gunshots were heard coming from the direction of the victims' residence; the victims' deaths resulted from multiple gunshot and stab wounds; and defendant told another inmate of the jail where he was incarcerated that he killed a man and a woman by shooting them and afterwards stabbing them to make sure they were dead.

APPEAL by defendant from *Lewis, Judge.* Judgment entered 5 December 1978 in Superior Court, POLK County. Heard in the Court of Appeals 24 September 1979.

Defendant was convicted on two charges of second degree murder and sentenced to two consecutive terms of not less than 70 nor more than 80 years.

The State presented evidence at trial which tended to show the following:

On 14 July 1978 the bodies of Gary Leatherwood and Janet Driscoll were found in their house in Saluda, North Carolina. Medical evidence revealed that the two deaths, which occurred on 12 July 1978, resulted from multiple gunshot and stab wounds. Approximately eight .32 caliber cartridges were found at the residence. It was established at trial that defendant possessed a

.32 caliber pistol on the day of the murders. Defendant was identified as being in the vicinity of the victims' residence during the afternoon before their deaths.

A substantial portion of the State's evidence came from the testimony of one Tommy Guin, who had associated with defendant on 12 July 1978. Guin testified that he and some companions contacted defendant at a service station in Hendersonville where defendant worked; that they later met at a motel and drove back to the service station where defendant obtained a small pistol; that they then drove to defendant's house where defendant obtained more weapons; that later in the evening they drove to a house in Saluda, where defendant left the others in their vehicle and approached the house; that defendant said that "he and a guy that lived at this house had a few problems and that [he] had to go by and talk to him". Guin testified further concerning the evening of 12 July 1978:

> "David got out and walked around the van and went up sort of this way, and we sat there for a moment and just sitting there and we heard some gunshots go off, and these gunshots came from the way David Hunnicutt went. I heard four or five gunshots. Then we started the van up and started to leave and we were driving down the road with the lights off; and we heard a girl yell, 'Oh, my God.' Then I heard some more gunshots, and we drove down the road and right as we got to a post light, we turned on our lights."

Guin's testimony was corroborated by several of the deceased victims' neighbors who stated they had heard gunshots on the night in question. Defendant was seen later the same night at a service station in Saluda, where a friend picked him up. At that time, defendant explained that he had been with two boys and that they had left him and had stolen his guns from him.

Further evidence indicated that a telephone call was made from defendant's unlisted phone to St. Luke's Hospital in Polk County at which time a male voice inquired whether either of the victims had been admitted to the hospital. The manager of the Hendersonville Southern Bell office was allowed to testify over defendant's objection concerning the computer billing system used by Southern Bell. He testified that defendant's telephone bill indicated a call had been placed from defendant's number to the

number belonging to St. Luke's Hospital, consistent with previous testimony. The State offered the testimony of a police officer with respect to a statement made by defendant after he had been taken into custody.

The State also offered the testimony of Gary Durham, Chief Jailer of Polk County, who stated that after defendant had been placed in the Polk County Jail, one Michael Lawson was arrested in connection with the murders in Saluda and placed in the detention facility along with defendant. The jailer testified that defendant gave him a book and a deck of cards to give to Lawson, and that upon examining them, he found a note hidden in the cards which read: "Silence is golden, don't let them trick you, you've done nothing. Tear note up, flush it. H.U.N." Further evidence indicated that while in the Polk County Jail, defendant related to inmate Hughes that he killed a man and a woman by shooting them and afterwards stabbing them to make sure they were dead. There was also evidence that defendant told inmate Hayes that he was paid to kill Janet Driscoll, that Gary Leatherwood was not supposed to be killed, but that he did not leave any witnesses.

Defendant did not present any evidence.

The trial court denied defendant's motions to dismiss, and sent the case to the jury with instructions on first and second degree murder. The jury returned a verdict of guilty to second degree murder, and defendant appealed.

Attorney General Edmisten, by Associate Attorney Grayson G. Kelley, for the State.

Stepp, Groce, Pinales & Cosgrove, by W. Harley Stepp, Jr., and Edwin R. Groce, for defendant appellant.

MORRIS, Chief Judge.

[1] Defendant initially assigns as error several evidentiary questions, the first of which concerns the introduction into evidence of a microfiche reader printout indicating that a telephone call had been made from defendant's phone to St. Luke's Hospital in Polk County. Defendant's objection to the evidence as hearsay was overruled. The State asserts that the computer printout was properly admitted under the business records exception to the rule against hearsay.

The admissibility of computer printout sheets of business records stored in electronic computers is governed by our Supreme Court's ruling in *State v. Springer*, 283 N.C. 627, 197 S.E. 2d 530 (1973), wherein the Court stated the following:

> "[P]rintout cards or sheets of business records stored on electronic computing equipment are admissible in evidence, if otherwise relevant and material, if: (1) the computerized entries were made in the regular course of business, (2) at or near the time of the transaction involved, and (3) a proper foundation for such evidence is laid by testimony of a witness who is familiar with the computerized records and the methods under which they were made so as to satisfy the court that the methods, the sources of information, and the time of preparation render such evidence trustworthy." 283 N.C. at 636, 197 S.E. 2d at 536.

See also State v. Passmore, 37 N.C. App. 5, 245 S.E. 2d 107, *cert. denied*, 295 N.C. 556, 248 S.E. 2d 734 (1978); *State v. Stapleton*, 29 N.C. App. 363, 224 S.E. 2d 204, *appeal dismissed*, 290 N.C. 554, 226 S.E. 2d 513 (1976). *See generally* 1 Stansbury's N. C. Evidence, § 155 (Brandis Rev. Supp. 1976).

In the instant case, the evidence is plenary in support of the admissibility of the computer printouts. Upon voir dire examination, Harold Kincaid, manager of the Southern Bell Office in Hendersonville, testified that the microfiche printout in question was made as part of the business records regularly kept by Southern Bell Telephone. He further testified that the microfiche entries were recorded as each call was made, and were thereafter made available for billing in the form of printed sheets. The witness explained that the system had been in operation in Hendersonville for two years, and that during this time he had become familiar with the interpretation of the computer records, as well as how the information was gathered, stored and utilized. Mr. Kincaid testified further that the records were based and calculated on what he understood to be a reliable and accurate information system. From this evidence we hold that the State provided a proper foundation for the introduction of the computer billing printout sheets. It follows, therefore, that the exhibit and the testimony with respect thereto were properly admitted into evidence. *See State v. Stapleton*, supra.

[2] Defendant argues that the trial court court erred by allowing Gary Durham to testify as to the contents of a note he found in a deck of cards handed to him by defendant. We find no merit in defendant's argument, in that the note was properly identified and authenticated. The note was produced at trial and identified as the note which defendant handed to Gary Durham. The evidence indicates that defendant handed Durham the deck of cards; that defendant requested the cards be given to Lawson; that defendant and Lawson then were the only two persons in the facility at that time who had been charged in connection with the deaths of Gary Leatherwood and Janet Driscoll; that defendant was the only person in the facility at that time whose name or initials included the letters "H.U.N."; that the witness had the occasion to observe defendant write his name, which he said included the initials on the note; and that the deck of cards was in the exclusive possession of the witness from the time defendant gave it to him until he examined it and discovered the note. This evidence is sufficient to authenticate the writing in question. *See State v. Davis*, 203 N.C. 13, 164 S.E. 737, *petition for reconsideration dismissed*, 203 N.C. 35, 164 S.E. 749, *cert. denied*, 287 U.S. 649, 77 L.Ed. 561, 53 S.Ct. 95 (1932). *See generally* 2 Stansbury's N. C. Evidence, § 195 (Brandis Rev. 1973).

[3] Defendant also assigns error to the admission of the testimony of one William Pace that he observed a truck similar to that of defendant's in the vicinity of the deceased victims' house on 12 July 1978. Defendant urges us to reject this testimony because of its supposed lack of specificity and positiveness. This concern goes to the weight of the evidence, and not its admissibility. Since we view the testimony sufficiently probative to justify admission into evidence, we overrule this assignment of error. Defendant further objects to the court's allowing testimony concerning certain admissions allegedly made by defendant while in Polk County Jail, in that such testimony was unreliable. Again, we view the issue of credibility as one for the jury, and therefore admission of such testimony to the jury, after cross-examination and upon proper instructions, is proper.

[4] Defendant complains that the trial court erred by admitting the testimony of State Bureau of Investigation Agent Ned Whitmire as to a statement made by defendant in his presence. Whitmire testified that after serving certain warrants upon defendant

and taking him into custody, defendant stated, "You mean you are saying I went down there and shot those people?" Defendant contends that the effect of the testimony was that defendant failed to deny an accusatory statement made in his presence, and that he had not been warned of his *Miranda* rights prior to his statement. After reviewing the record and the applicable law, we conclude that the statement was properly admitted and that no prejudice was created by its admission. It is clear that defendant was not questioned regarding his guilt or innocence, and that no interrogation of defendant had taken place prior to the statement being made. Further, we view defendant's statement as constituting a denial and certainly not an implied admission to the charges listed in the warrants. Defendant suffered no prejudice by the admission of this testimony.

[5] By his next assignment of error, defendant contends that the court erred by failing to strike *ex mero motu* a portion of the district attorney's closing argument, asserting that it was tantamount to commenting on defendant's failure to testify or present a defense. Defendant did not object to the State's remarks, and, therefore, waived his right to complain. "Ordinarily, an impropriety in counsel's jury argument should be brought to the attention of the trial court before the case is submitted to the jury in order that the impropriety might be corrected." *State v. Hunter*, 297 N.C. 272, 277, 254 S.E. 2d 521, 524 (1979). Although this rule does not apply when the impropriety is so gross that it cannot be corrected, *State v. Hunter*, supra, we conclude upon review of the argument that the alleged transgression was not prejudicial to defendant. Control of jury arguments is largely a matter of judicial discretion, and rulings thereon by the trial judge will not be disturbed in the absence of gross abuse of discretion. *State v. Hunter, supra. See generally* 4 Strong's N. C. Index 3d, Criminal Law, § 102.2 (1976). We find no abuse of discretion.

Defendant next complains that the trial judge failed to submit to the jury the issue of voluntary manslaughter in addition to the issues of first and second degree murder. This objection is not well taken. "The correct rule requires the trial judge to charge on a lesser included offense when and only when there is evidence which would support a conviction of the lesser crime. The presence of such evidence is the determinative factor." *State v. Irick*, 291 N.C. 480, 501, 231 S.E. 2d 833, 847 (1977). There was no

evidence presented in this case that would justify such a submission. Defendant's exception is, therefore, overruled.

[6] Defendant further contends that the trial court improperly denied his motion to dismiss at the close of the State's evidence and at the close of all the evidence, and that the court improperly entered judgment upon the jury's verdict. Justice Huskins, in *State v. McKinney*, 288 N.C. 113, 215 S.E. 2d 578 (1975), clearly stated the applicable standards in consideration of a motion to nonsuit:

> "A motion to nonsuit in a criminal case requires consideration of the evidence in the light most favorable to the State, and the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom. *State v. Cutler*, 271 N.C. 379, 156 S.E. 2d 679 (1967). Contradictions and discrepancies are for the jury to resolve and do not warrant nonsuit. *State v. Bolin*, 281 N.C. 415, 189 S.E. 2d 235 (1972); *State v. Greene*, 278 N.C. 649, 180 S.E. 2d 789 (1971). All of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is considered by the Court in ruling upon the motion. *State v. Cutler, supra; State v. Walker*, 266 N.C. 269, 145 S.E. 2d 833 (1966). If there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that defendant committed it, a case for the jury is made and nonsuit should be denied. *State v. Cook*, 273 N.C. 377, 160 S.E. 2d 49 (1968); *State v. Norggins*, 215 N.C. 220, 1 S.E. 2d 533 (1939)." 288 N.C. at 117, 215 S.E. 2d at 581-82.

Under these principles, "[i]f the trial court determines that a *reasonable* inference of the defendant's guilt *may* be drawn from the evidence, it must deny the defendant's motion and send the case to the jury even though the evidence may also support reasonable inferences of the defendant's innocence." *State v. Smith*, 40 N.C. App. 72, 79, 252 S.E. 2d 535, 540 (1979). We view the evidence, when considered in a light most favorable to the State, as sufficient to raise a reasonable inference of defendant's guilt. The evidence, although circumstantial, certainly supports an inference that defendant visited the deceased victims' residence armed with a weapon, and that some form of altercation occurred

resulting in the deaths. The State having carried its burden, the trial judge properly submitted the evidence to the jury. At that point, "it is *solely* for the jury to determine whether the facts taken singly or in combination satisfy them beyond a reasonable doubt that the defendant is in fact guilty." *State v. Smith, supra,* 40 N.C. App. at 79, 252 S.E. 2d at 540. We further hold that a rational trier of fact could reasonably have found the defendant committed the crimes charged. *See Jackson v. Virginia,* --- U.S. ---, 61 L.Ed. 2d 560, 99 S.Ct. 2781 (1979); *State v. Barbour,* 43 N.C. App. 143, 258 S.E. 2d 475 (1979).

Defendant argues, in addition, that the trial court erred in its charge to the jury with respect to the effect convictions of criminal offenses were to have upon the truthfulness of the various witnesses. Upon a review of the judge's charge in this case, we conclude that the judge accurately explained to the jury the purposes for which such evidence was to be considered, as well as explaining the role of the jury in deliberating upon the evidence. Defendant's objection to the trial court's instruction is thereby overruled.

We conclude that in the trial below, the judge committed

No error.

Judges PARKER and MARTIN (Robert M.) concur.

ROBINHOOD TRAILS NEIGHBORS, AN UNINCORPORATED ASSOCIATION, A. THOMAS OLIVE AND WANDA T. REMY, PETITIONERS v. THE WINSTON-SALEM ZONING BOARD OF ADJUSTMENT, DAISY REED, R. J. CHILDRESS, NORMAN SWAIN, GRACE ANDRONICA, CLARK BROWN, MARCUS SHELTON, JAMES R. LANCASTER, R. W. SCOGGIN AND AMOS E. SPEAS, RESPONDENTS

No. 7921SC215

(Filed 15 January 1980)

1. Administrative Law § 4; Attorneys at Law § 4— testimony of attorney while representing client before administrative board

While it was not improper for a local administrative board to consider the testimony of an attorney given while he was representing a client in a matter

before the board, attorneys are strongly discouraged from serving as both a witness and an advocate, even before local administrative boards, unless the exceptions in DR 5-101(B) or other compelling circumstances exist.

2. **Attorneys at Law § 4; Municipal Corporations § 30.6— board of adjustment—evidence by unsworn attorney**

Appellants were not prejudiced because a board of adjustment, in making its findings of fact in granting a special use permit for off-street parking, considered a slide presentation of the site by appellants' attorney who was not sworn as a witness where the board made a visit to the site; furthermore, appellants cannot complain because the board considered information which their own attorney presented to the board.

3. **Municipal Corporations § 30.6— special use permit—sufficiency of evidence**

There was substantial competent evidence in the record to support a decision by a board of adjustment to grant a special use permit for off-street parking on property in a residential zone.

4. **Municipal Corporations § 30.6— special use permit for parking—abutting lot—meaning of "lot"**

Where a provision of a zoning ordinance permitted a special use permit for use of a lot zoned residential as a parking area for a business only if said lot abuts for a distance of not less than 25 feet upon the lot to which such parking would be an accessory, "lot" means a zoning lot consisting of land to be developed under one ownership rather than a tax map lot, and two tax map lots, one containing a store and the other a parking area, were properly considered together as a single "lot" for the purpose of determining whether a third tax map lot met the requirements of the statute for a parking special use permit.

5. **Municipal Corporations § 30.6— special use permit—approval of site grading plan—substantial compliance**

There was substantial compliance with a provision of a city ordinance prohibiting the issuance of a special use permit until the superintendent of inspections approved any site plan required by the soil erosion and sedimentation control ordinance where persons in charge of erosion control were familiar with grading activity on the land in question and had suggested changes which were adopted by the owner.

APPEAL by plaintiffs from *Wood, Judge*. Judgment entered 19 October 1978 in Superior Court, FORSYTH County. Heard in the Court of Appeals 23 October 1979.

Appellant, Robinhood Trails Neighbors, is an unincorporated association comprised of residents in approximately 80 households in the Robinhood Trails subdivision. Appellants Olive and Remy are citizens and residents of Winston-Salem. The appellants challenge the issuance of an off-street parking special use permit

issued to Mt. Tabor Food Market, Inc., by the Winston-Salem Board of Adjustment (hereinafter referred to as the "Board"), an administrative and quasi-judicial body created pursuant to N.C. Gen. Stat. § 160A-388 and Section 25-17 of the Winston-Salem Zoning Ordinance.

On 2 February 1978 the Mt. Tabor Food Market, Inc. (hereinafter "Mt. Tabor"), requested an appearance before the Board in order to request the following special use permit:

> "To permit the . . . use of the property . . . to establish off-street parking on residential property abutting business property located on the north side of Robinhood Road, approximately one quarter mile west of Whitaker Road. The property is zoned R-4. Lots 48E, eastern portion of 48F, Block 3410, being all of that lot designed (*sic*) as Lots 48E and 48F, Block 3410, Forsyth County tax maps, except that portion of Lot 48F for which Special Use Permit for off-street parking was granted May 4, 1967."

On 4 May 1978 Mt. Tabor had its hearing before the Board at which time Mt. Tabor proffered the sworn testimony of its counsel, William S. Mitchell. Mr. Mitchell presented 1,071 signatures of persons approving the proposed use, as well as previously filed or to-be-filed letters of approval from the owners to the north and east of the subject property. Also, Mr. Mitchell explained that the property partly across Robinhood Road was already in business use by Sherwood Plaza and that a building and loan association was immediately across the road. Mr. Mitchell further stated that additional parking would promote safety because many customers would have to park across Robinhood Road and walk across the road to get their groceries. Market values, stated Mitchell, would not be decreased by granting the permit because the front of the subject lot would remain wooded, the land to the east was wooded, the land across the street next to Sherwood Plaza was wooded and there were no houses close enough to be affected by the parking area. Finally, the parking lot would be in harmony with the Mt. Tabor store next to the lot and Sherwood Plaza across the street from the lot.

At the hearing plaintiffs' attorney, Thomas Ross, who did not take an oath, gave a slide presentation of the proposed parking lot as well as the surrounding area. Mr. Ross indicated that, with

the exception of Sherwood Park, Mt. Tabor and the savings and loan, all of the surrounding property was zoned residential. Mr. Ross also submitted affidavits stating that the existing parking space for Mt. Tabor was 30% empty each time it had been monitored and that the persons occupying five houses on the other side of Robinhood Road opposed the special permit. Other exhibits introduced included applications for a building permit for additions to the Mt. Tabor food market, an application for a development permit by the Winston-Salem Soil Erosion and Sedimentation Control Ordinance, and tax maps for the lots in question. Finally, Mr. Ross presented, for a standing count, twenty-one persons who were in opposition to the proposed permit.

The Board approved the special use permit in an open executive session. Appellants petitioned to superior court for judicial review. A writ of certiorari was granted on 28 September 1978. After reviewing the entire record of the proceeding and considering oral arguments, Superior Court Judge William Wood held that the Board acted properly in granting the special use permit. Appellants excepted only to the judgment entered by the trial court.

Craige, Brawley, Liipfert & Ross by C. Thomas Ross for plaintiff appellants.

City Attorney Ronald G. Seeber and Womble, Carlyle, Sandridge & Rice by Roddey M. Ligon, Jr., for defendant appellees.

CLARK, Judge.

I. Rule 10(a)

We are aware that Rule 10(a) of the Rules of Appellate Procedure limits appellate consideration to exceptions set out in the record. However, Rule 10(b)(1) provides an exception for matters where objection was noted at the trial level. It is now clear that formal rules of evidence do not apply to municipal administrative boards, *Humble Oil and Refining Company v. Board of Aldermen*, 284 N.C. 458, 470, 202 S.E. 2d 129, 137 (1974), and each of the items we have discussed was argued by counsel to the local board as being improper. Counsel could not except to the findings of fact because none were made. In the interest of justice, and for

the purpose of giving some guidance to local boards, we have chosen to not strictly enforce Rule 10(a) in this case.

II. Substantial Evidence

[1] Appellants first contend that William Mitchell, attorney for Mt. Tabor Food Market, Inc., breached Disciplinary Rule DR 5-102 of the North Carolina Code of Professional Responsibility by presenting sworn testimony as a witness while at the same time representing his client. For this reason, appellants argue that the testimony of Mr. Mitchell was not competent and cannot serve as a basis for finding there was "substantial evidence" to support the special use permit.

We deal with the propriety of the professional conduct of Mr. Mitchell to the extent that it is relevant to the issues involved in this case. A panel of this Court, in *Mebane v. Iowa Mutual Insurance Company*, 28 N.C. App. 27, 220 S.E. 2d 623 (1975), held that an attorney who testifies on behalf of his client is a competent witness; nonetheless, because of the policy behind the Professional Ethical Considerations, the panel refused to overturn a trial court ruling that the attorney's evidence was inadmissible. The instant case is distinguishable from *Mebane* in at least two respects: (1) the local administrative board in this case chose to consider the testimony of the attorney; and (2) the formal rules of evidence applicable to the General Court of Justice, even if they were controlled by the Code of Professional Responsibility, are not binding on local municipal administrative agencies. *Humble Oil, supra.* Consequently, we do not find a compelling reason to extend existing law by holding that the evidence presented by an attorney who testifies while representing a client before a local administrative board may not be considered by the local administrative board. We do, however, for the reasons set forth in Ethical Consideration 5-9, strongly discourage attorneys from serving as both a witness and an advocate, even if before local administrative boards, unless the exceptions in DR 5-101(B) or other compelling circumstances exist:

> "EC 5-9. Occasionally a lawyer is called upon to decide in a particular case whether he will be a witness or an advocate. If a lawyer is both counsel and witness, he becomes more easily impeachable for interest and thus may be a less effec-

tive witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case. An advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility. The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another; while that of a witness is to state facts objectively."

[2] Appellants' next objection is that the Board of Adjustment could not make a finding based upon the showing of slides by appellants' attorney because appellants' attorney was not sworn in before the Board. Appellants' position is consistent to a limited degree with the holding of our Supreme Court in *Jarrell v. Board of Adjustment*, 258 N.C. 476, 481, 128 S.E. 2d 879 (1963), that a board of adjustment may not base critical findings of fact on unsworn statements. However, since the Board made its own site visit we can see no prejudice to the appellants. There is no indication that every critical factor which might have been shown in the slides could not also have been seen during the visit to the site by the Board. In addition, we note that the requirement of sworn testimony and affidavits is to establish credibility and it would be inappropriate except in limited circumstances for the administrative board or a court to deny, at appellants' request, consideration of the very information which appellants' attorney presented to the board or court. The underlying principles of estoppel as well as the credibility safeguards which inhere in the hearsay exceptions for declarations against interest and admissions by party opponents would all support this result.

[3] Having rejected these arguments by the appellants, we now hold that there was substantial competent evidence in the record to support the Board's decision to grant the special use permit. Stated differently, there was "sufficient information to understand the Board's action. [*Humble Oil, supra*] does not require that parties aggrieved by a grant be treated as parties aggrieved by a denial." *Washington Park Neighborhood Association v. Winston-Salem Board of Adjustment*, 35 N.C. App. 449, 457, 241 S.E. 2d 872, 877, cert. denied, 295 N.C. 91, 244 S.E. 2d 263 (1978).

III. Definition of Lot

[4] Appellants' next major contention is that the Board of Adjustment did not follow the law of North Carolina or Winston-Salem. In this regard appellants argue that the Board did not comply with the following underlined language in section 25-7.F of the Winston-Salem Zoning Ordinance:

> "A special use permit may be granted for the use of a lot in a residential zone as a parking area to serve a business or industrial, or multi-family use located in a district in which such use is permitted, *but only if said lot abuts for a distance of not less than twenty-five (25) feet upon the lot to which such parking would be an accessory. . . .*" (Emphasis supplied.)

To support their argument, appellants present tax maps to show that Tax Map Lot 47-B, Tax Map Lot 48-F, and Tax Map Lot 48-E are located, from left to right respectively, on the north side of Robinhood Road. All three lots are owned either legally or beneficially by Mt. Tabor Food Market. The food market is located on Lot 47-B and is zoned for business. Lot 48-F is zoned residential but a special use permit for parking for approximately one-half of Lot 48-F was granted in 1967. Lot 48-E, which is also zoned residential only abuts Lot 48-F, not Lot 47-B where the food market is located. Appellants argue that a special use permit cannot be granted for Lot 48-E because it does not abut Lot 47-B, the lot for which such parking would be accessory. To allow a special permit for Lot 48-E, appellants argue, would be to use "tacking" to effectively rezone Lot 48-F as business property.

The critical factor in resolving this aspect of the dispute is the definition of "lot" within the meaning of section 25-7.F of the Ordinance, and on this point the Ordinance is no model of clarity. Appellants argue that "lot" means a tax map lot, and relies on the following definition in section 25-3.B:

> "Lot. A parcel of land designated by number or other symbol as a part of a legally approved and recorded subdivision, or as described by metes and bounds."

However, upon analyzing the context of subsection 25-7.F, we find that "lot" means "zoning lot" as also defined in section 25-3.B:

"Lot, Zoning. A parcel of land which is indicated by the owner, at the time of application for a building or zoning permit, as being that land which he proposes to develop under one ownership."

Under the latter definition, Tax Map Lots 48-E and 48-F would be considered a single lot to be developed under one ownership for zoning purposes. It is apparent, given this definition, that the Ordinance contemplated "tacking" for the limited purpose of allowing a business to expand its parking capacity on adjacent land which it owns even though such adjacent land is zoned residential, provided, of course, that all of the requirements of a special use permit, set out in subsection 25-19, are met. Such a provision constitutes an exception to the zoning ordinance and is not "rezoning." We also note that zoning district lines do not have to coincide with property lines, *Helms v. City of Charlotte*, 255 N.C. 647, 653, 122 S.E. 2d 817 (1961); and we are not, therefore, inclined to apply a definition to "lot" which is limited to a tax map lot where the governing body of the municipality has not made this designation.

[5] Finally, appellants argue that the Board should not have granted a special use permit because no permit for grading activity was issued by the Superintendent of Inspections pursuant to section 7-19.a. of the Winston-Salem Soil Erosion and Sedimentation Control Ordinance, set forth herein:

"a. Any person engaged in land-disturbing activities who fails to file a plan in accordance with this ordinance, or who conducts a land-disturbing activity except in accordance with provisions of an approved development plan shall be deemed in violation of this ordinance.

* * * *

c. None of the following documents or permits shall be issued or granted under applicable zoning regulations or other laws and ordinances unless and until a plan, as required by this ordinance, has been approved by the superintendent of inspections:

(1) Zoning Permit

(2) Special-Use Permit

(3) Variance Permit

(4) Temporary Permit."

We agree with appellant that the Board of Adjustment may not issue a permit until an "approval" under section 7-19.c. of the Winston-Salem Erosion and Sedimentation Control Ordinance has been made by the superintendent of inspections. No formal permit, however, is required under section 7-19.c. and the attorney for the appellants admitted in the hearing that the Board was not required to have the stamp of a registered engineer on grading plans. In addition, the evidence in the record shows that this provision was complied with in substance, even if not in the most desirable technical form. The record of the hearing indicates that the Board was aware that the people in charge of erosion control were "familiar with everything that went on on [the] lot and the owner of the lot at the suggestion of our people made certain construction changes at our suggestion such as a construction of a burm [*sic*] on the lot and that burm [*sic*] was so shaped that drainage from the site runs into a catch basi[n] and pipe that runs down through the fill to the toe of the fill."

The grant of the special use permit by the Winston-Salem Zoning Board of Adjustment and the decision of the Superior Court below are

Affirmed.

Judges HEDRICK and MARTIN (Harry C.) concur.

STATE OF NORTH CAROLINA v. RONALD TURGEON

No. 7912SC588

(Filed 15 January 1980)

1. Searches and Seizures § 13- defendant's briefcase voluntarily handed over by friend—no search and seizure

Where defendant entrusted his briefcase to a friend for safekeeping and the friend, upon request of law enforcement officers, delivered the briefcase to them, there was no search and seizure of the briefcase within the contemplation of the Fourth Amendment, and the trial court therefore did not err in denying defendant's motion to suppress the briefcase.

2. Criminal Law § 43.1; Rape § 10— photographs of defendant in sexual activity—admissibility in rape case

In a prosecution for first degree rape of a female child under the age of twelve years, defendant being a male person above the age of sixteen years, the trial court did not err in admitting into evidence photographs taken from defendant's briefcase which depicted defendant and a young female person, who was at one time defendant's fiance, engaging in a variety of sexual activities and photographs of the female in a variety of poses while in a state of complete undress, since defendant showed the photographs to the prosecutrix shortly after one instance of sexual abuse on a certain day and immediately prior to another instance on that same day; the showing of the photographs was closely related to and a part of the entire transaction with the prosecutrix which was charged under the indictment for first degree rape; the photographs were probative, competent and substantive evidence of defendant's animus and state of mind at the time the acts charged were committed; and the photographs were admissible to corroborate the testimony of the prosecutrix and her sister.

3. Criminal Law § 86.5; Rape § 10— photographs of defendant in sexual activity—cross-examination proper

In a prosecution for rape of a female child under twelve, defendant being a male over sixteen, where the State introduced into evidence photographs of defendant and a young female person engaging in a variety of sexual activities, the trial court did not err in allowing the State to cross-examine defendant with reference to the content of the photographs and defendant's relations with the person depicted therein, since the State could show whether defendant, in showing the pictures to the minor prosecutrix, intended to arouse or gratify sexual desire within the contemplation of G.S. 14-202.1(a)(1); the State could properly impeach defendant by asking questions concerning prior degrading conduct; and, inasmuch as the female in the photographs was young, the information elicited by this line of cross-examination was relevant and probative as to defendant's proclivities towards this type of conduct.

4. Criminal Law § 34.7; Rape § 10— sexual acts committed on prosecutrix' sister—evidence admissible to show animus

In a prosecution of defendant who was over sixteen for the rape of a female under 12, the trial court did not err in allowing testimony concerning sexual acts committed by defendant upon the sister of the prosecutrix over a period beginning two years before acts complained of by the prosecutrix and continuing to the general time of the acts for which defendant was being tried, since such testimony was admissible to show the animus and purpose of defendant.

5. Criminal Law § 86.5— prior degrading acts—cross-examination of defendant proper

In a prosecution for rape, the trial court did not err in permitting cross-examination of defendant concerning a bag of what appeared to be pubic hair which was seized from defendant's briefcase since defendant could properly be impeached by evidence of prior degrading acts.

6. Rape § 10— erotic books in defendant's briefcase—admission harmless error

Though the trial court in a first degree rape case should have excluded from evidence three erotic books seized from defendant's briefcase, admission of the books was not so prejudicial as to require a new trial.

Judge HEDRICK concurs in result only.

APPEAL by defendant from *McLelland, Judge.* Judgment entered 7 February 1979 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 13 November 1979.

Defendant was tried, upon an indictment proper in form, for the first degree rape of a female child under the age of twelve years, he being a male person above the age of sixteen years. The trial court instructed the jury on the first degree rape, assault with intent to commit rape, and taking indecent liberties with children. He was convicted by the jury of assault with intent to commit rape and received a sentence of fifteen years' imprisonment. From judgment imposing sentence he appeals, assigning error.

Attorney General Edmisten, by Assistant Attorney General R. W. Newsom, III, for the State.

Assistant Public Defenders James R. Parish and Rebecca Bosley, for the defendant.

MARTIN (Robert M.), Judge.

[1] Many of the defendant's exceptions in this matter pertain to the admission, over objection, of evidence which was found inside a briefcase belonging to defendant, which briefcase had been entrusted to a friend of defendant's for safekeeping and was delivered, upon request of law enforcement officers, by that friend to the officers. Our initial concern must therefore be whether the trial court erred in denying defendant's motion to suppress the warrantless seizure of the briefcase, as is contended by defendant.

It was found as fact by the court below, upon competent evidence, that the person who surrendered the briefcase to the police officers did so voluntarily and not in response to any threats or promises made by the officers. A statement was signed by the individual in question to that effect. At the hearing on the

motion to suppress, defendant offered no evidence in contradiction of the State's evidence. We conclude, on the rationale of *State v. Woods*, 286 N.C. 612, 213 S.E. 2d 214 (1975), that no "search" took place and that the briefcase was not "seized" within the contemplation of the Fourth Amendment of the U.S. Constitution. The trial court, therefore, did not commit error when it denied the motion to suppress the briefcase. Defendant's argument on appeal that the individual who surrendered the briefcase was, by reason of threats and coercion from the police officers, an involuntary participant and therefore an arm of the police is simply not supported by the record. This assignment of error is overruled.

The briefcase was opened pursuant to a valid search warrant. It contained a plastic bag containing what appeared to be pubic hair, three paperback books dealing with a specialized erotic subject matter, and a collection of forty-one photographs. The case also contained a Polaroid camera and flash attachment. Defendant moved *in limine* to exclude from evidence the hair, books, and photographs. This motion was denied, and defendant excepted. We find that the trial court properly overruled the motion *in limine* as to all of these items. We further find that the photographs were properly admitted into evidence as part of the State's case in chief. The photographs were of defendant and a female person who was at one time defendant's fiance. The photographs depict the female person in a variety of poses while in a state of complete undress. Several of the photographs depict defendant and the female person engaging in a variety of sexual activities. We are of the opinion that the showing of such sexually explicit photographs to a minor of the age of the prosecutrix in the instant case (ten years old) would arguably constitute an indecent liberty within the purview of N.C. Gen. Stat. § 14-202.1. Had the instant indictment so charged, the content of the photographs would have been competent, relevant, and substantive evidence as to that offense. However, inasmuch as the indictment alleged only facts and circumstances pertinent to first degree rape, and did not separately charge the offense of taking indecent liberties by means of displaying such sexually explicit photographs, we may not consider them in reference to the lesser included offense[1]

1. *See State v. Shaw*, 293 N.C. 616, 239 S.E. 2d 439 (1977) (N.C. Gen. Stat. § 14-202.1. Taking indecent liberties with children held to be a lesser included offense of the crime of rape of a virtuous female child under the age of 12 years)

of taking indecent liberties with children except to the extent the elements of the lesser included offense correspond to and are subsumed in the greater offense charged by the indictment. Therefore, the photographs were admissible, if at all, with reference to the facts and transactions which would have constituted the first degree rape or one of the lesser included offenses based on the same facts and transactions.

[2] The evidence of record adduced by the State shows that defendant's showing of the photographs to the prosecutrix occurred shortly after one instance of sexual abuse on a certain day and immediately prior to another instance on that same day. The logical inference from this evidence is that defendant intended, by use of the photographs, to arouse or gratify sexual desire, an element of the offense of taking indecent liberties with children, and that the showing of the photographs was closely related to and a part of the entire transaction with the prosecutrix which was charged under the indictment for first degree rape. Furthermore, although intent is not an element of first degree rape where the victim is a virtuous female under the age of 12 years and the defendant is a male person above the age of 16 years, it is an element of both assault with intent to commit rape and taking indecent liberties with children, lesser included offenses of the principal offense which were submitted to the jury in this case. The photographs and their content would be probative, competent, and substantive evidence of defendant's animus and state of mind at the time the acts charged were committed. In this context, the probative value of the photographs clearly outweighs any inflammatory effect they conceivably might have had on the jury. We note that, in a case where sordid and vile deeds are alleged and must be proved by the State, any evidence adduced to prove defendant's guilt must necessarily carry some taint of sordidness or vileness with it. That being the state of affairs in the instant case, it would be a circular argument which requires exclusion of the photographs: the defendant has been accused of acts of manifest depravity which shock the conscience, but, evidence which tends to demonstrate that depravity must be excluded because the effect on jurors would be too shocking and inflammatory. We decline to accept that argument.

Additionally, the photographs were specifically identified by the prosecutrix's sister, aged 15, and also identified specifically in

the testimony of the prosecutrix. Arguably, therefore, the photographs would also have been admissible as corroborative of the girls' testimony. The defendant objected generally to the admission of the photographs. Where the offer of evidence is objected to generally and the evidence is admissible for some purposes, if not for others, the trial judge may properly overrule the objection and admit the evidence. *See State v. Foster*, 284 N.C. 259, 200 S.E. 2d 782 (1973). Where a limiting instruction would be appropriate, but is not immediately requested, the failure to give such an instruction is not error. *See State v. Sawyer*, 283 N.C. 289, 196 S.E. 2d 250 (1973). Defendant did not request any limiting instruction as to the photographs. He is not, therefore, entitled to relief from the ruling of the trial court.

[3] For the same reasons we find it was proper for the State to cross-examine the defendant in regard to the contents of the photographs. As noted above, intent is an element of the offense of taking indecent liberties, and by demonstrating that defendant was familiar with their contents, the State could show whether defendant, in showing the pictures to the minor prosecutrix, intended to arouse or gratify sexual desire within the contemplation of N.C. Gen. Stat. § 14-202.1(a)(1). Inasmuch as the photographs depicted defendant and a female person engaging in sex acts, it was not improper for the State's attorney to question defendant on cross-examination about his relationship with the female in the photographs. Defendant, in taking the stand, placed his credibility in issue. It is a long-standing rule in this jurisdiction that a defendant may, on cross-examination, be impeached by questions about collateral matters, including prior degrading conduct. *See State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174 (1971); *also see State v. Monk*, 286 N.C. 509, 212 S.E. 2d 125 (1975) and *State v. Neal*, 222 N.C. 546, 23 S.E. 2d 911 (1943). Defendant does not contend that the questions were not asked in good faith, and the questions were related to matters peculiarily within the knowledge of defendant, *State v. Williams, supra.* The scope of such cross-examination is ordinarily limited by whatever bounds are established by the trial judge in his sound discretion, *State v. Williams, supra; State v. Neal, supra.* No abuse of discretion has been made to appear. Furthermore, inasmuch as the female person in the photograph is obviously young, the information elicited by this line of cross-examination was relevant and probative as to

defendant's proclivities towards this type of conduct. For the foregoing reasons, we conclude it was not error to admit the photographs into evidence, or to allow the State to cross-examine defendant with reference to their content thereof and his relations with person depicted therein. Defendant's fourth, ninth and tenth assignments of error are overruled.

[4] By his seventh assignment of error, defendant argues that it was improper and prejudicial to allow testimony concerning sexual acts committed by defendant upon the sister of the prosecutrix over a period beginning two years before the acts complained of by the prosecutrix and continuing to the general time of the acts for which defendant was being tried. The evidence was presented by way of testimony of the prosecutrix's sister and by testimony of a social worker who took the statement of the sister. We are of the opinion that the testimony of the sister was admissible to show the animus and purpose of the defendant, under the rationale set forth in *State v. Davis*, 229 N.C. 386, 50 S.E. 2d 37 (1948). (The instant case, we note, does not contain the same factual or statutory situations as were present in the *Davis* case and which were troublesome to Stacy, C.J., who wrote a lengthy dissent concurred in by two other justices.) The testimony of the social worker was likewise admissible as corroborative of the sister's testimony. *See State v. Sawyer*, 283 N.C. 289, 196 S.E. 2d 250 (1973); *State v. Hooks*, 228 N.C. 689, 47 S.E. 2d 234 (1948). *See also State v. Wells*, 31 N.C. App. 736, 230 S.E. 2d 437 (1976). These assignments of error are overruled.

[5] In his second and third assignments of error, defendant argues that the admission into evidence of the plastic bag of pubic hair and three erotic books found in his briefcase was prejudicial. As to the bag of hair, we note that the record does not show that it ever was admitted into evidence. Cross-examination concerning it, however, was proper as impeachment of defendant's credibility by evidence of prior degrading (although collateral) acts. *State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174 (1971). This assignment of error is overruled.

[6] The three books (entitled *Angela's Naughty Secret, Going Down on Daddy,* and *Love for Little Girls*) present a different question, however. At the time the books were offered into evidence and their titles were read to the jury, neither the pros-

ecutrix nor her sister had identified them or given any testimony whatsoever concerning them. Defendant's character and credibility were not in issue when the books were offered as part of the State's case in chief. As the books were not competent for any corroborative or substantive purposes, they should have been excluded. We note, however, that only the titles of the books were read to the jury; the contents were not read or discussed. We conclude on this basis that their admission, while erroneous, was not so prejudicial as to require a new trial, particularly in view of the almost overwhelming evidence tending to demonstrate defendant's guilt. This assignment of error is overruled.

Defendant has abandoned his fifth, eighth and eleventh assignments of error. We have carefully examined his sixth assignment of error and find it to be without merit. We conclude that defendant had a fair trial free from prejudicial error. For the foregoing reasons the judgment of conviction is affirmed.

Affirmed.

Judge WELLS concurs.

Judge HEDRICK concurs in the result only.

IN THE MATTER OF THE APPEAL FROM THE DENIAL OF THE APPLICATION TO DREDGE AND/OR FILL OF THE BROAD AND GALES CREEK COMMUNITY ASSOCIATION

No. 793SC302

(Filed 15 January 1980)

Waters and Watercourses § 7— denial of dredge or fill permit—effect on riparian owner

The Marine Fisheries Commission acted arbitrarily and capriciously in denying a permit to dredge or fill in estuarine waters for the purpose of constructing a public boat ramp on the ground that the project would have a significant adverse effect on a riparian owner, G.S. 113-229(e)(2), where all of the evidence related to adverse effects such as noise, parking, trespass, and loss of privacy, but there was no evidence that the use of the proposed ramp and its approaches by the public or the operation of boats on the waters would have any adverse effect on the environment of estuarine resources of the riparian owner's land.

Judge MARTIN (Robert M.) dissenting.

In re Community Association

APPEAL by the applicant from *Rouse, Judge.* Judgment entered 6 November 1978 in Superior Court, CARTERET County. Heard in the Court of Appeals on 15 November 1979.

This case arises from the refusal of the North Carolina Marine Fisheries Commission to grant a permit to dredge and/or fill on Broad Creek in Carteret County. Applicant Broad and Gales Creek Community Association sought the permit for the purpose of constructing a public boat launching ramp. By letter dated 11 May 1976, L. Leo Tilley, assistant director of the Division of Marine Fisheries, informed the applicant that its request for the permit was being denied because of "strong objections from adjacent riparian landowners." Although eleven State agencies had lodged no objections to the proposal after extensive review of the plan and on-site inspections, the Division nevertheless concluded that the project would detrimentally affect the value and enjoyment of the property of the two landowners, Fred J. Cone and Rugumak, Ltd.

Pursuant to timely request by the applicant, the matter was heard before the full Commission on 18 August 1976. Thirty-four witnesses, who live in the area where the ramp was to be located, appeared in support of the project. The testimony of the property owners called by applicant was substantially to the effect that the ramp would enhance rather than adversely affect the value and enjoyment of their property, and that it would serve a much-needed public purpose since there was no other public launching ramp in the area. William R. Lewis, Chairman of the Board of Directors of the Broad and Gales Creek Community Association, testified that the Association, representing 1500 to 1700 members, had undertaken "numerous projects in the community for the public good", and that it wished "to add this project to our list of facilities to provide for the community."

Respondents offered the testimony of four witnesses, each of whom own one-fourth undivided interests in the Rugumak property adjacent to the site of the proposed ramp. They testified that the value and enjoyment of their property would be adversely affected by the construction of the ramp in the following ways: Edward Ruggles expressed concern about people parking on his property and littering the area; Mrs. George Gullette stated that she, too, was worried about litter and feared early morning noise

which would prevent her from sleeping late; Mrs. Edward Schoenborn said that she was "afraid of some of the characters . . . that would come in and use it [a public ramp]," and that all the dogs in the neighborhood "would bark like mad" when strangers came in; Mrs. Ralph Fadum testified that she was concerned about losing her privacy, that "[i]t will ruin what used to be private sunbathing and swimming", and that the noise would be detrimental to her enjoyment of her property. These witnesses also testified that they were concerned about drainage and erosion problems on the dirt access road to the ramp, although they conceded that the Association had maintained the road in the past. None of the four owners occupy the property on a full-time basis, but they and their families vacation there frequently. Fred Cone, the other landowner who initially objected to the project, did not appear to testify. Mrs. Fadum testified that he had told her he was "very opposed" to the project. She admitted that he did not live on his property and that she did not know when he had last vacationed there.

At the close of the evidence, the Commission made findings of fact and conclusions of law, and entered its Order dated 30 March 1977, denying the application for a dredge and fill permit on the ground that "the proposed project would . . . have a significant adverse effect on the value and enjoyment of the adjacent riparian owner, Rugamak [sic] Ltd."

Upon the applicant's petition for review in Superior Court, the matter was heard before Judge Rouse who affirmed the decision of the Commission upon findings that its decision was authorized by the statute, N.C. Gen. Stat. § 113-229(e)(2), that the statute was constitutional, and that the decision was supported by substantial evidence. Applicant thereupon appealed to this Court.

Bennett, McConkey & Thompson, by Thomas S. Bennett, for the applicant appellant.

Attorney General Edmisten, by Special Deputy Attorney General W. A. Raney, Jr., and Assistant Attorney General Amos C. Dawson III, for the Marine Fisheries Commission.

Wheatly, Wheatly & Davis, by Warren J. Davis, for Rugumak, Ltd.

HEDRICK, Judge.

Chapter 113 of the North Carolina General Statutes is entitled "Conservation and Development." The provision in question on this appeal, § 113-229, provides in pertinent part as follows:

> *Permits to dredge or fill in or about estuarine waters or state-owned lakes.*—(a) Except as hereinafter provided before any excavation or filling project is begun in any estuarine waters, tidelands, marshlands, or state-owned lakes, the party or parties desiring to do such shall first obtain a permit from the Department of Natural Resources and Community Development.
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> . . .
>
> (e) . . . The Department may deny an application for a dredge or fill permit upon finding: (1) that there will be significant adverse effect of the proposed dredging and filling on the use of the water by the public; or (2) that there will be significant adverse effect on the value and enjoyment of the property of any riparian owners; or (3) that there will be significant adverse effect on public health, safety, and welfare; or (4) that there will be significant adverse effect on the conservation of public and private water supplies; or (5) that there will be significant adverse effect on wildlife or fresh water, estuarine or marine fisheries. In the absence of such findings, a permit shall be granted.

This statute, as its title indicates, is in the nature of a conservation measure. Its purpose is obvious: the protection and preservation of the State's natural resources, in particular, its estuarine resources. Courts have universally agreed that such measures are constitutional as legitimate exercises by the State of its inherent police power to promote the public interest in conservation. *See* Annot., 46 A.L.R. 3d 1431 (1972). Nevertheless, any statute enacted in the exercise of the police power must be strictly construed so as to result in the least interference with personal liberty. 3 Strong's N. C. Index 3d, *Constitutional Law* §§ 11, 11.1 (1976). Moreover, the means chosen to achieve the legislative ends must be reasonable and, in the context of the police power, the reasonableness standard necessarily entails a balancing of the private interest to be affected and the public good to be achieved.

See A-S-P Associates v. City of Raleigh, 298 N.C. 207, 258 S.E. 2d 444 (1979); 16A Am. Jur. 2d *Constitutional Law* § 385 (1979).

In the case before us appellant argues, *inter alia*, that the Superior Court erred in affirming the decision of the Commission denying the permit for the reason that the Order was not supported by substantial evidence and that it was arbitrary and capricious. As we pointed out above, the obvious purpose of statutes regulating the issuance of dredge and fill permits is to protect the environment. Specifically, the obvious purpose of the statute under consideration is to protect the environment of estuarine waters and resources from the detrimental effects of dredging and filling in such waters.

The Commission bottomed its decision on the finding and conclusion that the dredging required for the construction of a boat launching ramp would have a "significant adverse effect on the value and enjoyment of the adjacent riparian owner, Rugamak [sic] Ltd." N. C. Gen. Stat. § 113-229(e)(2). It is significant that the record before us is wholly devoid of any evidence concerning any effect that the proposed "dredging or filling" pursuant to the permit might have on the estuarine resources contiguous to any riparian owners, including Rugumak. Furthermore, we think it logical to assume that the dredging would *not* adversely affect the estuarine resources since the plans for the proposal were circulated among and studied by the requisite eleven State agencies, none of whom raised objections thereto.

All of the evidence developed in this case relates exclusively to the effect that the use of the ramp and its approaches by the public would have on the idiosyncratic sensitivities of four individuals, in that the influx of people with boats, and the possible littering and noise, would adversely affect their enjoyment of their property. There is no evidence about the effect of the dredging itself. There is not one scintilla of evidence that the use of the ramp and its approaches, or the operation of boats on the waters, would have any adverse effect on the environment of the estuarine resources. Without belittling the concerns of the owners of the Rugumak property or their desires for privacy and quiet, we cannot accept a construction of this statute that allows the State to favor private interests over public interests.

The State in the exercise of its police power acts legitimately only when it acts to protect the *public* good and the *general* welfare. It matters not that private interests are thereby benefited. The State properly considers only the benefit to the members of the public as a group, and it may not exercise the police power to favor or benefit some private interest. *See A-S-P Associates v. City of Raleigh, supra;* 16A Am. Jur. 2d *Constitutional Law* §§ 360 *et seq.* (1979).

Yet, that is what the Commission did in this case. Despite the overwhelming evidence that construction of a boat launching ramp in the proposed area would be beneficial to the public, the Commission allowed private concerns to prevail. We agree with appellant that such action was arbitrary and capricious. The Commission cannot use the police power to further private interests in this way.

For the reasons stated, the judgment of the Superior Court is reversed. The cause is remanded to the Superior Court for the entry of an Order remanding the proceeding and directing the issuance of the permit, as required by the statute.

Reversed and remanded.

Judge WELLS concurs.

Judge MARTIN (Robert M.) dissents.

Judge MARTIN (Robert M.) dissenting.

The majority contends that the sole purpose of N.C. Gen. Stat. § 113-229 is "the protection and preservation of the State's natural resources, in particular, its estuarine resources." This approach, however, overlooks the fact that the Legislature has granted the Department of Natural Resources and Community Development the authority to deny an application for a dredge or fill permit upon finding: " . . . (2) that there will be significant adverse effect on the value and enjoyment of the property of any riparian owners . . ." That the Legislature has empowered the Department to consider the effects of a project on a private property owner is further reinforced by § 113-229(d) which requires that " . . . the applicant shall cause to be served . . . upon an

owner of each tract of riparian property adjoining that of the applicant a copy of the application filed with the State of North Carolina and each such adjacent riparian owner shall have 30 days from the date of such service to file with the Department of Natural Resources and Community Development written objections to the granting of the permit to dredge or fill." Thus the statutory pattern insures that *adjacent* riparian owners be given notice of a project and an opportunity to object and that significant adverse effect of a project on the value and enjoyment of *any* riparian owner's property will be grounds for the denial of such a permit. Thus the Commission was acting within the statute when it considered the adverse effects of the project on four adjacent land owners.

While protection of ecological interests may be the primary aim of the statute, protection of private interests is well provided for. The statute does not require that the riparian owner's value and enjoyment of the property be confined to its estuarine value and enjoyment or that his objections to a project be ecological in nature. Therefore, the Department is legitimately concerned with such objections and adverse effects as noise, parking, trespass and property values.

At the hearing before the Marine Fisheries Commission there was testimony by the adjacent owners which would support a finding that "the proposed project would . . . have a significant adverse effect on the value and enjoyment of the adjacent riparian owner, Ragamak [sic] Ltd." According to § 113-229(g)(5), "The burden of proof at any hearing shall be upon the person or agency . . . at whose instance the hearing is being held." In this case, although applicant adduced testimony on the beneficial effects of the project as a whole, it did not meet its burden of proving that there will not be significant adverse effects on the value and enjoyment of the property of any riparian owners. *In re Appeal of Seashell Co.*, 25 N.C. App. 470, 213 S.E. 2d 374 (1975).

I vote to affirm the judgment of the trial court.

C. HARRY KLEINFELTER AND DORIS L. KLEINFELTER v. NORTHWEST BUILDERS AND DEVELOPERS, INC.

No. 7917SC177

(Filed 15 January 1980)

1. **Fraud § 5— boundaries—buyer's reliance on seller's representations**

In the sale of real estate it is usual and necessary that the seller point out to the prospective buyer the boundaries of the tract, and the buyer should have the right to rely on the boundary representations of the seller when the seller purports to know them, the extent to which the buyer may rely upon them being dependent upon the size of the lot, the terrain and other circumstances.

2. **Fraud § 12— seller's representations as to boundaries—buyer's reliance on representations—summary judgment improper**

The trial court erred in entering summary judgment for defendant in plaintiffs' action to recover damages for fraud and deception and unfair trade practices where there was a genuine issue of fact as to whether plaintiffs were entitled to rely on the representations of defendant's agent with respect to the boundaries of a lot sold by defendant to plaintiffs where the evidence tended to show that defendant's agent showed plaintiffs the lot in question which consisted of a wooded area, a lawn, including a portion 60 feet wide on the east side of the house, and a dwelling; the agent told plaintiffs that the location of the southeast corner was a stake near the edge of the woods and outside the lawn area; half of the lawn which defendant had leveled and planted was in fact located on an adjoining lot; and the lot corner and boundaries near the area in question were in the woods and on a steep hill and were thus neither visible nor accessible.

APPEAL by plaintiffs from *Long, Judge.* Order entered 4 December 1978 in Superior Court, STOKES County. Heard in the Court of Appeals 18 October 1979.

In 1975 defendant, in the real estate development and home construction business, owned Lot No. 53, Sec. 4, Westridge Subdivision, King, North Carolina, as shown on map recorded in Plat Book 4, Page 79, in the office of the Register of Deeds, Stokes County. Lot No. 53 is shaped like an hourglass, fronts about 250 feet on the south side of Westridge Drive, is narrow in the center, has a depth of about 525 feet, and is 178 feet wide across the back. The terrain is hilly and wooded.

Defendant constructed a dwelling near the southeast corner of Lot No. 53, about 30 feet from both the south and east boundary lines. Apparently, this location was suitable because it was

level. Defendant determined that the only level area for the drainage lines from the septic tank was about 30 feet across the east boundary line onto Lot No. 52.

Defendant on 13 February 1975 obtained from the owners of Lot No. 52 (Colyer) a perpetual easement for an underground septic tank pipeline, and defendant agreed to "make level the surface of the ground above said septic tank line."

Defendant leveled the ground in front and on the east side of the dwelling, then planted grass in the leveled area, which included the area leveled for the septic tank drainage on Lot No. 52, about 34 feet wide.

Plaintiffs alleged, by complaint filed 25 May 1978, that the dwelling and lawn were shown to him as a prospective buyer, and that the lawn was about 60 feet wide on the east side of the house. Plaintiffs further alleged that they asked Michael Wilmoth, defendant's agent, to point out to them the location of the southeast corner of Lot No. 53, and that Wilmoth told them the corner was a stake near the edge of the woods and outside the lawn area. Thereafter, on 27 May 1975, plaintiffs purchased the house and lot from defendant. The deed contained the following description: " . . . Lot No. 53 as shown on the map of Westridge, Section No. 4, as recorded in the Office of the Register of Deeds of Stokes County, North Carolina, in Plat Book 4, Page 79, to which reference is hereby made for a more particular description."

Plaintiffs also alleged that upon taking possession under the deed, plaintiffs tended the lawn area, including that part thereof located on Lot No. 52 owned by Colyer. In November 1975, Colyer complained about plaintiffs' trespass upon Lot No. 52, and showed to plaintiffs some stakes hidden by the grass which marked the common corner and boundary of Lots No. 52 and No. 53. The true dividing line between the lots cut off 34 feet or one-half of the plaintiffs' side yard.

Plaintiffs further alleged that the lawn area was prepared and planted by defendant with no indication of the boundary line, and that the representation by defendant's agent Wilmoth of the location of the boundary were false representations or were representations made recklessly with intent that plaintiffs as

potential buyers would rely on them, and that plaintiffs did rely on the representations and suffered injury.

Finally, plaintiffs alleged that defendant's actions and conduct as alleged constituted (1) common law fraud and (2) deceptive and unfair trade practices in violation of N.C. Gen. Stat. § 75-1.1.

Plaintiffs also alleged a claim against defendant for a hairline fracture in a bathtub and a claim for failure to fill in the driveway.

Defendant by answer admitted the sale of Lot No. 53 to plaintiffs and admitted its acquisition of the easement on Lot No. 52 and the installation and maintenance of the septic field for the dwelling of plaintiffs on Lot No. 53, but denied all other material allegations of the complaint. Defendant asserted the failure of plaintiffs to assert a claim, the one-year statute of limitations as to the N.C. Gen. Stat. § 75-1.1. claim, the three-year statute of limitations, and other defenses not relevant to this appeal.

Defendant moved for summary judgment and supported the motion by the affidavit of Norman Simmons to the effect that plaintiffs appeared to have normal intelligence and awareness of business transactions. Plaintiffs in opposition to the motion offered their affidavits and depositions which in general supported the allegations in their complaint.

The trial court allowed the motion for summary judgment with respect to the First Claim for common law fraud and deceptive trade practices in violation of N.C. Gen. Stat. § 75-1.1, and to the Second Claim for punitive or exemplary damages, but denied the motion with respect to the claims based on the defective bathtub and failure to fill in the driveway.

Pfefferkorn & Cooley by William G. Pfefferkorn and J. Wilson Parker for plaintiff appellants.

Hudson, Petree, Stockton, Stockton & Robinson by Dudley Humphrey and William A. Brafford for defendant appellee.

CLARK, Judge.

In determining whether the trial court erred in allowing partial summary judgment with respect to plaintiffs' claims for fraud, deceptive trade practices in violation of N.C. Gen. Stat. § 75-1.1,

and punitive damages, it is particularly significant that the only matter offered by defendant to support its motion for summary judgment was the affidavit of Norman Simmons to the effect that he knew plaintiffs and they appeared to have normal intelligence and awareness of business transactions. The defendant, therefore, relies entirely on the principle that the plaintiffs had no right to rely upon the representations of the defendant, because the parties were on equal terms and the plaintiffs had knowledge of the facts or means of information readily available and failed to make use of their knowledge or information. This principle is established in many North Carolina decisions. *See, e.g., Peyton v. Griffin*, 195 N.C. 685, 687, 143 S.E. 2d 525 (1928). *See, also, Keith v. Wilder*, 241 N.C. 672, 86 S.E. 2d 444 (1955). Our inquiry, however, does not stop with this rule.

[2] Plaintiffs' allegations of fraud included the false representation by defendant's agent of the location of the boundary when plaintiffs were prospective buyers of the property. Plaintiffs further alleged that the lot corner and boundaries near the area in question were in the woods and on a steep hill and were thus neither visible nor accessible. Further, defendant leveled and planted a lawn, one-half of which (34 feet) was located in an adjoining lot, which tended to lend support to defendant's representation that the entire lawn area was within the boundaries of the lot offered for sale to plaintiffs.

[1] Under these circumstances, could the plaintiffs reasonably rely on the representations of the defendant's agent as to the location of the boundary? In the sale of real estate it is usual and necessary that the seller point out to the prospective buyer the boundaries of the tract. Generally, the buyer does not have the requisite knowledge or skill to accurately determine courses and distances for the purpose of establishing the boundaries of the tract he proposes to buy; he must rely on the representations of someone, and he should have the right to rely on the boundary representations of the seller when the seller purports to know them. The extent to which the buyer may rely upon the boundary representations is dependent upon the size of the lot, the terrain and other circumstances.

The buyer of real estate is not under the duty to have an accurate survey of the lines and boundaries, *Keith v. Wilder, supra,*

nor does the buyer necessarily have to examine the public records to ascertain the truth where the buyer reasonably relies upon representations made by the seller. *Fox v. Southern Appliances, Inc.*, 264 N.C. 267, 141 S.E. 2d 522 (1965).

In *Keith*, defendant, in procuring plaintiff to purchase timber, pointed out the lines and boundaries of an adjoining tract and falsely represented that it was included in the sale. The court recognized the principle of law relied on by defendant and added: "But the rule is well established that one to whom a positive and definite representation has been made is entitled to rely on such representation if the representation is of a character to induce action by a person of ordinary prudence, and is reasonably relied upon." 241 N.C. at 675. The court held that since plaintiff had the right to rely on the positive representation the evidence was sufficient to overrule the defendant's motion for nonsuit. *See also, Swinton v. Savoy Realty Company*, 236 N.C. 723, 73 S.E. 2d 785 (1953).

In *Fox, supra*, the court, in reversing a demurrer, stated that whether the purchasers of realty have the right to rely upon the representations of the seller's agent must be determined upon the basis of whether the representation is of such a character as to induce a person of ordinary prudence to reasonably rely thereon. 264 N.C. at 271. The determination of reasonable reliance involves questions of fact which ordinarily may not be determined by summary judgment.

The defendant relies primarily on *Calloway v. Wyatt*, 246 N.C. 129, 97 S.E. 2d 881 (1957); *Harding v. Insurance Co.*, 218 N.C. 129, 10 S.E. 2d 599 (1940); and *Plotkin v. Bond Co.*, 204 N.C. 508, 168 S.E. 820 (1933). *Calloway* involved a representation of the adequacy of a water supply, which could have been easily ascertained by the buyer by turning on the spigots. In *Harding* the seller represented the condition of a building to the buyer who made an inspection, who had ample opportunity to investigate, and who knew the representations made by defendant's corporate president were based upon secondhand information. Also, there was no evidence in *Harding* that the representations were made with knowledge of their falsity or with reckless disregard for their truth. In *Plotkin* there was a representation of a boundary line, but the jury found there was a mutual mistake and not a false

representation, and the court held that the fraud claim should have been nonsuited. We do not find these cases persuasive in support of defendant's position in the case *sub judice.* In contrast, it does not appear at this stage of the proceedings that plaintiffs as a matter of law had any right to rely on the misrepresentations.

[2] It is apparent that summary judgment on the plaintiffs' Second Claim for punitive damages was allowed because the trial court had determined that summary judgment was appropriate on the First Claim for fraud; and, therefore, there was no basis for the award of punitive damages. Fraud will support an award for punitive damages. *Newton v. Insurance Co.*, 291 N.C. 105, 229 S.E. 2d 297 (1976); *Oestreicher v. Stores*, 290 N.C. 118, 225 S.E. 2d 797 (1976), and since we reject summary judgment for defendant on the fraud claim, we also reject summary judgment on the punitive damages claim. The claim for punitive damages should not be rejected by summary judgment unless it appears that there can be no recovery even if the facts as claimed by the plaintiffs are true. W. SHUFORD, N. C. CIVIL PRACTICE AND PROCEDURE § 56-3 (1975).

Plaintiffs should not be deprived of trial on disputed material issues of fact. We cannot forecast the evidence which the parties will offer at trial. It may appear from the evidence that plaintiffs as a matter of law could not reasonably rely on the alleged misrepresentation, or, on the other hand, it may prove to be a question for the jury.

The partial summary judgment for defendant on both plaintiffs' First and Second Claims was improvidently entered. The judgment is reversed and the cause remanded.

Reversed and remanded.

Judges HEDRICK and MARTIN (Harry C.) concur.

STATE OF NORTH CAROLINA v. C. RICHARD TATE

No. 7918SC599

(Filed 15 January 1980)

1. **Criminal Law § 21— motion in limine to exclude evidence**

A motion *in limine* to exclude prejudicial evidence comes within the purview of G.S. 15A-952(a).

2. **Criminal Law § 21— motion in limine to exclude evidence**

A motion *in limine* to exclude prejudicial evidence should be made only in those cases where the proposed evidence is material and substantial and a pretrial ruling is necessary to avoid prejudice at trial or is necessary to the preparation of the case for trial.

3. **Criminal Law §§ 21, 149— motion in limine to exclude evidence—no right of State to appeal**

Defendant's pretrial motion to exclude the results of a test on green vegetable matter on the ground that the test was not conducted in a scientific manner was a motion *in limine* rather than a motion to suppress pursuant to G.S. 15A-979 since the motion was not based on constitutional objections or on any substantial violation of G.S. Ch. 15A; therefore, the State had no right under G.S. 15A-1445 to appeal from the court's interlocutory order granting the motion.

Judge VAUGHN dissenting.

APPEAL by the State of North Carolina from *Davis (James C.), Judge*. Order entered 22 May 1979 in Superior Court, GUILFORD County. Heard in the Court of Appeals 16 November 1979.

Defendant, an attorney, was charged with destroying marijuana, in the possession of Highway Patrolman E. F. Kelley, which was relevant to a criminal charge by the State against John Oren Gallman, III (a violation of N.C. Gen. Stat. § 14-221.1, a felony providing for a maximum prison term of five years).

Defendant made a "Motion to Suppress" a test and test results on a green vegetable matter made 10 July 1978 in the laboratory of the High Point Police Department which gave a positive reaction for marijuana. The stated ground for the motion was that the test was not conducted with sound scientific principles and was therefore inaccurate.

The State did not respond to the motion, offered no evidence, and made no argument. Defendant offered the affidavit of W. B. Byerly, Jr., who averred in substance that the test was conducted by use of a commercial chemical kit according to instructions therein, and that the test has no scientific acceptance as an accurate means for identifying marijuana.

The trial court considered defendant's motion as a *motion in limine* rather than a *motion to suppress*, found that the test has no scientific acceptance as a reliable means for identifying marijuana, and ordered that the test and test results not be admitted in evidence.

Attorney General Edmisten by Special Deputy Attorney General Lester V. Chalmers and Assistant Attorney General Joan H. Byers for the State.

W. B. Byerly, Jr., and Walter E. Clark, Jr., for defendant appellee.

CLARK, Judge.

N.C. Gen. Stat. § 15A-1445 specifically authorizes the State to appeal from an order of the trial court allowing a motion to suppress under N.C. Gen. Stat. § 15A-979. If the motion made by the defendant was a motion *in limine* to exclude evidence and under the facts does not also qualify as a more limited motion to suppress under N.C. Gen. Stat. § 15A-979, the State has no right of direct appeal, from the order, and the appeal must be dismissed. In such a situation the State may petition for a writ of certiorari under Rule 21 of the North Carolina Rules of Appellate Procedure, but this was not done in the instant case.

Article 53, Chapter 15A, General Statutes of North Carolina, as codified, is entitled "Motion to Suppress Evidence" and includes N.C. Gen. Stat. § 15A-971 through N.C. Gen. Stat. § 15A-979. The initial "Official Commentary" (based on the January 1973 report of the Criminal Code Commission) within the Article and following the title includes the following: "Ruling on a constitutional objection to admission of evidence during trial may require interrupting the course of the trial with a lengthy *voir dire*. . . . This Article prescribes a pretrial procedure for hearing motions to suppress evidence in the superior court. . . . Con-

siderations of jeopardy required that a decision to suppress evidence precede the commencement of the trial if the State is to be afforded a right to appeal."

N.C. Gen. Stat. § 15A-974 in pertinent part provides:

"Upon timely motion, evidence must be suppressed if:

(1) Its exclusion is required by the Constitution of the United States or the Constitution of the State of North Carolina; or

(2) It is obtained as a result of a substantial violation of the provisions of this Chapter. . . ."

N.C. Gen. Stat. § 15A-979(d) provides: "A motion to suppress evidence made pursuant to this Article is the exclusive method of challenging the admissibility of evidence upon the grounds specified in G.S. 15A-974."

The statutes and Official Commentary within Article 53 support the conclusion that the State can appeal from an order allowing a motion to suppress only if the motion to suppress is made under the Article on constitutional objection or substantial violation of Chapter 15A.

In the case *sub judice*, defendant designated his motion as a "Motion to Suppress" but did not specify that it was an N.C. Gen. Stat. § 15A-979 motion. In the order appealed from, the trial court on request of defendant considered the motion to suppress as a motion *in limine*.

[1] *In limine* means: "On or at the threshold; at the very beginning; preliminarily." BLACK'S LAW DICTIONARY 896 (4th ed., 1957). The motion has been recognized and tacitly accepted in North Carolina by recent decisions, both civil and criminal, as a proper method for pretrial determination of the admissibility of evidence proposed to be introduced at trial. *See State v. Ruof*, 296 N.C. 623, 252 S.E. 2d 720 (1979); *Duke Power Company v. Mom 'N' Pops Ham House, Inc.*, 43 N.C. App. 308, 258 S.E. 2d 815 (1979); *State v. McCormick*, 36 N.C. App. 521, 244 S.E. 2d 433 (1978). Such motion comes within the purview of N.C. Gen. Stat. § 15A-952(a) which provides: "Any defense, objection, or request which is capable of being determined without the trial of the general issue may be raised before trial by motion." The motion

in limine to exclude prejudicial evidence is a useful pretrial procedure for avoiding the dilemma of having prejudice implanted in the minds of the jurors during trial by examination of witnesses, objections, and curative instructions from the trial judge. *See generally*, Annot., 63 A.L.R. 3d 311 (1975); 75 Am. Jur. 2d *Trial* § 165 (1974); Rothblatt and Leroy, *The Motion in Limine in Criminal Trials: A Technique for the Pretrial Exclusion of Prejudicial Evidence*, 60 Ky. L.J. 611 (1972); Comment, *The Motion In Limine*, 27 U. Fla. L. Rev. 531 (1975). We find no merit in the contention of the State that the trial court had no authority to suppress the evidence because defendant did not assert as grounds for suppression a constitutional objection or substantial violation of Chapter 15A as required by N.C. Gen. Stat. § 15A-974.

[2] It should be noted, however, that though the motion *in limine* to exclude prejudicial evidence is recognized and accepted in this State, the motion should be made by counsel only in those cases where the proposed evidence is material and substantial and a pretrial ruling is necessary to avoid prejudice at trial or is necessary to the preparation of the case for trial. The grounds for the motion should be clearly stated therein and supported when appropriate by affidavit or other material. A pretrial ruling on the motion is not required unless movant properly supports his claim that prejudice will result if the ruling is delayed until trial. *See* N.C. Gen. Stat. § 15A-952(f).

[3] A ruling on a motion *in limine* to exclude evidence on grounds other than those specified in N.C. Gen. Stat. § 15A-974 is an interlocutory order. In the case *sub judice* the defendant's motion, though designated a motion to suppress, was not a motion to suppress under N.C. Gen. Stat. § 15A-979. The motion was not based on constitutional objections nor on any substantial violations of Chapter 15A. The motion was correctly treated by the trial court as a motion *in limine* to exclude prejudicial evidence. The substantive question of whether the trial court erred in granting the motion is not now properly before this Court. Since the State had no right to appeal from the interlocutory order, the appeal is

Dismissed.

Judge HILL concurs.

Judge VAUGHN dissents.

Judge VAUGHN dissenting.

I must note at the outset that the judge's actions in this matter are patently erroneous. Defendant was indicted for the felony of destroying evidence relevant to a criminal offense or court proceeding. As used in the statute, evidence means *any* article or document in the possession of a law enforcement officer or officer of the General Court of Justice being retained as evidence. G.S. 14-221.1. The indictment alleges that defendant destroyed evidence, marijuana, relevant to a criminal offense involving one John Oren Gallman that was being retained for introduction into evidence. Defendant may or may not have destroyed evidence being so held by the officer. At defendant's trial, however, the State will not be required to prove that the substance destroyed was, in fact, marijuana. The essence of the crime is the destruction of evidence being held for trial, not what the evidence might be.

It further appears to me that there is absolutely nothing in this record to sustain or justify the order entered, which is as follows:

> "that no evidence of the test conducted in the High Point Police Department laboratory on 10 January 1979 upon the substance which the State contends is marijuana in its answer to the defendant's request for voluntary discovery and in the indictment in this matter nor any evidence of the result of said test shall be admitted into evidence upon the trial of this case nor shall the State make any mention of said test or the result thereof at the trial of this matter."

I next consider the nature of the motion under consideration. Defendant's motion to suppress was, in part, as follows:

> "NOW COMES the defendant, by and through his counsel, W. B. Byerly, Jr. and Walter E. Clark, Jr., pursuant to Chapter 15A, Article 53, of the General Statutes of North Carolina, and moves to suppress evidence of a reported test on July 10, 1978, of green vegetable material in the police laboratory of the High Point Police Department. In support of his motion, defendant shows unto the Court. . . ."

In paragraph (4) of the order before us, the judge recites "During the hearing of this motion the defendant asked that his motion to suppress also be allowed and taken as a motion in limine and the Court has so considered this motion."

Article 53 of Chapter 15A provides the only express statutory procedure (in criminal cases) for the suppression of evidence prior to trial. A motion to suppress made under that article is, of course, a motion "in limine." Calling a motion to suppress a motion "in limine" does not change or otherwise describe the motion to suppress—it merely designates its threshold timing. The label simply points out *when* it is made, not what kind of motion it is or what it seeks to accomplish. Other than a motion to suppress under Article 53 of Chapter 15A, "North Carolina has no statutory provisions for such a motion [in limine]." *State v. Ruof*, 296 N.C. 623, 628, 252 S.E. 2d 720, 724 (1979). If defendant's motion to suppress evidence, made preliminarily, before trial and "in limine" was properly made, it was made under Article 53. The State, consequently, has the right to appeal. G.S. 15A-979.

There may be an instance when the judge can indicate preliminarily his views on the admissibility of certain evidence, not subject to exclusion under Article 53. Such a decision, however, is not irrevocable if, when put to test during the crucible of trial, the propriety of admissibility becomes more apparent to the judge and he elects to change his mind.

I respectfully suggest that the majority's reference to G.S. 15A-952 is misplaced. That section is a part of Article 52 entitled "Motions Practice" and deals with motion practice generally in criminal cases. It is, of course, true that G.S. 15A-952(a) provides that any "defense objection or request which is capable of being determined without the trial of the general issue may be raised before trial by motion." Article 53 is, in my view, consistent with this section and details the procedure to be followed when the "objection" or "request" is to *suppress evidence* by pretrial motion.

I would entertain the appeal and reverse the order.

CLIFFORD C. CLONTZ v. J. V. CLONTZ AND MARY RUTH CLONTZ

No. 7920DC78

(Filed 15 January 1980)

Quasi Contracts and Restitution § 1.2— plaintiff's improvements to defendants' land—recovery under unjust enrichment

The fact that plaintiff made improvements on defendants' property upon the good faith belief that a life estate in such property was promised him, and that such improvements inured to defendants' benefit, was sufficient to support recovery under the unjust enrichment doctrine.

APPEAL by defendants from *Honeycutt, Judge.* Judgment entered 14 September 1978 in District Court, UNION County. Heard in the Court of Appeals 26 September 1979.

This action was instituted by plaintiff on 27 May 1977 to recover $2,404 allegedly expended for improvements placed by plaintiff upon defendants' land. Plaintiff alleged an oral agreement between the parties wherein defendants, J. Vann Clontz and Mary Ruth Clontz, promised that if plaintiff would build a well and various other improvements on the property and locate his house trailer thereon, they would execute a deed and convey to plaintiff a life estate in the land he occupied. Plaintiff alleged further that after he had performed, defendants refused to execute the deed, and that thereafter defendants filed an action in ejectment against plaintiff. Plaintiff subsequently vacated the property, and the ejectment action was dismissed.

Defendants, in their answer, denied the existence of any agreement entitling plaintiff to a life estate in the property. Defendants also averred that plaintiff resided on their property as a tenant at sufferance and counterclaimed to recover $3,000 allegedly owed by plaintiff as the fair market rental value for the period of occupancy. Plaintiff replied, reaffirming his original claim for a life estate, and argued that no rental agreement existed for the period of his occupancy.

At trial, plaintiff testified that during February and March of 1974, he was hospitalized and thereafter defendants asked plaintiff to move onto their property so they could care for him; that he spent considerable sums of money improving a portion of defendants' property and digging a well to provide water for the

trailer located there; and that defendants did not share in the labor or expenses involved in such improvements. Further testimony revealed that at the time plaintiff moved onto defendants' property, J. Vann Clontz said that he was "moving his brother out there so they could help take care of him and intended to let him stay there as long as he lived if he acted like somebody", and that he "was giving Clifford a place to stay if Clifford would dig the well and septic tank out there."

Defendant J. Vann Clontz testified that during conversations with plaintiff concerning plaintiff's moving onto the property, he told plaintiff that "I wouldn't give him no lease, but I told him as long as he tried to get along with me and my family, he could live there as long as he wanted to if that was all his life." J. Vann Clontz denied ever having an intention to convey his brother any interest in the property. J. Vann Clontz stated that he had asked plaintiff to vacate the property because plaintiff and his family were "raising the devil, cussing all the time over there", and because plaintiff had allegedly cursed his wife and son during an incident concerning plaintiff's dog. Defendant Mary Clontz testified that she had never made any agreements with plaintiff about moving onto the property, and that she finally had to ask plaintiff to leave the property because of plaintiff's improper behavior. Defendants admitted that after plaintiff moved from the property, they used the well which had been dug at plaintiff's expense, and that their son had moved onto the property and was using the well and septic tank installed by plaintiff.

The jury returned a verdict in favor of plaintiff, awarding $1,000 in damages. Defendants' motion for judgment notwithstanding the verdict was denied, and defendants appealed.

Griffin, Caldwell & Helder, by H. Ligon Bundy, for plaintiff appellee.

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

MORRIS, Chief Judge.

The only question presented on this appeal is whether the trial court erred in denying defendants' motion for judgment notwithstanding the jury's verdict awarding compensation for improvements made by plaintiff on defendants' property.

By G.S. 1-340, the betterments statute, North Carolina provides for recovery of the value of improvements made upon another's property. However, this section does not create an independent cause of action. Rather, it embodies only a defensive right, declaring that an owner of land who seeks and obtains the aid of the court to enforce his right to possession has no just claim to anything but the land itself and a fair compensation for being kept out of possession. Further, if the land has been improved by another under the belief that he was the owner, the true owner ought not to take the increased value without some compensation to the ousted occupant. *Beacon Homes, Inc. v. Holt*, 266 N.C. 467, 146 S.E. 2d 434 (1966); *Board of Commissioners v. Bumpass*, 237 N.C. 143, 74 S.E. 2d 436 (1953). It is clear that plaintiff has no right to recover under this statute.

Defendants erroneously contend that plaintiff bases his right to recovery upon the theory of improvements under the betterments statute. Plaintiff bases his action to recover the value of improvements on the common law theory of unjust enrichment. "The rule of unjust enrichment is based upon the equitable principle that a person should not be permitted to enrich himself unjustly at the expense of another." *Stauffer v. Owens*, 25 N.C. App. 650, 652, 214 S.E. 2d 240, 241 (1975). Thus, where services are rendered and expenditures are made by one party to or for the benefit of another without an express contract to pay, the law will imply a promise to pay a fair compensation therefor. *See R.R. v. Highway Commission*, 268 N.C. 92, 150 S.E. 2d 70 (1966); *Beacon Homes, Inc. v. Holt, supra.*

The theory of unjust enrichment has been specifically applied in situations such as this involving the making of improvements based on an alleged parol contract to convey real property. Aside from the right to setoff used as a quasi-contract remedy at common law and under G.S. 1-340, the law has recognized the theory of unjust enrichment as the basis for an independent action to recovery for improvements. In *Rhyne v. Sheppard*, 224 N.C. 734, 32 S.E. 2d 316 (1944), the Court stated that while no independent action to recover for improvements could be maintained at common law, the plaintiff may pursue his remedy in equity:

> "Plaintiff is not confined to a common law action for improvements, if indeed such right may be enforced by inde-

pendent action. G.S. 1-340. He may resort to the equitable doctrine of unjust enrichment frequently enforced under the doctrine of estoppel." 224 N.C. at 736-37, 32 S.E. 2d at 317-18.

Early decisions recognized that under equity principles, a party entering into possession of real property under a parol contract to convey and who in good faith makes improvements in reliance on the promise to convey is entitled to compensation therefor. In *Pitt v. Moore*, 99 N.C. 85, 5 S.E. 389 (1888), the Supreme Court enunciated the following rule:

> "[W]here the labor or money of a person has been expended in the permanent improvement and enrichment of the property of another by a parol contract or agreement which cannot be enforced because, and only because, it is not in writing, the party repudiating the contract, as he may do, will not be allowed to take and hold the property thus improved and enriched, 'without compensation for the additional value which these improvements have conferred upon the property,' and it rests upon the broad principle that it is against conscience that one man shall be enriched to the injury and cost of another, induced by his own act." 99 N.C. at 91, 5 S.E. at 392.

Similarly, in *Jones v. Sandlin*, 160 N.C. 150, 75 S.E. 1075, (1912), the Court stated as follows:

> "The general rule is that if one is induced to improve land under a promise to convey the same to him, which promise is void or voidable, and after the improvements are made he refuses to convey, the party thus disappointed shall have the benefit of the improvements to the extent that they increased the value of the land. (Citations omitted.)" 160 N.C. at 154, 75 S.E. at 1077.

Application of this principle has been broad and quite liberal in an attempt to do justice upon the facts of the particular case in which applied. *See, e.g., Insurance Co. v. Cordon*, 208 N.C. 723, 182 S.E. 496 (1935); *Jones v. Sandlin, supra; Eaton v. Doub*, 190 N.C. 14, 128 S.E. 494 (1925). This independent action was recognized and approved in the more recent decision of *Beacon Homes, Inc. v. Holt, supra.*

We now consider the propriety of the trial court's denial of defendants' motion for judgment notwithstanding the verdict. In *Brokers, Inc. v. Board of Education*, 33 N.C. App. 24, 234 S.E. 2d 56, *cert. denied*, 293 N.C. 159, 236 S.E. 2d 702 (1977), this Court stated the standard appropriate for review of an order denying a motion for judgment *non obstante veredicto:*

> "When passing on a motion for judgment notwithstanding the verdict, the same standards applicable to a motion for directed verdict are to be applied. Thus, 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 support a verdict for plaintiff. *Hargett v. Air Service* and *Lewis v. Air Service*, 23 N.C. App. 636, 209 S.E. 2d 518 (1974)." 33 N.C. App. at 28, 234 S.E. 2d at 59.

Applying this rule, it is reasonable to infer from the evidence presented in this case that defendants did promise to convey a life estate in the property. It is apparent from the record that defendants told plaintiff he could stay on the property as long as he lived. Defendants contend, however, that plaintiff's rights in the property were conditioned upon the requirement that he conduct himself properly, thereby limiting plaintiff to a tenancy at will. Although such a construction is possible, it is not the only reasonable interpretation possible. Having heard the testimony and observed the demeanor of each of the witnesses, the jury found that defendants orally promised to convey a life estate to the plaintiff and that plaintiff made permanent improvements upon the land pursuant to the oral promise. The evidence presented certainly supports such findings. We conclude that the evidence in this case was sufficient to withstand defendants' motion for directed verdict and so hold.

Plaintiff's recovery in this action is based on the jury's finding that an oral contract to convey real property existed between the parties. It is important, we think, to note that plaintiff's recovery does not necessarily depend on such an agreement. In *Stauffer v. Owens, supra*, this Court affirmed an award for improvements made by plaintiff inuring to the benefit of defendant, irrespective of contractual agreement. The Court stated:

> "Even though the court found that no partnership existed between the parties, in our opinion it properly allowed plaintiff to recover for those goods and services which benefited defendant . . . . The mere ineffectiveness of a partnership agreement between the parties would not prevent plaintiff's recovery." 25 N.C. App. at 652, 214 S.E. 2d at 241.

Such a recovery is founded on the equitable theory of estoppel and not on principles of quasi or implied contract. In this case, the fact that plaintiff made improvements on defendants' property upon the good faith belief that a life estate in such property was promised him, and that such improvements inured to defendants' benefit, is sufficient to support recovery under the unjust enrichment doctrine.

No error.

Judges PARKER and MARTIN (Robert M.) concur.

GRACE T. MOORE v. E. CRAIG JONES, JR., AS TRUSTEE OF THE "RAMIE L. MOORE TRUST FUND," E. CRAIG JONES, JR., AS EXECUTOR OF THE ESTATE OF RAMIE LAWRENCE MOORE, MOUNT OLIVE COLLEGE INCORPORATED, BRANCH CHAPEL FREE WILL BAPTIST CHURCH, SELMA TROOP #32 OF THE BOY SCOUTS OF AMERICA, PERCY L. MOORE, J. ALLIE MOORE, EFFIE J. DAVIS, ELIZABETH M. LYNCH, JOSEPH A. MOORE, JR., FRANCES T. MOORE, JAMES L. CREECH AND CLARENCE M. MOORE

No. 7811SC227

(Filed 15 January 1980)

1. Trusts § 1.1— inter vivos trust—retention of life estate and powers over assets

In this State a valid trust may be created even though the settlor retains both a life estate and the power to revoke or modify the trust, and the coupling of such retained rights and powers in an otherwise valid *inter vivos* trust will not invalidate the trust as an attempted testamentary disposition when the trust instrument was not executed in the manner required for execution of a valid will.

2. Trusts § 5; Wills § 61— inter vivos trust—retention of control of assets—assets as part of estate in determining spouse's right to dissent

Where the settlor of an *inter vivos* trust retains up to the instant of his death powers over the trust assets so extensive that in a real sense he had the same rights therein after creating the trust as he had before its creation, the trust assets should be considered as part of the settlor's estate for purposes of determining the right of his wife to dissent to his will under G.S. 30-1 and of computing the share of his estate to which his wife is entitled under G.S. 30-3(a) should her right to dissent be established.

APPEAL by defendants from *Braswell, Judge.* Judgment dated 24 October 1977 in Superior Court, JOHNSTON County. Heard in the Court of Appeals 9 January 1979.

By this declaratory judgment action the plaintiff, Grace T. Moore, widow of Ramie L. Moore, seeks judgment declaring void an *inter vivos* trust executed by her husband or, in the alternative, declaring the trust void to the extent it impairs her statutory rights as surviving spouse.

Plaintiff and Ramie L. Moore were married 21 June 1963. He died on 16 September 1976, leaving plaintiff as his surviving spouse but leaving no child, issue of a deceased child, or parent surviving. His will, dated 5 November 1963, was probated, and the executor named therein, E. Craig Jones, Jr., duly qualified. By this will the testator left one-half of his estate remaining after payment of debts, funeral expenses, costs of administration, and estate and inheritance taxes, to his wife, the plaintiff herein, and the remaining one-half to his brothers and sisters.

In 1964 Ramie L. Moore, as Settlor, and E. Craig Jones, Jr., as Trustee, executed an instrument dated 19 November 1964 which provided that the Trustee should hold, manage, invest and reinvest certain assets, consisting of stocks, bonds, and savings accounts having a total value of approximately $100,000.00, delivered to him by the Settlor, and pay all of the net income therefrom in semi-annual installments to the Settlor during his lifetime. The trust instrument provided that on the death of the Settlor the Trustee should pay certain specified amounts to named persons and institutions and distribute the remainder to the Settlor's brothers and sisters or their surviving issue. The Settlor retained the right to withdraw assets from the trust, to change beneficiaries, and to modify, amend, add to, or revoke the

trust agreement. Plaintiff was not named as a beneficiary of the trust and did not know of its existence until after her husband's death.

On 6 October 1976 plaintiff filed an instrument dissenting from her husband's will. Thereafter, on 3 January 1977, plaintiff filed this action for declaratory relief, naming as defendants the trustee and the beneficiaries under the trust created by her husband in 1964 and the executor and beneficiaries named in his will. The defendants answered, asserting the validity of the trust. The case was heard by the court without a jury.

After hearing evidence, the court entered judgment making findings of fact and concluding and adjudging that the trust is a valid *inter vivos* trust except to the extent that it impairs the statutory distributive rights of the plaintiff under the provisions of Article 1 of Chapter 30 of the General Statutes. The judgment ordered E. Craig Jones, Jr., as trustee of the trust, to deliver to himself in his capacity as executor such portion of the trust assets, free of any trust, as plaintiff is entitled to receive under the provisions for dissent of Article 1, of G.S. Ch. 30.

From this judgment, defendants appeal.

Young, Moore, Henderson & Alvis by B. T. Henderson, II, and R. Michael Strickland for plaintiff appellee.

Corbett & Corbett, by Albert A. Corbett, Jr., for defendant appellants.

E. Craig Jones, Jr., Executor and Trustee, defendant appellant, pro se.

PARKER, Judge.

[1] In this State a valid trust may be created even though the settlor retains both a life estate and the power to revoke or modify the trust. Moreover, the coupling of such retained rights and powers in an otherwise valid *inter vivos* trust will not invalidate the trust as an attempted testamentary disposition when, as here, the trust instrument was not executed in the manner required for execution of a valid will. *Ridge v. Bright*, 244 N.C. 345, 93 S.E. 2d 607 (1956). Here, there was a written trust agreement signed and acknowledged both by the settlor and the trustee.

This instrument unequivocally expressed the settlor's intention to create a trust. The trust, consisting of stocks, bonds, and cash deposits, was clearly identified and was transferred into the custody of the trustee. The duties and powers of the trustee with respect to the trust assets were expressly defined. The beneficiaries were clearly designated and their respective interests were expressly set forth. Thus, the trust met all prerequisites for a valid trust under the laws of this State. *See Finch v. Honeycutt*, 246 N.C. 91, 97 S.E. 2d 478 (1957); *Starling v. Taylor*, 1 N.C. App. 287, 161 S.E. 2d 204 (1968). Therefore, we agree with the trial court's conclusion that the trust was valid. The question remains as to its effect upon plaintiff's rights as surviving spouse granted her under Article 1 of G.S. Ch. 30.

The statutory right to dissent granted the surviving spouse is defined by G.S. 30-1 which reads in pertinent part:

> (a) A spouse may dissent from his deceased spouse's will in those cases where the aggregate value of the provisions under the will for benefit of the surviving spouse, when added to the value of the property or interests in property passing in any manner outside the will to the surviving spouse as a result of the death of the testator:
>
> * * *
>
> (2) Is less than one half of the deceased spouse's net estate in those cases where the deceased spouse is not survived by a child, children, or any lineal descendant of a deceased child or children, or by a parent.

Once the right to dissent under G.S. 30-1 has been established, the effect of such dissent is prescribed by G.S. 30-3(a), which, insofar as pertinent to this appeal, is as follows:

> (a) . . . if the deceased spouse is not survived by a child, children, or any lineal descendants of a deceased child or children, or by a parent, the surviving spouse shall receive only one half of the deceased spouse's net estate as defined in G.S. 29-2(5), which one half shall be estimated and determined before any federal estate tax is deducted or paid and shall be free and clear of such tax.

G.S. 29-2(5), to which we are directed by G.S. 30-3(a), provides the following definition:

(5) "Net estate" means the estate of a decedent, exclusive of family allowances, costs of administration, and all lawful claims against the estate.

[2] We agree with the trial court's conclusion that these statutes express the public policy of this State. The question presented by this appeal is whether that public policy or the *inter vivos* trust created by plaintiff's husband which circumvents that public policy should prevail. Expressed somewhat differently, the question is whether the assets held in a trust over which the settlor retained such extensive powers at the time of his death should properly be considered as part of his estate for purposes of (1) determining plaintiff's right to dissent under G.S. 30-1, and (2) computing the share of his estate to which plaintiff is entitled under G.S. 30-3(a) should her right to dissent be established.

So far as our research and the briefs of counsel reveal, the North Carolina Supreme Court has not had occasion to pass on the question presented by this appeal. The question in various forms has, however, come before the appellate courts of many other jurisdictions. *See* Annot., *Validity of inter vivos trust established by one spouse which impairs the other spouse's distributive share or other statutory rights in property*, 39 A.L.R. 3d 14 (1971). As stated in that annotation:

> The problem of the validity of an inter vivos trust which impairs the distributive share or other statutory right of the surviving spouse of the settlor has given rise to a substantial measure of complexity in the decisions of the courts of the various jurisdictions. Although, in a broad sense, the problem presents a conflict between the public policy considerations favoring protection of a surviving spouse against disinheritance, and those policy considerations favoring the free alienability of property inter vivos, nevertheless it may be said in more specific terms that the crux of the matter generally concerns the extent to which a married person who transfers his or her property in trust may reserve powers of beneficial ownership and control over such property for his or her lifetime and still, through the medium of such trust, provide for disposition of the property, after death, in such a manner as to deprive his or her surviving spouse of the distributive share therein to which such spouse would otherwise have been entitled by statute.

39 A.L.R. 3d at p. 18.

Recognizing the conflicting public policy considerations which decision of this appeal involves, and in the absence of any controlling decisions from our own Supreme Court, we hold that the public policy favoring protection of a surviving spouse against disinheritance, which has been adopted and expressed by our legislature by enactment of Article 1 of G.S. Ch. 30, should prevail. Therefore, we affirm the trial court's judgment holding the trust created by plaintiff's husband ineffective insofar as it impairs plaintiff's statutory rights as surviving spouse. Except to that extent, the trust is valid and should be carried out in accordance with its terms in order, so far as practicable, to effectuate the intentions of the settlor.

In arriving at this result, we do not base our decision on any concept that in creating the trust, plaintiff's husband acted in any way fraudulently toward her or even that it was his intention to impair her rights in any manner. Indeed, the record before us would not support such a view. We hold only that where, as here, the settlor retains up to the instant of his death powers over the trust assets so extensive that in a real sense he had the same rights therein after creating the trust as he had before its creation, such assets should be considered part of his estate insofar as the statutory rights granted the settlor's surviving spouse by Art. 1 of G.S. Ch. 30 are concerned.

We note that the trial court found as a fact that no hearing has been held on plaintiff's dissent, and the question of whether she can dissent has not yet been determined. The trial court's judgment, which we now affirm, adjudged only that when the hearing on plaintiff's dissent is held and plaintiff's rights in her husband's estate are determined, the trust assets must be taken into account and for that purpose considered to be a part of the estate.

Affirmed.

Judges ARNOLD and WEBB concur.

DONNA CLEO FOUNTAIN v. HOLLIS T. PATRICK AND NATHANIEL WEST

No. 794SC65

(Filed 15 January 1980)

Rules of Civil Procedure §§ 4.1, 60.2— service by publication improper—default judgments set aside

The trial court properly set aside default judgments against defendants and dismissed plaintiff's claim upon a finding of insufficient service of process where the evidence tended to show that plaintiff gave notice by publication without first exercising due diligence in ascertaining addresses for defendants, since plaintiff had available to her certain insurance accident reports which contained addresses for each defendant.

APPEAL by plaintiff from *Strickland, Judge.* Judgment entered 30 October 1978 in Superior Court, ONSLOW County. Heard in the Court of Appeals 15 October 1979.

Plaintiff filed this action on 7 July 1977 to recover damages for injuries incurred in an automobile collision allegedly due to defendants' negligence. Civil summonses were issued and returned the same day upon certification that defendants were not to be found in Onslow County. Service of process by publication was utilized by plaintiff, a notice of publication appearing in the Jacksonville Daily News on 13 July, 20 July and 27 July 1977. An affidavit of publication was filed on 27 February 1978. Thereafter, on 17 March 1978, plaintiff filed a request for entry of default, supported by affidavit pursuant to Rule 55 of the North Carolina Rules of Civil Procedure. The Clerk of Superior Court of Onslow County entered default against defendants on 17 March 1978, and judgment by default was ordered on 22 March 1978 in favor of plaintiff on the issue of liability. The issue of damages was submitted to a jury, which returned a verdict in the amount of $12,500.

On 5 October 1978, defendants filed motions requesting that the court set aside the judgment pursuant to Rule 60(b) and dismiss plaintiff's claim because of insufficient service of process. On 20 October 1978, plaintiff filed a reply to defendants' motion, averring that service of process by publication was proper and appropriate under the circumstances.

Upon hearing, on 30 October 1978, the trial court granted defendants' motion to set aside the judgment, and in addition, dismissed the action. Plaintiff appeals.

Joseph C. Olschner for plaintiff appellant.

Hamilton, Bailey & Coyne, by H. Buckmaster Coyne, Jr., for defendant appellees.

ERWIN, Judge.

The setting aside of default judgments is governed by the provisions of G.S. 1A-1, Rule 60(b) and G.S. 1A-1, Rule 55(d). Rule 60(b), relied upon by defendants in their motion to set aside the judgment, provides:

> On motion and upon terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) Mistake, inadvertence, surprise, or excusable neglect;
>
> . . .
>
> (6) Any other reason justifying relief from the operation of the judgment.

"If a movant is uncertain whether to proceed under clause (1) or (6) of Rule 60(b) he need not specify if his 'motion is timely and the reason justifies relief.' 7 Moore's Federal Practice § 60.27(2) (2d ed. 1970). The broad language of clause (6) 'gives the courts ample power to vacate judgments whenever such action is appropriate to accomplish justice.' 3 Barron and Holtzoff, Federal Practice and Procedure (Wright Ed.) § 1329.", and movant has shown a meritorious cause of action or defense and that "he himself has acted with proper diligence throughout." *Brady v. Town of Chapel Hill*, 277 N.C. 720, 723-24, 178 S.E. 2d 446, 448 (1971); *Sides v. Reid*, 35 N.C. App. 235, 241 S.E. 2d 110 (1978). Here the motion was timely, and movant specified merely Rule 60(b). Findings of fact made by the trial court 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); *City of Durham v. Keen*, 40 N.C. App. 652, 253 S.E. 2d 585, *cert. denied*, 297 N.C. 608, 257 S.E. 2d 217 (1979); *Dishman v. Dishman*, 37 N.C. App. 543, 246 S.E. 2d 819 (1978);

Norton v. Sawyer, 30 N.C. App. 420, 227 S.E. 2d 148, *cert. denied*, 291 N.C. 176, 229 S.E. 2d 689 (1976); *Kirby v. Asheville Contracting Co.*, 11 N.C. App. 128, 180 S.E. 2d 407, *cert. denied*, 278 N.C. 701, 181 S.E. 2d 602 (1971). Where such findings of fact support the conclusions of law and the conclusions of law support the judgment, the judgment must be affirmed. *Kleinfeldt v. Shoney's, Inc.*, 257 N.C. 791, 127 S.E. 2d 573 (1962).

Plaintiff assigns error to various findings by the trial court concerning the sufficiency of service of process on defendants. Specifically, we concern ourselves with plaintiff's contention that the trial judge committed error in finding that plaintiff had not exercised due diligence in ascertaining addresses for defendants, thereby deeming plaintiff's use of service of process by publication under Rule 4(j)(9)c inappropriate. Upon a careful review of the materials presented, we find the record supportive of the trial court's findings.

A defect in service of process by publication is jurisdictional, rendering any judgment or order obtained thereby void. *Sink v. Easter*, 284 N.C. 555, 202 S.E. 2d 138, *rehearing denied*, 285 N.C. 597, --- S.E. 2d --- (1974). A judgment by default granted without proper service of process upon the defendant is void where defendant does not otherwise waive service of process. *Kleinfeldt v. Shoney's, Inc., supra.* Service of process by publication is in derogation of the common law. Therefore, statutes authorizing service of process by publication are strictly construed, both as grants of authority and in determining whether service has been made in conformity with the statute. *Sink v. Easter, supra; Harrison v. Hanvey*, 265 N.C. 243, 143 S.E. 2d 593 (1965); *Richmond Cedar Works v. Farmers Manufacturing Co.*, 41 N.C. App. 233, 254 S.E. 2d 673, *cert. denied*, 298 N.C. 202, --- S.E. 2d --- (1979).

G.S. 1A-1, Rule 4(j)(9)c, provides for service by publication "whenever the party's address, whereabouts, dwelling house or usual place of abode is unknown and cannot with due diligence be ascertained . . . ." In the present case, the trial court ruled the plaintiff's service by publication defective, in that "the addresses of the defendants were available to the plaintiff and that the plaintiff did not use diligence to ascertain said addresses." On hearing, evidence presented indicated that plaintiff had available to him certain insurance accident reports which contained ad-

dresses for each defendant. There is no evidence that an attempt was made to mail the summonses to the addresses available. Further, there was evidence tending to show that plaintiff's counsel, a former counsel for defendants' insurance carrier, was aware of and familiar with the carrier's operating procedures concerning lawsuits, and that the carrier had address information on each of its insureds. In fact, by the time this action was commenced, plaintiff had already negotiated with defendants' insurance carrier acting on behalf of defendants. Evidence tended to show that plaintiff could have easily notified the carrier of her potential civil action and solicited aid in ascertaining defendants' addresses for purposes of service of process. Finally, it appears that plaintiff had available to her the option of requesting defendants' insurance carrier to answer the complaint voluntarily and defend the claim where the defendants could not be located, although there was no duty to do so by either party. There was no attempt to pursue any of these options. Due diligence dictates that plaintiff use all resources reasonably available to her in attempting to locate defendants. Where the information required for proper service of process is within plaintiff's knowledge or, with due diligence, can be ascertained, service of process by publication is not proper. G.S. 1A-1, Rule 4(j)(9)c; *Thomas v. Thomas*, 43 N.C. App. 638, 260 S.E. 2d 163 (1979).

Plaintiff, in opposition to defendants' motion to set aside the judgment, filed certain affidavits to the effect that all reasonable means had been taken in an attempt to ascertain defendants' addresses. The trial judge considered all the materials and ruled in defendants' favor. There was presented some evidence supporting the trial court's decision to set aside the judgment, and that ruling, therefore, must remain undisturbed.

In so holding, we affirm the trial court's determination that "the attempted service of process upon the defendants by publication was defective and void and that there has been an insufficiency of process . . . ." The court had no jurisdiction over the person of the defendants, and plaintiff's action was properly dismissed. *See Sink v. Easter, supra; Kleinfeldt v. Shoney's, Inc., supra.*

Since we find the trial court's finding of a lack of due diligence under Rule 4(j)(9)c dispositive in our review of defendants Rule 60(b) and Rule 12(b)(5) motions, we do not discuss plain-

tiff's assignments of error concerning the summonses, publication notice, and affidavit of publication.

Affirmed.

Judges PARKER and MARTIN (Robert M.) concur.

SYLVIA MARIE BURRELL BUCK, PLAINTIFF-APPELLANT v. TWEETSIE RAILROAD, INC., AND GOFORTH BROTHERS, INC., DEFENDANTS-APPELLEE

No. 7828SC916

(Filed 15 January 1980)

Negligence § 29.2 — amusement park device — failure to warn patrons of danger — genuine issues of fact

In an action to recover for injuries sustained by plaintiff while she was bouncing on a "moonwalk" at defendant's amusement park, the trial court erred in entering summary judgment for defendant amusement park and defendant seller and installer of the "moonwalk" where there were genuine issues of material fact as to whether (1) defendant amusement park's failure to get adequate information as to the danger involved in bouncing on a "moonwalk" and its failure to warn or instruct plaintiff as to bouncing on the "moonwalk" was a failure to do something a reasonable man would have done which was a proximate cause of injury to plaintiff, and (2) defendant seller's failure to procure adequate information about the dangerous propensities of the "moonwalk" and/or its failure to warn defendant amusement park of those propensities was a failure to do something a reasonable man would have done which was a proximate cause of injury to plaintiff.

Judge MITCHELL concurs in the result.

APPEAL by plaintiff from *Snepp, Judge*. Judgment entered 9 May 1978 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 12 June 1979.

This is an action for personal injury to the plaintiff, which injury occurred while she was in a moonwalk on the premises of defendant Tweetsie. A moonwalk is a balloon type amusement device. It has a lower chamber which when inflated provides a soft, undulating floor cushion approximately three feet deep which simulates the sensation of weightlessness. The moonwalk has an upper chamber, which when inflated provides the room in which the patrons move. The moonwalk contains no internal or

external support devices and is secured by nylon ropes attached to the ground. Plaintiff alleged that Tweetsie "negligently failed to post instructions concerning the use of said device and failed and neglected to provide counsellors, guides and instructors in the proper use of the said device," "negligently failed to counsel and advise plaintiff in the use of said device, its dangers and hazards" and "negligently failed and neglected to maintain adequate supervision over the maintenance, use and operation of the said device." She alleged that defendant Goforth "negligently placed the said device in operation without causing to be posted thereon adequate instructions concerning the use of said device . . . ."

According to affidavits filed in the case, defendant Goforth sold the moonwalk to Tweetsie. Employees of Goforth installed it on 10 June 1971 on the premises of Tweetsie and instructed the employees of Tweetsie in its maintenance and use. From that date to the time of the accident, Goforth had nothing further to do with the moonwalk. On 19 June 1971, plaintiff and several other persons were paying customers using the moonwalk. Plaintiff stated in an affidavit that she was told by a man at the entrance to the moonwalk to take off her shoes, to remove any sharp objects from her pockets, and not to bounce within five feet of anyone else. There was not a posted sign giving any instructions as to the use of the moonwalk. In a deposition plaintiff stated "then I started bouncing around and I bounced up in the air and turned a flip . . . then I started bouncing and landed on my backside and the second time I bounced or the third time I just landed and couldn't get up." Plaintiff suffered a serious injury.

Tom Thrailkill, the Metropolitan Coordinator of Physical Education of the Y.M.C.A. of Asheville and Buncombe County, made an affidavit in which he stated that he held a bachelor's degree from Miami University and had been actively engaged in physical education programs since August 1952; that he had worked directly or indirectly with trampoline instruction since 1953; that a trampoline should not be used as an unsupervised activity; a trampoline requires instruction by experienced trampoline instructors who themselves have been trained to teach the proper use of the apparatus; that most injuries which occur during the use of a trampoline are from landing in an improper posi-

tion on the bed of the apparatus itself; that a person has to be taught how to jump up and down on a trampoline and how to stop properly; and loss of control of balance in the air adversely affects landing on the device and therefore can cause injury to the jumper. There was no evidence that either of the defendants was aware of the dangers in using a trampoline or a moonwalk.

The defendants moved for summary judgment and relied on the plaintiff's deposition and affidavits in support of the motion. The plaintiff filed affidavits in opposition. From the granting of summary judgment for both defendants, the plaintiff appealed.

McLean, Leake, Talman, Stevenson and Parker, by Joel B. Stevenson, for plaintiff appellant.

Roberts, Cogburn and Williams, by Landon Roberts, for defendant appellee Tweetsie Railroad, Inc.

Morris, Golding, Blue and Phillips, by William C. Morris, Jr., for defendant appellee Goforth Brothers, Inc.

WEBB, Judge.

The plaintiff assigns as error the granting of the motion for summary judgment. In regard to summary judgments, G.S. 1A-1, Rule 56(c) provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.

Our Supreme Court has interpreted this section in *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E. 2d 419 (1979) to mean that if the moving party forecasts such evidence as would require a directed verdict for the movant at trial, the party opposing the motion must file papers which forecast evidence which would prevent a directed verdict at trial in order to prevent summary judgment in favor of the movant. Using this test, we must determine if the evidence as forecast by the papers filed in this case would require directed verdicts for the defendants.

The plaintiff suffered a serious injury while bouncing on a moonwalk. She had received no warning of danger and no instruc-

tions as to how to land while bouncing except she was told to take off her shoes, remove sharp objects from her pockets, and not to bounce within five feet of any other person. Mr. Tom Thrailkill's affidavit was to the effect that it is dangerous for a person to bounce on a trampoline without training as to proper landing. The question as to each defendant is if the jury should find that the plaintiff was injured on the moonwalk because she was not warned of its dangers or instructed in its use, could the jury find that the injury was proximately caused by the failure of the defendant to do something that a reasonable man would have done. *See Electric Co. v. Dennis*, 255 N.C. 64, 120 S.E. 2d 533 (1961) for a definition of negligence.

As to defendant Tweetsie, we hold that if the jury should believe Mr. Thrailkill as to the dangers in using a trampoline; and if they should find that Tweetsie purchased the moonwalk and had it installed on Tweetsie's premises without getting proper information as to the dangerous propensities of the moonwalk; and if it failed to warn plaintiff of the danger of bouncing on the moonwalk without proper instruction; and she was injured while bouncing on the moonwalk, this is evidence from which the jury could conclude that Tweetsie's failure to get adequate information as to the danger involved in bouncing on a moonwalk and its failure to warn or instruct the plaintiff as to bouncing on the moonwalk was a failure to do something a reasonable man would have done which was a proximate cause of injury to the plaintiff. It was error to grant the motion for summary judgment in favor of Tweetsie.

As to the defendant Goforth, we hold that if the jury should believe Mr. Thrailkill as to the dangers in using a trampoline; and if they should find that Goforth sold the moonwalk to Tweetsie without knowing its dangerous propensities and/or without warning Tweetsie of its dangerous propensities; and the plaintiff was injured while bouncing on the moonwalk, this is evidence from which the jury could conclude defendant Goforth's failure to procure adequate information about the dangerous propensities of the moonwalk and/or its failure to warn Tweetsie of these propensities is evidence from which the jury could conclude defendant Goforth failed to do something a reasonable man would have done which was a proximate cause of injury to the plaintiff. It was er-

ror to grant the defendant Goforth's motion for summary judgment.

The defendants argue that Mr. Thrailkill gave expert testimony as to a trampoline, and the plaintiff was not injured on a trampoline. Defendants contend his testimony should not be considered. We believe the answer to this argument is that, assuming a moonwalk is not a trampoline in the sense that the physical principles used by a trampoline to propel a person upward are not used by a moonwalk, it is not the cause of the bounce that is the danger. The danger at which Mr. Thrailkill's affidavit is directed is the propelling a person upward without training as to how to fall.

Appellant has also assigned as error the refusal of the court to allow her to amend her complaint to allege with more specificity the negligence of Tweetsie. We believe the plaintiff has sufficiently alleged negligence on the part of each defendant to offer proof of her claim. In light of this we do not disturb the ruling of the superior court denying the motion to amend the complaint.

Reversed and remanded.

Judge MARTIN (Robert M.) concurs.

Judge MITCHELL concurs in the result.

HORACE WELLS v. NORTH CAROLINA NATIONAL BANK, T. GRAY ELLIS, D/B/A ELLIS INSURANCE AGENCY

No. 7926SC85

(Filed 15 January 1980)

Insurance § 2.2— lender's failure to procure fire insurance—summary judgment for lender

Summary judgment was properly entered for defendant bank in an action to recover damages for the alleged failure of defendant to procure fire insurance on property purchased by plaintiff and financed by defendant where the evidence showed no language or conduct on the part of defendant's employee which constituted a representation or promise that defendant would obtain fire insurance coverage on plaintiff's property.

APPEAL by plaintiff from *Walker (Ralph A.), Judge.* Judgment entered 23 October 1978 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 26 September 1979.

By this action plaintiff seeks to recover damages resulting from the alleged failure of defendants, North Carolina National Bank (NCNB) and T. Gray Ellis, doing business as Ellis Insurance Agency (Ellis), to procure fire insurance on property purchased by plaintiff. In his complaint, plaintiff alleged: He filed an upset bid on certain property subject to a foreclosure sale, and NCNB agreed to finance the purchase of the property and other obligations concerning the property; NCNB informed plaintiff that it would make certain arrangements for fire insurance coverage on the property and informed plaintiff's attorney that it would transfer the purchase money to the plaintiff's attorney's trust account when fire insurance had been obtained and other details resolved. NCNB later transferred the purchase money as promised. As a result of these representations plaintiff reasonably relied on the belief that fire insurance had been obtained for the property, but, in fact, no fire insurance had been procured. Subsequently, and on 29 November 1976, a restaurant located on the property was destroyed by fire, and at the time of the fire, the insurance coverage allegedly represented as obtained would have had a face value of at least $85,000.

NCNB answered and averred that it had neither a duty to obtain fire insurance nor had represented to plaintiff that fire insurance would be procured. NCNB counterclaimed to recover $101,000, an amount allegedly owed by reason of plaintiff's default under the loan agreement.

After discovery was taken, NCNB's motion for summary judgment was granted. Plaintiff appeals.

Other facts pertinent to this opinion will be stated below.

Walker, Palmer & Miller, by James E. Walker, Douglas M. Martin and Raymond E. Owens, Jr., for plaintiff appellant.

Moore and Van Allen, by John T. Allred and Robert D. Dearborn, for defendant appellee, North Carolina National Bank.

MORRIS, Chief Judge.

The sole question presented by this appeal is whether the trial court erred in granting summary judgment in favor of defendant NCNB. Rendition of summary judgment is proper "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). *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E. 2d 419 (1979); *Railway Co. v. Werner Industries, Inc.*, 286 N.C. 89, 209 S.E. 2d 734 (1974); *First Federal Savings and Loan Association v. Branch Banking and Trust Co.*, 282 N.C. 44, 191 S.E. 2d 683 (1972); *Kessing v. National Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). The record in this appeal consists of pleadings, depositions, and certain exhibits.

We are of the opinion that summary judgment was proper under the facts of this case. In the materials presented we find no issue of material fact to be submitted to a jury for determination. Plaintiff testified by deposition that he had placed an upset bid on property and that he contacted Ellis about insuring the property. Ellis informed him that obtaining coverage would be difficult and that he would have to get "four or five or six" companies to share the risk of coverage. Plaintiff testified further that he contacted Tim Hilton at NCNB concerning financing, and thereafter the parties underwent negotiations:

> During my previous conversation with Tim Hilton of NCNB, I told him I would need an answer on the loan pretty quick because they were ready for me to purchase the property. He wanted to know who I write my insurance through and I told him what I had done and what Mr. Ellis had said. Hilton took down Ellis' name and said, "I will contact him after I get the loan approved." He went uptown the next morning, I believe, to the main office [of NCNB] and he called me the next afternoon and told me to come in the office. I went over and sat down and talked with him and he gave me the facts and figures and what we could do on the loan . . . I told Mr. Hilton I had already contacted Ellis Insurance Agency and had requested insurance. I had no other conversation with Mr. Hilton about insurance until after the fire.

Anthony diSanti, the attorney handling the purchase of the property on behalf of plaintiff, testified by deposition as follows:

> Regarding the matter of fire insurance, Mr. Wells [plaintiff] advised me that he had dealt with and was currently dealing with . . . an agency in Charlotte . . . During one of our meetings, we discussed this and I telephoned Mr. Tim Hilton with North Carolina National Bank in Charlotte . . . [T]he gist of the conversation was that Mr. Wells would use the company in Charlotte. Mr. Wells and Mr. Hilton were in Charlotte and they would take care of the insurance . . . I asked about the fire insurance on the building. Mr. Wells advised me he had a company in Charlotte and would use them. Mr. Tim Hilton advised me that he and Mr. Wells would get the insurance . . . Mr. Wells told me that he had an insurance company in Charlotte that he wanted to insure the Red Roof Property. I advised Mr. Hilton that Mr. Wells had informed me that he had a company in Charlotte which he would use.

In a letter dated 10 December 1976, diSanti stated what he believed concerning the matter of insurance on the property:

> All matters pertaining to this loan were discussed between myself, Mr. Wells and Tim Hilton of NCNB by phone conversation. In effect, the insurance question was handled as follows. Since Mr. Wells had a good relationship with an insurance firm in Charlotte he stated that he would insure the building with this firm and I believe he notified Mr. Hilton of his intention. Mr. Hilton . . . stated that he would take care of the insurance with Mr. Wells in Charlotte.

Hilton's affidavit contained the following:

> Mr. diSanti telephoned me and said that Mr. Wells had an agency in Charlotte he would use. I told Mr. diSanti that would be fine and I would discuss all loan details with Mr. Wells when he returned to Charlotte. Subsequently, Mr. Wells came by my office and told me that he had obtained the fire insurance from Ellis Insurance Company. Accordingly, I forwarded the loan proceeds to Mr. diSanti's escrow account.

It is apparent that the question is whether the statements and conduct by Hilton constituted a promise that he would procure in-

surance on the property which would entitle plaintiff reasonably to rely on such assurances.

Under the facts presented, we find no language or conduct on the part of NCNB that constitutes a representation or promise that it would obtain fire insurance coverage on plaintiff's property. A promise has been defined as "a declaration which binds the person who makes it, either in honor, conscience, or law, to do or forbear a certain specific act, and which gives to the person to whom made a right to expect or claim the performance of some particular thing." Black's Law Dictionary 1378 (4th ed. 1951). *See also* 17 C.J.S. *Contracts* § 1(1) (1963). Taking the evidence presented in a light most favorable to plaintiff, as we are required to do, we nonetheless find that the only statements ever made by Hilton concerning insurance are that he told plaintiff he would contact Ellis after the loan was approved, and that he told diSanti that he would take care of the insurance with Mr. Wells in Charlotte. Standing alone, these statements do not give plaintiff the right to expect that fire insurance coverage would be obtained without further effort on his part.

Neither do the surrounding circumstances lend themselves to the conclusion that NCNB had obligated itself to procure fire insurance on the subject property. According to plaintiff's own testimony, on at least two occasions he told Hilton that he had already contacted Ellis about fire insurance for the property. Further, there is no evidence that plaintiff and NCNB ever discussed the type or amount of insurance appropriate for the property, which would indicate some intention by NCNB to act on behalf of plaintiff. Finally, there is no indication that a fiduciary relationship or course of dealing existed between plaintiff and NCNB such that would create a duty on the part of NCNB to attend to details of plaintiff's purchase other than the financial services it offered.

Plaintiff argues that NCNB represented to him that fire insurance had been obtained on the subject property, in that plaintiff "presumed that because NCNB advanced the money, Mr. Ellis had acquired the insurance." Plaintiff contends that, since NCNB normally required insurance on loan transactions such as this one, NCNB obligated itself to purchase insurance before it transferred funds. This contention is wholly without merit. Such a require-

ment was obviously for the benefit of NCNB in order to protect the collateral upon which it made the loan. Hilton's responsibility concerning the insurance, therefore, ran to NCNB and not to plaintiff. From a review of the record it is apparent that Hilton forwarded the funds upon the mistaken presumption that the property would be insured. The result of such an error here is that NCNB can no longer rely on the improvements on the property as security for its loan because of their destruction, but this in no way makes NCNB liable for plaintiff's losses as well.

Since there is no evidence that NCNB expressly or impliedly agreed to acquire fire insurance for the benefit of plaintiff, and no issue of material fact for disposition by a jury, the trial court's granting of summary judgment in favor of defendant NCNB is

Affirmed.

Judges PARKER and MARTIN (Robert M.) concur.

T. A. LOVING COMPANY v. OSCAR MILLER CONTRACTOR, INC.

No. 7910SC147

(Filed 15 January 1980)

Contracts § 16.1— subcontract for curb and gutter work—notice to perform three years later—contract binding

Where plaintiff general contractor and defendant subcontractor entered into an agreement whereby defendant was to provide asphalt paving and curb and gutter work for a hospital, defendant agreed to incorporate in its contract with plaintiff the conditions of the general contract between plaintiff and Durham County, including the provisions therein pertaining to the extension of time, agreed to commence work "when notified" by plaintiff, and agreed to guarantee the quoted prices for the duration of the job "plus any time extensions granted by the Owner," then defendant was bound by its subcontract, which was entered into on 14 June 1972, to perform when plaintiff asked defendant on 4 March 1975 to submit a starting time and when plaintiff gave defendant notice to perform on 5 May 1975, since plaintiff's request was made within the original 1000-day time period plus the 334-day time extension granted by the owner.

APPEAL by defendant from *Bailey, Judge.* Judgment entered 8 November 1978 in Superior Court, WAKE County. Heard in the Court of Appeals 17 October 1979.

The plaintiff in this civil damage action, T. A. Loving Company, is a general contractor on contract with Durham County to build a hospital. The defendant, Oscar Miller Contractor, Inc., subcontractor with the plaintiff to provide asphalt paving and curb and gutter work for the hospital. The plaintiff alleged that defendant refused to perform under its contract. The defendant denied liability on the ground that the contract was terminated by plaintiff's failure to request performance within a reasonable period of time. Defendant also filed a counterclaim alleging that the plaintiff's failure to request performance within a reasonable period of time was a breach of contract.

The following evidence is undisputed. On 2 June 1972 plaintiff entered into a contract with Durham County (the "Owner") to build a nine-story hospital. The contract consisted primarily of the "Agreement," the "General Conditions" and "all Modifications issued subsequent thereto." Paragraph 43 of the General Conditions, as modified by the Supplemental General Conditions, contained a subsection on delays and extensions of time which explicitly provided that upon the occurrence of certain conditions, or when authorized by the Owner or Architect, "the Contract Time shall be extended by Change Order for such reasonable time as the Architect may determine."

It is also undisputed that on 14 June 1972 defendant entered into a subcontract with plaintiff for the concrete, asphalt and paving work. The first paragraph of the subcontract provided in relevant part:

> "[T]he Subcontractor agrees to furnish all material and perform all work . . . in accordance with the general conditions, special conditions, plans, specifications, and the Contract between the Contractor [plaintiff] and the Owner [Durham County] . . . and the Subcontractor hereby agrees to be bound to the Contractor by the terms of the above Contract, general conditions, special conditions . . . and to assume toward the Contractor all the obligations and responsibilities that the Contractor, by those documents, assumes toward the Owner . . . ."

Similar provisions are also provided in paragraph twenty-four of the subcontract. The third paragraph of the subcontract provides:

> "The Subcontractor agrees that the time of performance is of the essence of this contract, and further agrees to commence work when notified. The Subcontractor further agrees to perform all work under this contract with all possible dispatch, and to execute all work in such a manner as not to delay any other Subcontractor or the Contractor in the general progress of the whole work."

Page Four of the Subcontract first identifies unit prices for the concrete, curb and asphalt paving work, and then provides as follows:

> "Acceptance of this subcontract guarantees the above prices for the duration of the project. Duration of the project is defined as being the original job time plus any time extensions granted by the Owner."

The original time for completion of the general contract was 1000 days, commencing 19 June 1972 and ending 15 March 1975. After several "Change Orders," however, the original time period was extended by 334 days.

The initial work schedule, prepared after the subcontract was signed, showed that site improvements including curb and gutter work were to be done August-October 1972 and January-February 1975. A copy of this schedule was sent to defendant on 3 August 1972. Although other progress schedules were prepared, none were sent to the defendant.

On 4 March 1975 plaintiff sent defendant a letter asking defendant to set up a definite starting time. In a letter dated 17 March 1975 defendant's counsel indicated that the subcontract was terminated because of plaintiff's extreme delay in requesting defendant's performance. On 5 May 1975 plaintiff again notified defendant that defendant was to proceed with the work under the subcontract. Defendant never set a starting date and never performed any work. Plaintiff solicited another contract to do the gutter and asphalt work and this second subcontractor was paid $25,314 more than defendant would have been paid.

The defendant presented evidence tending to show that defendant made its bid to work for the plaintiff based on informa-

tion given to it by the plaintiff, prior to the time the subcontract was executed, that the paving work was to be done in 1972. The defendant's president, Oscar Miller, testified that the work could not be started in 1972 because the site had not been graded. In addition, the defendant's representatives went by the job site frequently to find out if the site was ready. In late 1973, after defendant had called upon plaintiff's job superintendent, defendant was told that the curb and gutter work had been rescheduled for July and August of 1974. No notice to begin work, however, was received until 4 May 1975.

After both parties had presented their evidence, the trial court entertained plaintiff's Rule 50 motion and directed a verdict in favor of the plaintiff on defendant's counterclaim and in plaintiff's favor on plaintiff's damage claim for $25,314.

Parker, Sink & Powers by William H. Potter, Jr., for defendant appellant.

Poyner, Geraghty, Hartsfield & Townsend by John J. Geraghty, David W. Long and Cecil W. Harrison, Jr., for plaintiff appellee.

CLARK, Judge.

The controlling issue in this appeal is whether the defendant was bound by its subcontract with plaintiff to perform when plaintiff asked defendant on 4 March 1975 to submit a starting time and when plaintiff gave defendant notice to perform on 5 May 1975. "It is settled law that where the terms of a written instrument or contract are explicit, the Court determines their effect by declaring their legal meaning." *Howland v. Stitzer*, 240 N.C. 689, 696, 84 S.E. 2d 167 (1954). We now hold that defendant was obligated to perform under its subcontract with plaintiff.

The critical facts have already been set out. Notwithstanding any conversations defendant may have had with the plaintiff prior to submission of defendant's bid, defendant signed a subcontract in which defendant agreed: (1) to incorporate the conditions of the general contract between plaintiff and Durham County, including the provisions therein pertaining to the extension of time; (2) to commence work "when notified" by the plaintiff; and (3) to guarantee the quoted prices for the duration of the job "plus any

time extensions granted by the Owner." Plaintiff's request was made within the original time period plus the 334-day time extension granted by the Owner. Undoubtedly, plaintiff might have organized its activities so as to place a lesser burden on defendant, but it was not obligated under the subcontract to do so. Contracts are made for the benefit of all parties to the contract. Each party assumes certain risks. In this case defendant assumed both the risk that the cost of doing the work would go up before the job would be completed and the risk that the time for performing the work could be extended. Defendant cannot now deny these self-assumed obligations, even if the course of events prove them to be harsh. *Weyerhaeuser v. Carolina Power & Light Co.*, 257 N.C. 717, 722, 127 S.E. 2d 539 (1962).

We do not agree with defendant that the language "for the duration of the job" was so ambiguous as to make the subcontract unenforceable. The subcontract explicitly defines the duration of the project as "the original job time plus any time extensions granted by the Owner." Moreover, we think that the context of the quoted language indicates that "job" refers to the construction of the entire hospital complex and not just the curb and gutter work.

The trial court's rulings on plaintiff's motion for directed verdict on plaintiff's claim and defendant's counterclaim are

Affirmed.

Judges HEDRICK and MARTIN (Harry C.) concur.

STATE OF NORTH CAROLINA v. BOBBY GRIFFIN

No. 7920SC763

(Filed 15 January 1980)

Criminal Law § 99.2— question by jury—misconstruction by court—expression of opinion

The trial court improperly expressed an opinion on defendant's guilt and encouraged a verdict of guilty where, prior to the time the jury reached a verdict, the jury foreman asked the court whether the jury could make an "explanation" of its verdict, the court misconstrued the question as asking

whether the jury could make a sentence recommendation, and the court made remarks concerning the duty of the court to determine the sentence upon a verdict of guilty.

APPEAL by defendant from *Seay, Judge.* Judgment entered 3 May 1979 in Superior Court, UNION County. Heard in the Court of Appeals on 8 January 1980.

Defendant was charged in a proper bill of indictment with the armed robbery of Horace Aycoth, a violation of N. C. Gen. Stat. § 14-87. The jury found him guilty as charged, and the court entered judgment imposing a prison sentence of 12 to 15 years. Defendant appealed.

Attorney General Edmisten, by Assistant Attorney General Jo Anne Sanford, for the State.

Joe P. McCollum, Jr. for defendant appellant.

HEDRICK, Judge.

The record discloses that, after the jury had deliberated for approximately two hours, it returned to the courtroom and the following colloquy occurred between the foreman and the judge:

COURT: I believe the Bailiff has indicated that one of you perhaps has a question.

FOREMAN: May I approach the Bench?

COURT: You have to ask the question where you are because it has to be taken into the record.

FOREMAN: We have not made a decision. We have taken a preliminary vote and later votes and there has been no unanimous decision. *We would like to know if we do come to a decision may we have a right of explanation with our decision?*

COURT: *A right of explanation?* Well, let's see. Let me put it this way so you will understand, and I hope you will. The role of the jury is to—I don't want to be repetitious, is to listen to the evidence, take the law from the court and find the facts and render a verdict which reflects the facts. *From then on the proposition comes before the Judge at the sentencing hearing. The jury will have no part in that.* You see, whatever judgment is

rendered, if there is a conviction, is rendered within the limits that is set by the statute, that is what the Legislature enacts, and then the Court will consider the evidence on sentencing offered at the sentencing hearing. The jury has no part in that. *Is that what you were concerned, you were concerned the jury may have some part in sentencing?*

FOREMAN: *No, sir,* that is not the question.

COURT: *If any of you would want to at the sentencing hearing,* if the attorney who represented the defendant would call one of you as a witness, I don't know what for, but he could call one of you as a witness and if you could testify as to character and reputation of the defendant and things like that, but as I remember, all of you had said you didn't know him.

FOREMAN: We don't.

COURT: *The sentence is entirely up to the Court.*

FOREMAN: *I don't think I made myself clear.*

COURT: *I do not follow recommendations of the jury as to sentencing.* I base the sentencing on the law and facts of the case and the evidence as presented at the sentencing hearing. *What you want to do is help out on the sentence?*

FOREMAN: *No, sir.* Our point was that *we felt that there was some explanation needed* from our standpoint as to the decision made by us.

COURT: All you do is find the facts. There is no necessity at all for any explanation, because once you act, that's it.

FOREMAN: That answers the question.

[Emphasis added.]

Defendant contends on appeal that these remarks of the judge constitute an expression of his opinion that defendant was guilty, thereby prejudicing the case in the minds of the jurors and intimating to them that the only issue to be decided was the sentence defendant would receive.

It is an elementary and long-established rule of law that the trial judge may not express during his instructions to the jury

his opinion a to whether any fact has been proved. N. C. Gen. Stat. § 15A-1232. (*Cf.* N. C. Gen. Stat. § 15A-1222, another statutory prohibition against the judge's expressing his opinion during the course of the trial.) This section requires that the judge maintain absolute impartiality until the verdict has been rendered because the jury, out of great respect for him, is easily influenced by his slightest suggestion. This Court has observed that any expression of opinion on the issue of the defendant's guilt or innocence results in prejudice to his case which is virtually impossible to cure. *See, e.g., State v. Teasley,* 31 N.C. App. 729, 230 S.E. 2d 692 (1976). Thus, the judge may not, in a capital case, apprise the jury as to whether it can make a recommendation of mercy since such a recommendation assumes a guilty verdict. *See State v. Rhodes,* 275 N.C. 584, 169 S.E. 2d 846 (1969); *State v. Davis,* 238 N.C. 252, 77 S.E. 2d 630 (1953); *State v. Rowell,* 224 N.C. 768, 32 S.E. 2d 356 (1944).

We think the rule must apply as strictly in this case. Moreover, we think this a stronger case for the strict application of the prohibition since, in the cases cited above where the jury asked if it could recommend mercy, it is plain from the asking that the jurors were concerned about sentencing. Nothing in the exchange between judge and jury in this case, however, even hints that the jurors had reached a stage in their deliberations which had engendered concern about the effect—*i.e.*, the punishment—of a guilty verdict. Yet, during the colloquy between the foreman and the judge hereinabove set out, the judge stated three times that the jury's real concern was its role in the sentencing process. He treated the foreman's inquiry as though it was a question of whether the jury could make a "recommendation" in the case, rather than noting what the foreman actually asked, that is, whether the jury could make an "explanation" of its verdict. For all we know, at that point in the deliberations, the jurors may have desired to explain a verdict of "not guilty" instead of the converse. Since it is obvious, however, that a defendant will not be sentenced unless he is first found guilty, the judge's premature remarks about sentencing assume that the jury has already reached a guilty verdict, and leave little doubt that the judge expects the jury to find the defendant guilty. Such an assumption, in our opinion, amounts to an unwarranted expres-

sion of opinion on defendant's guilt and thereby encourages the rendering of a guilty verdict.

We hold that this defendant was denied a fair trial for that the remarks of the judge induced the verdict of guilty. For this reason the defendant must have a

New trial.

Judges MARTIN (Robert M.) and WELLS concur.

CHARLES R. BLAIR v. CORA JO H. BLAIR

No. 7915DC752

(Filed 15 January 1980)

1. **Divorce and Alimony § 18.12— alimony pendente lite—right to relief—abandonment—findings unsupported by evidence**

The trial court's error in finding that plaintiff abandoned defendant was harmless, since there was sufficient evidence to support the court's finding that plaintiff committed indignities making defendant's condition intolerable, and there was thus an adequate ground to support an award of alimony pendente lite.

2. **Divorce and Alimony § 18.13— alimony pendente lite—amount—no findings as to plaintiff's needs**

There was no merit to plaintiff's argument that an award of alimony pendente lite should be reversed because the trial court made no findings as to the amount needed by plaintiff to subsist during the pendency of this action, since the court found that plaintiff had a gross annual income in excess of $45,000 and awarded defendant $8500 per year as alimony pendente lite, and plaintiff did not argue that he was actually left with an amount insufficient for his needs.

3. **Divorce and Alimony § 18.8— alimony pendente lite—defendant's living expenses—document not entered in evidence—technical error harmless**

Plaintiff in an action for alimony pendente lite was not prejudiced by the technical error of defendant's failing to enter into evidence a document detailing her living expenses since the document was before the trial court and plaintiff's counsel had the document before him.

4. **Divorce and Alimony § 18.16— alimony pendente lite—attorney's fee—no finding of reasonableness**

In an action for alimony pendente lite an award of $750 for attorney fees was improperly entered where the court made no finding as to the reasonableness of the fee.

APPEAL by plaintiff from *Paschall, Judge.* Judgment entered 12 March 1979 in District Court, ORANGE County. Heard in the Court of Appeals 7 December 1979.

Plaintiff seeks an absolute divorce on the ground of one year's separation. Defendant answered, alleging that plaintiff abandoned her and subjected her to indignities, and cross claiming for a divorce from bed and board, possession of the homeplace, alimony both pendente lite and permanent, and attorney's fees. Plaintiff in his reply alleged constructive abandonment as a bar to an award of alimony. Plaintiff moved for partial summary judgment, which was granted for him on the issue of divorce, with all defendant's rights with respect to her cross-claim preserved. Subsequently, upon motion, defendant was awarded $708.33 per month as alimony pendente lite, possession of the parties' home on Churchill Drive, and $750 attorney's fees. Plaintiff appeals.

Haywood, Denny & Miller, by James H. Johnson III, for plaintiff appellant.

Nye, Mitchell, Jarvis & Bugg, by R. Roy Mitchell, Jr., for defendant appellee.

ARNOLD, Judge.

[1] Plaintiff contends that there appears in the record no evidence to support the trial court's finding that plaintiff abandoned defendant. In this he is correct. By defendant's own testimony she "fully agreed" that the parties would purchase a condominium and plaintiff would move there and live separately from her. However, since there is sufficient evidence to support the finding that plaintiff committed indignities making defendant's condition intolerable, an adequate ground to support an award of alimony pendente lite, G.S. 50-16.3(a)(1) and G.S. 50-7(4), the error as to abandonment is harmless.

[2] Plaintiff argues that the award of alimony pendente lite must be reversed because the trial court made no findings as to the amount needed by plaintiff to subsist during the pendency of this action. Plaintiff relies on *Briggs v. Briggs*, 21 N.C. App. 674, 205 S.E. 2d 547 (1974), but that case is distinguishable upon its facts. In *Briggs*, the court found the husband to have a monthly income

of $1533, and ordered that he pay more than $1000 per month for the wife and two minor children. Under those circumstances, we observed that the trial court had appeared to ignore the fact that the husband must also exist during the pendente lite period. Here, however, the court found that plaintiff has a gross annual income in excess of $45,000, and awarded defendant $8,500 per year as alimony pendente lite. Plaintiff does not argue that he has actually been left with an amount insufficient for his needs. We find no merit in this assignment of error.

[3] Plaintiff bases his attack upon the amount of alimony pendente lite awarded on the fact that the document detailing defendant's living expenses was never formally offered into evidence. However, the document was clearly before the trial court, the trier of fact, since defendant's expenses are set out in detail in his order. And it is clear from plaintiff's cross-examination of defendant that plaintiff's counsel had the document before him. We find no prejudice to plaintiff from the technical error of defendant's failing to enter the document into evidence, and we decline to reverse upon that ground. Furthermore, the amount of alimony pendente lite is to be determined by the trial court, G.S. 50-16.3(b) and 50-16.5(a), and we find no abuse of discretion here.

[4] Plaintiff is correct that the award of $750 attorney fees is insufficiently based. G.S. 50-16.4 provides for the awarding of "reasonable" counsel fees. Here, as in *Austin v. Austin*, 12 N.C. App. 286, 296, 183 S.E. 2d 420, 427 (1971), the order "contains no findings of fact, such as the nature and scope of the legal services rendered, the skill and time required, *et cetera*, upon which a determination of the requisite reasonableness could be based." For this reason, this portion of the award must be reversed and remanded for further hearing.

We need not discuss plaintiff's further assignments of error. The order of the trial court is

Affirmed in part and reversed and remanded in part.

Judges CLARK and ERWIN concur.

ROBERT B. ROACH AND WIFE, MILDRED LOUISE ROACH v. CITY OF LENOIR

No. 7925DC436

(Filed 15 January 1980)

1. **Rules of Civil Procedure § 56— motion for judgment on pleadings—consideration of outside evidence—treatment as summary judgment motion**

A motion to dismiss under G.S. 1A-1, Rule 12(b)(6) should be treated as a motion for summary judgment under G.S. 1A-1, Rule 56 where the court considers matters outside the pleadings.

2. **Municipal Corporations § 21— maintenance of sewer system—governmental immunity**

A municipality's maintenance of a public sewer system is a governmental function, and the municipality is not liable for damages resulting from negligence in the maintenance of its sewer system unless it has expressly waived its immunity pursuant to G.S. 160A-485.

3. **Municipal Corporations § 21— maintenance of sewer system—waiver of governmental immunity—inadequacy of record**

In this action to recover damages allegedly resulting from defendant municipality's negligence in the maintenance of its sewer system, the entry of summary judgment for defendant on the ground it had not waived its governmental immunity is reversed and the cause is remanded where the record is inadequate to permit a determination as to whether defendant has waived its immunity.

APPEAL by plaintiffs from *Crotty, Judge*. Order entered 26 March 1979 in District Court, CALDWELL County. Heard in the Court of Appeals 6 December 1979.

Plaintiffs filed complaint on 15 November 1978 alleging that defendant was a municipal corporation which owned and maintained a sewer system, that they owned and maintained a residence within defendant's boundaries which was connected to defendant's sewer system, and that on 17 June 1977 "sewage from Defendant's sewage system backed up through the connecting sewer pipe and into the home of the Plaintiffs, destroying and damaging personal property of the Plaintiffs and rendering the home unfit for habitation." Plaintiffs further alleged that defendant had been "careless and negligent in the operation of its sewer system" in that it had permitted the sewer line to become clogged, it had permitted other users to clog the lines, and had failed to make reasonable inspection of the lines. Plaintiffs alleged that the defendant had had knowledge of the clogged line "but

negligently and carelessly failed to correct it." Plaintiffs charged that defendant's "careless and wrongful acts" had caused their damage, that defendant had received and rejected their claim for damages, and that they should recover $3,500 damages from defendant.

Defendant moved to dismiss the complaint for failure to state a claim.

A hearing was held and an order was entered allowing the motion to dismiss. The judge found that the defendant had been performing a govermental function in the maintenance of the sewer system, that defendant therefore had governmental immunity against plaintiffs' claims, and that defendant had not waived its immunity. Plaintiffs appealed.

Mitchell, Telle, Blackwell & Mitchell, by Marcus W. H. Mitchell, Jr., for the plaintiff.

Carpenter & Bost, by J. Bradley Wilson, for the defendant.

MARTIN (Robert M.), Judge.

[1] Defendant moved to dismiss plaintiffs' action under G.S. 1A-1, Rule 12(b)(6). The trial court entered its order granting defendant's motion based upon ". . . the pleadings, citations of law, arguments of counsel and other evidence . . ." Because matters outside the pleadings were considered by the court in reaching its decision, the motion should be treated as a motion for summary judgment and disposed of in the manner and on the conditions stated in G.S. 1A-1, Rule 56. *Kessing v. National Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971).

Having converted defendant's Rule 12(b)(6) motion into a Rule 56 motion for summary judgment, the question on appeal is whether there is a genuine issue as to any material fact. *Fowler v. Williamson*, 39 N.C. App. 715, 251 S.E. 2d 889 (1979). The trial court in its order refers to "other evidence" outside of the allegations in the complaint which it considered in determining that there was no genuine issue of material fact and that as a matter of law:

> (3) The Defendant, City of Lenoir, had not waived said governmental immunity pursuant to N.C.G.S. 160A-485.

The record on appeal, however, does not contain any of the evidence relied upon by the trial court in support of its conclusion. The record on appeal contains only the bare complaint and no other pleading, deposition, affidavit or testimony. Furthermore, the complaint makes no mention of whether governmental immunity exists or is waived.

[3] We do not intimate that in the form the controversy took in the District Court that the court lacked justification for its conclusion. Nevertheless, because of the inadequacy of the record to decide the factual and legal issues involved in governmental immunity, this Court is unable to determine whether there is any genuine issue of material fact and whether summary judgment was properly granted on the evidence before the trial court. *See Kennedy v. Silas Mason Co.*, 334 U.S. 249, 92 L.Ed. 1347, 68 S.Ct. 1031 (1948).

Had it been evident from the record that there was no waiver of governmental immunity by defendant, then it is clear plaintiffs could not prevail on their claim for the following reasons.

[2] The establishment and construction of a sewer system by a municipality are governmental functions entitling it to immunity from negligence. *Metz v. Asheville*, 150 N.C. 748, 64 S.E. 881 (1909). Plaintiffs concede in their brief that ". . . the maintenance of a public sewerage system is a governmental function," citing *Metz v. Asheville, supra.* Plaintiffs argue that even if the doctrine of governmental immunity is applicable, property damages are recoverable, relying on *Rhyne v. Mount Holly*, 251 N.C. 521, 112 S.E. 2d 40 (1960). We do not agree. The case *sub judice* is distinguishable since plaintiffs neither allege facts sufficient to support a nuisance claim nor is their claim based on a theory of nuisance. Thus, the City of Lenoir, while performing a governmental function in the maintenance of a sewer system within its municipal jurisdiction, may not be held liable for any damage arising out of the governmental activity unless it expressly waives its immunity pursuant to N.C. Gen. Stat. § 160A-485.

[3] As stated above, because of the inadequacy of the record, the Court is unable to review the grant of summary judgment on the issue of waiver. Hence we vacate the judgment below and remand the case to the district court for amplification of the record in light of this opinion.

Reversed and remanded.

Judges HEDRICK and WELLS concur.

ROBERT E. LEE AND WIFE PATRICIA R. LEE v. CHARLIE SIMPSON, JOE HUDSON, HARRY MYERS, ROY RICHARDSON, AND ROGER TICE, UNION COUNTY BOARD OF COMMISSIONERS, AND LUTHER M. McPHERSON, JR., UNION COUNTY PLANNING OFFICER AND UNION COUNTY, A BODY POLITIC

No. 7920SC475

(Filed 15 January 1980)

Municipal Corporations § 30.20— rezoning tract—failure to give notice to adjoining landholders

A county board of commissioners violated the procedural provisions of the county's zoning ordinance in rezoning a tract of land by amendment to the ordinance without giving the notice to adjoining landholders required by the ordinance.

APPEAL by petitioners from *Seay, Judge.* Judgment entered 29 March 1979 in Superior Court, UNION County. Heard in the Court of Appeals 8 January 1980.

Charles D. Humphries, for petitioner appellants.

Griffin, Caldwell and Helder, by Thomas J. Caldwell and H. Ligon Bundy, for respondent appellees.

VAUGHN, Judge.

This appeal presents the question of whether the Union County Board of Commissioners violated the procedural provisions of the county's zoning ordinance in rezoning a tract of land by amendment to the ordinance without giving the notice to adjoining landholders required by the ordinance. We hold that it did.

This civil action brought by certain Union County property owners against the county, the county board of commissioners and the county planning officer sought to have a certain rezoning action by the board of commissioners on 6 September 1977 declared invalid. The board acted upon a petition filed 21 July

1977 by DME, Inc. to rezone a 10.055 acre tract in the county from R-40 to R-20. The effect of the zoning amendment under the Union County Zoning Ordinance was to decrease the minimum lot size for a residential dwelling from 40,000 square feet to 20,000 square feet. On the day the petition was filed and the day the zoning amendment was adopted, petitioners owned property adjacent to the 10.055 acres in question. The Union County Zoning Ordinance § 133 (emphasis added) requires in part that "[a]ll petitions for change in the zoning map *shall* include a legal description of the property involved and the names and addresses of current abutting property owners . . . ." Petitioners' names and addresses were not listed in the rezoning petition. Section 130 of the zoning ordinance requires in part that "[t]he zoning enforcement officer *shall* also *notify* the owner or owners or [*sic*] property abutting the property sought to be rezoned of the petition for rezoning by mailing copy of said petition to such owner or owners at their last known address by regular mail." (Emphasis added.) Petitioners were not notified in this manner.

The trial court concluded that both sections 130 and 133 of the zoning ordinance were "directory only." In this conclusion, the trial court erred. The definitional section of the zoning ordinance of which the trial court was not made aware expressly provides, "[t]he word 'shall' is always mandatory and not merely directory." Union County Zoning Ordinance § 40.7.

Even though the board of commissioners may have complied with the enabling legislation's requirements of notice set out in G.S. 153A-323, it must also comply with its own rules and this it did not do. "The procedural rules of an administrative agency 'are binding upon the agency which enacts them as well as upon the public . . . . To be valid, the action of the agency must conform to its rules which are in effect at the time the action is taken, particularly those designed to provide procedural safeguards for fundamental rights.' " *Refining Co. v. Board of Aldermen,* 284 N.C. 458, 467-68, 202 S.E. 2d 129, 135 (1974); *George v. Town of Edenton,* 294 N.C. 679, 242 S.E. 2d 877 (1978). Because the Union County Board of Commissioners violated its own ordinance's notice requirement, the zoning amendment must be set aside.

Reversed.

Judges WEBB and MARTIN (Harry C.) concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 8 JANUARY 1980

BATTLE v. BATTLE No. 7830DC1068	Jackson (72CVD13)	Affirmed
DEATON v. DEATON No. 7917DC675	Rockingham (79CVD301)	Affirmed in Part, Vacated and Remanded In Part
DOUGLAS v. DOUGLAS No. 7911DC596	Lee (77CVD0064) (78CVD0031)	Affirmed
GREGORY CO. v. PHELPS & WHITE CO. No. 7910SC300	Wake (76CVS3287)	New Trial
McLEAN v. WHALEY No. 7925SC335	Catawba (78CVS32)	Reversed
READ v. LANDRY No. 797DC64	Nash (78CVD570)	Reversed
REICH v. REICH No. 7926DC640	Mecklenburg (76CVD4205)	Affirmed
STATE v. CARSON No. 7818SC700	Guilford (77CRS38969) (77CRS38970) (77CRS67531) (77CRS67532)	No Error
STATE v. DUNLAP No. 7818SC651	Guilford (77CRS18405)	No Error
STATE v. HEWETT No. 7913SC413	Brunswick (76CRS5025) (76CRS5026)	No Error
STATE v. SELLARS No. 7917SC720	Rockingham (78CR8783)	No Error
STATE v. WASHINGTON No. 7812SC944	Cumberland (77CRS26199)	No Error
TALLEY v. TALLEY No. 792SC311	Beaufort (76CVS248) (76CVS301)	Affirmed

FILED 15 JANUARY 1980

EATON v. ROGERS No. 7818DC1049	Guilford (78CVD1944)	Affirmed
ETHERIDGE v. ETHERIDGE No. 781SC341	Currituck (77CVS58)	Remanded
HAMILTON v. PAYNE No. 7926SC42	Mecklenburg (77CVS9131)	New Trial
STATE v. DANCY No. 7923SC683	Wilkes (78CRS6091) (78CRS6092) (78CRS6093) (78CRS6095)	No Error
STATE v. MATTHEWS No. 798SC493	Wayne (78CR16600) (78CR16605) (78CR16607) (78CR16615) (78CR16626) (78CR16627) (78CR16628) (78CR16633)	No Error
STATE v. SLOAN No. 7926SC662	Mecklenburg (78CRS147850)	Judgment Vacated, Remanded for Resentencing

Cockerham v. Ward and Astrup Co. v. West Co.

VESTAL H. COCKERHAM, PLAINTIFF v. ROY D. WARD, T/A WARD'S AWNING COMPANY AND AS WARD'S AWNING AND MATTRESS COMPANY, DEFENDANT

AND

THE ASTRUP COMPANY, DEFENDANT AND THIRD-PARTY PLAINTIFF v. THE WEST COMPANY, THIRD-PARTY DEFENDANT

No. 7818SC1141

(Filed 5 February 1980)

1. **Sales § 22— product used for purpose for which made—manufacturer's duty of care**

A manufacturer may be held liable for harm resulting from the use of a product for the purpose for which it was made if the manufacturer has failed to recognize when he should have that, if negligently manufactured, the product's proper use would involve an unreasonable risk of harm to those using it for the purpose for which it was manufactured.

2. **Sales § 22— manufacturer's liability—duty of care required**

In N.C. a manufacturer is not an insurer of the safety of products designed and manufactured by him but is under an obligation to those who use his product to exercise that degree of care in its design and manufacture which a reasonably prudent man would use in similar circumstances.

3. **Sales § 22— rubber strap—no defect shown—manufacturer's liability**

In an action to recover for personal injuries sustained by plaintiff while using a rubber strap manufactured by one defendant, evidence was insufficient to justify a trial on the issue of manufacturer negligence in that plaintiff presented no evidence to show that a defect existed in the rubber strap at the time it was manufactured or that defendant was negligent in its design, assembly or inspection of its straps but presented evidence only that the strap broke or came apart while he was using it.

4. **Negligence § 6.1— breaking of rubber strap—res ipsa loquitur inapplicable**

Res ipsa loquitur was inapplicable in an action to recover for personal injuries sustained by plaintiff while using a rubber strap manufactured by one defendant, since the strap causing injury was not under the exclusive control or management of defendant manufacturer at the time plaintiff was injured.

5. **Sales § 22.1— rubber strap—defect alleged—seller's liability**

Summary judgment was properly entered for defendant seller of a rubber strap which allegedly broke and caused injury to plaintiff, since a vendor is not required to inspect goods for latent defects and since plaintiff failed to produce at least some evidence as to whether the strap was defective and such defect could have been discovered by defendant vendor upon reasonable inspection.

6. Uniform Commercial Code § 13— rubber strap—no defect shown—no breach of implied warranty of merchantability

In an action to recover for injuries sustained by plaintiff while using a rubber strap sold by one defendant, summary judgment was properly entered for defendant vendor on plaintiff's claim of breach of implied warranty of merchantability, since plaintiff presented no evidence tending to show a defective condition aside from the fact that the strap broke. G.S. 25-2-314.

APPEAL by plaintiff from *Albright, Judge*. Judgment entered 11 July 1978 in Superior Court, GUILFORD County. Heard in the Court of Appeals 17 September 1979.

On 17 January 1977, plaintiff filed this suit against Roy D. Ward (Ward) and The Astrup Company (Astrup) as a result of an alleged injury he received on 22 March 1975 while using a rubber strap allegedly sold by Ward's Awning and Mattress Company, located in Guilford County.

In his complaint, plaintiff alleged that the strap in question was one of ten rubber straps he had purchased through one John Brothers, who had actually gone to Ward's business and paid for the straps. The straps were manufactured by Astrup, which had purchased the rubber component for the straps from The West Company (West).

Plaintiff alleged that defendant Ward was negligent in failing to inspect for defects in its rubber straps and in failing to warn that the straps might split. Plaintiff also alleged that the rubber strap was not merchantable and thus Ward breached an implied warranty under G.S. 25-2-314. Plaintiff further alleged that Astrup was negligent in that it failed to use reasonable care in its manufacture, inspection, and testing of the straps, and in its failure to warn that the straps might split. Ward answered denying both negligence and breach of warranty claims, specifically alleging contributory negligence and the lack of privity of contract as defenses to plaintiff's claim. Ward also filed a cross-claim against Astrup for indemnification in the event of his liability. Ward amended his answer to include the defense that plaintiff failed to provide sufficient notice under G.S. 25-2-607 on its breach of implied warranty claim. Astrup answered, denying any liability under negligence or warranty theories, also alleging lack of contractual privity and contributory negligence as defenses. Astrup filed a third-party action against The West Company, manufac-

turer of the rubber straps used by Astrup, for indemnification. The West Company subsequently answered, denying liability.

Ward and Astrup both filed motions for summary judgment. The court considered the deposition testimony of plaintiff and A. V. Cherri on behalf of Astrup, various interrogatories, the affidavits of Brothers and Ward, and exhibits consisting of the allegedly defective rubber strap and an invoice from the sale of rubber straps to Brothers. During the summary judgment hearings, plaintiff attempted to introduce a second affidavit from John Brothers, but upon defendants' objection, the trial court excluded the affidavit. Judgment was entered in favor of defendants Ward and Astrup on their respective motions, denying plaintiff any recovery, which excused West from any liability.

From the judgment granting defendant Ward's motion for summary judgment on plaintiff's claim of negligence and breach of warranty, the judgment granting defendant Astrup's motion for summary judgment on plaintiff's claim of negligence, and the court's refusal to admit plaintiff's second affidavit from John Brothers, plaintiff appeals.

Frassineti, Younger & Glover, by Durant M. Glover, for plaintiff appellant.

Perry C. Henson for defendant appellee and third-party plaintiff The Astrup Company.

Nichols, Caffrey, Hill, Evans & Murrelle, by William L. Stocks, for defendant appellee Roy D. Ward.

J. B. Winecoff and Harry Rockwell for third-party defendant appellee.

MORRIS, Chief Judge.

N.C. Gen. Stat. § 1A-1, Rule 56 requires that the party moving for summary judgment "clearly [establish] the lack of any triable issue of fact by the record properly before the court." *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 469-70, 251 S.E. 2d 419, 421 (1979); *Singleton v. Stewart*, 280 N.C. 460, 186 S.E. 2d 400 (1972). *See generally* 6 Moore's Federal Practice, ¶ 56.15[8] (2d ed. 1979). In *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 209 S.E. 2d

795 (1974), our Supreme Court stated the applicable rule as follows:

> This burden may be carried by movant by proving that an essential element of the opposing party's claim is nonexistent or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim. If the moving party meets this burden, the party who opposes the motion for summary judgment must either assume the burden of showing that a genuine issue of material fact for trial does exist or provide an excuse for not so doing.

286 N.C. at 29, 209 S.E. 2d at 798. In effect, this motion forces plaintiff to produce a forecast of evidence which he has available for presentation at trial to support his claim. *Moore v. Fieldcrest Mills, Inc., supra.* In order for a defendant's motion for summary judgment to be granted, however, he must produce a forecast of his own which is sufficient, if considered alone, to compel a verdict in his favor as a matter of law. *Moore v. Fieldcrest Mills, Inc.*, supra. *See generally* 2 T. Wilson & J. Wilson, McIntosh N.C. Practice and Procedure § 1660.5 (2d ed. Phillips Supp. 1970). Failure of the plaintiff to counter the effect of defendant's forecast by his own forecast of evidence sufficient to create a genuine issue of material fact will result in a judgment against him. The test is whether plaintiff has presented evidence sufficient to survive a motion for directed verdict if such evidence were offered at trial. *Coakley v. Ford Motor Co.*, 11 N.C. App. 636, 182 S.E. 2d 260, *cert. denied*, 279 N.C. 393, 183 S.E. 2d 244 (1971); *Haithcock v. Chimney Rock Co.*, 10 N.C. App. 696, 179 S.E. 2d 865 (1971); *Pridgen v. Hughes*, 9 N.C. App. 635, 177 S.E. 2d 425 (1970). To rebut his opponent's claim that there is no genuine issue of material fact presented, plaintiff may not rest on the allegations of his pleadings, but must, by affidavits or otherwise, set forth specific facts demonstrating that there is an issue for trial. G.S. 1A-1, Rule 56(e); *Haithcock v. Chimney Rock Co., supra.*

In his first assignment of error, plaintiff argues that the trial court erred when it granted defendant Astrup Company's motion for summary judgment on plaintiff's claim of negligent manufacture.

[1, 2] The general rule concerning manufacturer negligence is that the manufacturer may be held liable for harm resulting from

the use of that product for the purpose for which it was made if, in its manufacture, the manufacturer has failed to exercise due care in its manufacture, failing to recognize, when he should have, that, if negligently manufactured, the product's proper use would involve an unreasonable risk of harm to those using it for the purpose it was manufactured. *See* 1 Frumer and Friedman, Products Liability § 5.03[1] (1979). In this connection, a manufacturer is under a duty to exercise due care to make reasonable tests and inspections to discover latent hazards involved in the use of its products. 1 Frumer and Friedman, Products Liability § 6.01[1] (1979). In North Carolina, a manufacturer is not an insurer of the safety of products designed and manufactured by him, but is under an obligation to those who use his product to exercise that degree of care in its design and manufacture which a reasonably prudent man would use in similar circumstances. *Corprew v. Geigy Chemical Corp.*, 271 N.C. 485, 157 S.E. 2d 98 (1967); *Gwyn v. Lucky City Motors, Inc.*, 252 N.C. 123, 113 S.E. 2d 302 (1960); *Cassels v. Ford Motor Co.*, 10 N.C. App. 51, 178 S.E. 2d 12 (1970). In an action to recover for injuries resulting from manufacturer negligence, plaintiff must present evidence which tends to show that the rubber straps manufactured by Astrup were defective at the time they left Astrup's plant, and that Astrup was negligent in its design of the straps, in its selection of materials, in its assembly process, or in inspection of the straps. *See Coakley v. Motor Co., supra; Fowler v. General Electric Co.*, 40 N.C. App. 301, 252 S.E. 2d 862 (1979).

[3] In our view, the evidence presented on motion for summary judgment does not justify a trial on the issue of manufacturer negligence in that plaintiff presented no evidence to show that a defect existed in the rubber strap at the time it was manufactured or that Astrup was negligent in its design, assembly, or inspection of its straps. The materials presented on motion for summary judgment reveal that, sometime before 22 March 1975, plaintiff purchased ten 20-inch rubber straps that had the name "The Astrup Company" printed on them from John Brothers, who had previously purchased the straps from defendant Roy D. Ward; that on 22 March 1975, plaintiff was using some rubber straps which were 20″ to 22″ long to secure a tarpaulin over a load of oats in a truck; that he was injured when he stretched one of the straps five or six inches in order to hook it to the under-

side of the truck, and the strap either broke or pulled loose from the metal hook fastened at the end of the strap, and hit plaintiff in the eye; that there had been at least one previous suit filed against Astrup on a claim of an alleged defective strap, which was settled; that about five complaints concerning straps manufactured by Astrup were received annually; that Astrup tested and inspected its straps by stretching each strap to determine its breaking point and accepted only those straps whose breaking point was beyond fifty percent of the original length; that such testing procedures were performed irregularly, and no records were kept of such tests. On the basis of this forecast of evidence, plaintiff contends that the issue of manufacturer's negligence should be put before the jury.

With respect to the defect alleged, plaintiff must present facts supporting the conclusion that the article was dangerous because of some latent defect or was inherently dangerous when used for the purpose for which it was manufactured. *Wyatt v. North Carolina Equipment Co.*, 253 N.C. 355, 117 S.E. 2d 21 (1960). All that is shown by plaintiff is the fact that the strap broke or came apart while he was using it. In plaintiff's own words:

> I had just leaned over from the waist. I had placed the hook in the tarpaulin and I started to pull down, and it pulled out of the end—busted out. The strap busted out—turned the strap loose.

Plaintiff, in response to interrogatories, asked of him by Astrup, stated:

> The strap referred to in the complaint was defective at the time it was used, as evidenced by its breaking after being stretched only a very short distance. Nothing occurred to the strap immediately before its use by the Plaintiff which could have caused any defect to develop. Therefore, the defect was in the strap prior to its use by the Plaintiff.

Plaintiff similarly testified by deposition as follows:

> With reference to what facts or information I have or had at the time the lawsuit was filed that leads me to believe that The Astrup Company was negligent in manufacturing the strap in question, as to why I think they were negligent, well, if it had been a good strap, it wouldn't have broken. The

> basis upon which I feel that the defendant, The Astrup Company, was negligent in inspecting and in testing this strap was that if it had been a good strap, it wouldn't have broken.

When questioned as to what examinations were performed upon the strap that would reveal the defective condition alleged, plaintiff responded as follows:

> To my knowledge, this strap has never been examined by anyone other than myself and my attorney. It has never been examined by any person who would be an expert in the field of rubber and rubber molding.

It is, therefore, abundantly clear that plaintiff's forecast of evidence as to the defective nature of defendant Astrup's strap is based merely on his own observation that the strap broke. The record is devoid of any indication as to *why* the strap broke, or *how* the strap was defective. Further, plaintiff's argument that the mere allegation that the strap broke is sufficient to survive motion for summary judgment is without merit. On the materials presented, there is nothing which makes it more probable than not that the rubber strap broke because it was defective.

Moreover, even if there were presented facts supporting plaintiff's contention that the rubber strap was defective, there is no evidence to indicate that defendant Astrup was negligent in its design of its straps, in its selection of materials, in its assembly process, or in inspection of the straps. The only evidence available at the summary judgment hearing concerning manufacture was that Astrup performed manual stretching tests to determine the breaking point of each strap. Plaintiff offered no evidence whatsoever to support his allegation that these testing procedures were insufficient or otherwise negligently performed. It is well settled that negligence is never presumed from the mere fact that an accident or injury has occurred, except in the narrow class of cases to which the doctrine of *res ipsa loquitur* is applicable. *Coakley v. Motor Co.*, supra; *Millsaps v. Wilkes Contracting Co.*, 14 N.C. App. 321, 188 S.E. 2d 663, *cert. denied*, 281 N.C. 623, 190 S.E. 2d 466 (1972). Indeed, an issue of negligence is created only when a party produces evidence of specific acts or omissions on the part of the defendant that would constitute negligence. *Millsaps v. Wilkes Contracting Co.*, supra. Upon a review of the materials presented, we must conclude that plaintiff

failed to produce evidence of specific acts or omissions on the part of Astrup from which a jury could infer negligence in its manufacture of the straps.

[4] In addition, we hold that the doctrine of *res ipsa loquitur* is inapplicable to the facts as presented. When applicable, that doctrine operates as a rule of evidence and constitutes prima facie proof of negligence. In *Newton v. Texas Co.*, 180 N.C. 561, 105 S.E. 433 (1920), the Court recognized that "when a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen, if those who have the management use the proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care." 180 N.C. at 567, 105 S.E. at 436. In the present case, the rubber strap allegedly causing injury was not under the exclusive control or management of defendant Astrup at the time plaintiff was injured, and therefore *res ipsa loquitur* is not available to plaintiff as a presumption of negligence. *See Trull v. Well Co.*, 264 N.C. 687, 142 S.E. 2d 622 (1965); *Wyatt v. North Carolina Equipment Co., supra.* In addition, North Carolina has not embraced the doctrine of strict liability in tort, *Fowler v. General Electric Co.*, 40 N.C. App. 301, 252 S.E. 2d 862 (1979), and therefore Astrup's obligation to plaintiff in this case is tested by the law of negligence, rather than the fact of injury itself. Having been unable to locate any facts that show negligence on the part of Astrup, we overrule plaintiff's assignment of error.

[5] Plaintiff next argues that summary judgment was improper as against defendant Ward on both claims of negligence and breach of warranty. We will consider plaintiff's negligence claim first. Plaintiff originally alleged that Ward was negligent in failing to inspect for defects in the straps which he sold, and in failing to warn that the straps might break during use.

The rubber straps were manufactured by The West Company and then attached to steel hooks by Astrup, who then sold the finished product to defendant Ward. Defendant Ward in turn sold the straps to the public without alteration. Ward, as a retail seller of these straps, was under a general duty to exercise reasonable care to prevent injury from a known danger presented by defects in the product. Ward's duty is limited, however,

because there was no patent defect in the strap in question. The defect, if one existed, was latent, as evidenced by the testimony of plaintiff, who handled the strap: "I saw the end of the strap that broke, but did not notice anything wrong with it. I did not see any crack or anything like that." In this regard, the general rule of liability is as follows:

> [A] retailer who purchases from a reputable manufacturer and sells the product under circumstances where he is a mere conduit of the product is under no affirmative duty to inspect or test for a latent defect, and, therefore, liability cannot be based on a failure to inspect or test in order to discover such defect and warn against it.

2 Frumer and Friedman, Products Liability § 18.03[1][a] (1979); *General Motors Corp. v. Davis*, 141 Ga. App. 495, 233 S.E. 2d 825 (1977) and cases there cited.

In this case, where the retail seller does not manufacture the product, "he may assume that the manufacturer has done his duty in properly constructing the article and in not placing upon the market a commodity which is defective and likely to inflict injury. (Citations omitted.)" *General Motors Corp. v. Davis*, supra, 141 Ga. App. at 498, 233 S.E. 2d at 829.

In *Nationwide Mutual Insurance Co. v. Weeks-Allen Motor Co.*, 18 N.C. App. 689, 198 S.E. 2d 88 (1973), plaintiff alleged that a retail dealer of automobiles was negligent in the sale of a defective master brake cylinder for installation on the automobile of plaintiff's insured. The dealer moved for summary judgment, which was granted. On appeal, this Court affirmed, stating:

> Any liability of [the dealer] could only be predicated upon the existence of a defect of which it was aware or by reasonable diligence could have discovered at the time of sale. It would not, however, be responsible for a defect subsequently discovered which was not discernible by reasonable inspection at the time of sale. (Citations omitted.)

18 N.C. App. at 693, 198 S.E. 2d at 91. In the present case, then, it is incumbent upon plaintiff on motion for summary judgment to produce evidence tending to show that a defect existed in the rubber strap at the time of sale, and that defendant Ward, by reasonable inspection, could have discovered the defect. Plaintiff

has offered nothing which indicated he could show at trial that a defect existed in the strap when sold. Further, plaintiff offered nothing as evidence of his contention that a reasonable inspection would have disclosed the defect. In *Coakley v. Motor Co.*, supra, plaintiff argued on appeal that the jury should have been allowed to determine whether the retail seller could have, in the exercise of reasonable care, discovered the alleged defect. In affirming a summary judgment in favor of defendant seller, this Court stated:

> Assuming that [a defect existed], plaintiff has offered no evidence as to whether a reasonable inspection . . . would have disclosed the defect. The question may not be left for conjecture.

11 N.C. App. at 640, 182 S.E. 2d at 263. Under the facts of this case, no knowledge may be imputed to Ward as to the alleged defective condition of the rubber straps. In light of the general rule which does not require a vendor to inspect for latent defects, and in light of the plaintiff's failure to produce at least some evidence as to whether the strap was defective and such defect could have been discovered by Ward upon reasonable inspection, we overrule plaintiff's assignment of error.

Plaintiff argues in addition that Astrup furnished warnings and recommendations with the straps it sold to Ward, and that Ward's failure to pass these on to the purchaser constituted negligence. Plaintiff contends that "any warnings and recommendations concerning stretching were placed there for the information of the customer who would be stretching the straps." However, plaintiff failed to present any evidence of these warnings and recommendations on motion for summary judgment. Therefore, even if we were to agree with plaintiff on this point, we are given nothing on which to base an opinion.

[6] Plaintiff further contends that the court erred when it granted defendant Ward's motion for summary judgment as to Ward's alleged liability for breach of implied warranty of merchantability. Since we find no evidence from which a defect could be shown, this contention must also be rejected.

Under G.S. 25-2-314, a plaintiff must prove, first, that the goods bought and sold were subject to an implied warranty of merchantability; second, that the goods did not comply with the

warranty in that the goods were defective at the time of sale; third, that his injury was due to the defective nature of the goods; and fourth, that damages were suffered as a result. *Tennessee-Carolina Transportation, Inc. v. Strick Corp.*, 286 N.C. 235, 210 S.E. 2d 181 (1974); *Burbage v. Atlantic Mobilehome Suppliers Corp.*, 21 N.C. App. 615, 205 S.E. 2d 622 (1974). The burden is upon the purchaser to establish a breach by the seller of the warranty of merchantability by showing that a defect existed at the time of the sale. *Rose v. Epley Motor Sales*, 288 N.C. 53, 215 S.E. 2d 573 (1975). As discussed above, plaintiff has presented no evidence that tends to show a defective condition aside from the fact that the strap broke. In other words, there was no evidence that the rubber straps were not "fit for the ordinary purposes for which such goods are used" at the time they were purchased. G.S. 25-2-314. To the contrary, plaintiff said that he saw the "end of the strap that broke, but did not notice anything wrong with it." In addition, contrary to plaintiff's assertion, there was no evidence that the age of the straps was a causative factor in plaintiff's injury.

Rose v. Epley Motor Sales, supra, relied upon by plaintiff, is distinguishable on the facts. In *Rose*, plaintiff purchased from defendants a used automobile, which was subject to the implied warranty of merchantability. The evidence established that nothing was done to the automobile after the sale which altered its condition, and that at all times following the sale plaintiff operated it in a normal and proper manner. It was shown that three hours after the sale, while it was being operated, the automobile was totally destroyed by a fire originating in its motor compartment. The Court ruled that "[f]rom the facts shown by the plaintiff's evidence, taken to be true, it may reasonably be inferred that the vehicle sold to him by the defendants was not in condition suitable for ordinary driving at the time of the sale, three hours before the fire." 288 N.C. at 59, 215 S.E. 2d at 577. Plaintiff argues that under *Rose*, his evidence is sufficient to show a defect without additional evidence as to the exact cause of the strap breaking. However, the facts as established do not suggest such a presumption. In this case, the rubber straps were transferred from defendant to Brothers and then to plaintiff subsequent to their purchase, unlike the situation in *Rose* where there was exclusive possession by plaintiff from the time of pur-

chase until the automobile was destroyed by fire. There being no evidence of a defective condition existing at the time of sale, summary judgment in favor of defendant Ward was proper on the issue of implied warranty under G.S. 25-2-314.

Plaintiff finally argues that the trial court erred in excluding a second affidavit of John Brothers, offered during the course of the summary judgment hearing. Plaintiff did not file the affidavit before the hearing, did not serve the affidavit upon opposing counsel, nor did plaintiff make the proffered affidavit a part of the record on appeal. Notwithstanding the merits of plaintiff's arguments, since the record gives no indication of what the affidavit would have shown if admitted, we have no basis upon which to rule concerning this assignment, and it is, therefore, overruled.

Affirmed.

Judges PARKER and MARTIN (Robert M.) concur.

DANJEE, INC. v. ADDRESSOGRAPH MULTIGRAPH CORPORATION

No. 797SC196

(Filed 5 February 1980)

1. **Uniform Commercial Code § 8— statute of frauds—waiver by failure to plead—sufficiency of writings**

In an action to recover for breach of contract in the sale of typesetting equipment, the trial court did not err in failing to instruct the jury on the statute of frauds of G.S. 25-2-201(1) where defendant waived the defense of the statute of frauds by failing to plead it and where the exhibits at trial constituted "writings" showing that contracts of sale had been made between the parties.

2. **Uniform Commercial Code §§ 20, 23— acceptance—revocation of acceptance—instructions not required**

In an action to recover for breach of contract in the sale of two typesetting machines, the trial court did not err in failing to instruct the jury on acceptance and revocation of acceptance where the record shows that plaintiff retained both machines, had possession of them at the time of trial, the condition of the machines was fully known to plaintiff, and revocation of its acceptance was not available to plaintiff after the long period of time it used the machines.

3. Contracts § 27.3— breach of contract of sale of machine—loss of profits

Plaintiff's evidence was sufficient to support a jury verdict finding that defendant breached its contract of sale of a typesetting machine and awarding plaintiff $40,000 for such breach of contract where it tended to show that the machine was ordered on 19 February 1973 and defendant promised delivery in eight weeks and to provide plaintiff a loaner machine within twenty-four hours if the machine was not delivered in eight weeks; plaintiff's agent advised defendant's agent that plaintiff was going to sell business based on the arrival of the machine in eight weeks; in April 1973 plaintiff advised defendant the machine was needed desperately and asked for a loaner; a loaner was delivered about 14 May and the new machine was delivered on 22 August; a customer had committed itself to furnish plaintiff with $100,000 in business but plaintiff was unable to perform the work because it had not received the machine from defendant; and plaintiff's production costs for the work would have been from forty to sixty percent.

4. Contracts § 27.3— breach of contract of sale of machine—damages

Plaintiff's evidence was sufficient to support a jury verdict awarding plaintiff $11,200 for defendant's breach of contract of sale of a phototypesetter where it tended to show that defendant delivered a demonstrator model to plaintiff but represented it to be a new model; the demonstrator was worth $12,000 to $13,000 less than the $23,400 plaintiff paid for it; and the cost to reproduce work because the phototypesetter would not work properly when delivered was $7,045.34.

5. Contracts § 29.5— interest on award for breach of contract

The trial court erred in awarding interest on the amount awarded for breach of contract from the date of the breach.

APPEAL by defendant from *Fountain, Judge*. Judgment entered 9 October 1978 in Superior Court, WILSON County. Heard in the Court of Appeals 23 October 1979.

Plaintiff filed its complaint against defendant, alleging, *inter alia*, unfair and deceptive trade practices, breach of warranties on the sale of a 748 Phototypesetter (hereinafter referred to as 748), including a warranty that the 748 was new, breach of contract to deliver a 797 Input Machine (hereinafter referred to as 797) to plaintiff on a timely basis, and breach of warranty to provide expert care and maintenance service on plaintiff's 745 Processor.

Defendant answered, denying the material allegations of plaintiff's complaint, and alleged that plaintiff is indebted to defendant for $3,707.11 with interest from 11 March 1975, that prior to the institution of the present action, defendant had filed suit against plaintiff in District Court in Wilson County, and that

its action should be a compulsory counterclaim in defendant's action against plaintiff in District Court.

The court entered certain orders denying relief sought by defendant in its answer. Defendant's motion was granted to consolidate this case for trial and the case wherein Addressograph, as plaintiff, sought the amount due on its account with Danjee.

At trial, plaintiff presented Jean Glover, a part owner of Danjee, who testified that she and Dana Corum formed Danjee typesetting business in early 1973. On 19 February 1973, Glover telephoned Robert Jackson of Addressograph, who committed to deliver a 797 Input Machine to plaintiff within eight weeks and committed to get plaintiff a loaner machine within twenty-four hours if the 797 was not delivered in eight weeks. When plaintiff placed its 797 order, it had no funds to buy the machine, so it set up a line of credit with First Union National Bank. Plaintiff received an acknowledgment from defendant dated 7 March 1973 that the order which was C.O.D. was accepted with a delivery date on or before twelve weeks or approximately 7 June 1973. Glover immediately called Jackson, who said it should be delivered any day. The machine was not delivered in eight weeks. In April, Glover told Jackson she had sold an account, needed the machine desperately, and wanted the loaner promised. The loaner was provided with no charge to plaintiff about 14 May 1973. The 797 ordered was not installed until at least twenty-two weeks after it was ordered, about 20 August 1973.

Plaintiff paid for the machine the day it arrived. Glover was informed that the first 797 sent to fill the order was damaged at the branch office. Plaintiff could not work on the account it had with Practicing Law Institute (P.L.I.) under which plaintiff had a commitment of approximately $100,000 a year in work. Plaintiff lost this account. At that time, plaintiff's overhead expenses were a very bare minimum. Costs of production on the P.L.I. contract were calculated at forty percent to sixty percent. Plaintiff complained of jamming problems with its 797, which a serviceman ultimately remedied.

Plaintiff also ordered a 748 Phototypesetter on 29 June 1973 from defendant with a promised six to eight week delivery date. The bill on the 748 was over $23,400. A written acknowledgment, dated 16 July 1973, was received by plaintiff indicating a twelve

week delivery date on the 748. The 748 was sold C.O.D. with bank financing. Plaintiff did not personally have the money to pay for it when it was installed, and plaintiff was having difficulties with bank financing. The 748 was not delivered as promised, and plaintiff contacted defendant and told it how badly plaintiff needed the machine. Plaintiff was told it had not come from the factory. After receiving the 748 on 20 October 1973, plaintiff had a number of problems with it. A leading problem concerning the spacing of print was not finally corrected until 5 December 1973. Plaintiff was told by Jackson that the 748 was a new machine, but plaintiff learned in June 1975 that the machine had been "carted around a couple of states as a demonstrator." During the last half of 1973, plaintiff's business was operated eighteen to twenty hours per day. Defendant loaned to plaintiff and serviced free of charge a 744 machine from the end of August or first of September 1973 until the 748 was workable in February 1974. All of plaintiff's phototypesetting work after February was processed on the 748. After a meeting, the plaintiff agreed to pay $1,000 per month rent from May to July which would apply to the purchase price with the balance to be paid in full on 15 August 1974.

Raymond Harrow, who was experienced in dealing with a large number of phototypesetting companies, testified that while in charge of production with the P.L.I., he committed by verbal contract that P.L.I. would "most likely" supply plaintiff with an excess of $100,000 of business beginning in April 1973 if their requirements were met. When plaintiff could not meet the commitment, Harrow went elsewhere with the business. Harrow stated, "I cannot say that I know anyone in the business that is better than Danjee."

On recall, Glover testified that the 744 was considered a machine to use until the 748 was working and that work prepared for processing on the 744 could not be run through the 748 and vice versa. Plaintiff was told by defendant's serviceman to prepare work for the 748, but the 748 was not operable, so plaintiff had to "redo" tapes for the 744.

Ernest Bell, formerly employed as defendant's sales representative, testified that Jackson was defendant's district manager and his immediate supervisor; that on the sale of the 748, Jackson called the home office to verify the six to eight week

delivery date; that upon receipt of Plaintiff's Exhibit 5, indicating twelve weeks' delivery, Glover called Bell, and he told her it was a standard form sent to most anyone ordering equipment; that the 748 plaintiff ordered was actually received by the Charlotte office approximately six weeks after the order was turned in; that in 1973, normal procedure when a machine was received was to deliver it in two or three days; that Jackson sent the machine into North Carolina and South Carolina for sales demonstrations; that Jackson instructed Bell to tell plaintiff the machine had not come in yet, which he did; that when it was delivered, plaintiff was told it was a new machine, when in fact it was worth only about $12,000 to $13,000 instead of full value. Bell also testified that the first 797 ordered was damaged by the airfreight lines.

Plaintiff's evidence tended to show that the total cost of redoing tapes was $7,045.34. On cross-examination, Corum testified that plaintiff operated at a loss in 1973, 1974, and 1975, and she was not positive about 1976.

A motion for directed verdict was allowed as to plaintiff's claim for punitive damages.

Defendant's evidence tended to show that Charles LaFollette, defendant's technical specialist, made a number of service visits to plaintiff's business and corrected problems with its machines. On 22 August 1973, he assisted in uncrating and testing the 748 in Charlotte. It was not in proper condition for delivery. Robert Jackson testified about placing Glover's orders from defendant, the financing involved, and the loaner machines. He committed to a normal twelve-week delivery on the 797, but testified that he had qualified it by stating he would provide a loaner if for any reason the delivery was impossible. The 797 was shipped in June by airfreight and damaged beyond repair. Plaintiff's 31 July 1973 cashier's check totally closed out the sale of the 797 on the date the replacement was delivered. The 748 was the first to come into the area, and it was shown to prospective customers in North and South Carolina prior to delivery to plaintiff. It was standard practice in the industry to show equipment while it was being operated and run to exercise it and burn in the electronics.

Concerning the agreement on the 748 machine, Jackson said he considered the payment of $1,000 per month to be rental. That "was just a very nebulous term used to apply, because at that

point, they had paid no money on the machine." The ninety-day period was given plaintiff to see if the 748 would function properly. In February 1973, Glover told Jackson she was going to sell business based on the delivery date of the 797. Defendant's salesman had no authority to commit defendant to shorter delivery dates than appeared in the acknowledgment of orders unless they had the equipment in their inventories, and they did not have a 748 or 797 in inventory.

Ralph Keith, defendant's repairman, testified that in October 1973, he told plaintiff to prepare tapes for the 748, but plaintiff had to reprocess them for the 744, because the 748 would not run.

At the close of all the evidence, the court denied all of defendant's motions for directed verdict except as to plaintiff's claim for unfair and deceptive trade practices, which the court allowed. Issues were submitted to the jury and were answered in favor of plaintiff. Defendant's motions for judgment notwithstanding the verdict and for a new trial were denied. Defendant appealed.

Narron, Holdford, Babb, Harrison & Rhodes, by William H. Holdford, for plaintiff appellee.

Connor, Lee, Connor, Reece & Bunn, by Cyrus F. Lee and James F. Rogerson, for defendant appellant.

ERWIN, Judge.

Defendant's first argument is based on six assignments of error and forty exceptions set out in the record on appeal. Some of the exceptions relate to the court's rulings on the admission of evidence as presented by plaintiff; four relate to motions of defendant made at the close of plaintiff's case, which were denied by the court; three relate to motions of defendant made at the close of defendant's case and denied by the court; several relate to the charge of the court to the jury; and two relate to post-trial motions for judgment notwithstanding the verdict and for a new trial, which were denied by the court.

After setting out the assignments of error and exceptions, defendant does not show the relationship of these matters to the question it requests us to determine. We conclude, from a study of the record and defendant's brief, that the first question before

us is: Did the trial court commit error in failing to instruct the jury as required by G.S. 1A-1, Rule 51, of the Rules of Civil Procedure, in that the trial court did not instruct on the Statute of Frauds, acceptance, and rejection of the goods (the 797 and 748) under the provisions of the Uniform Commercial Code? We answer, "No," for the reasons that follow.

Statute of Frauds

[1] Defendant did not plead any affirmative defenses as required by G.S. 1A-1, Rule 8(c), of the Rules of Civil Procedure, which includes the Statute of Frauds. We hold that defendant waived any and all benefits it may have had pursuant to G.S. 25-2-201(1). In addition, the evidence presented at trial showed complete contracts for the sales. Plaintiff's Exhibits 3, 5, 6, and 10 (relating to 748) and defendant's Exhibit 10 (relating to 797) were sufficient to constitute "writings" to indicate that contracts of sales had been made between the parties. *Hosiery Mills v. Burlington Industries*, 285 N.C. 344, 204 S.E. 2d 834 (1974). We find no merit in defendant's contention that G.S. 25-2-201(1) applies in this case.

Acceptance and Revocation of Acceptance

[2] Defendant states in its brief:

> "Again like the purchase of the 797 machine, the Plaintiff has accepted the 748 and after using it for three months or more, paid for it in full and without any NOTICE of breach as required by the provisions of GS 25-2-607(3)(a). Again the Plaintiff has neither plead nor proven the giving of any such notice."

We find no error in the trial court's failure to charge on the issue of acceptance and revocation of acceptance.

G.S. 25-2-606(1) provides:

> "§ 25-2-606. *What constitutes acceptance of goods.*—(1) Acceptance of goods occurs when the buyer
>
> (a) After a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their nonconformity; or

(b) fails to make an effective rejection (subsection (1) of § 25-2-602), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or

(c) does any act inconsistent with the seller's ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him."

The record clearly shows that plaintiff retained both machines, had possession of them at the time of trial, and had ample time to reject them, particularly since the condition of the goods was fully known to plaintiff. The acts of plaintiff were inconsistent with the seller's (defendant's) ownership. This constituted acceptance. G.S. 25-2-606(1)(c).

Revocation of acceptance was not available to plaintiff after the long period of time it used the machines. The 748 was delivered to plaintiff about 20 October 1973, and the 797 was delivered to plaintiff about 20 August 1973. Under G.S. 25-2-608(2), "[r]evocation of acceptance must occur within a reasonable time after the buyer [plaintiff] discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects." Plaintiff notified defendant of the defects, and defendant responded to plaintiff's complaints on several occasions. Plaintiff has properly instituted this action for breach of contracts after acceptance of the machines. G.S. 25-2-607(3); *Credit Co. v. Concrete Co.*, 31 N.C. App. 450, 229 S.E. 2d 814 (1976). Neither the pleadings nor the evidence raised any issue as to acceptance or revocation of acceptance. This contention of defendant is without merit.

Breach of Contract

[3] Defendant assigns the following as error: (1) that the record in this case will not support a jury verdict that defendant breached its contract of sale of the 797; and (2) that plaintiff has made no showing to justify the jury award of $40,000 damages for breach of contract of sale of the 797. We do not agree.

Plaintiff's action is for consequential damages due to the loss of an account because of delay in delivery and making the 797 operable. Plaintiff's evidence tended to show that the 797 was ordered on 19 February 1973 and that defendant promised

delivery in eight weeks and committed to provide plaintiff a loaner machine within twenty-four hours if the 797 was not delivered in eight weeks. In April 1973, plaintiff advised defendant that the machine was needed desperately, and it wanted the loaner machine. The loaner was delivered about 14 May 1973, and the 797 was delivered about 20 August 1973, at least twenty-two weeks after it was ordered.

Defendant's evidence tended to show that it committed to a normal twelve-week delivery on the 797 but had qualified it by stating that it would provide a loaner if for any reason delivery was impossible. The 797 was shipped in June 1973 by airfreight and was damaged beyond repair.

Taking the evidence and the inferences to be drawn therefrom in the light most favorable to plaintiff, it was clearly sufficient to submit an issue on breach of contract, on the part of defendant relating to the 797, to the jury and support a verdict thereon. *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971); *Adams v. Curtis*, 11 N.C. App. 696, 182 S.E. 2d 223 (1971).

Defendant's witness, Robert Jackson, testified with reference to the loaner machine:

> "As to my efforts to get the loaner that I promised her for her after the order, when the order was placed was in my possession in the Charlotte office and it was based on that fact that I made the commitment to back them up so to speak if for any reason we had a delivery problem. I was not able to make the delivery of the loaner that I had there in Charlotte at that time.
>
> Around the middle of April, my regional manager instructed me to send it to Phoenix, Arizona. I brought my problem to his attention that I was going to possibly be needing the loaner. And, he indicated that he would make sure that I had a piece of equipment there in a prompt fashion. I was able to locate and procure a loaner for her. We found a machine in the Boston district office and this was subsequently sent to Raleigh, no pardon me, I take that back, it was sent to Charlotte for installation and we transported it in a very prompt fashion to Danjee at that point. The 797 loaner was installed in her place of business the first part of May, 1973.

As to a more exact date, I think Jean, Miss Glover, commented on around the 14th of May, and I have nothing to indicate that it was before that date. I have nothing to refute that at all."

The 797 was delivered late, and problems developed in making the machine operable gave rise to an action for consequential damages. G.S. 25-2-715(2)(a). Plaintiff's evidence tended to show that it had a contract for services to be rendered in the amount of $100,000 less cost of production of $30,000 to $60,000. Plaintiff alleged its damages to be $60,000, and the jury found an amount of $40,000. The evidence was that plaintiff had a commitment based on a dollar volume that it would be supplied with business in excess of $100,000 from the P.L.I. and that plaintiff met the specifications of the institute for its business. The work was to begin in April 1973, and plaintiff was not able to keep its commitment. The business was completed by someone else.

The trial court instructed the jury as follows (defendant excepting to the first paragraph):

"(The plaintiff contends it lost $100,000.00 gross and a minimum of $40,000.00 net. So, it contends that you should answer that issue in not less, a sum not less than $40,000.00.)

Defendant excepts to this portion of the charge.

EXCEPTION NO. 93

The defendant on the other hand contends that there was no binding contract with the Practicing Law Institute and that even if it was within a very short while they got substantially the same work from another company represented by the same person who they were dealing with with the Practicing Law Institute.

And, so the defendant contends, members of the jury, that there has been no breach, but if there was, that plaintiff should recover only nominal or trivial damages, nominal damages whenever there is a breach of contract, the party who breaches it, even though he causes no actual damages, is liable for at least nominal damages. Nominal damages may be said to be a dollar, two or three dollars or five dollars. Simply something to compensate for a breach where no actual damages arise."

Defendant contends in its brief: "The Plaintiff not only had to establish the FACT of damages with reasonable certainty but had the burden of establishing the amount with reasonable certainty. If the Plaintiff fails in either regard, the Plaintiff is not entitled to recover. We submit here Plaintiff has failed in both regards."

Defendant relies on our Supreme Court's decision in *Machine Co. v. Tobacco Co.*, 141 N.C. 284, 53 S.E. 885 (1906), wherein the Court held that in an action for damages by reason of defendant's failure to exhibit plaintiff's cigarette machine at the Saint Louis Exposition, as it had contracted to do, the court erred in charging the jury that they might allow plaintiff damages suffered by the loss of profits it would have made if the contract had been performed and the loss of the benefits that would have accrued to it in increased sales of its machine, etc., in the absence of evidence that plaintiff had secured any contracts for the purchase of its machines if these proved satisfactory when exhibited, or that plaintiff would have made any particular number of sales, or any other proof which would enable the jury by any certain and reliable standard to estimate the losses.

The case *sub judice* does not fall within the rule of *Machine Co. v. Tobacco Co., supra.* The evidence of plaintiff is reasonably clear that P.L.I. had committed itself to plaintiff to furnish it business. Plaintiff's evidence tended to show its overhead expenses were at a bare minimum, and if it had been able to complete the business of $100,000 as committed, its production costs could vary from forty to sixty percent. Plaintiff's agent advised defendant's agent that she was going to go out immediately and sell business based on the arrival of the 797 in eight weeks as promised by defendant. If not delivered, a loaner machine would be provided in twenty-four hours by defendant. Based on the contract, plaintiff's agents (1) began to solicit business, (2) terminated their jobs, (3) broke their lease for an apartment, (4) made arrangements to leave New York and move to Bailey, and (5) received a commitment from P.L.I.

The court's instructions were clear and correct on the issues of damages raised by the pleading and evidence properly admitted. The damages in question were ascertained and measured with reasonable certainty. *Pike v. Trust Co.*, 274 N.C. 1, 161 S.E. 2d 453 (1968). We find no merit in this assignment of error.

Defendant contends that the parties met on 14 May 1974 and entered into a new contract, wherein plaintiff agreed to make rental payments on 15 May, 15 June, and 15 July of $1,000 each and that by 15 August 1974, the balance due on the purchase price of the 748 would be paid in full. This agreement amounted to a modification of the original contract. The provisions of G.S. 25-2-209 were complied with; therefore, there was not a breach of contract. In addition, there is not any evidence showing damages. Again, we do not agree.

[4] Plaintiff's action in regard to the 748 arose out of delivery and payment for a new 748 when a demonstrator model was delivered but misrepresented as a new model and breakdowns of the 748 resulting in a costly switch to another machine. The damages are both direct and consequential. Defendant did not plead any matter that would constitute avoidance or any affirmative defense sufficiently particular to give the court and plaintiff notice of the transaction it intended to prove. G.S. 1A-1, Rule 8(c), of the Rules of Civil Procedure. Defendant did not present any written request for instructions to the jury nor did defendant object to any issue submitted. If so, the record does not show that the trial court ruled on such objections. This assignment is without merit.

Plaintiff's evidence tended to show that the actual value of the 748 when delivered in its condition to be $12,000 to $13,000 less than the $23,400 paid for it and that the cost to reproduce work because the 748 operated improperly was $7,045.34. The jury found breach of contract and awarded damages to plaintiff in the amount of $11,200. There is not any dispute that the 748 was used as a demonstrator in North and South Carolina. We hold that the evidence was amply sufficient to support the verdict of the jury. We find no error.

Judgment

[5] The judgment entered provided interest on the sum of $11,200 from 20 October 1973 and on the sum of $40,000 from 19 May 1973. Defendant contends that the entries of interest constitute error. Plaintiff concedes that the case may be remanded to the trial court to be modified to eliminate the entries of interest on the amounts in question. We agree, in that this case does not

fall in the rule stated in *General Metals v. Manufacturing Co.*, 259 N.C. 709, 131 S.E. 2d 360 (1963).

Conclusions

We have reviewed defendant's assignments of error and its exceptions as they relate to admission of evidence, motions made during trial, the charge of the court, and post-trial motions and find no error.

The results reached by the trial court are proper on the record before us. Although the parties did not plead any section of the Uniform Commercial Code nor did the trial court mention the code in its charge, the results would be the same as reached on this record.

In the trial of this action, we find no error. The case is remanded to modify the judgment entered in keeping with this opinion.

Judges VAUGHN and HILL concur.

GLADYS L. BOST, ADMINISTRATRIX OF THE ESTATE OF WADE LEE BOST; AND GLADYS L. BOST, INDIVIDUALLY v. WILLIAM J. RILEY, B. L. RABOLD, LOUIS HAMMAN, AND CATAWBA MEMORIAL HOSPITAL, INC.

No. 7925SC256

(Filed 5 February 1980)

1. Physicians, Surgeons and Allied Professions § 15— malpractice action—surgeon's opinion of hospital care—exclusion improper

The trial court in a medical malpractice action erred in excluding testimony by intestate's father concerning a conversation he had with a surgeon who treated intestate at a hospital to which intestate was transferred after one month of treatment by defendants, since the excluded testimony was that the surgeon, in commenting upon intestate's condition, stated that "inferior hospitals . . . would hold patients . . . too long sometimes and then they would send them to him and expect miracles"; the surgeon testified at trial that all of the treatment which intestate received at defendant hospital and under the care of defendant physicians was in keeping with accepted medical practices; the excluded testimony was in direct conflict with the surgeon's trial testimony; and the statements of the surgeon concerning quality of care of-

fered at defendant hospital were pertinent and material to whether all or any of defendant physicians were negligent.

2. Witnesses § 6.1— inconsistent statements—admissibility for impeachment—opportunity to deny or explain—when required

Where inconsistent statements of a witness relate to a matter which is pertinent and material to the pending inquiry, or which respects the subject matter in regard to which he is examined, the inconsistent statements may be proved by other witnesses without first bringing them to the attention of the main witness; therefore, because statements which a surgeon allegedly made to intestate's father concerning the quality of care offered at defendant hospital were pertinent and material to whether all or any of defendant physicians were negligent, plaintiff was not required to afford the surgeon an opportunity to deny or explain these statements prior to impeaching him through the testimony of another witness.

3. Hospitals § 3— corporate negligence—insufficiency of evidence

In N. C. a hospital may be found liable to a patient under the doctrine of corporate negligence, but the trial court in this case properly directed verdict for defendant hospital where plaintiff made no showing that the hospital's failure to take action when physicians did not keep progress notes on plaintiff's intestate's condition contributed to intestate's death; hearsay testimony concerning the opinion of a surgeon at another hospital that defendant hospital was inferior could not be considered substantive evidence of the quality of care administered by defendant hospital; and there was no evidence at trial that defendant hospital failed to use reasonable care in selecting the defendant surgeons to practice at the hospital.

APPEAL by plaintiff from *Walker, Judge.* Judgment entered 7 June 1978 in Superior Court, CATAWBA County. Heard in the Court of Appeals 13 November 1979.

Plaintiff's intestate, Wade Lee Bost (Lee), was involved in a bicycle accident on 23 July 1974 in which he injured the left side of his body. On 25 July 1974 Lee was seen in the emergency room of defendant Catawba Memorial Hospital, Inc. (Catawba) and was admitted to Catawba under the supervision of defendant Dr. William J. Riley. Riley conducted tests and diagnosed Lee's injury as a delayed rupture of the spleen. Riley, a surgeon, performed a splenectomy on Lee and replaced blood lost as a result of the rupture. Following the operation, Lee was placed in the intensive care unit, fed intravenously and given various medications. Defendant Riley went on vacation from 29 July 1974 through 11 August 1974, leaving Lee in the care of his two partners, defendant Drs. Bernard L. Rabold and Louis Hamman.

Lee's progress improved from the time of the operation until the late evening of 29 July 1974, when he began experiencing abdominal pain, increased intraperitoneal fluid, perspiration, decreased blood pressure, rapid breathing and vomiting. Defendants Rabold and Hamman diagnosed Lee's condition as peritonitis, an infection of the peritoneal cavity. The doctors placed Lee on the antibiotic Geopen. Between 3 August 1974 and 4 August 1974 Lee's vital signs improved somewhat and the doctors, sensing an improved condition, removed Lee from the intensive care unit.

On 5 August 1974, Lee's condition took a sudden turn for the worse. His temperature shot up to 104°, his blood pressure dropped substantially, his skin became pale and his abdomen showed a marked increase in distention and tenderness. Defendants Rabold and Hamman operated on Lee on 6 August 1974 and found a volvulus, a twisting of the intestine which blocked the passage of its contents and the blood supply. The doctors resected approximately three feet of gangrenous bowel. Postoperatively, Lee recovered poorly, developing a fecal fistula, malnutrition and septicemia, and was treated with antibotics, steroids, hyperalimentation and transfusions.

On 23 August 1974 Lee was transferred to Baptist Hospital in Winston-Salem, his condition critical, under the care of Dr. Richard T. Myers. Three additional operations were performed on Lee, but his condition continued to deteriorate. On 27 January 1975 Lee died of liver failure induced by sepsis.

Plaintiff administratrix of Lee's estate sued defendants Riley, Rabold, Hamman and Catawba for malpractice. In the complaint it was alleged the defendant surgeons were negligent, *inter alia*, in failing to take adequate preoperative blood studies prior to the operation of 25 July 1974, damaging organs in the area of this operation, failing to diagnose and adequately treat Lee's intestinal infection, failing to adequately monitor Lee's progress, failing to provide Baptist Hospital with adequate information of Lee's condition, failing to keep plaintiff informed about Lee's true condition, removing an excess quantity of Lee's bowel, and failing to adequately treat Lee's condition both prior and subsequent to the operation performed on 6 August 1974. Plaintiff charged Catawba with negligence in the selection of the defendant surgeons to practice surgery in that hospital and allowing the

surgeons to perform such surgery, in failing to adequately supervise and monitor the activities of the defendants, and in failing to adequately monitor the condition of Lee or require the defendant surgeons to keep better progress notes on Lee's condition.

At trial, plaintiff called as adverse witnesses the defendant surgeons and other personnel of Catawba, as well as two radiologists and Dr. Richard T. Myers, the surgeon who treated Lee at Baptist Hospital. Plaintiff also called Dr. Stanley R. Mandel, a surgeon practicing at North Carolina Memorial Hospital at Chapel Hill, who had reviewed Lee's medical records. At the close of plaintiff's evidence, all of the defendants moved for a directed verdict. The trial court granted only the motion of defendant Catawba. The defendant surgeons offered no evidence, but renewed their motions for a directed verdict, which were all again denied by the court. The jury answered the issue of negligence in favor of the defendant surgeons. From the judgment of the court entered upon the jury's verdict, plaintiff appeals.

Gaither and Gorham, by James M. Gaither, Jr. and J. Samuel Gorham III, for plaintiff appellant.

Mitchell, Teele, Blackwell & Mitchell, by W. Harold Mitchell, for defendant appellees.

WELLS, Judge.

Plaintiff alleges error by the trial court in the admission and exclusion of evidence, the making of prejudicial remarks before the jury, granting defendant Catawba's motion for a directed verdict, charging the jury, and failing to grant plaintiff's motion for a new trial.

[1] Plaintiff assigns as error the trial court's exclusion of testimony of Ed Bost, Lee's father, of the conversation which Mr. Bost allegedly had with Dr. Richard T. Myers after Dr. Myers had performed his first operation on Lee at Baptist Hospital. Bost testified *in camera* that Dr. Myers had told him that Lee, at that point in time, was just a "mass of infection." Bost said that Dr. Myers commented, "[I]nferior hospitals . . . [w]ould hold patients . . . too long sometimes and then they would send them to him and expect miracles." Bost stated that he believed Dr. Myers was

categorizing defendant Catawba Memorial Hospital as one such "inferior hospital." The trial court excluded this testimony. Plaintiff's position is that this comment was admissible for impeachment purposes as a prior inconsistent statement of Dr. Myers. Under our rules of evidence, prior inconsistent statements of a physician are admissible to impeach his testimony. *Ballance v. Wentz*, 286 N.C. 294, 210 S.E. 2d 390 (1974). Dr. Myers, though called by plaintiff, was an adverse and hostile witness, and was therefore subject to impeachment by plaintiff. G.S. 1A-1, Rule 43(b). *See also, State v. Anderson*, 283 N.C. 218, 195 S.E. 2d 561 (1973).

Defendants maintain that since Dr. Myers did not testify whether or not Lee should have been transferred to Baptist Hospital prior to 23 August 1974, this statement was not inconsistent or contradictory to his testimony. We do not agree. Dr. Myers was called by plaintiff as a hostile witness, and testified on cross-examination that the splenectomy was performed well, that defendants' treatment of Lee for acute gastric dilatation was by a good, medically accepted process, and that defendant Rabold ordered the proper blood tests. Dr. Myers further stated that the medication and treatment prescribed and performed by defendants Rabold and Hamman were proper and in keeping with good medical practice, that surgery was not indicated as early as 31 July 1974, and that after the second operation at Catawba, Lee's postoperative management care was in keeping with good medical practice. Dr. Myers testified that sufficient progress notes on Lee's condition were kept at defendant Catawba after the 6 August 1974 operation. In summary, it was Dr. Myers' opinion that all of the treatment which Lee received at defendant Catawba was in keeping with accepted medical practices.

The comments which Dr. Myers allegedly made to Lee's father, however, clearly implied that Lee's treatment at Catawba had left him in such a condition as to require "miracles" to be performed at Baptist and that Lee should have been transferred to Baptist Hospital sooner. This statement stands in direct contradiction to the unfettered stamp of approval Dr. Myers gave at trial to the care Lee received at Catawba. The trial court's failure to admit this testimony was prejudicial to the plaintiff. Plaintiff called only two surgeons as witnesses who were not named defendants in the suit. The testimony of one of these witnesses, Dr.

Mandel, was sufficiently favorable to plaintiff to carry the issue of negligence to the jury. The other surgeon to testify who was not a named defendant was Dr. Myers.

Dr. Myers' credentials were impressive. At the time he treated Lee, he was Chairman of the Department of Surgery at Bowman-Gray School of Medicine. He co-authored an authoritative treatise on the surgical aspects of acute abdominal disorders entitled *The Acute Abdomen.* Dr. Myers examined Lee within a few days of his transfer from Catawba to Baptist. The excluded testimony of Mr. Bost apparently described an initial reaction by Dr. Myers to Lee's condition at the time he was transferred and to the treatment which Lee received at Catawba. Plaintiff's case was unquestionably critically damaged because the jury was prevented from hearing a patently negative statement from Dr. Myers made at the time he was treating Lee, relating to the quality of treatment Lee received at Catawba.

[2] Defendants further argue that the trial court's exclusion of this testimony was proper because plaintiff's counsel was required to lay a foundation for the questions posed to Lee's father, which plaintiff failed to do in the correct manner. We disagree. The rule in North Carolina as to whether a foundation need be laid by first confronting the witness to be impeached with the inconsistent statements is as follows: Where the inconsistent statements relate to a matter which is pertinent and material to the pending inquiry, or which respects the subject matter in regard to which he is examined, the inconsistent statements may be proved by other witnesses without first bringing them to the attention of the main witness. *State v. Mack,* 282 N.C. 334, 193 S.E. 2d 71 (1972); *State v. Wellmon,* 222 N.C. 215, 22 S.E. 2d 437 (1942); 1 Stansbury's N.C. Evidence § 48, pp. 135-140 (Brandis rev. 1973).

We believe that in the present case, the statements which Dr. Myers allegedly made to Lee's father concerning the quality of care offered at Catawba were pertinent and material to whether all or any of the defendant physicians were negligent—the issue central to this lawsuit. Accordingly, plaintiff was not required to afford Dr. Myers an opportunity to deny or explain these statements prior to impeaching him through the testimony of another witness.

Furthermore, even though plaintiff was not required to lay a foundation for her impeachment of Dr. Myers, plaintiff, in fact, did lay an adequate foundation:

> [Plaintiff's counsel]: All right, sir. And after the second operation, do you recall saying anything to Mr. Bost to the effect that . . . Lee received poor treatment at Catawba Memorial Hospital?
>
> [Myers]: No, I never said that.
>
> [Plaintiff's counsel]: Do you recall indicating or saying anything or indicating that after the second operation?
>
> [Myers]: No.

The record does not clearly reveal whether the conversation Ed Bost avers he had with Dr. Myers occurred after the first or second operation performed on Lee at Baptist Hospital. However, defendants do not argue on appeal that Dr. Myers may not have been confronted with the proper time at which the conversation allegedly occurred, preventing him from recalling the matter. Instead, defendants maintain that the wording of the above questions posed to Dr. Myers was insufficient to put Dr. Myers on notice about any comments he may have made to Mr. Bost concerning "inferior hospitals." We do not believe that plaintiff's counsel was required to confront Dr. Myers with the identical words Ed Bost attributes to him, as long as Dr. Myers was questioned with language meaning the same thing. Dr. Myers denied saying anything to Ed Bost to the effect that Lee received poor treatment at Catawba Hospital. Mr. Bost's testimony that Dr. Myers had made a statement to him previously to the effect that Catawba was an inferior hospital and that Lee was kept there too long, plainly related to the quality and sufficiency of treatment which Lee received at Catawba. Dr. Myers was thus afforded an adequate opportunity to explain or deny the conversation he allegedly had with Mr. Bost, and Dr. Myers flatly denied the conversation.

[3] Plaintiff also assigns as error the trial court's granting of defendant Catawba's motion for a directed verdict at the close of plaintiff's evidence. Generally, a directed verdict under G.S. 1A-1, Rule 50(a) may be granted only if the evidence is insufficient to

justify a verdict for the nonmovant as a matter of law. *Arnold v. Sharpe*, 296 N.C. 533, 251 S.E. 2d 452 (1979).

Plaintiff argues that the evidence it presented at trial was sufficient to withstand defendant Catawba's motion under both the theory of *respondeat superior* and the doctrine of corporate negligence. Catawba could be found vicariously liable under *respondeat superior* if the negligence of any of its employees, agents, or servants, acting within the scope of their authority, contributed to Lee's death. *Waynick v. Reardon*, 236 N.C. 116, 72 S.E. 2d 4 (1952). However, because plaintiff's evidence failed to show that the physicians treating Lee were acting as employees, agents, or servants of Catawba, the principle of *respondeat superior* is inapplicable to this case.

In contrast to the vicarious nature of *respondeat superior*, the doctrine of "corporate negligence" involves the violation of a duty owed *directly* by the hospital to the patient. Prior to modern times, a hospital undertook, "only to furnish room, food, facilities for operation, and attendants, and [was held] not liable for damages resulting from the negligence of a physician in the absence of evidence of agency, or other facts upon which the principle of *respondeat superior* [could have been] supplied." *Smith v. Duke University*, 219 N.C. 628, 634, 14 S.E. 2d 643, 647 (1941). In contrast, today's hospitals regulate their medical staffs to a much greater degree and play a much more active role in furnishing patients medical treatment. In abolishing the doctrine of charitable immunity, formerly available to charitable hospitals as a defense to negligence actions in North Carolina, Justice (later Chief Justice) Sharp acknowledged the changed structure of the modern hospital, quoting from *Bing v. Thunig*, 2 N.Y. 2d 656, 666, 143 N.E. 2d 3, 8, 163 N.Y.S. 2d 3, 11 (1957):

> "The conception that the hospital does not undertake to treat the patient, does not undertake to act through its doctors and nurses, but undertakes instead simply to procure them to act upon their own responsibility, no longer reflects the fact. Present-day hospitals, as their manner of operation plainly demonstrates, do far more than furnish facilities for treatment. They regularly employ on a salary basis a large staff of physicians, nurses and internes, as well as administrative and manual workers, and they charge patients

for medical care and treatment, collecting for such services, if necessary, by legal action. Certainly, the person who avails himself of 'hospital facilities' expects that the hospital will attempt to cure him, not that its nurses or other employees will act on their own responsibility."

Rabon v. Hospital, 269 N.C. 1, 11, 152 S.E. 2d 485, 492 (1967).

There has recently been a great deal of discussion about the liability of a hospital for its corporate negligence. *See, e.g.*, Note, *The Hospital's Responsibility for its Medical Staff: Prospects for Corporate Negligence in California*, 8 *Pacific L.J.* 141 (1977); Comment, *Medical Malpractice—Hospital May Be Held Liable for Permitting Incompetent Physician to Operate*, 8 *Rut.-Cam. L.J.* 177 (1976); Payne, *Recent Developments Affecting a Hospital's Liability for Negligence of Physicians*, 18 *S. Texas L.J.* 367 (1977); Spero, *Vicarious and Direct Corporate Responsibility for Acts of Professional Negligence Committed in a Hospital*, 15 *Trial* 22 (No. 7, July 1979); Southwick, *The Hospital's New Responsibility*, 17 *Clev.-Mar. L. Rev.* 146 (1968); Annot., *Hospital's Liability for Negligence in Failing to Review or Supervise Treatment Given by Individual Doctor, or to Require Consultation*, 14 A.L.R. 3d 873 (1967).

The proposition that a hospital may be found liable to a patient under the doctrine of corporate negligence appears to have its genesis in the leading case of *Darling v. Hospital*, 33 Ill. 2d 326, 211 N.E. 2d 253 (1965), *cert. denied*, 383 U.S. 946, 16 L.Ed. 2d 209, 86 S.Ct. 1204 (1966). In *Darling*, the plaintiff broke his leg while playing in a college football game and was seen at the defendant hospital's emergency room by the physician on call. With the assistance of hospital personnel the physician put a plaster cast on the plaintiff's leg. The cast was put on in such a manner as to restrict the blood flow in plaintiff's leg. Plaintiff was in great pain and his toes become swollen and dark in color, and later cold. When the doctor removed the cast two days later much of plaintiff's leg tissue had died and the leg had to be amputated below the knee.

The Supreme Court of Illinois affirmed the jury's finding of negligence on the part of the hospital. The Court held that the jury could have found the hospital was negligent, *inter alia*, in failing to have a sufficient number of trained nurses attending the

plaintiff, failing to require a consultation with or examination by members of the hospital staff, and failing to review the treatment rendered to the plaintiff. Since *Darling*, the courts of other states have found that a hospital's corporate negligence extends to permitting a physician known to be incompetent to practice at the hospital. *Corleto v. Hospital*, 138 N.J. Super. 302, 350 A. 2d 534 (Super. Ct. Law Div. 1975); *Purcell v. Zimbelman*, 18 Ariz. App. 75, 500 P. 2d 335 (1972); *Hospital Authority v. Joiner*, 229 Ga. 140, 189 S.E. 2d 412 (1972).

While the doctrine of corporate negligence has never previously been either expressly adopted or rejected by the courts of our State, it has been implicitly accepted and applied in a number of decisions. The Supreme Court has intimated that a hospital may have the duty to make a reasonable inspection of equipment it uses in the treatment of patients and remedy any defects discoverable by such inspection. *Payne v. Garvey*, 264 N.C. 593, 142 S.E. 2d 159 (1965). The institution must provide equipment reasonably suited for the use intended. *Starnes v. Hospital Authority*, 28 N.C. App. 418, 221 S.E. 2d 733 (1976). The hospital has the duty not to obey instructions of a physician which are obviously negligent or dangerous. *Byrd v. Hospital*, 202 N.C. 337, 162 S.E. 738 (1932). We have suggested that a hospital could be found negligent for its failure to promulgate adequate safety rules relating to the handling, storage and administering of medications, *Habuda v. Hospital*, 3 N.C. App. 11, 164 S.E. 2d 17 (1968), or for its failure to adequately investigate the credentials of a physician selected to practice at the facility, *Robinson v. Duszynski*, 36 N.C. App. 103, 243 S.E. 2d 148 (1978).

Since all of the above duties which have been required of hospitals in North Carolina are duties which flow directly from the hospital to the patient, we acknowledge that a breach of any such duty may correctly be termed corporate negligence, and that our State recognizes this as a basis for liability apart and distinct from *respondeat superior*. If, as our Supreme Court has stated, a patient at a modern-day hospital has the reasonable expectation that the hospital will attempt to cure him, it seems axiomatic that the hospital have the duty assigned by the *Darling* Court to make a reasonable effort to monitor and oversee the treatment which is prescribed and administered by physicians practicing at the facility.

The plaintiff in the present case has introduced evidence tending to show that the defendant surgeons failed to keep progress notes on Lee's condition for a number of days in succession following the operation of 6 August 1974, in violation of a rule promulgated by Catawba. Catawba took no action against the surgeons for their violation. While this evidence is sufficient to show that Catawba may have violated the duty it owed to Lee to adequately monitor and oversee his treatment, plaintiff has offered no evidence to show that this omission contributed to Lee's death. Where a hospital's breach of duty is not a contributing factor to the patient's injuries, the hospital may not be held liable. *Habuda v. Hospital*, 3 N.C. App. 11, 164 S.E. 2d 17 (1968).

Neither may the previously discussed impeachment testimony of Mr. Bost, which was hearsay, alleging that Dr. Myers called Catawba an "inferior hospital" and that Catawba unreasonably delayed its referral of Lee to Baptist Hosiptal, be considered substantive evidence of the quality of care administered by Catawba. *State v. Mack*, 282 N.C. 334, 193 S.E. 2d 71 (1972); 1 Stansbury's N.C. Evidence § 46, p. 131 (Brandis rev. 1973). There was also no evidence at trial that Catawba failed to use reasonable care in selecting the defendant surgeons to practice at the hospital. Accordingly, the trial court correctly granted defendant Catawba's motion for a directed verdict. However, as discussed previously, there must be a new trial with respect to the defendant surgeons for the trial court's failure to admit the above testimony as impeachment evidence.

Since plaintiff's other assignments of error are not likely to occur on retrial, we decline to address them here.

As to defendant hospital, affirmed; as to individual defendants,

New trial.

Judges HEDRICK and MARTIN (Robert M.) concur.

LORAN S. CLARK v. MARGARET J. CLARK

No. 7914DC245

(Filed 5 February 1980)

1. **Divorce and Alimony § 16.9— amount of alimony—discretion of court**

Although the factors in G.S. 50-16.5(a) must be considered by the trial judge in determining the amount of alimony to be awarded, his determination of the proper amount will not be disturbed absent a clear abuse of discretion.

2. **Divorce and Alimony § 16.5— alimony action—estimate of future value of stock—incompetency**

The trial court in an alimony action properly excluded a handwritten statement by plaintiff-husband of probable future increases in the value of his stock in a motel which indicated a higher value at the time of trial than plaintiff-husband testified at trial, since the statement was nothing more than an estimate and of little probative value.

3. **Divorce and Alimony § 16.9— amount of alimony—finding that budgeted expenses not "necessary"**

The trial court's finding that all of the items in the budget submitted by defendant-wife were not "necessary" items did not show that the court applied an improper standard in determining the amount of alimony for the wife of a wealthy man, since it is clear that the court considered "necessary" expenses in terms of what was necessary for a woman married to a man of substantial means rather than what was necessary for bare subsistence.

4. **Divorce and Alimony § 16.9— amount of alimony—income tax consequences**

An award of alimony to defendant-wife was not erroneous on the ground that the trial judge failed to consider the income tax consequences of the award where defendant-wife did offer evidence at trial of her potential income tax liability, and there is no indication in the record that this liability was not one of the factors taken into consideration in the determination of the amount of alimony.

5. **Divorce and Alimony § 16.9— alimony order—failure to provide for possession of homeplace**

The trial court did not abuse its discretion in failing to make some provision in its alimony order for possession of the parties' homeplace.

6. **Divorce and Alimony § 18.16— alimony action—amount of counsel fees—no abuse of discretion**

The court's award of only $500 in legal fees to the wife in an alimony action was not so patently unreasonable as to constitute an abuse of discretion in view of the court's finding that the wife had assets at the time of trial of approximately $87,000, including stocks, bonds and savings accounts and a one-half interest in the parties' homeplace.

7. Divorce and Alimony § 16.9— alimony order—division of household furnishings—absence of authority

The trial court erred in ordering the parties in an alimony action to divide the household furnishings in the homeplace in a mutually agreeable manner where neither party requested any property division in the pleadings, the parties stipulated that the sole issue to be determined at trial was the amount and type of alimony to which defendant-wife was entitled, and there was no indication that the court was ordering a transfer of property as payment of alimony as permitted by G.S. 50-16.7.

Judge ERWIN dissenting.

APPEAL by defendant from *Pearson, Judge.* Judgment signed 10 November 1978 in District Court, DURHAM County. Heard in the Court of Appeals 15 October 1979.

This action was instituted by plaintiff-husband against defendant-wife on 29 March 1977 seeking a divorce from bed and board. Defendant-wife counterclaimed for alimony *pendente lite*, permanent alimony, and attorney fees, alleging that defendant had unjustifiably abandoned her and had willfully failed to provide her with necessary subsistence.

In an order entered 19 May 1977, the court found that the parties had been married on 16 January 1954, that no children had been born of the marriage, and that plaintiff-husband was the supporting spouse and defendant-wife the dependent spouse. It awarded defendant-wife alimony *pendente lite* in the amount of $1400.00 per month, continued possession of the parties' dwelling house, and $600.00 in attorney's fees. Defendant-wife was ordered to make all payments on the mortgage on the dwelling, insurance, *ad valorem* taxes, and to pay the costs of ordinary repairs and upkeep of the house.

Prior to the hearing in this case, the parties stipulated that plaintiff-husband would withdraw his complaint for divorce from bed and board. Plaintiff-husband agreed to stipulate that defendant-wife was the dependent spouse and that the only question for the court would be the amount and type of permanent alimony and other relief to which defendant-wife was entitled. The award of attorney's fees was to be in the trial court's discretion.

The case came on for hearing before Judge Pearson on 18 October 1978. Based upon the testimony of both parties as well as

exhibits offered by each, the trial judge signed an order on 10 November 1978 in which he made findings of fact, in part, as follows:

3. That the defendant Margaret J. Clark is entitled to an award granting unto her permanent alimony and support.

4. That the parties married on the 16th day of January, 1954.

5. That prior to their marriage, the plaintiff had invested approximately $100,000 of his money and begun construction of the Eden Rock Motel and that defendant had been employed as a secretary for approximately 15 years, the last seven immediately preceding her marriage as a secretary to Mr. Watts Hill in Durham, North Carolina.

6. That immediately subsequently to the marriage both the husband and the wife worked at the Eden Rock Motel in Durham and the wife remained as a salaried employee for approximately a one year period of time thereafter; that in 1962 the parties moved to Puerto Rico where the husband was engaged in a golf glove manufacturing company while the wife supported the husband by entertaining and other business-related activities; she was not again employed outside the home up through the date of the separation of the parties.

7. That the parties continued to live together until on or about December 6, 1976, when the husband separated himself from the wife.

8. That pior to the separation and in 1974 the parties purchased as tenants by the entirety a residence located at 1918 Wilshire Drive, in the City of Durham at an original cost of $75,000; that at the present time the balance of the mortgage on said residence and homeplace is approximately $45,000.

9. That since the date of the separation the wife has lived in the homeplace and continues to reside there, pursuant to the Order of the Honorable E. Lawson Moore, then Chief District Judge of the Durham County District Court on May 19, 1977.

10. That the wife is the owner of a 1974 Dodge Monaco automobile with approximately 15,000 miles which has no lien against it.

11. That since the date of the separation the wife has not been employed outside the home and she has continued to live alone in the homeplace of the parties on Wilshire Drive and been responsible for and made payments on the morgage, taxes, insurance and general upkeep and care of the house owned by the parties as tenants by the entirety.

12. That the defendant has medical and physical problems which include cataracts, bursitis and some bone deterioration.

13. That the plaintiff, Loran S. Clark, used his funds from the Eden Rock Motel and the glove manufacturing concern and invested in Landmark Inns of Durham, Inc., and is chairman of the board and treasurer of Landmark Inns of Durham, Inc. (operated as "The Hilton Inn") in the City of Durham, North Carolina and has the controlling interest in said company. This business represents his second hotel/motel operation in Durham since the sale of the Eden Rock Motel in 1963-64.

14. Mr. Clark has a salary as a result of his employment as chief operating officer of The Hilton Inn of $72,000 in 1976 ($52,000 regular salary and a $20,000 bonus); a salary of $79,560 for 1977 and the same salary thus far in 1978.

15. That Landmark Inns of Durham, Inc., is and has been a Subchapter S corporation and that there have been additional dividends and undistributed income to the plaintiff in recent years; that the corporation has elected to terminate its Subchapter S status effective 1979.

16. That Mr. Clark is an equal partner with two other individuals in a motel operation in Myrtle Beach, South Carolina known as "The Four Seasons Motor Inn". However, the liabilities exceed the assets in this venture and the tax returns for Mr. Clark indicated losses for 1975 through 1977.

17. That in addition to these interests, the plaintiff Loran S. Clark is the owner of a condominium in Pebble

Creek, Durham, North Carolina, and is the owner of two vacant lots east of New Bern, North Carolina, which constitute one-acre of land and cost approximately $17,000.

18. That there is $300,000 worth of life insurance on Mr. Clark's life maintained by Landmark Inns of Durham, Inc., on which Landmark Inn of Durham, Inc., is the beneficiary.

19. That Mr. Clark's net worth by estimate in 1975 was approximately $650,000.

20. That Mr. Clark had a savings account as of March 1978 with a balance of approximately $74,000.

21. That at the time of the marriage of the parties the wife, Margaret J. Clark had less than $5000 available to her and, subsequent to the marriage, inherited approximately $18,000 from a relative; that at the time of this trial, the wife has assets including stock, bonds and savings accounts and her one-half (½) interest in the home, of approximately $87,000.

22. That during the course of the marriage of the plaintiff and defendant the parties accumulated certain fine art objects which included silverware, porcelain and antique furniture which property and objects had been purchased primarily by Mr. Clark and that said objects have a value of between $7,500 and $55,000, which objects have remained in the homeplace pending this trial.

23. That the parties were, prior to the separation, members of the Hope Valley Country Club in Durham, North Carolina, although they did not make great use of the club's facilities for entertaining purposes prior to their separation, nor have either of them subsequent to the separation.

24. That during the 22 years of marriage, the parties did travel together from time to time and had at least one world tour lasting approximately seven months, have sailed boats in and around the Caribbean, have travelled to Canada and to the mountains of North Carolina, but did not travel extensively in the last three years of their living together.

25. That during the course of their marriage the parties were accustomed to dressing well and generally ate the best of foods.

26. That since the separation, and specifically since May, 1977, the wife's sources of income have included the $1400 per month alimony that has been paid to her, pursuant to the *pendente lite* Order of Judge Moore and approximately $3000 per year in interest and dividends.

27. That at the time of the *pendente lite* Order in this matter, Mrs. Clark had a savings account balance of approximately $4350 and at the time of this trial, that savings account balance was approximately $13,350.

28. That the Court does not feel that all of the items on the budget submitted by the wife, Margaret J. Clark, on her Exhibit 1, are needed or necessary items.

29. That the wife has received legal assistance and was entitled to receive legal assistance from Egbert L. Haywood, Esquire, and that those services have been of value to her.

The court concluded that defendant-wife was a dependent spouse, and plaintiff-husband a supporting spouse within the meaning of G.S. 50-16.1, and, further, that defendant-wife was entitled to live in a lifestyle to which she had been accustomed during the marriage and up to and including the date of the separation of the parties on 6 December 1976. The court expressly declined to order division or writ of possession as to the parties' homeplace. Plaintiff-husband was ordered to pay permanent alimony in the amount of $1500.00 per month and part of defendant-wife's attorney fees in the amount of $500.00. From this order defendant-wife appeals.

Maxwell & Freeman, P.A., by James B. Maxwell for plaintiff-appellee.

Haywood, Denny & Miller by Egbert L. Haywood for defendant-appellant.

PARKER, Judge.

Defendant-wife first contends that there was error in the award of $1500.00 per month in alimony on the grounds that the

trial court failed to consider the income tax consequences of the award; that it applied an improper standard in evaluating her expenses in light of the plaintiff's income and estate; and that the court abused its discretion in failing to make provision for possession of the parties' homeplace. We find no error in the award of permanent alimony.

[1,2] G.S. 50-16.5(a) provides: "Alimony shall be in such amount as the circumstances render necessary, having due regard to the estates, earnings, earning capacity, condition, accustomed standard of living of the parties, and other facts of the particular case." Although the factors in G.S. 50-16.5(a) must be considered by the trial judge in determining the amount of alimony to be awarded, his determination of the proper amount will not be disturbed absent a clear abuse of discretion. *Eudy v. Eudy,* 288 N.C. 71, 215 S.E. 2d 782 (1975); *Schloss v. Schloss,* 273 N.C. 266, 160 S.E. 2d 5 (1968); *Sayland v. Sayland,* 267 N.C. 378, 148 S.E. 2d 218 (1966). We find no such abuse of discretion in the present case. The trial judge, as required by G.S. 50-16.5(a), made extensive findings of fact concerning plaintiff-husband's substantial income and estate, defendant-wife's individual estate, and the parties' high standard of living during their marriage. Defendant-wife contends that the trial court failed to take into account the entire value of plaintiff-husband's estate because it excluded from evidence Defendant's Exhibit 14, a handwritten statement by plaintiff-husband in which he estimated the value of his controlling interest in Landmark Inns of Durham, Inc. as of 1976 at $202,000 and forecasted probable annual increases in the value of his Landmark shares of at least $100,000 per year after May 1976. We find no error in the exclusion of this evidence. At the time of trial in October 1978 plaintiff-husband testified that he owned 89,333 shares of stock in Landmark Inns of Durham, and that the current value of the stock was $.61 per share. Although the excluded exhibit, which had been written by plaintiff-husband some time prior to May 1976, contained plaintiff-husband's estimate of probable future increases which would indicate a higher value in 1978 than plaintiff-husband stated at trial, it was nothing more than an estimate and of little probative value.

[3] Defendant-wife has also assigned error to the court's finding that "all of the items on the budget submitted by the wife, Margaret J. Clark, on her Exhibit 1 are [not] needed or necessary

items." Defendant-wife contends that the finding, which refers to "needed or necessary" items, demonstrates that the court applied an improper standard in determining the amount of alimony. It is true that "[t]he wife of a wealthy man, who has abandoned her without justification, should be awarded an amount somewhat commensurate with the normal standard of living of a wife of a man of like financial resources." *Schloss v. Schloss, supra* at 272, 160 S.E. 2d at 11; *see also, Taylor v. Taylor,* 26 N.C. App. 592, 216 S.E. 2d 737 (1975). However, viewed in the context of the findings of fact concerning the accustomed living standard of the parties, the court's use of the word "necessary" with regard to defendant-wife's evidence of expenses is not inconsistent with the standard outlined in *Schloss v. Schloss, supra.* It is clear that the court considered "necessary" expenses in terms of what was necessary for a woman married to a man of substantial means, rather than in terms of what was necessary for bare subsistence, and determined that $400.00 of the $1900.00 monthly expenses which she claimed were not necessary even for a woman of her accustomed standard of living. Defendant-wife's assignment of error directed to this finding of fact is, therefore, overruled.

[4] Neither do we find that the award should be reversed on the ground that the trial judge failed to consider the income tax consequences of the award. It is true that the court made no specific finding of fact concerning the tax implications involved. However, defendant-wife did offer evidence of her potential income tax liability at trial, and there is no indication in the record that this liability was not one of the factors taken into consideration in the determination of the amount of alimony to which defendant-wife was entitled. Again, no clear abuse of discretion has been shown.

[5] Defendant-wife also contends that the award must be reversed because of the failure of the court to make some provision in its order for possession of the parties' homeplace. In its conclusions of law, the court expressly stated that no division or writ of possession as to the homeplace of the parties was to be made in the judgment. Under G.S. 50-16.7(a), the court *may* order payment of alimony by possession of real property. Further, G.S. 50-17 provides that "[i]n all cases in which the court grants alimony by the assignment of real estate, the court has power to issue a writ of possession when necessary in the judgment of the court to do so." While the court has authority to order a transfer of title or

possession of real property, the provisions of G.S. 50-16.7(a) and G.S. 50-17 do not require it to do so. *See, Spillers v. Spillers*, 25 N.C. App. 261, 212 S.E. 2d 676 (1975). We find no abuse of discretion in the trial judge's failure to do so in the present case, particularly in view of defendant-wife's failure to request this relief in her pleadings.

[6] Defendant-wife then assigns error to the trial court's award of $500.00 in legal fees on the ground that the amount is not supported by sufficient findings of fact or conclusions of law. In its judgment of 10 November 1978, the court found that at the time of trial, defendant-wife had assets, including stocks, bonds and savings accounts and a one-half interest in the parties' homeplace, of approximately $87,000. Based on this finding, it concluded that defendant-wife was "entitled to some partial assistance on legal expenses incurred in this matter." It is well established that the amount of attorney's fees to be awarded is within the sound discretion of the trial judge and is not reviewable except for abuse of discretion. *Stanback v. Stanback*, 270 N.C. 497, 155 S.E. 2d 221 (1967); *Stadiem v. Stadiem*, 230 N.C. 318, 52 S.E. 2d 899 (1949). "The purpose of the allowance for attorney's fees is to put the wife on substantially even terms with the husband in the litigation." *Stanback v. Stanback, supra* at 509, 155 S.E. 2d at 230; *accord, Harrell v. Harrell*, 253 N.C. 758, 177 S.E. 2d 728 (1961). In view of the court's finding concerning defendant-wife's substantial individual estate, we are unable to conclude that the amount awarded was so patently unreasonable as to constitute an abuse of discretion.

[7] Defendant-wife finally assigns error to that portion of the judgment ordering the parties to divide the household furnishings located in the homeplace in a mutually agreeable manner. We agree that the court was without power to order such a division. Neither party requested any property division in the pleadings, and in their pre-trial stipulation, they agreed that the sole issue to be determined at trial was the amount and type of alimony to which the defendant might be entitled. Plaintiff-husband argues that the order for division was an appropriate exercise of the court's powers under G.S. 50-16.7. That statute provides in pertinent part:

> (a) Alimony . . . . shall be paid by lump sum payment, periodic payments, *or by transfer of title or possession of personal property* or any interest therein, . . . as the court may order.

Although the statute clearly vests the court with power to order a transfer of personalty, that power does not exist independently of the court's power to order alimony for the dependent spouse. G.S. 50-16.7 contemplates such transfers only in terms of satisfaction of the obligation to support. In the present case, there is no indication that the court was ordering a transfer of property as payment of alimony, and the statute is, therefore, inapplicable. Unless the parties choose to make a division between themselves or properly to invoke the jurisdiction of the court to order such division, the parties may not be ordered to divide their property.

That portion of the judgment awarding defendant-wife $1500 per month in alimony and $500.00 in attorney's fees is

Affirmed.

That portion of the judgment ordering plaintiff and defendant to divide the property located in their homeplace is

Vacated.

Judge MARTIN (Robert M.) concurs.

Judge ERWIN dissents.

Judge ERWIN dissenting.

I dissent from that part of the majority's opinion which affirms the judgment awarding defendant-wife $1500 per month in alimony. I would hold that the trial court abused its discretion by inadvertence or by accident.

The order for alimony *pendente lite* of 19 May 1979, entered by Judge Moore, provided *inter alia*:

> "That the defendant shall have the continued use, occupancy and possession of the homeplace located at 1918 Wilshire Drive in Durham, North Carolina, and shall pay

from the alimony *pendente lite* ordered herein all ordinary expenses in connection therewith, including mortgage payments, insurance, ad valorem taxes and ordinary repairs and upkeep."

In the order for permanent alimony, plaintiff-husband was ordered to pay defendant-wife $1500 per month without any reference to the payments of the mortgage, insurance, *ad valorem* taxes, and ordinary or major repairs or upkeep of the home of the parties. This should have been provided, although a writ of possession was not issued. Without a determination placing these obligations of payment, the court left a reasonable inference that defendant-wife should continue to make all these payments, in that the order for alimony *pendente lite* required her to do so.

The court found "[t]hat the Court does not feel that all of the items on the budget submitted by the wife, Margaret J. Clark, on her Exhibit 1, are needed or necessary items." This finding supports my conclusions, since this exhibit included all the items in question and, to me, it left the impression that defendant-wife should continue to pay them. On remand, this matter should be clarified in view of the very modest monthly award to defendant-wife when compared with the substantial income of plaintiff-husband.

STATE OF NORTH CAROLINA v. ROBERT TRIMBLE

No. 7929SC482

(Filed 5 Feburary 1980)

1. Poisons § 1— putting poisonous foodstuffs in public places—exception for insects and rats—burden of proof

The insect control and rat extermination exception in G.S. 14-401, which prohibits the placing of poisonous foodstuffs in certain public places, is neither an element of the crime nor an affirmative defense thereto but is instead a "hybrid" factor in determining criminal liability; the State has no initial burden of producing evidence to show that defendant's actions do not fall within the exception; however, once the defendant, in a non-frivolous manner, puts forth evidence to show that his conduct is within this exception, the burden of persuading the trier of fact that the exception does not apply falls upon the State.

2. Indictment and Warrant § 9.4— statutory offense—exception—necessity for allegation

An indictment or warrant for an arrest need not set forth a charge that defendant's conduct is not within an exception to the statute under which he is charged.

3. Poisons § 1— putting poisonous foodstuffs in public place—exception for insects or rats—burden of proof

In a prosecution of defendant for unlawfully placing poisonous foodstuffs in his yard and thereby causing death or injury to his neighbor's dogs, the trial court properly placed the entire burden of proof on the State to show that defendant placed the poison food out for "purposes other than poisoning insects or worms for the production of crops, plants or trees or for the extermination of rats," and defendant therefore was not prejudiced by the omission in the indictment of a statement that he did not place the poison out for insect control or rat extermination.

4. Poisons § 1— putting poisonous foodstuffs in public places—food on concrete patio—parathion—constitutionality of statute

G.S. 14-401 prohibiting the placing of poisonous foodstuffs in a public place is not unconstitutionally vague, since the General Assembly intended to prohibit putting poison outside virtually everywhere an innocent child or animal could find it, and defendant's concrete patio came within the prohibition of the statute; furthermore, though parathion is a poison used in rat extermination, it nevertheless comes within the prohibition of the statute if it is put out for purposes other than rat extermination.

5. Criminal Law § 34.7— poisoning dogs—evidence that other dogs were killed—admissibility

In a prosecution of defendant for unlawfully placing poisonous foodstuffs in a public place thereby causing injury and death to a neighbor's dogs, evidence concerning the death of two other dogs belonging to neighbors was admissible to show the *corpus delecti* of the crime, particularly for showing that the poison was put out for purposes other than rat extermination, and the evidence was also admissible to show intent, motive, and plan or design on the part of defendant to eliminate the problem of visitations by his neighbor's dogs.

6. Criminal Law § 75.9— volunteered incriminating statement

In a prosecution of defendant for placing poisonous foodstuffs in a public place thereby causing injury or death to a neighbor's dogs, defendant's statement to a police officer, "If your neighbor's dogs come up and [defecated] all over your wife's flowers, what would you do?" was properly admitted into evidence as a voluntary and uncoerced statement made freely without any compelling influences, where the evidence tended to show that defendant was under arrest at the time that he made the statement, but defendant made the statement in response to no question or comment by the arresting officer.

7. Searches and Seizures § 33— pie pan in plain view on patio—warrantless seizure proper

In a prosecution of defendant for placing poisonous foodstuffs in a public place thereby causing injury or death to a neighbor's dogs, the trial court properly admitted into evidence a pie pan found on defendant's patio, its contents and evidence relating to a chemical analysis thereof, since defendant admitted placing the pan on the patio; an officer discovered the pan which was in plain view when he was knocking on the back door of defendant's house; the officer went to defendant's premises armed with a valid warrant for defendant's arrest; and it was entirely reasonable for the officer to conclude that contents of the pan could be the poisonous foodstuffs described in the warrant.

APPEAL by defendant from *Ferrell, Judge.* Judgment entered 15 February 1979 in Superior Court, HENDERSON County. Heard in the Court of Appeals 27 September 1979.

On 13 October 1979, defendant Robert Trimble was arrested by law enforcement officer George Kent for violation of N.C. Gen. Stat. § 14-401 by "unlawfully, willfully, [placing] poisonous compounds on beef and other foodstuffs on his yard in the country [with] [s]aid poinsonous [*sic*] foodstuffs causing death and or injury to the dogs belonging to Renee Winton."

SUMMARY OF STATE'S EVIDENCE

On 13 October 1978 Renee and Danny Winton owned three Irish setter puppies which were nine weeks old, approximately ten inches tall, vaccinated, in good health and without any visible wounds. The Winton's house was located in the woods behind defendant's house. At about 7:30 on that morning Renee Winton walked out her front door and looked around for the puppies because they usually stayed on the porch. She saw the puppies in defendant's yard by his garbage cans, called the puppies back into her yard and went in the house to help one of her children. When she returned, she found that the puppies had gone back to the area by defendant's garbage cans. At this time Renee Winton again called the puppies and took them with her into the house. Approximately fifteen minutes later the female puppy started wobbling around, released her bowels, and went into convulsions. Shortly thereafter, the other two puppies became sick. One of them vomited and lived but the other two puppies died.

Renee Winton then took the puppies to Dr. Justice, a veterinarian. Shortly thereafter Danny Winton took the two dead puppies to the North Carolina Department of Agriculture Western Animal Disease Diagnostic Laboratory where they were examined by Dr. Edwin A. Holsinger, a veterinary pathologist who was Director of the laboratory. Dr. Holsinger suspected insecticide poisoning and sent stomach contents to the Raleigh laboratory for further testing.

On 13 October 1978, Officer Jim Goodwin of the Henderson County Sheriff's Department, went to the defendant's home with the warrant of arrest for the crime charged in the present case. Officer Goodwin knocked on defendant's front door, got no response, then knocked on defendant's back door, and similarly got no response. At this time, Officer Goodwin noticed an aluminum pie pan located next to the garbage cans and containing what looked like sausage and biscuits. Officer Goodwin picked up the pie pan, placed it in a plastic bag and put it in the trunk of his car to take it to the diagnostic lab.

Renee Winton went back home and later heard defendant slam his car door when he returned to his house. Renee Winton then watched defendant walk directly to the garbage cans in the back of his house, bend over and look around. Defendant did not open the garbage cans.

Shortly thereafter Officer Goodwin returned to defendant's residence and found defendant home. Officer Kent, who was accompanying Officer Goodwin, read the warrant to defendant and gave defendant a copy of the warrant. The defendant went back into his house to get his coat and the officers returned to their car. When defendant came out of the house the officers told him that he could drive his truck in, that the Magistrate would set his bond, and that very possibly he could come back home. At this point in time, defendant was under arrest but had not been advised of his *Miranda* rights. Defendant then made the following statement to the officers:

> "Let me ask you this. If your neighbors' dogs come up and [defecated] all over your wife's flowers, what would you do?"

The testimony of Dr. Edwin Holsinger and Robert Smith, an analytic chemist and toxicologist with the North Carolina Depart-

ment of Agriculture at the Rollins Animal Disease Diagnostic Laboratory, indicated that the stomach contents and the hamburger compound taken from the pie pan contained the toxic insecticide parathion and that the parathion caused the death of two of the puppies.

On 13 October 1978 a cocker spaniel owned by Tommie Hyer, defendant's next door neighbor, also died of parathion poisoning.

In the spring prior to 13 October 1978 defendant shot and buried another Irish setter owned by the Wintons. This incident followed a call from the Humane Society to the Wintons indicating that the Winton's dog had barked at defendant's brother-in-law.

SUMMARY OF DEFENDANT'S EVIDENCE

Defendant testified that in the spring of 1978 he saw some large rats 12 to 14 inches long on his property; that he thought that rats were coming onto his property from an open septic tank next to the Mitchem home; that he had made a complaint about the septic tank to Mary Frances Dixon at the Environmental Health Section of the Henderson County Health Department; that the aforesaid complaint discusses the open septic tank and terrible odors but does not mention any problem with rats; that between the spring and fall of 1978 he placed parathion out; and that he had succeeded in killing one rat with the poison during this earlier period.

Defendant also testified that at about 7:30 a.m. on a Saturday morning in the spring of 1978, his wife's uncle came to defendant's front door and was yelling "real loud." Defendant saw that Mrs. Winton's Irish setter had Mr. Owenby backed up against the front door. Mr. Owenby stated, "That dog is going to bite me." Defendant thereafter called the dogcatcher who purportedly told defendant that he had a right to kill the dog. Later that afternoon, while defendant, his wife, and his daughter were sitting at the dining room table eating, the Irish setter came into defendant's yard again and growled. Defendant got out his rifle and shot the dog.

Attorney General Edmisten by Special Deputy Attorney General John R. B. Matthis and Assistant Attorney General Rebecca R. Bevacqua for the State.

Prince, Youngblood, Massagee and Creekman by James E. Creekman for defendant appellant.

CLARK, Judge.

I. *Elements of the Offense*

Appellant was convicted under N.C. Gen. Stat. § 14-401, which statute provides as follows:

> "§ 14-401. *Putting poisonous foodstuffs, etc., in certain public places, prohibited*—It shall be unlawful for any person, firm or corporation to put or place any strychnine, other poisonous compounds or ground glass on any beef or other foodstuffs of any kind in any public square, street, lane, alley or on any lot in any village, town or city or on any public road, open field, woods or yard in the country. Any person, firm or corporation who violates the provisions of this section shall be liable in damages to the person injured thereby and also shall be guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, at the discretion of the court. *This section shall not apply to the poisoning of insects or worms for the purpose of protecting crops or gardens by spraying plants, crops or trees nor to poisons used in rat extermination.*" (Emphasis supplied.)

Appellant argues that the above-underlined exception for rat extermination and insect control constitutes an element of the offense which is not set forth in the arrest warrant as required by N.C. Gen. Stat. § 15A-924(a)(5), and that therefore the charges must be dismissed pursuant to N.C. Gen. Stat. § 15A-924(e) and § 15A-954(a)(10).

We are hesitant to define an exception in a statutory definition of a crime as an element of that crime. Appellant's seemingly simple contention is replete with subtle but significant procedural due process questions left unresolved by the United States Supreme Court in *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed. 2d 368 (1970); *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct.

1881, 44 L.Ed. 2d 508 (1975); and *Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed. 2d 281 (1977), concerning the proper interrelationships between the definition of a crime, defenses thereto, the respective burdens of proof and ultimate criminal liability.[1]

Our concern is that a purely formalistic or procedural approach to defining elements and assigning burdens of proof (X is an element of the crime therefore S has the burden of proof) may disregard federal and state due process and law of the land, respectively, limitations on substantive criminal law, such as that enunciated in *In re Winship, supra*, that the accused is protected "against conviction except upon proof beyond reasonable doubt of *every fact necessary* to constitute the crime with which he is charged." 397 U.S. at 364 (emphasis supplied). In essence, following a purely formalistic approach would allow the General Assembly "to shift, virtually at will, the burden of persuasion with respect to any factor in a criminal case, so long as it is careful not to mention the nonexistence of that factor in the statutory language that defines the crime." *Patterson v. New York*, 432 U.S. at 223 (Powell, J., dissenting).[2]

In the instant case we are not troubled by the possibility that the General Assembly, in enacting N.C. Gen. Stat. § 14-401 has gone beyond the constitutional limits established by *In re Winship, supra*, and we recognize that legislatures do have con-

1. *See generally*, Jeffries and Stephens, *Defenses, Presumptions and Burdens of Proof in the Criminal Law*, 88 Yale L.J. 1325 (1979); Eule, *The Presumption of Sanity; Bursting the Bubble*, 25 U.C.L.A. L. Rev. 637 (1978); Allen, *The Restoration of In re Winship; A Comment on Burdens of Persuasion in Criminal Cases After Patterson v. New York*, 76 Mich. L. Rev. 30 (1977); Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 Yale L.J. 1299 (1977); Ashford & Risinger, *Presumptions, and Due Process in Criminal Cases: A Theoretical Overview*, 79 Yale L.J. 165 (1969); Osenbaugh, *The Constitutionality of Affirmative Defenses to Criminal Charges*, 29 Ark. L. Rev. 429 (1976); Tushnet, *Constitutional Limitations of Substantive Criminal Law: An Examination of the Meaning of Mullaney v. Wilbur*, 55 B.U. L. Rev. 775 (1975).

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

The procedural implications with respect to the burden of proof are, however, quite serious. As Mr. Justice Powell, in his dissent in *Patterson, supra*, explains: "For example, a state statute could pass muster . . . if it defined murder as mere physical contact between the defendant and the victim leading to the victim's death, but then set up an affirmative defense leaving it to the defendant to prove that he acted without culpable mens rea. The State, in other words, could be relieved altogether of responsibility for proving *anything* regarding the defendant's state of mind, provided only that the face of the statute meets the Court's drafting formulas." 432 U.S. at 224, fn. 8.

siderable latitude in defining elements of a crime and in specifying defenses to that crime, *Patterson, supra*, 432 U.S. at 210; rather, our attention is directed to our concern that we do not artificially analyze the problem and thereby set a precedent for future cases where the General Assembly might define a crime in such way as to place an egregious burden of proof on the defendant. Equally important, we find that where, as in the instant case, the General Assembly has left open the question of whether a factor is to be an element of the crime or a defense thereto, it is more substantively reasonable to ask what would be a "fair" allocation of the burden of proof, in light of due process and practical considerations, and then assign as "elements" and "defenses" accordingly, rather than to mechanically hold that a criminal liability factor is an element without regard to the implications in respect to the burden of proof.

[1] In light of these considerations we hold that the insect control and rat extermination exception in N.C. Gen. Stat. § 14-401 is neither an element of the crime nor an affirmative defense thereto but is instead a "hybrid" factor in determining criminal liability: the State has no initial burden of producing evidence to show that defendant's actions do not fall within the exception; however, once the defendant, in a non-frivolous manner, puts forth evidence to show that his conduct is within this exception, the burden of persuading the trier of fact that the exception does not apply falls upon the State. In sum, we are not convinced that the exception is a sufficiently "independent, distinct substantive matter of exemption, immunity or defense, beyond the essentials of the legal definition of the offense itself," *State v. Johnson*, 229 N.C. 701, 706, 51 S.E. 2d 186 (1949), to put all the "onus" of proof on the defendant, *id.; State v. Connor*, 142 N.C. (Biggs) 700, 704-05, 55 S.E. 787 (1906).

[2] With respect to the precise question before us, it follows from this reasoning that an indictment or warrant for an arrest need not set forth a charge that defendant's conduct is not within the exception to the statute. *State v. Johnson, supra.*

[3] We note that in the case *sub judice*, the trial court placed the entire burden of proof on the State to show that the defendant placed the poison food out for "purposes other than poisoning insects or worms for the production of crops, plants or trees or for

the extermination of rats." This charge is entirely consistent with this opinion. We see no actual prejudice to defendant by the omission of a "not within the exception" statement in the indictment, even if such a statement were required, since the warrant sufficiently apprised defendant of the crime for which he was charged, N.C. Gen. Stat. § 15A-924(a)(5), and the State carried the entire burden of proof on the exception.

II. *Vagueness*

[4] We find no merit in defendant's contention that the N.C. Gen. Stat. § 14-401 is unconstitutionally vague. We also hold that the language, "in any public square, street, lane, alley, or on any lot in any village, town or city or on any public road, open field, woods or yard in the country" was sufficiently broad to indicate that the General Assembly prohibited putting poison outside virtually everywhere where an innocent child or animal could find it, and that defendant's concrete patio comes within this definition. Similarly, we agree with the State that while parathion is a poison used in rat extermination, if it is put out for purposes other than rat extermination it comes within the scope of the statutory prohibition.

III. *Evidentiary Issues*

[5] The trial court properly admitted testimony pertaining to the Hyer dog and the death of Mrs. Winton's Irish setter. Each of these evidentiary items would not be admissible for the purpose of showing that defendant acted in conformity with other crimes but would be admissible to establish the *corpus delecti* of the crime, particularly for showing that the poison was put out for purposes other than rat extermination. Similarly, the evidence was properly admissible to show intent, motive, and plan or design on the part of defendant to eliminate the problem of visitations by his neighbor's dogs. *See* 1 Stansbury's North Carolina Evidence § 92 (Brandis rev. 1973).

[6] The statement of the defendant to Lieutenant Goodwin ("If your neighbor's dogs come up and [defecated] all over your wife's flowers, what would you do?") was also properly admitted into evidence as a voluntary and uncoerced statement made freely without any compelling influences and therefore falls without the protections of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966), and its progeny.

[7] Also, the trial court properly admitted the pie pan, its contents and evidence relating to the chemical analysis thereof into evidence. First, the defendant admitted placing the pan out on the concrete patio. Second, Officer Goodwin discovered the pan which was in "plain view" when he was knocking on the back door of defendant's house. In the present case the officer went to defendant's premises armed with a valid warrant for the defendant's arrest. The warrant charged the defendant with placing poisonous compounds on beef and other foodstuffs in his yard in the country. It was entirely reasonable for the officer to conclude that contents of the pan could be the poisonous foodstuffs described in the warrant. As the Fourth Amendment only protects individuals from unreasonable searches and seizures, *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968), we find no violation of defendant's Fourth Amendment rights.

No error.

Judges HEDRICK and MARTIN (Harry C.) concur.

SARAH T. THOMPSON v. NORTHWESTERN SECURITY LIFE INSURANCE COMPANY

No. 7923SC240

(Filed 5 February 1980)

1. Insurance § 17— life insurance—forfeiture for nonpayment of premium—waiver or estoppel

In this action to recover under a policy of life insurance, the materials before the trial court on motion for summary judgment raised a material issue of fact as to whether defendant insurer waived or was estopped from asserting forfeiture of the policy for nonpayment of premiums where they tended to show that the parties disagreed as to whether insured paid a premium due on 6 April 1975 within the grace period; insured paid premiums of $102.20 for two months by check dated 24 June, and this check was deposited by defendant insurer in its premium account; defendant's check returning this $102.20 was given to insured on 17 July along with an application for continuation of coverage showing a schedule of premiums owing from 6 April through 6 August totalling $255.50; the application stated that defendant agreed to continuation of coverage subject to receipt by defendant of the premium requested during the lifetime and good health of the insured; on 17 July insured sent the completed application for continuation of coverage to defendant, including a signed statement that he was in good health, with checks for $255.50;

defendant's agent informed insured on 19 July that his policy had lapsed and that he was required to submit to a medical examination to reinstate the policy; defendant retained the $255.50 in premiums paid by insured; insured was involved in an accident on 20 July which resulted in his death on 8 August; and defendant wrote to the insured on 5 August, returning his checks and notifying him that his application for reinstatement of coverage was denied, but this letter was not delivered to insured during his lifetime.

2. Insurance § 22— life insurance—reinstatement after lapse—invalidity of requirement for acceptance of premiums

Where a life insurance policy which lapsed for nonpayment of premiums gave the insured the unfettered right to reinstatement of the policy upon payment of the overdue premiums and furnishing of evidence of insurability satisfactory to the company, a provision in defendant insurer's application for reinstatement which attempted to condition reinstatement on defendant's acceptance of insured's premiums substantially altered the terms of the policy and was void for lack of consideration.

3. Insurance § 22— life insurance—reinstatement after lapse—evidence of insurability—signed statement by insured

An insured's application for reinstatement of a lapsed life insurance policy which contained his signed assurance that he was in good health and had not suffered any injuries or illnesses since the issuance of the policy constituted evidence of insurability which must be deemed satisfactory to defendant insurer as a matter of law were defendant's request that insured undergo a medical examination was not communicated to insured until two days before the accident which caused his death, and insured did not have a reasonable opportunity to have this examination performed.

4. Judgments § 36— judgment as estoppel—no identity of parties

Plaintiff's action to recover in her individual capacity as beneficiary of a life insurance policy was not barred by her prior action on the policy brought as executrix of the deceased insured's estate and dismissed for failure to prosecute, since there was no identity of parties in the two actions.

APPEAL by plaintiff from *Rousseau, Judge.* Judgment entered 13 October 1978 in Superior Court, WILKES County. Heard in the Court of Appeals 26 October 1979.

Plaintiff is the beneficiary under a ten-year level term life insurance policy issued by the defendant on the life of the insured, William C. Thompson. The policy was issued on 6 October 1969 and had a face value of $50,000, requiring monthly premium payments of $51.10. There is no dispute that the insured had paid all premiums due as of 6 March 1975. The parties disagree as to whether the insured paid the premium due on 6 April 1975 within the thirty-one day period of grace provided by the policy. By check dated 24 June 1975, the insured paid $102.20 for two

months premiums, which defendant deposited in its premium account.

On 11 July 1975 defendant forwarded its check for $102.20 payable to the Northwestern Bank (Northwestern) with the notation that it was for the benefit of the insured. The check was sent to Jack Buchanan, an employee of Northwestern, who was also an agent of the defendant who sold the insured the policy and with whom the insured often dealt. Until 13 February 1975, the insured had made all premium payments payable to Northwestern. Accompanying the check was an application for continuation of coverage which showed a schedule of premiums owing from 6 April 1975 through 6 August 1975 totalling $255.50. The check and application were received by Buchanan on 12 July 1975. Buchanan gave the application to the insured on 17 July 1975, at which time insured completed the application and gave it to Buchanan with his check made payable to defendant for the balance of $153.30. The application stated that the defendant agreed to continuation of coverage under the policy subject to receipt and acceptance of the premiums requested. The application contained the following question: "A. Has any person previously insured under this policy been ill, suffered an accident, or consulted a physician since the date the policy was issued? B. If yes, please furnish the following information. . . ." The insured answered the question in the negative. The application contained no request or requirement that the insured submit to a medical examination.

Buchanan forwarded the two checks, totalling $255.50, as well as the application and transmittal letter to defendant on 17 July 1975. The next day, following receipt of these documents, defendant wrote Buchanan stating that the policy had lapsed, that the insured had no coverage at that time, and that to reinstate the policy, the insured was required to submit to a medical examination. The defendant retained the insured's premium payments. Buchanan telephoned the insured, who obtained the medical examination form from him on Saturday, 19 July 1975. The insured told Buchanan that he would have the examination by the following Monday. The following day, 20 July 1975, the insured was involved in an automobile accident in which he suffered a broken leg and internal injuries requiring hospitalization.

On 21 July 1975, Buchanan was contacted by insured's wife who informed him of the accident and that insured was in the hospital. Defendant refused to permit the insured to have the examination until the cast on his leg was removed. Defendant wrote to the insured on 5 August 1975, returning his checks and notifying the insured that his policy had lapsed and that it had denied his application for reinstatement of coverage. This letter was the first and only communication from the defendant directly to the insured regarding the status of his coverage. On 8 August 1975, the insured, while still in the hospital, died from complications of the injuries he received in the accident. Defendant's letter of 5 August 1975 was not delivered to the insured during his lifetime.

On 2 July 1976, the plaintiff in the present action, as administratrix of the estate of the insured, issued a civil summons against the defendant in Rutherford County and obtained an extension of time to file her complaint. The action was dismissed on 10 January 1977, no summons having been served and no complaint having been filed.

The present action was commenced on 27 February 1978, by the plaintiff in her individual capacity, by the filing of a complaint in Mecklenburg County. In the complaint plaintiff alleged the insured was covered by a life insurance policy issued by defendant, that defendant failed to pay the plaintiff, as beneficiary, the amount due under the policy, and that prior to his death, the insured had complied with all of the provisions of the policy including the payment of all premiums due thereunder.

The defendant denied that the insured was covered under the policy at the time of his death, further defending on grounds that the dismissal of plaintiff's previous action barred prosecution of the present suit. Defendant moved for a change of venue to Wilkes County. The action was ordered removed to Wilkes County on 21 August 1978. Defendant moved for summary judgment under G.S. 1A-1, Rule 56 and to dismiss under Rule 12(b), and plaintiff moved to amend her complaint pursuant to Rule 15(a). From the trial court's actions granting defendant's motion for summary judgment and denying plaintiff's motion to amend, plaintiff appeals. Defendant cross-appeals from the court's denial of its motion to dismiss under Rule 12(b) based on principles of *res judicata.*

William D. McNaull, Jr., and Charles V. Bell for the plaintiff appellant.

E. James Moore and Katherine D. Woodruff for the defendant appellee.

WELLS, Judge.

Plaintiff assigns as error the trial court's action granting defendant's motion for summary judgment. Summary judgment is proper only if the verified pleadings, depositions and affidavits properly before the court show that no genuine issue as to any material fact exists and that defendant is entitled to judgment as a matter of law. G.S. 1A-1, Rule 56(c).

> The court is not authorized by Rule 56 to decide an issue of fact. It is authorized to determine whether a genuine issue of fact exists. The purpose of summary judgment is to eliminate formal trials where only questions of law are involved by permitting penetration of an unfounded claim or defense in advance of trial and allowing summary disposition for either party when a fatal weakness in the claim or defense is exposed.

Moore v. Fieldcrest Mills, Inc., 296 N.C. 467, 470, 251 S.E. 2d 419, 422 (1979).

Plaintiff, in both her affidavit and deposition, stated that the insured had paid all the premiums when due under the policy and that the policy was not in arrears. This testimony is sufficient to raise a material issue of fact as to whether coverage had lapsed for nonpayment of the premiums due.

[1] Even had the policy lapsed, the affidavits and depositions before the trial court raise a material issue of fact as to whether the defendant has waived or is estopped from asserting forfeiture of the policy for nonpayment of premiums.

> Waiver sometimes has the characteristics of estoppel and sometimes of contract, but it is always based upon an express or implied agreement. There must always be an intention to relinquish a right, advantage, or benefit. The intention to waive may be expressed or implied from acts or conduct that naturally lead the other party to believe that the right has been intentionally given up. . . .

> ***" 'A course of action on the part of the insurance company which leads the party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will estop the company from insisting upon the forfeiture, though it might be claimed under the express letter of the contract.' [Citations omitted.]" *Paul v. Ins. Co.*, 183 N.C. 159, 162, 110 S.E. 847, 849 (1922).

Klein v. Insurance Co., 289 N.C. 63, 68, 220 S.E. 2d 595, 598-599 (1975). A waiver occurs where the company expressly or impliedly leads the insured to believe it has given up a right under its policy; while estoppel results when the company leads the insured to believe that conformance to a course of action by the insured will prevent forfeiture of the policy. *Id.* It is well established in this State that an insurance company may waive its right to assert forfeiture of an insurance policy for the nonpayment of premiums. *Murphy v. Insurance Co.*, 167 N.C. 334, 83 S.E. 461 (1914).

On the issues of waiver and estoppel, the conduct and acts of defendant and its agent, Buchanan, are critical. There is evidence that the insured usually dealt with defendant through agent Buchanan and Northwestern. There is no evidence that either defendant, Buchanan or Northwestern had ever informed the insured, prior to 19 July 1975, that his policy had lapsed or that he was not covered. The insured always promptly paid defendant what it requested. That defendant never intended to rely upon its right to forfeiture until after the insured's fatal accident seems manifest from its long-term retention of five months premium payments tendered by the insured on 17 July 1975.

The "Application for Continuation of Coverage" which defendant had the insured complete could also have been misleading to the insured. The application shows the following handwritten entry, apparently subscribed by the same employee of defendant who requested the application and premium payment, S. Souther:

> Lapsed 4-6-75, Due 9-6-75
> Money OK for 5 Mos.

The closing sentence in the application stated: "The Company agrees to the continuation of my covereage subject to receipt and

acceptance by the Company of the premium requested above during the lifetime and good health of all persons previously insured under this policy." From this language, which nowhere mentions that the policy was not in effect from the moment the overdue premiums were tendered or that the insured might have to submit any further proof of insurability to reinstate the policy, the insured certainly could reasonably have believed his coverage remained intact. Of course, ambiguous language affecting an insurance policy is liberally construed in favor of the insured. *Grant v. Insurance Co.*, 295 N.C. 39, 243 S.E. 2d 894 (1978).

From the evidence available to the plaintiff at trial, a jury may well find that defendant waived forfeiture of the policy or is estopped to assert forfeiture as a defense.

[2] Whether or not defendant has waived or is estopped to assert its right to declare a forfeiture of the policy for the nonpayment of premiums, there is no question here that the insured had an absolute contractual right to reinstatement of coverage. The reinstatement clause of the policy provided:

> 3. REINSTATEMENT.
>
> If this policy shall lapse in consequence of default in payment of any premium it may be reinstated within five years after such default, but not later than the Expiry Date; upon receipt by the Company of (a) evidence of insurability satisfactory to the Company, and (b) payment of all overdue premiums with interest at 5% per annum from their respective due dates.

The policy thus allowed the insured the unfettered right to reinstatement upon the payment of overdue premiums and receipt of evidence of insurability satisfactory to the company. It must be noted that the defendant's application for reinstatement attempted to condition reinstatement on defendant's *acceptance* of the insured's premiums. Such a condition would substantially alter the terms of the policy, which require payment only, and is void for lack of consideration. There is no dispute here that the insured tendered the premiums requested by defendant for reinstatement, and accordingly, that policy condition was satisfied by the insured.

[3] We now reach the question whether the insured fulfilled the other policy condition for reinstatement—providing "evidence of insurability satisfactory to the Company." There is no dispute here that the insured was in good health at the time he made application for reinstatement. The previously mentioned health question addressed to the insured in the application form was the only evidence of insurability requested of the insured at the time of the application. Defendant does not contend that the insured fraudulently misrepresented his health on the application. Although defendant later requested a medical examination, this message was not communicated to him until Friday, 18 July 1975, and his accident, two days later, did not afford him a reasonable opportunity to have this examination performed. On these facts we hold that the insured's application for reinstatement, which contained his signed assurance that he was in good health at that time, constituted evidence of insurability which must be deemed satisfactory to the defendant as a matter of law. While we have found no decision of our courts directly on point, there is considerable authority in other jurisdictions for our holding.

Bruegger v. Insurance Co., 387 F. Supp. 1177 (D.C. Wyo. 1975), *mod. on other grounds*, 529 F. 2d 869 (10th Cir. 1976), a diversity action, involved interpretation of an insurance policy under Wyoming law. In that case, the policy had lapsed, and the insured had completed an application for reinstatement and paid the overdue premiums. The next day, the insured was shot by an assailant, and he died from his wounds eleven days later. The defendant insurance company, unaware of the insured's injury and death, mailed notice of reinstatement to the insured two days after his death. When the beneficiary requested payment, defendant declined, contending that approval of reinstatement was not final until notice was mailed to the decedent, which was ineffective in this case because it antedated the insured's death.

The reinstatement provision of the policy in *Bruegger* was virtually identical to that of the policy we are presently considering. As in the case *sub judice*, in *Bruegger*, defendant's form application for reinstatement, signed by the insured, contained an assurance that the named insured was in good health and had not suffered any injuries or illnesses since the issuance of the policy. As in the present action, the defendant insurance company in *Bruegger* argued that it was entitled to additional evidence of in-

surability and could deny reinstatement until such evidence was provided. The District Court granted summary judgment for the plaintiff, reasoning, 387 F. Supp. at 1182-1183:

> When the insured mailed his application for reinstatement, together with payment of all premium arrears, there is no doubt that he was in good health. . . . His application for reinstatement provided "evidence of insurability satisfactory to the company" pursuant to the policy. . . . Of course, if at the time the application was mailed the insurer would have been justified in rejecting the application, as a reasonable insurer, it could have done so even though the death of the insured intervened, [citation omitted]. The agreement did not contemplate the exercise of the insurer's caprice or fancy. That which the law will say a contracting party ought in reason to be satisfied with, the law will say he is satisfied with. [Citations omitted.] The deceased was objectively insurable on [the date he mailed the insurer his application for reinstatement.]
>
> * * *
>
> This is not to say that the insurer could not investigate to determine if the actual facts were other than as stated in the application or if there were elements of fraud present. [Citation omitted.] This was not the case here. If at the time of mailing of the application to reinstate there then existed no valid objection to the form or substance of the application, and there did not, the insurer could do but what it was bound to do—grant reinstatement. The accidental death of the insured due to a shooting in no way affected the insurer's right to approve or reject such application after the insured had fully complied with the conditions of his contract. [Citations omitted.]

See also, Bowie v. Life Co., 105 F. 2d 806 (10th Cir. 1939); *Insurance Co. v. Trust Co.*, 56 Ind. App. 418, 105 N.E. 505 (1914); 3A Appleman, Insurance Law and Practice § 2016, pp. 495-496 (1967); Annotation, 164 A.L.R. 1057 (1946); Annotation, 105 A.L.R. 478 (1936).

While we acknowledge that there is a division among jurisdictions on the question of what constitutes satisfactory

evidence of insurability, we believe the *Bruegger* standard to be the better rule. Our Supreme Court has held that an insurer may not act arbitrarily upon an application for reinstatement of coverage. *Trust Co. v. Insurance Co.*, 201 N.C. 552, 160 S.E. 831 (1931). In the case before us, the only evidence of insurability which defendant requested of the insured at the time he made application for reinstatement consisted of questions concerning the health of the insured which it presented in the application form. There was no request at the time for a medical exam. Although defendant subsequently demanded such an examination, the insured was not afforded a reasonable opportunity to have the exam prior to his fatal accident. Subsequent to his accident, defendant itself acted to delay the exam. On the date the insured submitted his application and overdue premiums to defendant, there existed no valid objection to the form or substance of the application, and the insured's signed statement of his good health is the only evidence of insurability in this record. Defendant has in no way rebutted that evidence. Since the insured was objectively insurable on the date of the application, we hold defendant was bound to grant reinstatement on this date.

As to plaintiff's other assignment of error, we see no prejudice to plaintiff preventing her from prosecuting the present action by the trial court's denial of her motion under Rule 15(a) to amend her complaint.

[4] Defendant cross-assigns as error the trial court's denial of its motion under G.S. 1A-1, Rule 12(b) to dismiss plaintiff's claim on grounds that the dismissal of plaintiff's Rutherford County action, for failure to prosecute under Rule 41(b), bars the present suit. In general, a judgment on the merits bars parties or their privies from relitigating issues in a subsequent action which were, of necessity, already decided. *Brondum v. Cox*, 292 N.C. 192, 232 S.E. 2d 687 (1977). This prior Rutherford County action was commenced by plaintiff solely in her official capacity as executrix of the insured's estate. Since plaintiff's entitlement to the proceeds of the insurance policy issued by defendant is based solely on her status in her *individual* capacity as the wife and beneficiary of the insured under the policy, plaintiff could have recovered nothing under the policy in the prior action. *Andrews v. Masons*, 189 N.C. 697, 128 S.E. 4 (1925). Accordingly, there is insufficient identity of

parties in the two actions to bar the plaintiff from bringing her present claim.

We reverse the granting of defendant's motion for summary judgment and remand the case for proceedings not inconsistent with this opinion.

Reversed.

Judges ARNOLD and WEBB concur.

JAMES O. WRAY v. KENNETH HUGHES

No. 7818SC1031

(Filed 5 February 1980)

1. Automobiles § 86— last clear chance—showing required

In order for an issue of last clear chance to be submitted to the jury, the evidence must tend to show: (1) that plaintiff, by his own negligence, placed himself in a position of peril (or a position of peril to which he was inadvertent); (2) that defendant saw, or by the exercise of reasonable care should have seen, and understood the perilous position of plaintiff; (3) that he should have so seen or discovered plaintiff's perilous condition in time to have avoided injuring him; (4) that notwithstanding such notice defendant failed or refused to use every reasonable means at his command to avoid the impending injury; and (5) that as a result of such failure or refusal plaintiff was in fact injured.

2. Automobiles § 89.1— last clear chance—sufficiency of evidence

The trial court erred in failing to submit an issue of last clear chance to the jury in this action to recover damages arising out of a collision between plaintiff's tractor and defendant's automobile where there was evidence tending to show that both plaintiff and defendant were proceeding south on a two-lane road; in preparing to turn left into a driveway, plaintiff slowed his tractor to a stop and looked backwards for a distance of 640 feet at which point defendant's vehicle was not yet in view; after three seconds plaintiff had traveled six to eight feet and had reached a point three feet beyond the center line into the northbound lane; at that moment, plaintiff heard a horn blow and glanced back to find defendant traveling approximately 80 mph in the northbound lane at a distance of 250 feet; after a second elapsed plaintiff heard tires screeching, and after another second defendant collided with the left rear portion of the tractor; defendant first saw plaintiff ahead of him at a distance of over 600 feet; defendant pulled out into the northbound lane to pass plaintiff while he was some distance from plaintiff and did not communicate his inten-

tion to pass until he was 250 feet from plaintiff; and defendant left 110 feet of skid marks from his attempt to stop.

APPEAL by plaintiff from *Crissman, Judge.* Judgment entered 16 March 1978 in Superior Court, GUILFORD County. Cross-appeal by defendant. Heard in the Court of Appeals 22 August 1979.

Plaintiff instituted this action to recover for property damage and personal injuries sustained in a collision between his tractor and defendant's automobile, allegedly caused by the negligence of defendant. Defendant answered, denying negligence, pleading the contributory negligence of plaintiff in bar of plaintiff's claim, and counterclaiming for damage to his automobile resulting from the collision. Plaintiff replied, averring that defendant had the last clear chance to avoid the collision.

Plaintiff's tractor was struck in the left rear area by defendant's vehicle when defendant was attempting to overtake and pass plaintiff's tractor. On 9 May 1975, at approximately 9:00 a.m., both plaintiff and defendant were proceeding south on rural paved road 1001, North Church Street Extension, in Guilford County, North Carolina, where the posted speed limit was 55 miles per hour. The road was a two-lane road, with northbound and southbound traffic meeting. The shoulders were three feet in width and sloped downward into a drainage ditch on either side of the road. The collision occurred on a level portion of the road below a hillcrest to the north. The distance between the area of collision and the hillcrest was measured by an investigating officer to be approximately 637 feet, with clear visibility for the entire distance. In the area of the collision, three private driveways entered the road from the east shoulder of the road, each constructed over the drainage ditch. The collision occurred in front of the middle driveway, the actual impact occurring in the northbound lane of the road.

Evidence presented by plaintiff tended to show the following: Plaintiff was travelling south about five or six miles per hour just before he proceeded to turn left into the middle driveway. The right two tires of the tractor were at the edge of the road. At the middle driveway, plaintiff "clutched" the tractor to a stop. He was sitting sideways in the tractor seat, "angling" toward his left.

Plaintiff looked back up the hill for a distance of approximately 640 feet to its crest, and upon seeing no traffic coming in either direction, began his turn. About three seconds thereafter, he heard a car horn blow and glanced back to the north to see the defendant about 250 feet behind him in the northbound lane. At the time he heard defendant's horn, plaintiff had travelled approximately six feet across the highway to his left. About a second later, plaintiff heard defendant's tires skidding. Although plaintiff attempted to cut the tractor back to the right, defendant continued to skid and collided with plaintiff. Plaintiff testified that in his opinion defendant was travelling about 80 miles per hour when he first saw defendant at 250 feet away, and about 55 or 60 miles per hour at the point of impact.

Defendant's evidence tended to show the following:

Defendant was travelling south on North Church Street Extension at the time of the collision. As defendant crested the hill north of the point where the collision occurred, he observed plaintiff's tractor proceeding south about 640 feet ahead of him along the right shoulder of the road, obviously travelling at a lower rate of speed. At about 300 feet from the point of impact, defendant sounded his horn to alert plaintiff, and proceeded to go around the tractor as it continued down the shoulder of the road. When defendant sounded his horn, plaintiff looked back acknowledging defendant's presence, and defendant proceeded under that assumption. Defendant was approximately 170 feet behind plaintiff, attempting to go around him, when plaintiff turned left into his path. Defendant braked and sounded his horn, but at that point the collision was unavoidable, and defendant skidded approximately 110 feet and collided with plaintiff. Defendant testified that at no time did plaintiff signal his intention to turn left across the road, and that immediately before plaintiff turned left, defendant was travelling at approximately 55 miles an hour.

The jury found both plaintiff and defendant negligent, thereby denying recovery. The trial court refused to instruct the jury on the doctrine of last clear chance.

From the judgment entered in accordance therewith, plaintiff appeals. Defendant also brings forward certain cross assignments of error.

Max D. Ballinger for plaintiff appellant.

Perry C. Henson and Perry C. Henson, Jr., for defendant appellee.

MORRIS, Chief Judge.

Plaintiff assigns as error various rulings by the trial court as to the sufficiency of the evidence on the issues of plaintiff's contributory negligence, defendant's negligence, and as to certain instructions to the jury. In particular, plaintiff argues that the court erred in failing to charge the jury on the doctrine of last clear chance. Upon a careful review of the evidence presented, we conclude that there was evidence which would have supported a charge on the issue of last clear chance. Plaintiff is, therefore, entitled to a new trial.

Recently, our Supreme Court explained the duty of a trial judge to submit an issue to the jury for consideration:

> When charging the jury in a civil case it is the duty of the trial court to explain the law and to apply it to the evidence on the substantial issues of the action. G.S. 1A-1, Rule 51: *Superior Foods, Inc. v. Harris-Teeter Super Markets, Inc.*, 288 N.C. 213, 217 S.E. 2d 566 (1975); *Investment Properties of Asheville, Inc. v. Norburn*, 281 N.C. 191, 188 S.E. 2d 342 (1972). If a party contends that certain acts or omissions constitute a claim for relief or a defense against another, the trial court must submit the issue with appropriate instructions 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. *See, Vernon v. Crist*, 291 N.C. 646, 231 S.E. 2d 591 (1977); *Atkins v. Moye*, 277 N.C. 179, 176 S.E. 2d 789 (1970).

Cockrell v. Cromartie Transport Co., 295 N.C. 444, 449, 245 S.E. 2d 497, 500 (1978).

[1] It is well established that in order to submit the issue of last clear chance to the jury, the evidence must tend to show the following elements: (1) that plaintiff, by his own negligence, placed himself in a position of peril (or a position of peril to which he was inadvertent); (2) that defendant saw, or by the exercise of reasonable care should have seen, and understood the perilous

position of plaintiff; (3) that he should have so seen or discovered plaintiff's perilous condition in time to have avoided injuring him; (4) that notwithstanding such notice defendant failed or refused to use every reasonable means at his command to avoid the impending injury; and (5) that as a result of such failure or refusal plaintiff was in fact injured. *Cockrell v. Cromartie Transport Co., supra; Vernon v. Crist,* 291 N.C. 646, 231 S.E. 2d 591 (1977); *Exum v. Boyles,* 272 N.C. 567, 158 S.E. 2d 845 (1968); *Bell v. Wallace,* 32 N.C. App. 370, 232 S.E. 2d 305, *cert. denied,* 292 N.C. 466, 233 S.E. 2d 921 (1977). Although it is a humane rule of law imposing liability on the one who can last avoid an injury, "[u]nless all the necessary elements of the doctrine of last clear chance are present in order to bring the doctrine into play, the case is governed by the ordinary rules of negligence and contributory negligence." *Clodfelter v. Carroll,* 261 N.C. 630, 634, 135 S.E. 2d 636, 638 (1964).

Whether the evidence is sufficient to require submission of the case to the jury on the last clear chance doctrine depends on the facts of the individual case. In many cases our courts have applied the last clear chance doctrine. For example, in *Cockrell v. Transport Co., supra,* plaintiff's intestate was proceeding north on U.S. Highway 421 in Sampson County, a two-lane paved road, when she attempted to turn left across the southbound lane. As she commenced her turn, intestate's car stalled and the left front end of the car crossed the yellow line into the southbound lane. While intestate attempted to restart the car, defendant driver approached from the north and shortly thereafter collided with the deceased. Plaintiff's evidence showed that the truck driven by defendant did not swerve or deviate from a direct line of travel from the time he first observed it until he struck intestate's car. Plaintiff's evidence also indicated that defendant was or should have been aware of the deceased's perilous position from a distance of at least 395 feet away. The Court concluded on these facts that there was sufficient evidence upon which a jury could find that defendant discovered or should have discovered plaintiff's helpless peril and thereafter, having the means and the time to avoid the injury, negligently failed to do so. *See Exum v. Boyles, supra.*

Similarly, in our recent decision of *Honeycutt v. Bess,* 43 N.C. App. 684, 259 S.E. 2d 798 (1979), there was evidence presented

upon which a jury could find that defendant had the last clear chance to avoid plaintiff's injury. In that case, plaintiff was travelling north on Old Charlotte Road where it approaches Highway 49 in Cabarrus County, and after approaching the intersection, stopped at the stop sign. Plaintiff testified that he looked for oncoming traffic and saw defendant's truck approaching him about 1500 feet east of the intersection. As he started to cross the highway, plaintiff's car stalled and cut off, but continued to roll across the road until it was completely blocking the westbound lane of the highway. Plaintiff attempted to restart his truck, but before he could do so, defendant collided with him. A witness stated that defendant's vehicle was approximately 900 yards away when plaintiff stopped in the highway and was travelling approximately 60 miles per hour at the time. Plaintiff was stopped in the highway for 8 to 10 seconds before the collision occurred. Further evidence indicated that there was no traffic coming toward defendant in the other lane. This Court held that upon such evidence the jury could have found that defendant could or should have avoided the collision by stopping or driving around the car, but failed to do so.

[2] In the present case, the evidence indicates, when viewed in the light most favorable to plaintiff, that defendant first saw plaintiff ahead of him at a distance of more than 600 feet; that defendant attempted to pass plaintiff and pulled out into the northbound lane while he was still some distance from plaintiff; that defendant did not communicate his intention to pass plaintiff until he was 250 feet away from plaintiff; that plaintiff slowed his tractor to a stop and, after observing no traffic in either direction, proceeded to turn left into a driveway on the east side of the highway; that after three seconds, within which time plaintiff had travelled approximately six to eight feet to his left, plaintiff reached a point about three feet beyond the center line into the northbound lane of travel; that at that moment plaintiff heard a horn blow and glanced back to find defendant travelling approximately 80 miles per hour in the northbound lane at a distance of approximately 250 feet; that after a second had elapsed plaintiff heard tires screeching; that after another second defendant collided with plaintiff, making contact on the left rear portion of the tractor; and that defendant left around 110 feet of skidmarks from his attempt to stop. Viewing the evidence favorably to plaintiff, it is apparent that since defendant was at a distance of 250 feet

from plaintiff when he sounded his horn and began braking, defendant must have been at a greater distance when plaintiff began his turn three seconds earlier. Further, plaintiff testified that at the time he began his turn, plaintiff looked backwards for a distance of 640 feet at which point defendant's vehicle was not yet in view. Taken as true, this indicates that defendant was at a distance of at least 640 feet away when plaintiff began his turn. Thus, the evidence is supportive of the inference that defendant had or should have had knowledge of plaintiff's attempt to turn left across the northbound lane at a point in time and distance up to 640 feet, wherein he could have avoided the accident by use of reasonable means available to him. We consider this question one for the jury, upon proper instructions, to determine.

We are, of course, cognizant that the last clear chance doctrine contemplates a last "clear" chance to avoid injury. *See, e.g., Battle v. Chavis,* 266 N.C. 778, 147 S.E. 2d 387 (1966); *Artis v. Wolfe,* 31 N.C. App. 227, 228 S.E. 2d 781, *cert. denied,* 291 N.C. 448, 230 S.E. 2d 765 (1976); *Grant v. Greene,* 11 N.C. App. 537, 181 S.E. 2d 770 (1971). In *Grant v. Greene,* for example, plaintiff's evidence showed that plaintiff and her intestate, who was legally blind, were standing on the side of a highway at night when intestate suddenly ran into the highway in front of defendant. Upon seeing plaintiff's intestate enter the highway, defendant switched his lights from low to bright, immediately applied his brakes, and attempted to swerve out of the way of intestate. Evidence indicated that there was clear visibility between defendant and intestate of approximately 200 feet at the time intestate entered the highway. This Court held the evidence insufficient to submit the issue of last clear chance to the jury:

> [D]efendant's duty to act arose only after he knew or in the exercise of due care should have known that the plaintiff's intestate was insensitive to danger. *Wise v. Tarte,* 263 N.C. 237, 139 S.E. 2d 195 (1964). The doctrine contemplates that if liability is to be imposed the defendant must have a last "clear" chance, not a last "possible" chance to avoid injury.

11 N.C. App. at 540-41, 181 S.E. 2d at 772. Indeed, where there is no evidence that defendant failed to keep a reasonable lookout in the direction of travel or that a person exercising a proper lookout would have been able in the exercise of reasonable care

to avoid the collision, the last clear chance doctrine does not apply. *Billings v. Billings Trucking Corp.*, 44 N.C. App. 180, 260 S.E. 2d 671 (1979); *Sink v. Sumrell*, 41 N.C. App. 242, 254 S.E. 2d 665 (1979). However, this case suggests facts from which a jury could infer that defendant saw or should have seen plaintiff's attempt to turn left from a distance within which he could have avoided the collision. This ability to avoid collision is such that would "enable a reasonably prudent man in a like situation to act effectively." *Sink v. Sumrell*, 41 N.C. App. at 249, 254 S.E. 2d at 670.

Because the questions presented by plaintiff's other assignments and those presented by defendant on cross-appeal may not arise upon retrial, we do not discuss them.

Reversed and remanded for a new trial.

Judges PARKER and MARTIN (Harry C.) concur.

WACHOVIA BANK & TRUST COMPANY, N.A. v. CHARLIE SMITH, JR. AND WIFE, BETTY W. SMITH v. TOM TUNSTALL, TRADING AND DOING BUSINESS AS TOM'S MOBILE HOME SALES

No. 793SC145

(Filed 5 February 1980)

1. Fraud § 12— defects in mobile home—actual knowledge of seller—insufficiency of evidence of fraud

In an action to recover for fraud in the sale of a mobile home, evidence was insufficient to be submitted to the jury where it tended to show that third party defendant did not represent to defendants anything other than the fact that the mobile home was just like a new trailer except that it had been set up and dismantled but had never been lived in; there was no evidence justifying an inference that third party defendant participated in the transaction with bad faith or otherwise with an intent fraudulently to induce defendants to purchase; there was no evidence that third party defendant knew of any problems with the mobile home other than those concerning installation; and there was no evidence tending to show that any representations were made in order to induce defendants to purchase the mobile home.

2. Unfair Competition § 1— defects in mobile home—no unfair or deceptive trade practices

Where there was no evidence of willful deception or bad faith, the existence of defects in a mobile home sold by third party defendant to defendants and third party defendant's failure to perform stated services with respect to the mobile home did not constitute unfair and deceptive trade practices in violation of G.S. 75-1.1 since, even if such facts did constitute a breach of warranty, a breach alone does not constitute a violation of G.S. 75-1.1.

3. Rules of Civil Procedure § 42— third party action—separate trials—no error

In an action by plaintiff to recover the amount owed on a note, which defendants executed for the purchase of a mobile home, where defendants brought a third party action against the seller of the mobile home for fraud and unfair and deceptive trade practices, defendants were not prejudiced by the trial court's granting of plaintiff's motion for separate trials, since the court provided for a consolidated trial with plaintiff and third party defendant as defendants on the issues of breach of implied and express warranties, and since the issues of fraud and unfair and deceptive trade practices primarily related to the conduct of third party defendant and did not involve plaintiff.

ON writ of certiorari to review an order entered by *Tillery, Judge.* Order entered 6 April 1978 in Superior Court, CRAVEN County. Heard in the Court of Appeals 16 October 1979.

On 25 October 1973, Charlie Smith, Jr., and his wife, Betty W. Smith, defendants and third party plaintiffs (hereinafter referred to as Smiths), purchased a 1972 Signet double wide mobile home from Tom Tunstall of Tom's Mobile Home Sales (Tunstall), third party defendant. The Smiths' purchase was financed by Wachovia Bank and Trust Company (Wachovia), with the first payment due on 10 December 1973. Thereafter, on 12 November 1973, Wachovia sent the Smiths a payment book, simultaneously advising them pursuant to G.S. 25A-25(b) (subsequently amended as of 30 June 1978) that any defenses which they might have against Tunstall would be waived unless Wachovia be notified within 30 days. Mrs. Smith wrote a letter to Wachovia on 13 November 1973, informing Wachovia of several defects found in the mobile home. A similar letter was sent 30 November 1973 to Tunstall, which concerned some of the defects listed in the previous letter to Wachovia. On 4 December 1973, the Smiths advised Wachovia and Tunstall that they revoked acceptance of the mobile home. Although a letter dated 5 December 1973 from Wachovia to the Smiths stated that Tunstall had assured Wachovia that adjustments had been made to the trailer, another

letter of rejection was sent to Wachovia on 6 December 1973. On 28 December 1973, the Smiths wrote Tunstall and demanded the return of their down payment and other expenses. The Smiths thereafter, on 7 January 1974, informed Tunstall that the mobile home would be sold on 14 March 1974 at private sale pursuant to G.S. 25-2-711(3).

On 1 February 1974, Wachovia instituted this action to recover the full amount owing on the note of $21,020.02. Ancillary to its action, Wachovia sought claim and delivery of the mobile home. Upon hearing on the issue of claim and delivery, an order of seizure was issued on 28 February 1974. Such order was subsequently affirmed by the Superior Court of Craven County, and the Smiths' appeal to this Court was dismissed on 4 December 1974. The Smiths' petition for a writ of certiorari was denied by the Supreme Court on 4 February 1975.

The Smiths thereafter filed an answer and counterclaim, joining Tunstall as a third party defendant and seeking damages against Wachovia and Tunstall, jointly and severally, on grounds of fraud, unfair and deceptive trade practices, breach of implied warranty, and breach of express warranty. Third party defendant Tunstall answered the third party complaint. Wachovia filed no reply to defendants' counterclaim.

On 15 January 1977, separate trials were ordered, with the claim of the Smiths against Tunstall to be tried prior to the claim against Wachovia.

Trial was held of the Smiths' action against Tunstall at the 24 April 1978 Civil Session of Superior Court in Craven County. At the close of all the evidence, Tunstall's motions for directed verdict were allowed as to the issues of fraud and unfair or deceptive trade practices. The trial court further ruled that the issues of breach of express warranty and breach of implied warranty concerned Wachovia as well as Tunstall and, therefore, ruled that another trial be conducted on those issues with Wachovia and Tunstall as defendants. The trial court concluded that "[t]hese matters are reserved without prejudice to any rights of any party to this action." The Smiths appeal from the trial court's ruling.

Davis, Hassell & Hudson, by Charles R. Hassell, Jr., and Brock, Foy & Proctor, by Louis F. Foy, Jr., and Jimmie C. Proctor, for defendant appellants.

Dunn and Dunn, by Raymond E. Dunn, for third party defendant appellee.

CLARK, Judge.

A threshold consideration in this appeal is whether the trial court erred in granting Tunstall's motions for directed verdict on the issues of fraud and unfair or deceptive trade practices. It is the well-established rule that in determining the sufficiency of evidence to withstand a defendant's motion for directed verdict under G.S. 1A-1, Rule 50, all the evidence which supports the plaintiff's claim must be taken as true and considered in the light most favorable to him, giving him the benefit of every reasonable inference which may legitimately be drawn therefrom, and resolving contradictions, conflicts and inconsistencies in his favor. *Maness v. Fowler-Jones Construction Co.*, 10 N.C. App. 592, 179 S.E. 2d 816, *cert. denied*, 278 N.C. 522, 180 S.E. 2d 610 (1971). A directed verdict may be granted only if, as a matter of law, the evidence is insufficient to justify a verdict for the plaintiff. *Dickinson v. Pake*, 284 N.C. 576, 201 S.E. 2d 897 (1974). We will consider the issues of fraud and unfair or deceptive trade practices separately.

[1] We find the evidence presented insufficient to support a verdict on the issue of fraud and, therefore, the issue of fraud was properly withheld from the jury. In *Ragsdale v. Kennedy*, 286 N.C. 130, 209 S.E. 2d 494 (1974), our Supreme Court stated the essential elements of actionable fraud: "(1) [f]alse representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party." (Citations omitted.) 286 N.C. at 138, 209 S.E. 2d at 500; *Rosenthal v. Perkins*, 42 N.C. App. 449, 257 S.E. 2d 63 (1979); *Stone v. Paradise Park Homes, Inc.*, 37 N.C. App. 97, 245 S.E. 2d 801, *cert. denied*, 295 N.C. 653, 248 S.E. 2d 257 (1978). From the evidence presented, we find nothing tending to show that Tunstall represented to the Smiths anything other than the fact that the mobile home was "just like a new trailer, except that it had been set up and dismantled and had never been lived in." Further, we find the

evidence insufficient to justify an inference that Tunstall participated in the transaction with bad faith or otherwise with an intent fraudulently to induce the Smiths to purchase the mobile home. Mrs. Smith testified that at the time she agreed to purchase the trailer, she looked in every room and after looking, decided she wanted it. It is clear that at that time, the parties understood that the trailer would have to be installed and adjusted, and Tunstall agreed to perform the installation. With respect to the alleged defects in the trailer, assuming that such defects did exist, there is no evidence indicating that Tunstall knew of any problems with the mobile home other than the problems concerning the installation of the trailer at the time it was sold. Knowledge on the part of the promisor is an essential element of fraud. *Tarlton v. Keith*, 250 N.C. 298, 108 S.E. 2d 621 (1959). And, although actual knowledge of the falsity of the representation is not required when such representations are made with reckless indifference as to their truthfulness and with an intent that the other party should rely upon them, *Zager v. Setzer*, 242 N.C. 493, 88 S.E. 2d 94 (1955), such is not the case here. Moreover, there was no evidence tending to show that any representations were made in order to induce defendants to purchase the mobile home. *See Rosenthal v. Perkins, supra.* The sale of the mobile home was an arm's length transaction, and although problems concerning the mobile home subsequently developed, this fact alone is insufficient to justify a jury verdict on the issue of actionable fraud. *See Hardy v. Toler*, 288 N.C. 303, 218 S.E. 2d 342 (1975); *Stone v. Paradise Park Homes, Inc., supra.*

The Smiths next argue that it was error to grant Tunstall's motion for directed verdict on the issue of unfair or deceptive trade practices. G.S. 75-1.1 provides generally that unfair methods of competition and unfair or deceptive trade practices are unlawful. By its enactment of Chapter 75, the General Assembly meant to provide a civil legal means to maintain ethical standards of dealings between persons in businesses and the consuming public. *State ex rel. Edmisten v. J. C. Penney Co.*, 30 N.C. App. 368, 227 S.E. 2d 141 (1976), *rev'd on other grounds*, 292 N.C. 311, 233 S.E. 2d 895 (1977). Whether an act or practice is unfair or deceptive within the meaning of G.S. 75-1.1 is a question of law for the court to determine. *CF Industries, Inc. v. Transcontinental Gas Pipe Line Corp.*, 448 F. Supp. 475 (W.D.N.C. 1978); *Hardy v.*

Toler, supra; Love v. Pressley, 34 N.C. App. 503, 239 S.E. 2d 574 (1977), *cert. denied,* 294 N.C. 441, 241 S.E. 2d 843 (1978).

At the outset we note that Chapter 747 of the 1977 Session Laws, which rewrote Subsections (a) and (b) of G.S. 75-1.1, is not applicable to the present case. This action was pending when the 1977 act was adopted, and Section 5 of that act provides that it shall not apply to pending litigation. Therefore, we refer to G.S. 75-1.1 as it existed prior to the 1977 amendment and as it was originally adopted in 1969. At that time, G.S. 75-1.1(a) and (b) read:

> (a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.
>
> (b) The purpose of this section is to declare, and to provide civil means to maintain, ethical standards of dealings between persons engaged in business, and between persons engaged in business and the consuming public within this State, to the end that good faith and fair dealings between buyers and sellers at all levels of commerce be had in this State.

Chapter 75 does not define "unfair or deceptive acts or practices," nor is any precise definition of the term possible. In *Harrington Mfg. Co. v. Powell Mfg. Co.,* 38 N.C. App. 393, 248 S.E. 2d 739 (1978), *cert. denied,* 296 N.C. 411, 251 S.E. 2d 469 (1979), this Court, in dealing with the term "unfair methods of competition" under G.S. 75-1.1(a) as it existed before the 1977 amendment, stated:

> Unfair competition has been referred to in terms of conduct "which a court of equity would consider unfair." *Extract Co. v. Ray,* 221 N.C. 269, 273, 20 S.E. 2d 59, 61 (1942). Thus viewed, the fairness or unfairness of particular conduct is not an abstraction to be derived by logic. Rather, the fair or unfair nature of particular conduct is to be judged by viewing it against the background of actual human experience and by determining its intended and actual effects upon others.

38 N.C. App. at 400, 248 S.E. 2d at 744. Applying G.S. 75-1.1, the *Harrington* Court concluded that whether a particular advertisement exceeds the bounds of fairness must be determined by viewing it against the background of all of the relevant facts of that

case, one of which concerns the market which the advertisement is designed to influence. Thus, in the case before us, whether Tunstall's conduct concerning the sale of the mobile home to the Smiths was unfair or deceptive must be determined in light of the circumstances surrounding the transaction.

In *Hardy v. Toler*, 288 N.C. 303, 218 S.E. 2d 342 (1975), our Supreme Court held as a matter of law that certain false representations made by defendants to plaintiff constituted unfair or deceptive acts or practices in violation of Chapter 75-1.1. In that case, defendants represented that the automobile it sold to plaintiff was a one-owner car, had been driven only 23,000 miles, had never been wrecked, and that the warranty could be transferred to plaintiff. After plaintiff purchased the vehicle upon those representations, it was discovered that the car was a second-owner vehicle, had been wrecked, had been driven 80,000 miles when plaintiff bought it, and the warranty could not be transferred. It was established that defendants had actual knowledge of the condition of the automobile at the time it was sold.

[2] We need not decide now what specific actions, if any, which do not constitute fraud, would nonetheless be a violation of G.S. 75-1.1. Nevertheless, under the evidence presented in this case, absent evidence of willful deception or bad faith, we cannot conclude that the existence of defects in the mobile home or Tunstall's failure to perform the above stated services constitutes a violaton of G.S. 75-1.1 to warrant the award of treble damages under G.S. 75-16. Assuming *arguendo* that such facts, if established, constitute a breach of warranty, a breach alone does not constitute a violation of Chapter 75, and it is, therefore, inappropriate to treble damages resulting solely from the breach. *Stone v. Paradise Park Homes, Inc., supra.*

[3] The Smiths next assign as error the trial court's granting Wachovia's motion for separate trials under Rule 20(b) and Rule 42(b) of the North Carolina Rules of Civil Procedure. In their counterclaim and third party complaint, the Smiths allege a joint business venture and agency relationship between Wachovia and Tunstall, and contend that Wachovia and Tunstall are jointly and severally liable for damages allegedly suffered by them. The trial court concluded that "a separate trial will be in furtherance of convenience and will avoid prejudice against the plaintiff . . . ."

G.S. 1A-1, Rule 20(a), permissive joinder, provides that "[a]ll persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all parties will arise in the action." Alternative claims are most often joined where there is uncertainty as to which of several parties is entitled to recover or is liable. 1 T. Wilson and J. Wilson, McIntosh N.C. Practice and Procedure § 661 (2nd ed. 1956). *See, e.g., Woods v. Smith*, 297 N.C. 363, 255 S.E. 2d 174 (1979); *Aetna Insurance Co. v. Carroll's Transfer, Inc.*, 14 N.C. App. 481, 188 S.E. 2d 612 (1972).

Although the basic philosophy of the party joinder provisions is to allow relatively unrestricted initial joinder, G.S. 1A-1, Rule 20(b) and G.S. 1A-1, Rule 42(b) provide that the trial judge has discretionary authority to sever and order separate trials. Under Rule 42(b), "[t]he court may in furtherance of convenience or to avoid prejudice . . . order a separate trial of any claim, crossclaim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, crossclaims, counterclaims, third-party claims, or issues." G.S. 1A-1, Rule 42(b). "Whether or not (sic) there should be severance rests in the sound discretion of the trial judge." *Aetna Insurance Co. v. Carroll's Transfer, Inc., supra*, 14 N.C. App. at 484, 188 S.E. 2d at 614.

In the present action, regardless of whether the trial court properly ordered separate trials, we find no evidence in the record of any prejudice to the Smiths. By providing for a consolidated trial with Wachovia and Tunstall as defendants on the issues of breach of implied warranty and breach of express warranty, the trial court's order cured any prejudice that might have resulted from severance. In addition, severance on the issues of fraud and unfair or deceptive trade practices was similarly not prejudicial, in that those issues primarily related to the conduct of Tunstall and did not involve Wachovia except as holder of the note evidencing the Smiths' purchase of the mobile home.

By so holding, we reject the Smiths' contention that the trial court misinterpreted the order for severance by failing to submit the issues concerning breach of warranty to the jury. The trial court's order specifically preserved all issues except that of fraud

and unfair or deceptive trade practices for later consideration. We view this procedure as appropriate under the particular circumstances of this case.

The Smiths' next assignment of error concerns the trial court's failure to submit the issue of wrongful claim and delivery to the jury. In *Wachovia Bank & Trust Co. v. Smith*, 24 N.C. App. 133, 210 S.E. 2d 212 (1974), *cert. denied*, 286 N.C. 420, 211 S.E. 2d 801 (1975), this Court held that the issues surrounding the Smiths' alleged security interest in and priority to the mobile home, in opposition to Wachovia's claim and delivery motion, should be decided when the case was heard on its merits, stating that "[n]o substantial right of the defendants has yet been judicially determined." 24 N.C. App. at 135, 210 S.E. 2d at 213. This matter is to be decided under the applicable provisions in the Uniform Commercial Code. In its judgment, the trial court preserved these issues for resolution by a jury subsequently empaneled. Defendants have suffered no prejudice by the order. This assignment of error is overruled.

The last assignment of error is directed to the exclusion of evidence as to the price paid by Tunstall for the mobile home. We fail to see the relevance of that evidence on any issue as between the Smiths and Tunstall. It was properly excluded. The judgment of the trial court is

Affirmed.

Judges PARKER and MARTIN (Robert M.) concur.

FRED POINDEXTER v. SANCO CORPORATION AND SURRY COUNTY

J AND J OIL COMPANY OF ELKIN, INC. v. SANCO CORPORATION AND SURRY COUNTY v. FRED POINDEXTER

No. 7917SC565

(Filed 5 February 1980)

1. **Negligence § 30— garbage truck catching on fire—negligence of lessee—sufficiency of evidence**

In an action to recover for damages to plaintiff's gasoline pump, other equipment and building sustained when a garbage truck owned by one defendant and leased by the other caught fire and burned, the trial court erred in granting summary judgment for defendants where genuine issues of material fact were raised as to whether the gas tank on the truck was properly vented, the tank was designed for gasoline fuel, the placement of the muffler and exhaust system in close proximity to the fuel tank was unsafe, defendant lessee failed to inspect the garbage truck or failed to discover the dangerous condition of the gas tank if it did inspect, the agents and employees of defendant lessee knew the truck was not functioning properly, and defendant lessee failed to inform the gas station attendant of this unsafe condition.

2. **Negligence § 6— garbage truck catching on fire—res ipsa loquitur inapplicable**

Res ipsa loquitur was inapplicable in an action to recover damages sustained when a garbage truck owned by one defendant and leased by the other caught fire and burned, since the owner did not have exclusive control or management of the truck, and since the existence of lessee's negligence in failing to inspect the truck and warn of its unsafe condition, if proven, could be found by the jury to establish the existence of negligence.

APPEAL by plaintiffs Fred Poindexter and J and J Oil Company from *Long, Judge.* Judgments entered 9 April 1979, and Orders entered 20 April 1979 in the Superior Court, SURRY County. Heard in the Court of Appeals 16 January 1980.

These are separate cases originally filed in the District Court of Surry County, which were consolidated and transferred to the Superior Court Division. Both actions grew out of a fire which occurred on or about 17 July 1976 at a gasoline station owned by Fred Poindexter when a garbage truck owned by the defendant Sanco Corporation and leased to defendant Surry County caught fire and burned, destroying the garbage truck, damaging the gasoline pumps and other equipment owned by plaintiff J and J Oil Company of Elkin, Inc., and damaging the building and other

personal property of plaintiff Fred Poindexter. The complaints of the plaintiffs alleged joint and concurring negligence on the part of both defendants, which negligence resulted in the fire and damage to the plaintiffs' property. Both defendants answered, denying negligence. Defendant Sanco Corporation filed a counterclaim and third-party complaint against Fred Poindexter for damages to their garbage truck, and crossclaimed against defendant Surry County for damages to the garbage truck. Defendant Surry County also crossclaimed against the defendant Sanco Corporation for indemnity, or contribution. Motions for summary judgment were granted against both plaintiffs who have filed a joint appeal to this Court.

Finger, Park & Parker, by Raymond A. Parker II and M. Neil Finger, for plaintiff appellants.

Faw, Folger, Sharpe & White, by Cama C. Merritt, and Womble, Carlyle, Sandridge & Rice, by Allan R. Gitter, for defendant appellees.

HILL, Judge.

Two questions are raised on this appeal:

(1) Did the court err in granting defendant appellee Sanco Corporation's motion for summary judgment against the plaintiff appellants Fred Poindexter and J and J Oil Company of Elkin, Inc.?

(2) Did the court err in granting defendant appellee Surry County's motion for summary judgment against the plaintiff appellants Fred Poindexter and J and J Oil Company of Elkin, Inc.?

From the verified complaint, affidavits and interrogatories filed in this cause and introduced for the purpose of considering the motions for summary judgment, the following facts appear.

(1) The 1971 garbage truck was manufactured by General Motors Corporation, then shipped to Dempster-Dumpster Systems, Inc., where a refuse body was mounted on the GMC chassis and where a 50-gallon fuel tank was installed in lieu of the temporary tank that originally came on the truck from GMC. The

truck was then shipped by Dempster-Dumpster, Inc. to the General Motors distributor in Winston-Salem.

(2) General Motors then sold the truck to Sanitary Container Service, Inc. with the gas tank and exhaust system already installed and in place.

(3) Some 48 months later, Sanitary sold the truck to Sanco Corporation. During the period the truck was owned by Sanitary and Sanco, new mufflers were installed from time to time, but the exhaust system was not otherwise altered. The truck never caused any problem before the day of the fire, to the knowledge of Sanco or Sanitary, and no one from Dempster-Dumpster, Inc., or GMC ever notified Sanitary or Sanco that the positioning of the exhaust system should be changed.

(4) Employees of Surry County took delivery of the garbage truck in Winston-Salem, N.C., at Sanco's premises on or about 14 July 1976. An employee of Sanco filled the gas tank without incident and detected no problem during fueling. The cap on the gas tank was green and of the vented type with four lead slugs in it.

(5) After the truck was filled with gas, employees of Surry County drove this truck back to Surry County, stopping in the Westfield community to make a routine garbage collection, then drove the vehicle on to the Surry County landfill where an employee of Surry County again filled the gas tank without incident. During the next two days the truck was operated by employees of Surry County and filled once at the service station owned by Fred Poindexter without incident.

(6) On the following day, a Saturday, the employees of Surry County again used the truck for routine garbage collections. The temperature was over 100° F, and one employee is alleged to have stated that he was ". . . running it like hell." There was evidence that the truck was backfiring on this date.

(7) The employees of Surry County pulled the truck into the filling station owned by Fred Poindexter. One of Poindexter's employees removed the gasoline nozzle from the pump and began unscrewing the cap when the cap ". . . blew out of his hand . . ." and gasoline began gushing from the tank. The truck burst into flames, damaging the building and equipment owned by the plaintiffs.

(8) Herbert Settle, one of the affiants, stated in his affidavit, *inter alia*, that he had taught auto and truck mechanics, had several years of experience as a mechanic, and had taken several courses taught at the General Motors Training Center in Charlotte; that he examined the GMC truck in question after the fire; and

> . . . that at the time he examined this 1971 GMC truck he found that the gas tank was not vented in any manner and that what appeared to have been a vent at one time had been plugged by a 'screw type cap'. That this affiant also examined the exhaust system on said truck and the exhaust system including the muffler appeared to be old and in a very much deteriorated condition; also in this affiant's opinion the exhaust system was not of sufficient length to provide a safe means for the expulsion of fumes, sparks and other gasses [sic] escaping from the combustion chambers of the engine on said truck; that in this affiant's opinion the exhaust system in the condition it appeared to be in at the time of his examination was such that it would allow sparks and even flames to be emitted from the exhaust system and muffler especially if the truck engine was not operating properly and was 'back-firing' or not firing properly. Any malfunction of the engine which would cause sparks or flames to escape through the exhaust system, especially 'back-firing' would cause the fuel tank on said truck to become extremely hot because the exhaust system terminated under the middle of the fuel tank and only inches below the same. Such a condition would cause the muffler to become extremely hot and in turn heat the fuel tank to such an extent that tremendous pressure would be built in the gas tank and could very likely cause gas to spew from the tank if the cap were removed. In the opinion of this affiant gasoline and the gaseous fumes escaping from the tank could come in contact with an overheated muffler and cause immediate combustion.
>
> It is further the opinion of this affiant that the arrangement of the exhaust system in the proximity of the fuel tank as it was on the 1971 GMC truck created a very hazardous condition and one which could very likely result in the fire which has been described to him to have occurred to this truck and it is further the opinion of this affiant that this

resulting fire was foreseeable by any trained mechanic who could have observed the arrangement of the exhaust system, especially the short length of the same and its close proximity to the fuel tank of said truck.

(9) There was other testimony offered by affidavit and interrogatories that was in conflict with the testimony of Settle and some testimony which would have, in part, corroborated it which we do not find necessary to set out.

Rule 56(c) of the Rules of Civil Procedure provides for summary judgment. "The judgment sought shall be rendered forthwith if the pleadings, deposition, 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."

A motion for summary judgment should not be granted unless it is perfectly clear that no issue of fact is involved and inquiry into the facts is not desirable to clarify the application of law. "Rule 56 is for the disposition of cases where there is no genuine issue of fact and its purpose is to eliminate formal trials where only questions of law are involved." *Kessing v. Mortgage Corp.*, 278 N.C. 523, 534, 180 S.E. 2d 823, 830 (1971); *Phillips v. Insurance Co.*, 43 N.C. App. 56, 58, 257 S.E. 2d 671, 673 (1979).

At trial, in order to survive a motion for a directed verdict, plaintiff will have the burden of offering proof of every material fact. On a motion for summary judgment, however, the moving party has the burden of showing the absence of a genuine issue as to any material fact. We feel the movants have failed to carry the burden and that summary judgment should be denied.

[1] In this case there appear material issues of fact presented by the pleadings, interrogatories, depositions and affidavits. Plaintiffs allege that the gasoline tank on the truck owned by defendant Sanco Corporation was not properly vented; that the tank was not designed for gasoline fuel and that the placement of the muffler and exhaust system in close proximity to the fuel tank was unsafe. The affidavit of witness Settle showed the muffler to be old and in a very much deteriorated condition; that the exhaust system was not of sufficient length to provide a safe means for the expulsion of fumes, sparks and other gases escaping from

the combustion chambers; that the exhaust system would allow sparks and even flames to be emitted from the exhaust system, especially if the truck engine was not operating properly and was backfiring; that any malfunction of the engine which would cause sparks or flames to escape through the exhaust system, especially "backfiring", would cause the fuel tank on said truck to become extremely hot because the exhaust system terminated under the middle of the fuel tank and only inches below the same; that such a condition would cause the fuel tank to become extremely hot and tremendous pressure would build in the tank which would cause gas to spew therefrom; and that the resulting fire was foreseeable by any trained mechanic who could have observed the arrangement of the exhaust system.

> A bailor for hire, while not an insurer, may be liable for personal injuries to the bailee or third persons proximately resulting from the defective condition of a rented automobile while being used by the bailee for the purpose known to be intended, if the bailor was aware of the defective condition or by reasonable care and inspection could have discovered it. (Citations omitted.)
>
> It is the duty of a bailor for hire of an automobile to use reasonable care to see that the automobile is in good condition when it is let out for use on the highway, and he is liable for injury to the bailee or a third person proximately resulting from a breach of this duty.

Hudson v. Drive It Yourself, Inc., 236 N.C. 503, 504-5, 73 S.E. 2d 4, 5 (1952).

It is not in dispute that defendant Sanco Corporation was a bailor for hire, and that defendant Surry County was the bailee. Sanco Corporation did owe a duty to third persons to lease a garbage truck in good condition to defendant Surry County. The questions as to whether the gasoline tank in question was defective and unvented and whether the muffler and exhaust system were unsafe, are thus material, and constitute issues of material facts concerning actionable negligence.

A bailor is not responsible for a defect subsequently discovered which was not discernible by reasonable inspection at the time. *Hudson, supra*, at p. 505. In fact, however, the truck had

been in the possession of Sanco for several years, the location of the exhaust system was fixed, and the termination of the exhaust system below the fuel tank was easily discernible. Although the deteriorated condition of the exhaust system was discovered some weeks after the accident, there is no contention that the condition had changed.

Plaintiff further alleges in its complaint that defendant Surry County, through its agents and employees, failed to inspect the leased garbage truck, or if they did inspect it, failed to discover the dangerous and hazardous condition of the gasoline tank and the unsafe condition and location of the exhaust and muffler system; that the agents and employees of the defendant Surry County knew the truck was not functioning properly and that the same was backfiring through the muffler and exhaust system creating additional heat and sparks in the vicinity of the gasoline tank, thus creating a more hazardous condition; and that the employer Surry County failed to inform the gas station attendant of this unsafe condition. The affidavits and depositions presented by plaintiff establish these facts. There are no affidavits presented by defendant Surry County showing that it inspected the truck or that its employees advised the filling station attendant of the backfiring.

It is the opinion of this Court that there are genuine issues of material fact concerning actionable negligence before the Court.

[2] Plaintiff contends that the doctrine of *res ipsa loquitur* applies against both defendants. We do not so hold in this case. It is a well settled rule that *res ipsa loquitur* does not apply where the instrumentality causing the injury is not under the exclusive control or management of the defendant. *Saunders v. R.R.*, 185 N.C. 289, 117 S.E. 4 (1923). In the case at bar, Sanco certainly did not have exclusive control or management of the truck. Likewise, the doctrine of *res ipsa loquitur* does not apply where the existence of negligent default is not the more reasonable probability, and where proof of the occurrence, without more, leaves the matter resting only in conjecture. *Dail v. Taylor*, 151 N.C. 284, 66 S.E. 135 (1909). Plaintiff has alleged a duty on the part of Surry County to inspect the garbage truck and learn of its dangerous condition; that Surry County knew the truck was not functioning properly; and that the agents of Surry County failed to inform the

service station attendant of the dangerous condition involving the gasoline tank and exhaust system. These facts, if proven, may be found by the jury to establish the existence of negligence.

The orders for summary judgment in favor of both the defendant Sanco and the defendant Surry County are

Reversed.

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

NORMAN BROWNING, JOHN HUBLY, JAMES THORTON, HILDA REICH, HARROLD GOBEILLE, DAVID WEISBERT, HARRY SHRIER, JOSEPH SHRIER, EUGENE BOHLANDER, HOWARD GUGGENHEIM, PAUL ECKELBERRY, EUGENE KANDEL, STERLING PFEIFFER, PHILIP DRAKE, RALPH STRING, JOHN ROBINSON, JOHN McDONALD, M. G. BROWNE, JOSEPH THOMAS, ROBERT HAYS AND JOE FASSETT v. MAURICE B. LEVIEN & CO., P.C.; MAURICE B. LEVIEN; MAURICE B. LEVIEN & CO.; AND MAURICE LEVIEN ASSOCIATES

No. 7826SC761

(Filed 5 February 1980)

1. Partnership § 7— limited partners—no right to bring action for partnership

The statute giving limited partners the same rights as a general partner to have "dissolution and winding up by decree of court," G.S. 59-10(a)(3), does not include bringing a lawsuit on behalf of the partnership to recover damages to their interest in the partnership based on the negligence of defendants in overcertifying to a construction lender the amount of work performed on an apartment complex owned by the partnership.

2. Architects § 3; Partnership § 7— action against architects—standing of limited partners

Plaintiff limited partners had standing to bring an action against defendant architectural firm based on defendant's negligence in overcertifying to the construction lender the amount of work performed on an apartment project owned by the limited partnership, although defendant's contract for overseeing the project was with the lender and there was no privity of contract between plaintiffs and defendant, since it could reasonably be foreseen when defendant undertook to render services to the lender that the owners of the project might rely on defendant's certification.

3. Partnership § 7; Principal and Surety § 10— failure of partnership to require performance bond—contributory negligence of partners

In an action by limited partners in a partnership formed to build an apartment complex to recover for damages to their interest in the partnership based on negligence by defendant architectural firm in overcertifying to the construction lender the amount of work performed on the project by a contractor who defaulted, evidence of plaintiffs' investment in a limited partnership which did not require a performance bond from the contractor required submission of an issue of contributory negligence to the jury. However, the court erred in charging the jury that plaintiffs' failure to examine the books and records of the partnership could constitute negligence on their part where there was no evidence that a careful examination of the records of the partnership would have revealed the overcertification.

4. Partnership § 7— action by limited partners—knowledge by general partners of defendant's negligence

Knowledge by the general partners of a limited partnership of defendant's overcertification to the construction lender of the amount of work completed on an apartment project owned by the partnership did not bar plaintiff limited partners from maintaining an action against defendant to recover for damages to their interest in the partnership allegedly caused by defendant's negligence in overcertifying the amount of work completed.

APPEAL by plaintiffs from *Kirby, Judge.* Judgment entered 12 December 1977 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 2 May 1979.

This is an action by plaintiffs who were some of the limited partners in a limited partnership formed to build an apartment complex in Winston-Salem. Maurice Levien is an architect. Mr. Levien and the entities through which he did business are the defendants. The limited partnership had two general partners who were Gene Phillips and Phillips Development Corporation (PDC). Gene Phillips was the principal stockholder and chief executive officer of PDC. In order to secure financing for the project, the title to the real estate was taken by Orion Enterprises, Ltd., the partnership's corporate nominee. Orion entered into a construction contract with PDC under the terms of which PDC was to construct the project for $3,045,000.00. At the time they invested in the partnership, each of the plaintiffs signed statements saying he had been advised of the merits of the transaction or he was a knowledgeable investor familiar with this type of investment; that he was aware of the risks involved; that he was in at least the 50 percent tax bracket; and that he had access to all documents he deemed relevant. First National City Bank of

New York agreed to lend the partnership up to $3,700,000.00 to fund the cost of the project.

Maurice B. Levien and Co. made an agreement with the bank to supervise the project. Among Levien's duties were to inspect "the construction at the time of each progress payment request and certification as to the accuracy of the requisition and compliance of the construction with the plans and specifications." On 26 July 1973, defendant certified the project was 85.5 percent complete. The bank, at that time, had paid $3,216,021.00 to the contractor. In late July or in August 1973, the contractor defaulted on the construction. The partnership was not able to procure financing for the project and it was foreclosed. PDC and Gene Phillips have been adjudicated bankrupts.

The plaintiffs brought this action "on their own behalf and, in the alternative, derivatively on behalf of the Partnership." Plaintiffs alleged that defendants had been negligent in certifying as to work by the contractor. Defendants pled contributory negligence. The plaintiffs offered evidence that the defendants certified to the bank that work had been done on the project which had not been done in the amount of approximately $900,000.00. The evidence showed that no performance bond had been required of PDC. The jury found the defendant had been negligent, the plaintiffs had been contributorily negligent, and awarded the plaintiff one dollar in damages. Plaintiffs appealed.

Grier, Parker, Poe, Thompson, Bernstein, Gage and Preston, by Mark R. Bernstein, Fred T. Lowrance and Francis O. Clarkson, for plaintiff appellants.

Craighill, Rendleman, Clarkson, Ingle and Blythe, by J. B. Craighill and William B. Webb, Jr., for defendant appellees.

WEBB, Judge.

[1] The plaintiffs have alleged that the action was brought "on their own behalf and, in the alternative, derivatively on behalf of the Partnership." We deal first with the question of whether the plaintiffs may bring this action on behalf of the limited partnership. We hold they may not. G.S. 59-26 provides:

> A contributor, unless he is a general partner, is not a proper party to proceedings by or against a partnership, ex-

cept where the object is to enforce a limited partner's right against or liability to the partnership.

Both general partners are now bankrupt so that the limited partnership has been dissolved pursuant to G.S. 59-61(5). Plaintiffs contend that they are entitled to bring this action on behalf of the partnership pursuant to G.S. 59-10 which provides:

(a) A limited partner shall have the same rights as a general partner to

* * *

(3) Have dissolution and winding up by decree of court.

Plaintiffs contend their right under the statute to have a "dissolution and winding up" includes the right to bring this suit on behalf of the partnership. They also contend that if the statute does not give them this right, they should have it nevertheless because there is no one else to sue, as the general partners are now bankrupt and *par delictum* with the defendants. We do not believe the statute allowing the limited partners the right to a "dissolution and winding up" includes bringing a lawsuit on behalf of the limited partnership. There might be some cases in which the general partners refuse or are unable to bring an action for a limited partnership, and justice would require that the limited partners be allowed to do so. We hold this is not such a case. In this case the plaintiffs are suing for damages to their interest in the partnership based on the negligence of the defendants. There is no necessity that they be allowed to sue on behalf of the limited partnership.

[2] The defendants have cross-assigned as error the failure of the court to dismiss the action because the defendants' contract for overseeing the project was with the bank, and there was not privity between plaintiffs and defendants. There have been several recent cases dealing with the duty of architects and structural engineers. *See Drilling Co. v. Nello L. Teer Co.*, 38 N.C. App. 472, 248 S.E. 2d 444 (1978); *Davidson and Jones, Inc. v. County of New Hanover*, 41 N.C. App. 661, 255 S.E. 2d 580 (1979); *Industries, Inc. v. Construction Co.*, 42 N.C. App. 259, 257 S.E. 2d 50 (1979). From reading these cases and the authorities cited therein, we believe it is the law that an architect who contracts to perform services is liable for damages proximately caused by his

negligence to anyone who can be reasonably foreseen as relying on that architect's performing his services in a reasonable manner. In the case sub judice, when the defendants undertook to perform services for the bank, it could be reasonably foreseen that the owners of the property, the plaintiffs in this case, might rely on the certification of defendants. The plaintiffs have standing to bring this action. It is true that *Drilling Co. v. Nello L. Teer Co., supra,* has language to the effect that an architect or engineer is not liable for negligent performance to a person with whom he is not in privity. That case involved a suit by a subcontractor against a supervising engineer who required the plaintiff to do more than the plaintiff contended was specified in his contract. This Court made it clear that it would be bad policy to hold that a supervising engineer or architect can be liable for negligence to a subcontractor by requiring a performance of the subcontractor which the subcontractor contended was more than specified in the contract. No such policy is involved in this case.

[3] The plaintiffs assign error in regard to the contributory negligence issue. They contend that there was not sufficient evidence of contributory negligence to submit to the jury, and they further contend that the court erred in its charge as to contributory negligence.

> "Contributory negligence is an act or omission on the part of the plaintiff amounting to a want of ordinary care, which concurs with some negligent act or omission on the part of the defendant so as to constitute the act or omission of the plaintiff a proximate cause of the injury complained of."

9 Strong's N.C. Index 3d Negligence § 13, p. 379. In the case sub judice, the limited partnership did not require the contractor to file a bond. The plaintiffs were aware of this or should have been aware of it. We hold that the investment in a limited partnership by men of the business acumen of the plaintiffs, when the limited partnership did not require a performance bond from the contractor, is evidence from which the jury could conclude the plaintiffs failed to do something a reasonable man should have done which was a proximate cause of the damage to plaintiffs. The contributory negligence issue was properly submitted to the jury.

In charging the jury as to contributory negligence, the court recounted the evidence as to the business experience of the plaintiffs, their opportunity to inspect the project, the books and records of the project, and their failure to learn of the overcertification until work on the project had stopped. The court then charged the jury as follows:

> "Finally, as to this contributory negligence issue, I instruct you that if the defendants have proved by the greater weight of the evidence that at the time of the construction project, the plaintiffs were negligent in any one or more of the following respects: that experienced business people, accustomed to making investments and supervising such investments, aware of the risks involved, with tax and legal counsel to view the project, all in the fifty percent tax bracket, all having all relevant documents available to them, including the right of access to the project's books and records, and in spite of such opportunity did not learn of the overcertification until February, 1974, several months after bankruptcy of the initial contractor, and cessation of work on the project and that such funds were diverted by other partners of the project, I say that if the defendants have proved by the greater weight of the evidence that the plaintiffs were negligent in any one or more of these things, and that if the defendants have further proven by the greater weight of the evidence that such negligence was the proximate cause of and contributed to the plaintiffs' damages, then, it would be your duty to answer this issue, 'yes,' in favor of the defendant."

We hold there was error in this portion of the charge. There is no evidence that a careful examination of the records of the partnership would have revealed the overcertification. If it was negligence on the part of the plaintiffs in failing to examine the books and records, this failure would not have been a proximate cause of the damage. In addition, the language of the charge was such that the jury could have been under the impression that the court thought this failure of the plaintiffs was negligence. It would have been better for the court to have charged the jury that these were acts from which the jury could conclude the plaintiffs were negligent.

[4] The defendants also contend that if there was negligence in the overcertification on the project by them it was done with the knowledge of Gene Phillips and PDC, the general partners, and knowledge of the overcertification is imputed to the plaintiffs. Defendants contend plaintiffs cannot recover for this reason. Defendants rely on G.S. 59-42 and *Howard v. Hamilton* and *Howard v. Fairley,* 28 N.C. App. 670, 222 S.E. 2d 913 (1976). That case involved a suit by a limited partnership as plaintiff. The defendants pled the statute of limitations and the case turned on whether the plaintiff limited partnership had knowledge prior to a certain date that a lien had been placed on a tract of real estate. The court held that knowledge of the general partners as to when the lien was put on the property was imputed to the limited partnership. The facts of this case are different. The plaintiffs are suing defendants for damages to their property interests based on the negligence of the defendants. The knowledge of the general partners as to the negligence of the defendants does not bar the plaintiffs from maintaining this action.

For reasons stated in this opinion there must be a

New trial.

Chief Judge MORRIS and Judge HEDRICK concur.

MARGARET BRICKELL v. D. K. COLLINS AND JO ELIZABETH COLLINS, D/B/A COLLINS CONSTRUCTION COMPANY

No. 7910SC269

(Filed 5 February 1980)

1. **Vendor and Purchaser § 6.1— sale of new house—implied warranty**

Defendant who sold a newly completed house and lot to plaintiff impliedly warranted to her that, at the time of passing the deed, the dwelling together with all the fixtures was substantially free from major structural defects and was constructed in a workmanlike manner.

2. **Vendor and Purchaser § 6; Fraud § 12— sale of new house—defect in masonry—defendant's lack of actual knowledge—insufficient evidence of fraud**

In an action to recover for damages to plaintiff's house occurring because masonry veneer was not anchored with properly spaced metal ties as required

by the city building code, plaintiff's evidence was insufficient to establish fraud by defendant builder since plaintiff failed to show that defendant actually knew of the defect, and the mason's knowledge of the improper spacing was not imputed to defendant so as to attribute to him actual knowledge.

APPEAL by defendant D. K. Collins from *Preston, Judge.* Judgment entered 29 December 1978 in Superior Court, WAKE County. Heard in the Court of Appeals 14 November 1979.

Plaintiff's complaint, filed 13 September 1977, alleged that defendant, as a homebuilder and as a vendor of real property, committed fraud in the inducement of sale of a new house to plaintiff. Plaintiff offered evidence tending to show that she purchased a newly constructed, two-story, brick veneer dwelling on a lot located at 4501 Keswick Drive in Raleigh, from defendant D. K. Collins, a speculative builder, on 19 November 1965 for $29,000. In August 1975 plaintiff discovered a crack in the brick veneer at a front corner of the house. An inspection revealed that the house was not constructed in conformity with the Raleigh Building Code, Sec. 15(5) which required that masonry veneer be anchored to the frame with "metal ties spaced every sixth course or 16 inches vertically and not more than 32 inches o.c. horizontally . . . ."

Plaintiff also alleged that Collins knew of the latent defect but fraudulently concealed it from her. She prayed for cost of repairing the wall amounting to $2,527.50, for loss of market value in the sum of $18,000, and for punitive damages in the sum of $10,000.

Defendant denied all material allegations except the sale of the dwelling to plaintiff.

Upon trial without a jury the court found, *inter alia*:

"10. Collins subcontracted the masonry work for the Brickell house. He provided the masons with brick, mortar, and wall ties needed for the construction.

11. Collins did not direct the masons in the laying of the bricks, but he periodically inspected their work and had the authority to require that they correct any defective work which they performed.

12. It was Collins' responsibility, as general contractor for the Brickell project, to supervise all work done on the house and to see that the wall ties in the veneer were properly installed as the masonry work progressed.

* * * *

16. After several unsuccessful attempts to contact Collins, Brickell contacted an engineer, Dale Blosser, and requested that he determine the cause of the cracking and assist in correcting the problem.

17. Mr. Blosser is a licensed architect with special expertise in the area of construction administration, and was accepted by Court as an expert witness.

* * * *

22. After the veneer at the corner was repaired, Blosser conducted tests with a specialized metal detector to determine the number and spacing of the wall ties in the other areas of the veneer.

23. Blosser's testing indicated that the majority of the veneer failed to meet the applicable Raleigh Building Code standard for the number and spacing of wall ties."

The trial court made, *inter alia*, the following conclusions of law:

"2. Collins knew, or should have known, that the house was constructed with an inadequate number of wall ties.

* * * *

4. Collins' responsibility for seeing that the wall ties were properly installed in compliance with the requirements of the Raleigh City Code was a non-delegable duty.

* * * *

6. Since the defect in the construction of the house built with insufficient wall ties was not apparent to Brickell and not within the reach of her diligent attention and observation, Collins was under a duty to disclose this information to Brickell.

7. Collins' failure to disclose to Brickell the material defect in the construction of the house constituted actionable fraud."

Defendant appeals from the judgment awarding $7,609.50 as general damages, and $5,000.00 as punitive damages.

Jordan, Morris and Hoke by Joseph E. Wall for plaintiff appellee.

Boyce, Mitchell, Burns & Smith by G. Eugene Boyce and James M. Day for defendant appellant D. K. Collins.

CLARK, Judge.

[1] Defendant sold a newly completed house and lot to plaintiff. In so doing he impliedly warranted to her that at the time of passing the deed the dwelling, together with all the fixtures, was substantially free from major structural defects and was constructed in a workmanlike manner. *See Griffin v. Wheeler-Leonard & Co.*, 290 N.C. 185, 225 S.E. 2d 557 (1976); *Hartley v. Ballou*, 286 N.C. 51, 209 S.E. 2d 776 (1974); 13 Strong's N.C. Index 3d *Vendor & Purchaser* § 6.1 (1978).

Clearly, the plaintiff has alleged and offered evidence tending to show a breach of implied warranty. However, an action for breach of implied warranty would in this case be barred by the ten-year statute of limitations, N.C. Gen. Stat. § 1-15(b) (repealed, effective 1 October 1979). It is apparent that plaintiff relies on fraud as the basis for recovery in this action for the purpose of bringing the claim within N.C. Gen. Stat. § 1-52 providing for a limitation of three years from the time of discovery of fraud.

The following essential elements of actionable fraud are well established: (1) False representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party. *Ragsdale v. Kennedy*, 286 N.C. 130, 209 S.E. 2d 494 (1974); *Johnson v. Owens*, 263 N.C. 754, 140 S.E. 2d 311 (1965); *Moore v. Wachovia Bank & Trust Co.*, 30 N.C. App. 390, 226 S.E. 2d 833 (1976). It is settled that where there is a duty to speak, the concealment of a material fact is equivalent to fraudulent misrepresentation. *Griffin v. Wheeler-Leonard & Co., supra.*

[2] We find, however, that one of the essential elements of fraud is not supported by the evidence and was not found by the trial court. The plaintiff has failed to show that defendant D. K. Collins *knew* the masonry veneer was not anchored to the frame with metal ties as required by the Raleigh Building Code, Sec. 15(5). The evidence is sufficient to support the findings of the trial court that the structural defect was material and that defendant D. K. Collins as builder was responsible for the defect. There was evidence that the masons who performed the work for defendant used metal ties, but that the ties, particularly in the area where the wall cracked, were not properly spaced as required by the Code. There was evidence that defendant furnished sufficient metal ties to the masons, and that the ties would not be visible when put in place between the framing and the brick. Nonetheless, even though the defendant on a daily basis observed their work, there is no evidence that he knew that the metal ties used by them were not spaced as required.

In addition, the trial court concluded: "2. Collins knew, *or should have known*, that the house was constructed with an inadequate number of wall ties." (Emphasis added.) The phrase "or should have known" does not meet the essential element of guilty knowledge or fall within any recognized exception to the rule that defendant must have knowledge of the falsity in order to be liable for fraud. In *Griffin, supra*, the court stated: "There is no evidence whatever that Wheeler *knew* that the Griffin house had been constructed so that there would, or likely would, be a continuing water problem in the crawl space." 290 N.C. at 199, 225 S.E. 2d at 566. The Court held that the directed verdict on the fraud issue was properly sustained. Similarly, the general rule is that "[s]ilence, in order to be an actionable fraud, must relate to a material matter *known to the party* and which it is his legal duty to communicate to the other contracting party . . . ." (Emphasis added.) 37 Am. Jur. 2d Fraud § 145 (1968). *See also, Setzer v. Old Republic Life Insurance Co.*, 257 N.C. 396, 126 S.E. 2d 135 (1962).

There are exceptions to the rule that to recover for fraud the defendant must have knowledge of the falsity. Guilty knowledge will be implied from a statement made by a vendor who affirms a material fact which he does not know to be true. *Silver v. Skidmore*, 213 N.C. 231, 195 S.E. 775 (1938); *Pate v. Blades*, 163 N.C. (Strong) 267, 79 S.E. 608 (1913). Under special circumstances the

Court may imply knowledge on the speaker, such as the inventor of a machine, "who must be fully informed as to [a machine's] good and bad qualities." *Unitype Co. v. Ashcraft Bros.*, 155 N.C. (Strong) 63, 67, 71 S.E. 61 (1911). Under certain conditions if a party to a bargain avers the existence of a material fact recklessly, the party will be held responsible for the falsehood. *Roberson v. Williams*, 240 N.C. 696, 83 S.E. 2d 811 (1954); *Atkinson v. Charlotte Builders, Inc.*, 232 N.C. 67, 59 S.E. 2d 1 (1950); *Ward v. Heath*, 222 N.C. 470, 24 S.E. 2d 5 (1943). However, we do not find any special conditions, circumstances, or recklessness on the part of the defendant, that would bring the case before us within any recognized exception to the broad rule that culpable knowledge of the misrepresentation is a necessary element of fraud.

The plaintiff relies on *Brooks v. Ervin Construction Co.*, 253 N.C. 214, 116 S.E. 2d 454 (1960). In that case defendant-builder sold plaintiff a house and lot. The defendant had constructed the house over a large hole which it had filled with debris and then covered over with clay. The defendant had actual knowledge of this condition, and defendant knew, or should have known, that a house built on "disturbed soil" will settle and material damage will result. The Court ruled that the evidence made out a case of actionable fraud sufficient to carry the case to the jury.

Plaintiff's reliance on *Brooks* is misplaced since the defendant in *Brooks* had actual knowledge of the structural defect, the displaced soil. In the case *sub judice*, defendant Collins should have known that inadequate spacing of the metal ties, as shown by plaintiff's evidence, would cause the masonry wall to pull from the framing and that material damage would result. But knowledge of the defect which would cause the result is absent. *Griffin v. Wheeler-Leonard & Co.*, *supra*. The negligence of the masons employed by defendant in failing to properly space the metal ties is imputed to the defendant and might be the basis for a tort action based on negligence or a breach of contract claim, if this were an action by an owner against a builder who contracted with the owner to build the house. Moreover, the improper spacing of the metal ties would support a claim for breach of implied warranty by the buyer-plaintiff against the seller-defendant in the case before us. Here, however, the plaintiff has based her action on fraud, and the mason's knowledge of the improper spacing is

not imputed to the defendant so as to attribute to him actual knowledge, a necessary element of fraud.

Since there is no evidence of actual knowledge by defendant of the construction defect and the finding of the trial court that "Collins knew, or should have known" about the defect does not support the judgment for fraud, the judgment is vacated, and the action is dismissed.

Vacated and dismissed.

Judges ARNOLD and ERWIN concur.

IN THE MATTER OF: COLLINS ROGERS, RESPONDENT

No. 789DC1166

(Filed 5 February 1980)

1. **Appeal and Error § 36.1— proper service of proposed record on appeal—no authority by clerk to adjudicate—authority of appellate court**

A clerk of superior court had no authority to make an adjudication of proper service of the proposed record on appeal under Appellate Rule 11; rather, the opinion of the appellate court determines whether service of the proposed record was properly made within the required time, whether the record on appeal was properly settled, and whether the record was certified by the clerk within 10 days after settlement as required by Appellate Rule 4.

2. **Appeal and Error § 36; Insane Persons § 1— appeal from civil commitment order—service on special advocate**

The proposed record on appeal from a civil commitment order should have been served on the special advocate who represented the State at the commitment hearing pursuant to G.S. 122-58.7(b) (1977) rather than on the Attorney General. However, after the effective date of the 1979 amendment to that statute, the member of the staff of the Attorney General who represents the State at the commitment hearing should be served with the proposed record on appeal.

APPEAL by respondent from *Senter, Judge*. Order entered 31 August 1978 in the Mental Health Hearing Session, Ninth District, Granville County. Heard in the Court of Appeals 28 March 1979. Reheard 12 November 1979.

This Court filed an unpublished opinion in this cause on 1 May 1979 dismissing the appeal. The Petition for Rehearing of the respondent was denied originally but upon reconsideration was allowed by Order dated 26 October 1979.

It appears from the record on appeal that respondent was charged with rape (File No. 77-CR-5037). The mental capacity of the respondent to proceed to trial was questioned. Pursuant to Ch. 15A, Art. 56, after hearing and considering the report of Dr. Billy W. Royal, the District Court, by order dated 23 August 1978, found that respondent was unable to proceed to trial due to mental incapacity and respondent was transferred to a magistrate for civil commitment proceedings.

On 25 August 1978, according to the terms of N.C. Gen. Stat. § 122-58.4, respondent was examined by Dr. Lawrence Stucker, who found respondent to be mentally ill and imminently dangerous to himself or others; consequently, under the authority of N.C. Gen. Stat. § 122-58.18, respondent was placed in the custody of John Umstead Hospital for examination and treatment pending a hearing.

Pursuant to N.C. Gen. Stat. § 122-58.7 a hearing was held on 31 August 1978 in the District Court. Respondent was represented by special counsel. The State, or petitioner, presented as evidence two affidavits by Dr. Ganesh Kumer. These affidavits do not appear in the record on appeal, but they were summarized in the record as follows:

"He [Dr. Kumer] stated that on August 24, he had examined respondent with the following findings:

> The patient has been here for 90 days. He has allegedly been involved in a rape incidence. And presently his behavior is under control with medication and the hospital environment. His behavior is unpredictable and he is potentially dangerous.

He said that respondent's tentative diagnosis was paranoid schizophrenia.

Dr. Kumar testified in a further affidavit dated August 31, that respondent had not exhibited 'his behavior' in his locked hospital ward, but that in view of his history of al-

leged rape, Dr. Kumar recommended commitment 'to John Umstead Hospital Maximum Security Unit for the maximum time permissible under the law.' "

The District Court entered its order, in pertinent part, as follows:

> "The patient is mentally ill, suffering with a mental disorder, diagnosed as paranoid schizophrenia.
>
> The patient is imminently dangerous to himself or others in that he exhibits violent tendencies and traits.
>
> The patient is in need of further hospitalization and or treatment.
>
> It is, therefore, ordered that the respondent be committed to John Umstead Hospital for a period of 90 days or until such time as he is discharged according to law."

The record on appeal does not disclose that the State as Petitioner was represented by counsel at the 31 August 1978 hearing in the District Court. However, it appears from the certificate of special counsel in the record that notice of appeal was served on "Sam B. Currin, III, Federal Building, Oxford, North Carolina, attorney for the State and petitioner herein."

Attorney General Edmisten by Associate Attorney Christopher S. Crosby for the State.

Special Counsel for the Ninth Judicial District Susan Freya Olive for Respondent.

CLARK, Judge.

This Court first heard the case without oral argument, under Appellate Rule 30(f), on 28 March 1979.

The printed record on appeal did not include any settlement of the proposed record on appeal as required by Appellate Rule 11. The record on appeal did not include the report of Dr. Billy W. Royal, referred to as Exhibit 1 in the District Court order of 23 August 1978 finding defendant incapable of proceeding to trial. N.C. Gen. Stat. § 15A-1003(c) provides that such affidavit is admissible in the civil commitment proceedings. Nor did the record

on appeal include the affidavit of Dr. Stucker made on 25 August 1978, or the two affidavits of Dr. Kumer which were offered by the State at the civil commitment hearing on 31 August 1978. Only a short summary of these three affidavits appeared in the record. Since the integrity of the record on appeal was questionable, this Court on 1 May 1979, filed an unpublished opinion, under Appellate Rule 30(e), dismissing the appeal for failure of the respondent to settle the record on appeal as required by Appellate Rule 11.

Respondent-defendant, by Special Counsel Susan Freya Olive, in apt time filed a Petition for Rehearing, in which it appeared that even though the printed record on appeal noted only that "transcript [was] certified by Clerk Superior Court December 13, 1978," the original record on appeal contained the certification of the transcript by a Deputy Clerk and the following: "[A]s served upon the appellee, and appellee has filed no exception or proposed alternative record on appeal within the time allowed."

We originally denied the Petition for Rehearing because it appeared that the added material in the Petition did not show a compliance with Appellate Rule 11. Thereafter, upon reconsideration, it appeared that the added material raised the question of whether the proposed record on appeal should have been served upon the Attorney General or upon the special advocate representing the State in the civil commitment hearing. We decided to answer this issue on rehearing even though an addendum to the record on appeal is not properly made in a petition for rehearing.

[1] We begin with the certification of the Clerk of Superior Court. The Clerk of the Superior Court had no authority to make such an adjudication of proper service of the record under Rule 11. Upon appeal, the opinion of this Court, not the Clerk of the Superior Court, determines whether service of the proposed record was properly made within the required time, whether the record on appeal was properly settled, and whether the record is certified by the Clerk of the Superior Court within 10 days after settlement as required by Appellate Rule 11.

Nor was the Clerk of Superior Court correct in its determination. Appellate Rule 26 plainly states that if the record on appeal is not settled by agreement of the parties, the record should affirmatively show service "upon a party or his attorney of record."

[2] Counsel for respondent included in the Petition for Rehearing a copy of her Certificate of Service dated 2 November 1978 showing that she "served a copy of the above Proposed Record on Appeal on the Attorney General . . . ." It does not appear, however, that service of the proposed record on appeal was made on Sam B. Currin, III, who apparently had been appointed under N.C. Gen. Stat. § 122-58.7(b) (1977) to serve as special advocate to represent the State in the commitment hearing, who was by respondent's own statement "attorney for the State and petitioner herein," and who already had been served with notice of appeal.

We now turn to the question of whether the Attorney General or the special advocate should have been served with the proposed record. N.C. Gen. Stat. § 122-58.9 provides that the "Attorney General shall represent the petitioner on appeal." At the hearing, however, the petitioner [the State] was represented by Sam B. Currin, III, apparently the appointed special advocate. The special advocate was present at the hearing, had knowledge of the evidence offered, and was qualified to determine for the State if the proposed record on appeal was accurate. He alone was the "attorney of record" within the meaning of Appellate Rule 26, and the proposed record should have been served on Currin as special advocate rather than the Attorney General. The special advocate in a civil commitment proceeding occupies a position similar to the District Attorney in a criminal case. Both are attorneys of record who have the authority to settle the record on appeal. In contrast, the Attorney General represents the State in a criminal case and in a civil commitment proceeding only where the State is the petitioner on appeal (before the 1979 amendment hereafter stated), and his duties begin after the record on appeal has been settled and filed in this Court.

We note that the 1979 Session Laws, Ch. 915, sec. 12 (to be codified as N.C. Gen. Stat. § 122-58.24) provides that the Attorney General is authorized to appoint four attorneys to be assigned full time to the four regional psychiatric facilities to represent the State at commitment hearings. Sec. 13 rewrites N.C. Gen. Stat. § 122-58.7(b) to provide in pertinent part:

> "(b) The attorney who is a member of the staff of the Attorney General assigned to one of the State's four regional

psychiatric facilities shall represent the State's interest at commitment hearings, rehearings, and supplemental hearings held at the hospital to which he is assigned under Articles 4 and 5A of Chapter 122 of the General Statutes of North Carolina. Each of these attorneys shall also provide the liaison and consultation services necessary for these matters."

Under the new statute the staff attorney of the Attorney General who represents the State at the commitment hearing is the opposing counsel of record within the meaning of Appellate Rule 26 and should be served with the proposed record on appeal as required by Appellate Rule 11 where the respondent appeals from an order of commitment. And if the State is not the petitioner in the involuntary commitment proceeding, the proposed record on appeal should be served on opposing counsel of record for the petitioner by the respondent appellant.

For failure to comply with the Rules of Appellate Procedure, the appeal is

Dismissed.

Chief Judge MORRIS and Judge ARNOLD concur.

IN THE MATTER OF: JOHN W. CANTRELL, 312 NORTH HOFFMAN ROAD, DALLAS, NORTH CAROLINA 28034, S. S. NO. 250-52-3670, COMMISSION DOCKET NO. 6752, APPELLEE AND BURLINGTON INDUSTRIES, BOX 325, PEACH ORCHARD ROAD, BELMONT, NORTH CAROLINA 28012, ATTENTION: BOB LONG AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, POST OFFICE BOX 25903, RALEIGH, NORTH CAROLINA 27611, APPELLANT

No. 7927SC519

(Filed 5 February 1980)

Master and Servant § 108.1— refusal of truck driver to make trip—wilful misconduct—disqualification from receiving unemployment compensation

An unemployment compensation claimant's deliberate and unjustifiable refusal to report to work when the employer has the right to insist on the employee's presence and when the claimant knows that his refusal would cause logistical problems for the employer constitutes wilful misconduct sufficient to

disqualify a claimant from receiving benefits; therefore, claimant truck driver's refusal to make a trip which his employer had a right to ask of him, either in the belief that the employer's rotation rules for assigning drivers no longer applied to him or in protest for employer conduct in assigning him to make a trip with a black driver which he believed discriminated against him, constituted wilful misconduct which disqualified him from receiving unemployment insurance benefits.

APPEAL by respondent Employment Security Commission (ESC) from *Burroughs, Judge.* Judgment entered 23 January 1979 in Superior Court, GASTON County. Heard in the Court of Appeals 10 January 1980.

Claimant was employed as a truck driver with Burlington Industries for approximately nineteen months prior to his discharge on 29 September 1977. The next day claimant filed a claim for unemployment compensation benefits. After a hearing before the Claims Deputy of the ESC the Claims Deputy determined that claimant was disqualified from receiving benefits under G.S. 96-14(2) because he was discharged for misconduct in connection with his work at Burlington Industries. After appealing this decision, a hearing was held before the Appeals Deputy of the ESC at which claimant was represented by counsel. The Appeals Deputy affirmed the determination of the Claims Deputy. The decision of the Appeals Deputy was upheld by the Deputy Commissioner of the ESC.

Claimant appealed to the Superior Court of Gaston County. The court held that the Deputy Commissioner's findings were all based upon competent and substantial evidence contained in the record. However, the court additionally held that, "as a matter of law . . . the facts as found by the Employment Security Commission do not support the conclusion that the claimant was discharged for misconduct connected with his work as that phrase is used in G.S. 96-14(2) in that the facts as found do not show that the claimant's misconduct was misconduct connected with his work." From the court's judgment holding claimant eligible to receive benefits, respondent ESC appeals.

No brief for claimant appellee.

V. Henry Gransee, Jr., for respondent appellant Employment Security Commission of North Carolina.

WELLS, Judge.

We agree with the court below that the ESC's findings of fact are supported by competent evidence in the record. We are therefore bound by these findings. *In re Thomas*, 281 N.C. 598, 189 S.E. 2d 245 (1972). The findings present an accurate and concise description of the fact situation presented in this case, and we quote them in their entirety:

> 1. The claim series now under consideration was begun effective September 25, 1977, and had been continued through October 22, 1977, at the time of the adjudicator's conference.
>
> 2. The claimant last worked for Burlington Industires, Belmont, North Carolina, as a truck driver on September 28, 1977.
>
> 3. The claimant had been working for this employer for approximately nineteen months at the time of his discharge. During that time his work had been satisfactory and he had never been warned or otherwise reprimanded about any facet of his conduct.
>
> 4. Approximately one week before the claimant's last day of work, he was involved in a situation in which two other drivers, a black man and a white man, were scheduled to make a trip to Mississippi together. The claimant understood that because the black man refused to ride with the white driver, the claimant was called in to make the trip with the other white driver. The claimant made this trip as a favor to the supervisor involved. He did not discuss this action with any other supervisory personnel at the time.
>
> 5. As the claimant knew, assignment of drivers to trucks was generally done through a complex rotation system established by the employer. On his last day of work the claimant was told that according to this rotation system he was scheduled to make a long trip with another driver. This other driver was black. The claimant, remembering the situation of the week before, and not wanting to make this trip for personal reasons, refused to go. He assumed that a favor similar to the one he had done earlier would be done for him and another driver substituted in his place.

6. The claimant believed this favor should be done for him because it had been done for a black driver the previous week, and it was the claimant's feeling that not to do it for him would constitute racial discrimination on the employer's part. He also believed the situation the week before showed that the rotation rules no longer applied. He did not explain to any supervisory personnel why he would not make this particular trip.

7. The claimant's refusal to make this trip was reported to the employer's terminal manager, who discussed it with the claimant. At the conclusion of this conversation the claimant was discharged by the terminal manager for his refusal to make the trip. The terminal manager did not go through the system of verbal and written reprimands customarily utilized by the employer before an employee is terminated.

Where a claimant is discharged for "misconduct connected with his work" the claimant becomes disqualified from receiving benefits. G.S. 96-14(2). Thus, where the claimant is discharged because he willingly and knowingly violates a reasonable rule of his employer, the claimant is disqualified. *In re Stutts*, 245 N.C. 405, 95 S.E. 2d 919 (1957) (claimant disqualified for misconduct for violating employer's rule against making changes in machines operated by employees); *In re Collingsworth*, 17 N.C. App. 340, 194 S.E. 2d 210 (1973) (claimant disqualified for misconduct for refusing to follow employer's rule requiring employees to wear ear protective devices).

In *Collingsworth*, we adopted the Wisconsin definition of "misconduct":

[T]he term "misconduct" [in connection with one's work] is limited to conduct evincing such wilfull or wanton disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer.

17 N.C. App. at 343-344, 194 S.E. 2d at 212-213. In the *Stutts* and *Collingsworth* cases the reviewing bodies were solely concerned with the reasonableness of the employer's rule. However, the present action concerns not merely the reasonableness of the *employer's* request that claimant drive the truck on the night in question, but the reasonableness of *claimant's* refusal to drive. This issue has not previously been before the appellate courts of our State.

In this regard, we find the rule stated by the Supreme Court of Pennsylvania to be the most persuasive:

> [W]e must evaluate both the reasonableness of the employer's request in light of all the circumstances, and the employee's reasons for noncompliance. The employee's behavior cannot fall within "wilfull misconduct" if it was justifiable or reasonable under the circumstances, since it cannot then be considered to be in wilfull disregard of conduct the employer "has a right to expect." In other words, if there was "good cause" for the employee's action, it cannot be charged as wilfull misconduct. [Citations omitted.]

McLean v. Board of Review, 476 Pa. 617, 620, 383 A. 2d 533, 535 (1978). In *McLean,* a truck driver was discharged for refusing to follow his employer's directive that claimant drive a particular truck. The evidence showed that both the employer and claimant knew that the truck was not in good repair. The Court reversed the lower court's judgment upholding the Board of Review's denial of benefits on grounds of claimant's misconduct. In holding that claimant was eligible for benefits, the Pennsylvania Supreme Court stated that claimant's refusal to drive the truck was reasonable and justifiable in light of all of the circumstances—the truck's unsafe condition.

Similarly, a Florida appellate court has remanded a case in which a claimant was denied benefits after he was discharged for refusing to follow the employer's order to drive a truck on a long haul. *Smallwood v. Dept. of Commerce,* 350 So. 2d 121 (Fla. App. 1977). The Court held that since claimant had declined to drive the truck on a long-distance trip because he had cataract problems which distorted his peripheral vision, the Department of Commerce was required to make findings as to whether claimant's refusal was justified.

In the present action, the ESC found that claimant had refused to make a trip which his employer had a right to ask of him, either in the belief that the employer's rotation rules no longer applied to him or in protest for employer conduct which he believed discriminated against him. The ESC concluded that, in light of the other less disruptive alternatives for protest that were open to claimant, claimant's refusal to make the trip was not justified. While the record shows that claimant did not know for certain his refusal would result in discharge, he did know that his employer controlled the rotation, and could insist that he take the trip in question. Thus, his refusal to make the trip for either racial or unidentified personal reasons, when insisted upon by his employer, was not reasonable or justified.

A claimant's deliberate and unjustifiable refusal to report to work, when the employer has the right to insist on the employee's presence and when the claimant knows that his refusal would cause logistical problems for the employer, constitutes misconduct sufficient to disqualify claimant from receiving benefits. *See, Urso v. Board of Review*, 39 Pa. Commw. Ct. 593, 396 A. 2d 70 (1979). We reverse the judgment of the Superior Court and reinstate the decision of the ESC disqualifying claimant from receiving unemployment insurance benefits.

Reversed.

Judges HEDRICK and MARTIN (Robert M.) concur.

IN THE MATTER OF: GERALDINE W. WERNER, APPELLEE AND UNIVERSITY OF NORTH CAROLINA, EMPLOYER AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, APPELLANT

No. 7914SC332

(Filed 5 February 1980)

1. Master and Servant § 108— unemployment compensation—resignation at employer's request—involuntary separation

Employees who resign their employment because they are asked to do so by their employer do not leave "voluntarily" within the meaning of G.S. 96-14(1). In this case, an employee's resignation because her employer recom-

mended that she resign and implied that she would be discharged if she failed to resign constituted an involuntary separation.

2. **Master and Servant § 108— unemployment compensation—resignation at employer's request—failure to use grievance procedure—involuntary separation**

An employee's resignation at her employer's suggestion was not rendered a voluntary separation without good cause attributable to the employer by failure of the employee to seek redress under an available grievance procedure.

APPEAL from *Lee, Judge.* Judgment entered 9 November 1978 in Superior Court, DURHAM County. Heard in the Court of Appeals 27 November 1979.

Werner, the claimant, was employed as secretary to the Director of Contracts and Grants for the University of North Carolina at Chapel Hill. The working relationship between claimant, her immediate supervisor, and one of her senior associates deteriorated, and her supervisor recommended to her that she resign her position. In resigning, claimant cited an excessive work load as a basis for her resignation. However, the evidence before the Employment Security Commission (ESC) established without contradiction that claimant resigned at the request of her employer. Following her resignation, claimant submitted a claim for unemployment compensation. The claim was originally heard by a Claims Deputy of the ESC, who, in denying the claim, held that claimant voluntarily left her job without good cause attributable to her employer. Claimant appealed to the Appeals Deputy who affirmed the findings and conclusions of the Claims Deputy.

Claimant next appealed to the Deputy Commissioner of the ESC, who found that, since claimant's employer had requested her resignation, claimant became involuntarily separated from her employment. The Deputy Commissioner also found, however, that claimant could have declined to resign and could have pursued the grievance procedure provided by her employer. He held that her failure to pursue such a course of action rendered her departure voluntary and refuted any contention that claimant's leaving was for good cause attributable to her employer. Claimant appealed to the Superior Court. Judge Lee entered an order setting aside the Deputy Commissioner and remanded the matter to the

ESC for entry of an order granting the relief sought by claimant. The ESC appeals to this Court.

Upchurch, Galifianakis & McPherson, by William V. McPherson, Jr., for claimant appellee.

Gail C. Arneke for respondent appellant.

WELLS, Judge.

Judge Lee, in his conclusions of law, has succinctly set forth the issues in this matter. We repeat them verbatim:

> 1. The resignation of the appellant pursuant to a demand from her supervisor that she resign, was not a voluntary departure from work within the meaning of G.S. Sec. 96-15(1) [*sic*].
>
> 2. The appellant's failure to take affirmative action to pursue a grievance did not render her otherwise involuntary departure voluntary within the meaning of G.S. Sec. 96-14(1).
>
> 3. The Deputy Commissioner committed error in holding as a matter of law that the appellant was disqualified from receiving unemployment insurance benefits under G.S. Sec. 96-14(1) solely by reason of her failure to initiate grievance proceedings.
>
> 4. The appellant is not disqualified for unemployment insurance benfits under G.S. Sec. 96-14(1).

[1] There is no disagreement as to the facts of this case. Only two questions of law are raised: (1) Does the fact that an employee resigns and is not discharged, although the resignation is submitted upon the employer's request, render the resulting separation one made "voluntarily" within the meaning of G.S. 96-14(1)?; (2) Is an involuntary separation rendered voluntary and without good cause attributable to the employer by the failure of the separated employee to seek redress under an available grievance procedure? We answer both questions in the negative.

We perceive that these questions concern matters of first impression before our courts. G.S. 96-14(1) provides that an applicant shall be disqualified from receiving unemployment compensation benefits, ". . . if it is determined by the [Employment Security]

Commission that such individual is, at the time such claim is filed, unemployed because he left work *voluntarily without good cause attributable to the employer . . .*" [Emphasis added.] Claimant has the burden of proving he is not disqualified. *In re Steelman*, 219 N.C. 306, 13 S.E. 2d 544 (1941). In that the phrase italicized above is nowhere defined in either the statute or our caselaw, we look to the intent of the General Assembly as stated in G.S. 96-2:

> *Declaration of State public policy.*—As a guide to the interpretation and application of this Chapter, the public policy of this State is declared to be as follows: Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this State. Involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our economic life. This can be provided by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance. The legislature, therefore, declares that in its considered judgment the public good and the general welfare of the citizens of this State require the enactment of this measure, under the police powers of the State, for the compulsory setting aside of unemployment reserves to be used for the benefit of persons *unemployed through no fault of their own.* [Emphasis added.]

For clarity, we note that we are not dealing with involuntary separation for misconduct. Such disqualifications are addressed in G.S. 96-14(2) and were the subject of consideration and interpretation by this Court in *In re Collingsworth*, 17 N.C. App. 340, 194 S.E. 2d 210 (1973). We also note that the present case is clearly distinguishable from our opinion in *In re Vinson*, 42 N.C. App. 28, 255 S.E. 2d 644 (1979). In *Vinson*, the employee resigned upon his employer's request after he was arrested on six felony charges of possession and sale of phenobarbital. We held that the cause or reason the employee resigned was his arrest, which was solely at-

tributable to the employee and not to the employer. The fact that the employee resigned and was not discharged was conceded by the claimant to render his separation voluntary, so that the issue of voluntariness was not before the Court. In the present case, the Deputy Commissioner specifically found that, aside from claimant's failure to utilize the employer's grievance machinery, her forced resignation was involuntary.

Employees are often discharged for various reasons which do not operate to disqualify the individual for benefits under the Act. It is not necessary to cite all such examples, but we mention a few to illustrate the point: reduction in work force; insufficient skills; employer going out of business; business changes hands; business relocates; etc. We then reach the type of situation we have here, where an employee may be fired, not for misconduct, but simply because the employee no longer pleases the employer. When an employer is faced with such a situation he may choose from among several options. The employer may attempt to rectify the problem through counseling. He may place the employee on probationary status. The employer may recommend that the employee seek other employment. Or, the employer may discharge the employee. We note the availability to the employer of one additional option which is less severe, embarrassing, or traumatic for the employee than discharge. The employer may request the employee's resignation.

Perceiving that well-intentioned employers may prefer to allow the unsuitable employee the dignity of resignation, we believe that there are strong public policy reasons for not discouraging employers from exercising this option. Employees who resign under such circumstances become unemployed "through no fault of their own." We therefore hold that such employees who quit or resign employment because they are asked by their employer to leave do not leave "voluntarily" within the meaning of G.S. 96-14(1). In this case, the employer's recommendation to resign, coupled with the clear implication that the employee would be discharged if she failed to offer her resignation, constituted an involuntary separation.

Respondent has cited cases from other jurisdictions in support of its position that resignation, even if requested, constitutes voluntary separation. However, in all of these cases the employee

either resigned in advance of the date his resignation would have been required, or the resignation was not "attributable" to the employer. *See, In re Vinson*, 42 N.C. App. 28, 255 S.E. 2d 644 (1979). We note that in a case factually analogous to the one *sub judice*, a Delaware court held that a resignation induced under the pressure of the employer is tantamount to a discharge and is not made "voluntarily" within the disqualifying language of that State's unemployment insurance law. *Anchor Motor Freight, Inc. v. Appeal Board*, 325 A. 2d 374 (Super. Ct. Del. 1974).

[2] We now address the second question concerning the effect of claimant's failure to resort to an available grievance procedure on the voluntariness of claimant's separation and on whether the separation occurred without good cause attributable to the employer. The Deputy Commissioner concluded:

> Since [claimant] did have a choice of remaining and pursuing the grievance procedure or leaving, it must be concluded she did voluntarily leave work. . . .
>
> The availability of the grievance procedure likewise refutes any contention she might have that her leaving was for good cause attributable to the University of North Carolina.

We believe that the above language shows that the Deputy Commissioner concluded that claimant's failure to utilize respondent's grievance machinery rendered claimant's separation voluntary and without good cause attributable to the employer *as a matter of law*. The trial court concluded the contrary, that as a matter of law, claimant's failure to use the grievance machinery did not render the separation voluntary or without good cause attributable to the employer.

Although the General Assembly could have, by statute, disqualified all such employees who do not exhaust the employer's grievance machinery, it has not done so. The disqualifying provisions of G.S. 96-14 are to be construed strictly in favor of the claimant. *In re Watson*, 273 N.C. 629, 161 S.E. 2d 1 (1968). It therefore would not be consistent with the public policy of our State, as expressed in G.S. 96-2 or the opinions of our courts, to disqualify from benefit eligibility such employees for not availing themselves of the employer's grievance machinery.

Affirmed.

Judges HEDRICK and MARTIN (Robert M.) concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 5 FEBRUARY 1980

BEAN v. BEAN No. 7918DC345	Guilford (76CVD1002) (76CVD7010)	Affirmed
BROOKS v. BROOKS No. 798DC782	Lenoir (79CVD476)	Vacated and Remanded for New Trial
BROOKS v. DUMAS No. 798SC489	Wayne (75CVS400)	No Error
CLARK v. CLARK No. 7914DC246	Durham (77CVD2581)	Reversed and Remanded
CLARK v. CLARK No. 7914DC247	Durham (78CVD2820)	Vacated and Remanded
COLLINS v. COMBS No. 7917SC577	Rockingham (73CVS558)	Modified and Affirmed
GODWIN BUILDING SUPPLY CO. v. WARD No. 7911SC491	Harnett (78CVS832)	Affirmed
HUROW v. MILLER No. 7915SC391	Orange (78CVS480)	Affirmed
LEVINE v. DONATHAN No. 7928DC520	Buncombe (77CVD2473)	Reversed and Remanded
MANUFACTURING CO. v. TOWN OF WAKE FOREST No. 7910SC229	Wake (77CVS1538)	Affirmed in Part, Reversed and Remanded
MARINE RESEARCH SERVICES v. WAFF BROTHERS No. 7913DC414	Brunswick (75CVD380)	Dismissed
MURRAY v. MURRAY No. 7926DC600	Mecklenburg (78CVD7542) (76CVD8016)	Dismissed
NEWGARD v. NEWGARD No. 7920DC531	Union (76CVD451)	Affirmed
NUNAN v. CHESHIRE No. 7915SC392	Orange (78CVS591)	Affirmed
PARKER v. PARKER No. 798DC622	Wayne (74CVD1534)	Affirmed

PAUL v. COMR. OF MOTOR VEHICLES No. 798SC176	Wayne (78CVS70)	Affirmed
PENLAND v. STINES No. 7928SC192	Buncombe (76CVS2433)	Affirmed
SMITH v. BYERS No. 7921DC275	Forsyth (78CVD4307)	Reversed
STATE v. BELL No. 7918SC738	Guilford (78CRS44371)	No Error
STATE v. BRAY No. 797SC741	Wilson (78CRS9992) (78CRS9993)	No Error
STATE v. COCKRAN No. 795SC710	New Hanover (73CR20823) (73CR20825) (73CR20826) (73CR20827)	Reversed
STATE v. DOUGLAS No. 7919SC746	Cabarrus (79CRS1468)	Vacated and Remanded
STATE v. DUDLEY No. 7920SC770	Union (78CR1509) (78CR1512)	Affirmed
STATE v. ELAM No. 7913SC594	Columbus (78CRS5223) (78CRS5224)	No Error
STATE v. FURR No. 7920SC855	Stanly (79CRS1945)	No Error
STATE v. GREENE No. 7925SC685	Catawba (78CRS16193) (78CRS16194)	No Error
STATE v. HAIRR No. 7927SC689	Gaston (78CRS22741)	No Error
STATE v. LACKEY No. 7930SC711	Swain (77CR1561) (77CR1563)	No Error
STATE v. NEAL No. 7827SC1110	Gaston (78CRS27562)	Action Abated, Appeal Dismissed
STATE v. PATTERSON No. 7920SC603	Union (78CR2402) (78CR2401)	No Error

STATE v. SIMPSON No. 792SC726	Tyrrell (79CRS659)	New Trial
STATE v. SPEIGHT No. 792SC780	Beaufort (79CRS471)	No Error
STATE v. TITUS No. 794SC631	Onslow (78CRS19676) (78CRS19677)	No Error
WILLIS v. WILLIS No. 7917DC749	Surry (77CVD710)	Affirmed as to Alimony, Vacated and Remanded as to counsel fees
ZIMMERMAN, DISTRICT ATTORNEY v. LEONARD No. 7922SC505	Davidson (79CVS367)	Vacated

ANALYTICAL INDEX

WORD AND PHRASE INDEX

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ADMINISTRATIVE LAW

§ 4. Procedure and Hearings of Administrative Boards

It was not improper for a local administrative board to consider testimony of an attorney while he was representing a client in a matter before the board, but attorneys are strongly discouraged from serving as both a witness and an advocate. *Robinhood Trails Neighbors v. Board of Adjustment*, 539.

ADOPTION

§ 5. Effect of Decree

The trial court properly held that duly authenticated adoption decrees from Missouri were entitled to recognition by the courts of N.C. under the full faith and credit clause. *Trust Co. v. Chambless*, 95.

ANIMALS

§ 3. Injury Caused by Animal Roaming at Large

A genuine issue of material fact existed as to whether third party defendant was the owner of a cow which caused an automobile accident. *Faulk v. Dellinger*, 39.

APPEAL AND ERROR

§ 6.2. Finality as Bearing on Appealability

An order granting plaintiff's claim for alimony and child support arrearages and granting full faith and credit to a N. Y. decree imposing a continuing support obligation affected a substantial right of defendant and was reviewable though the court's order did not determine all the issues raised in the action. *McGinnis v. McGinnis*, 381.

§ 16. Powers of Trial Court after Appeal

Defendant's notice of appeal from the trial court's order did not divest the trial court of jurisdiction where defendant failed to perfect his appeal. *McGinnis v. McGinnis*, 381.

§ 30.2. Form of Exceptions

Exceptions not preserved and set forth as required by the Rules of Appellate Procedure are deemed abandoned. *Construction Co. v. Luckey*, 378.

§ 36. Making and Serving Case on Appeal in General

The proposed record on appeal from a civil commitment order should have been served on the special advocate who represented the State at the commitment hearing rather than on the Attorney General. *In re Rogers*, 713.

§ 36.1. Timeliness of Service of Case on Appeal

Appeal is dismissed for failure to serve the proposed record on appeal in apt time. *Phillips v. Industries, Inc.*, 66.

A clerk of superior court had no authority to make an adjudication of proper service of the proposed record on appeal. *In re Rogers*, 713.

§ 41.1. Form of Transcript for Case on Appeal

The Rules of Appellate Procedure are mandatory and apply to a litigant appearing in propria persona. *Shirley v. Administrative Office of the Courts*, 188.

ARCHITECTS

§ 3. Liability for Defective Conditions

Plaintiff limited partners had standing to bring an action against defendant architectural firm based on defendant's negligence in overcertifying to the construction lender the amount of work performed on an apartment project owned by the limited partnership, although there was no privity of contract between plaintiffs and defendant. *Browning v. Levien & Co.*, 701.

ARREST AND BAIL

§ 3.5. Legality of Arrest for Burglary and Related Offenses

Officers had probable cause to arrest defendant in Tyrrell County based on a radio message received from an officer in another county who had probable cause to arrest defendant. *S. v. Tilley*, 313.

§ 6.1. Resisting Arrest; Validity of Warrant

An individual does not have the right to resist an arrest by a police officer pursuant to a warrant issued by a magistrate which appears regular on its face but which fails to state a crime. *S. v. Truzy*, 53.

§ 12. Grounds for Arrest in Civil Action

Trial court properly granted defendants' motions for summary judgment on plaintiff's claim for malicious prosecution where plaintiff failed to show a lack of probable cause by defendants in seeking to have plaintiff arrested in a civil case. *Koury v. John Meyer of Norwich*, 392.

ATTORNEYS AT LAW

§ 4. Testimony by Attorney

It was not improper for a local administrative board to consider testimony of an attorney while he was representing a client in a matter before the board, but attorneys are strongly discouraged from serving as both a witness and an advocate. *Robinhood Trails Neighbors v. Board of Adjustment*, 539.

§ 5.1. Liability for Malpractice

An action for malpractice against an attorney was barred by the four year statute of limitations. *Clodfelter v. Bates*, 107.

§ 12. Grounds for Disbarment

Statute giving the State Bar Council discretion to reinstate the license to practice law of a disbarred attorney upon satisfactory evidence of "proper reformation" of the attorney does not constitute an unconstitutional delegation of legislative power. *In re Garrison*, 158.

The State Bar Council did not err in refusing to reinstate the license of a disbarred attorney who only satisfied judgments against him which he was able to compromise. *Ibid.*

A complaint was sufficient to support disbarment of defendant attorney for dishonesty, fraud, deceit or misrepresentation that adversely reflects on his fitness to practice law where it alleged that defendant contracted to sell certain lands and failed to advise the purchasers that the lands were subject to liens and encumbrances totaling over $448,600. *State Bar v. Combs*, 447

AUTOMOBILES

§ 2.2. Suspension or Revocation of License Proceedings

Evidence in the record as a whole did not support a determination by the Medical Review Board cancelling the driving privilege of petitioner, who takes medication to prevent seizures and suffered a blackout while driving, on the ground that he has an uncontrolled seizure disorder. *Chesnutt v. Peters*, 484.

§ 2.7. Revocation of License for Failure to Comply with Financial Responsibility Laws

Trial court properly affirmed the order of the Comr. of Motor Vehicles suspending plaintiffs' licenses under G.S. 20-279.13 for failure to pay a judgment. *Lupo v. Powell*, 35.

§ 45. Competency of Evidence in Action Arising out of Automobile Accident in General

Trial court properly excluded evidence with respect to a coat, the number of people in church, and deceased's habitual route to church in an action for wrongful death of a pedestrian who was leaving church. *McClave v. Crescimanno*, 10.

§49.2. Admissions

In an action to recover for damages to plaintiff's truck when a tractor trailer collided with it, trial court erred in limiting the jury's consideration of the tractor trailer driver's earlier admissions which conflicted with his trial testimony to the issue of the driver's credibility. *Leisure Products v. Clifton*, 233.

§ 89.1. Evidence Sufficient to Require Submission of Last Clear Chance Issue

Trial court erred in failing to submit an issue of last clear chance to the jury in an action to recover damages arising out of a collision between plaintiff's tractor and defendant's automobile. *Wray v. Hughes*, 678.

§ 89.2. Evidence Insufficient to Require Submission of Last Clear Chance Issue

Plaintiff was not entitled to an instruction on last clear chance where defendant's employee did not have the means and time to avoid harming plaintiff after plaintiff drove past defendant's flagman. *Billings v. Trucking Corp.*, 180.

§ 90.4. Instructions Not Supported by Evidence

In an action to recover for damages to plaintiff's truck which was struck while being towed by one defendant, trial court erred in charging the jury that it could find the tow truck driver negligent if it found the proximate cause of the collision was the driver's violation of G.S. 20-130.2 in failing to display an amber light. *Leisure Products v. Clifton*, 233.

§ 90.14. Erroneous Instruction on Negligence

Plaintiff was not prejudiced by the trial judge's instruction that if he had to define "negligence" in one word he would probably use the word "fault." *Billings v. Trucking Corp.*, 180.

BANKS AND BANKING

§ 4. Joint Accounts

Where plaintiff and his former wife executed a joint account agreement with right of survivorship for a certificate of deposit in a savings and loan association, the joint account could be changed only upon the signature of all the parties to the joint account agreement. *Benfield v. Savings and Loan Assoc.*, 371.

BANKS AND BANKING—Continued

§ 10. Paying Checks of Depositor

Defendant bank's issuance of its cashier's check in payment of a check to plaintiff drawn on an account of defendant's depositor constituted a final acceptance and an engagement by the bank to honor the cashier's check as presented without any right by the bank or anyone else to countermand the check. *Lowe's v. Trust Co.*, 365.

BILLS AND NOTES

§ 17. Limitations for Actions on Notes

Defendants who were makers of the promissory note in question but who did not pledge any collateral as security could not raise the one year statute of limitations under G.S. 1-54(6) as a bar to plaintiff's action for a deficiency. *Trust Co. v. Martin*, 261.

Payment on a note by one defendant did not fix the date of payment as a new date from which the statute of limitations began to run against the second defendant unless the second defendant agreed to, authorized, or ratified the partial payment by the first defendant. *Ibid.*

In an action to recover the balance due on a promissory note where a corporate seal appeared but there was no seal after defendants' names, a material issue of fact was raised as to the intent of the parties to enter into a sealed instrument. *Ibid.*

BURGLARY AND UNLAWFUL BREAKINGS

§ 1.2. What Constitutes "Breaking"

Defendant's act of concealing himself in a store area not open to the public beyond the closing of business hours for the purpose of participating in a theft voided consent by the store owner to his entry into the store and rendered him subject to prosecution for felonious entry. *S. v. Speller*, 59.

§ 2. Breaking and Entering Other than Burglariously

The statutory requirement that a decal be posted on vending machines stating it is a crime to break into vending machines is not an element of the offense of forcibly breaking into a coin-operated vending machine. *S. v. Tilley*, 313.

§ 5.8. Breaking and Entering and Larceny of Residential Premises

Evidence was insufficient for the jury in a prosecution for breaking and entering an apartment and larceny therefrom where none of the evidence placed defendant in the apartment or with any property that was stolen therefrom. *S. v. Campbell*, 69.

§ 5.9. Breaking and Entering and Larceny of Business Premises

Trial court erred in denying defendants' motions for nonsuit where the evidence tended to show that defendants were present at the crime scene but there was no evidence to show participation, assistance or encouragement in the perpetration of the crimes. *S. v. Ross*, 323.

CONSTITUTIONAL LAW

§ 4. Standing to Raise Constitutional Questions

Plaintiffs had no standing to bring an action challenging the constitutionality of Chapter 1138 of the 1977 Session Laws providing for city and county referendums on mixed drinks. *Wilkes v. Bd. of Alcoholic Control*, 495.

§ 26. Full Faith and Credit to Foreign Judgments

The trial court properly held that duly authenticated adoption decrees from Missouri were entitled to recognition by the courts of N.C. under the full faith and credit clause. *Trust Co. v. Chambless*, 95.

§ 26.1. Foreign Judgments Obtained Without Jurisdiction

In an action to enforce a N.Y. decree awarding child support to plaintiff, defendant waived any defect in authentication of the foreign judgment and there was no merit to defendant's contention that the court issued the decree without giving him notice and an opportunity to be heard. *McGinnis v. McGinnis*, 381.

§ 28. Due Process in Criminal Trials

Defendant was not prejudiced by a delay of 20 days in bringing him before a district court judge and having counsel appointed for him. *S. v. Collins*, 27.

§ 46. Withdrawal of Appointed Counsel

Defendant was not denied the effective assistance of counsel by the court's refusal to permit defendant's retained counsel to withdraw unless and until defendant employed other counsel or by the court's denial of a continuance. *S. v. Goode*, 498.

§ 48. Effective Assistance of Counsel

Defendant was not denied the right to effective assistance of counsel by the court's denial of his motion for a recess at the close of the State's evidence in order to make a decision as to whether to present evidence. *S. v. Goode*, 498.

Defendant was not denied the effective assistance of counsel by failure of his attorneys to obtain recordings of police radio communications. *Ibid.*

§ 50. Speedy Trial

Defendant in an embezzlement case was not denied his right to a speedy trial by the lapse of five years from the time of the alleged offense to the time of indictment. *S. v. Seay*, 301.

§ 67. Identity of Informants

Trial court in a prosecution for possession of LSD and PCP did not err in denying defendant's motion to compel the State to reveal the name and address of a confidential informant. *S. v. Collins*, 141.

§ 74. Self-Incrimination

In an action to recover compensatory and punitive damages for alienation of affections and criminal conversation where defendant refused to answer the allegations of plaintiff's complaint, claiming his constitutional privilege against self-incrimination, trial court erred in deeming the allegations as admitted. *Byrd v. Hodges*, 509.

CONTRACTS

§ 4.1. Consideration

In an action to recover on an installment sales contract where defendants contended that they were not purchasers under the contract but merely guarantors, there was sufficient consideration to support their obligation under the contract where the evidence showed both a benefit to the alleged principal debtor and a detriment to the promisee. *Savings & Loan Assoc. v. Cogdell*, 511.

§ 16. Conditions

There was no contract between the parties for the design and installation of a sprinkler system where the agreement in question specified that any plans for the design of a system had to be approved by Insurance Services Office, and such condition was not met. *Sprinkler Co. v. Dockery Corp.*, 5.

§ 16.1. Time of Performance

Defendant was bound by its subcontract which was entered into on 14 June 1972 to perform curb and gutter work when plaintiff asked defendant on 4 March 1975 to submit a starting time and when plaintiff gave defendant notice to perform on 5 May 1975. *Loving Co. v. Contractor, Inc.*, 597.

§ 27.3. Sufficiency of Evidence of Damages

Plaintiff's evidence was sufficient to support a jury verdict awarding plaintiff $40,000 for breach of a contract of sale of a typesetting machine and $11,200 for breach of contract of sale of a phototypesetter. *Danjee, Inc. v. Addressograph Multigraph Corp.*, 626.

§ 29.2. Calculation of Compensatory Damages

In an action to recover for defendant's alleged breach of contract in failing to construct a house in a workmanlike manner, trial court did not err in failing to determine damages by assessing the cost of labor and materials necessary to repair the house to meet contract specifications. *Patrick v. Mitchell*, 357.

§ 34. Interference with Contractual Rights by Third Person

Summary judgment was properly entered for defendant attorney in an action to recover damages for alleged interference with a contract by plaintiff's children to reconvey property to plaintiff. *Clodfelter v. Bates*, 107.

CRIMINAL LAW

§ 18.1. Sufficiency of Record to Show Jurisdiction in Superior Court

Defendant's appeal from conviction of assaulting an officer is dismissed where he failed to show how the superior court obtained jurisdiction of the case. *S. v. McKoy*, 516.

§ 21. Preliminary Proceedings

Defendant was not prejudiced by a delay of 20 days in bringing him before a district court judge and having counsel appointed for him. *S. v. Collins*, 27.

Defendant's pretrial motion to exclude the results of a test on vegetable matter on the ground the test was not conducted in a scientific manner was a motion in limine rather than a motion to suppress pursuant to G.S. 15A-979, and the State had no right to appeal from the court's interlocutory order granting the motion. *S. v. Tate*, 567.

CRIMINAL LAW—Continued

§ 23. Plea of Guilty

Defendant's plea agreement was not specifically enforceable where the prosecutor at the probable cause hearing refused to honor the agreement, a plea of not guilty was entered, and defendant had not changed his position to his detriment in reliance on the agreement. *S. v. Collins*, 141.

§ 29. Mental Capacity to Stand Trial

Though it would have been the better practice for the trial court to make findings of fact with respect to defendant's mental capacity to proceed, such error was harmless inasmuch as the evidence would have compelled the court to find against defendant. *S. v. Womble*, 503.

§ 34.4. Admissibility of Evidence of Other Offenses

Trial court in an armed robbery case did not err in permitting the victim to testify that during the course of the crime defendant left the room and her accomplice attempted a sexual assault upon her. *S. v. Horton*, 343.

§ 42.5. Identification of Articles Used in Crime

A witness's testimony that he observed a truck similar to that of defendant in the vicinity of two murder victims' house on the date of their deaths was not inadmissible because of its lack of specificity and positiveness. *S. v. Hunnicutt*, 531.

§ 48. Silence of Defendant as Implied Admission

An officer's testimony that after serving murder warrants on defendant, defendant stated, "You mean you are saying that I went down there and shot those people?" did not constitute failure to deny an accusatory statement and was not inadmissible because defendant had not been given the Miranda warnings. *S. v. Hunnicutt*, 531.

§ 74. Manner of Reading Confession to Jury

A witness was properly permitted to read a typewritten transcript of a tape recording of defendant's confession although the transcript was not signed by defendant. *S. v. Poole*, 242.

§ 75. Admissibility of Confession in General

Defendant's confession was not rendered inadmissible because she was not permitted to visit with her parents or friends who were at the police station. *S. v. Poole*, 242.

§ 75.3. Effect on Confession of Confronting Defendant with Statements of Others

Defendant's confession was not rendered inadmissible because her boyfriend, in the presence of officers, urged her to tell the truth and told her the two of them would be together and everything would be all right. *S. v. Poole*, 242.

§ 75.9. Volunteered Statements

A statement made by defendant after he was arrested was volunteered and therefore admissible where it was made in response to no question or comment by the arresting officer. *S. v. Trimble*, 659.

§ 75.11. Waiver of Constitutional Rights

The evidence supported the trial court's determination that the confession of a 16 year old girl was made voluntarily and understandingly. *S. v. Poole*, 242.

CRIMINAL LAW—Continued

§ 76.4. Evidence at Voir Dire Hearing

Defendant was not prejudiced by an officer's incompetent testimony during a hearing on a motion to suppress defendant's in-custody statement. *S. v. Poole*, 242.

§ 80.1. Authentication of Business Records and Other Writings

The court properly admitted a computer billing printout for defendant's telephone. *S. v. Hunnicutt*, 531.

The State properly identified and authenticated a note found by a jailer in a deck of cards sent by defendant while in jail to another inmate. *Ibid.*

§ 89.2. Corroborating Evidence

Officer's testimony as to what types of guns were reported stolen was competent to corroborate the testimony of the owner of the guns. *S. v. Oden*, 61.

§ 89.8. Impeachment; Promise or Hope of Reward

Trial court did not err in refusing to allow defendant to question a witness about unrelated criminal charges against him for the purpose of showing that he had a hope of reward from his testimony. *S. v. Gray*, 318.

§ 91.7. Continuance on Ground of Absence of Witness

Trial court did not err in the denial of defendant's motion for continuance because of the absence of a defense witness. *S. v. Oden*, 61.

Trial court did not abuse its discretion in denying defendant's motion to continue the case in order for her to obtain an alibi witness. *S. v. Horton*, 343.

§ 99.9. Examination of Witnesses by Court; Questions not Prejudicial

Where an officer testified that defendant was on foot and that he pursued defendant in his car, and defense counsel asked the officer a question pertaining to the speed of his car, the court's question, "You weren't planning to pull him for speeding, were you?" was inappropriate but was not sufficiently prejudicial to require a new trial. *S. v. Goode*, 498.

§ 112.6. Instructions on Defense of Insanity

It was proper for the court to inform the jury that the defense of insanity had not been raised at trial and should not be considered in the jury's deliberations. *S. v. Hart*, 479.

Trial court erred in instructing the jury that defendant had the burden of proving his defense of insanity to the "reasonable satisfaction" of the jury. *S. v. Ward*, 513.

§ 113.4. Instructions Defining Words Used in Charge

Trial court did not err in failing to define "altercation." *S. v. Hart*, 479.

§ 113.7. Charge on Acting in Concert

Trial court adequately charged the jury, upon sufficient evidence, that defendant would be guilty if she and her son, acting together, killed deceased. *S. v. Gray*, 318.

CRIMINAL LAW—Continued

§ 122.2. Additional Instructions Upon Jury's Failure to Reach Verdict

Where the jury could not reach a decision, trial court erred in instructing that if they did not agree upon a verdict, another jury might be called on to try the case, that the State and defendant had a tremendous amount of time and money invested in the case, and that retrial involved a duplication of all the time and expense. *S. v. Lamb*, 251.

§ 146. Appellate Jurisdiction in Criminal Cases

A sentence of 10 years to life imprisonment was a sentence of life imprisonment within the meaning of G.S. 7A-27(a) so that appeal should have been made directly to the Supreme Court. *S. v. Norwood*, 174; *S. v. Ferrell*, 374.

§ 146.1. Appeal Limited to Questions Raised in Lower Court and Properly Presented on Appeal

The statute providing for appellate review without objection at trial of errors based on the ground that "the criminal pleading charged acts which, at the time they were committed, did not constitute a violation of criminal law" applies only to appeals by defendants. *S. v. Truzy*, 53.

§ 149. Right of State to Appeal

Defendant's pretrial motion to exclude the results of a test on vegetable matter on the ground the test was not conducted in a scientific manner was a motion in limine rather than a motion to suppress pursuant to G.S. 15A-979, and the State had no right to appeal from the court's interlocutory order granting the motion. *S. v. Tate*, 567.

§ 157. Necessary Parts of Record

Defendant's appeal was subject to dismissal for failure to include the bill of indictment in the record on appeal. *S. v. Tatum*, 77.

§ 166. The Brief

Defendant's appeal was subject to dismissal for failure to refer to assignments of error immediately following each question presented in his brief. *S. v. Tatum*, 77.

§ 175.2. Review of Orders During Trial

Defendant was not denied the right to effective assistance of counsel by the court's denial of his motion for a recess at the close of the State's evidence in order to make a decision as to whether to present evidence. *S. v. Goode*, 498.

DEEDS

§ 21. Stipulation for Reconveyance of Land to Grantor

A provision of restrictive covenants requiring grantees who wish to sell to give grantor the first opportunity to purchase "at a price no higher than the lowest price he is willing to accept from any other purchaser" was void. *Smith v. Mitchell*, 474.

DESCENT AND DISTRIBUTION

§ 5. Adopted Children

The statute giving an adopted person the right to succeed to the estate of an adoptive parent upon intestacy and to take under the will of the adoptive parent if

the parent so provides applies to orders of adoption from other states as well as those under N.C. law. *Trust Co. v. Chambless*, 95.

DIVORCE AND ALIMONY

§ 5. Recrimination

Recrimination in the form of abandonment is unavailable as a defense in actions for divorce based on a year's separation brought after 31 July 1977 even though the alleged abandonment occurred prior to that date. *Boone v. Boone*, 79.

§ 11. Divorce from Bed and Board; Indignities Which Render Life Burdensome

Plaintiff's evidence that defendant husband spent considerable time with another woman was admissible for the purpose of proving the alleged indignities suffered by plaintiff at defendant's hands. *Watts v. Watts*, 46.

§ 16.5. Competency of Evidence in Alimony Action

Trial court in an alimony action properly excluded a handwritten statement by plaintiff husband of probable future increases in the value of his stock in a motel. *Clark v. Clark*, 649.

§ 16.9. Amount and Manner of Payment of Alimony

Trial court's finding that all of the items in the budget submitted by defendant wife were not "necessary" items did not show that the court applied an improper standard in determining the amount of alimony for the wife of a wealthy man. *Clark v. Clark*, 649.

An award of alimony to defendant wife was not erroneous on the ground the trial judge failed to consider income tax consequences of the award. *Ibid.*

Trial court did not abuse its discretion in failing to make some provision in its alimony order for possession of the parties' homeplace. *Ibid.*

Trial court erred in ordering the parties in an alimony action to divide household furnishings in the homeplace in a mutually agreeable manner. *Ibid.*

§ 17.3. Amount of Alimony Upon Divorce from Bed and Board

Trial court made sufficient findings to support its award of alimony of $210 per month to plaintiff wife. *Watts v. Watts*, 46.

§ 18.8. Evidence in Alimony Pendente Lite Proceeding

Plaintiff in an action for alimony pendente lite was not prejudiced by the technical error of defendant's failing to enter into evidence a document detailing her living expenses. *Blair v. Blair*, 605.

§ 18.12. Findings as to Right to Alimony Pendente Lite

Trial court's error in finding that plaintiff abandoned defendant was harmless since there was sufficient evidence to support the court's finding that plaintiff committed indignities making defendant's condition intolerable, and there was thus an adequate ground to support an award of alimony pendente lite. *Blair v. Blair*, 605.

§ 18.13. Amount of Alimony Pendente Lite

There was no merit to plaintiff's argument that an award of alimony pendente lite should be reversed because the trial court made no findings as to the amount needed by plaintiff to subsist during the pendency of the action. *Blair v. Blair*, 605.

DIVORCE AND ALIMONY—Continued

§ 18.16. Attorney's Fees in Alimony Pendente Lite Action

An award of an attorney fee was improperly entered in an action for alimony pendente lite where the court made no finding as to the reasonableness of the fee. *Blair v. Blair*, 605.

The court's award of only $500 in legal fees to the wife in an alimony action was not so patently unreasonable as to constitute an abuse of discretion. *Clark v. Clark*, 649.

§ 21.5. Enforcement of Alimony by Contempt

A contract between husband and wife whereby he agrees to pay specified sums for her support may not be enforced by contempt proceedings since alimony was not a part of any judgment by the trial court. *Baugh v. Baugh*, 50.

§ 21.8. Enforcement of Foreign Alimony Decree

In an action to enforce a N.Y. decree awarding alimony to plaintiff, defendant waived any defect in authentication of the foreign judgment, and there was no merit to defendant's contention that the court issued the decree without giving him notice and an opportunity to be heard. *McGinnis v. McGinnis*, 381.

The portion of a N.Y. alimony decree which adjudged defendant in contempt and ordered his incarceration was properly denied full faith and credit recognition by the N.C. district court. *Ibid.*

§ 24. Child Support Generally

Trial court properly granted defendant credit toward his child support payments for a portion of the cost of a furnace installed by defendant in the residence occupied by the children. *Lynn v. Lynn*, 148.

Trial court did not err in determining that plaintiff father was entitled to an award of $180 per month from defendant mother for partial support of their children. *Coble v. Coble*, 327.

Mortgage payments required to be made by defendant father constituted child support, and where plaintiff mother received public assistance under the AFDC program, the mortgage payments were assigned to the State both by operation of law and by her written assignment. *Cox v. Cox*, 339.

§ 24.4. Enforcement of Child Support Orders by Contempt

Even though the effect of the court's award of credit to defendant on his child support payments for the cost of a furnace made defendant current with respect to his support obligations, the court could nevertheless find defendant in contempt for his willful refusal to make child support payments when due. *Lynn v. Lynn*, 148.

§ 24.10. Termination of Child Support Obligation

The parties' separation agreement which provided that child support payments should continue until the two minor children reached the age of 18 years required defendant to make the payments until both children reached 18. *Rhoades v. Rhoades*, 43.

§ 25.12. Child Visitation Privileges

Trial court did not err in granting plaintiff father who was a homosexual unsupervised overnight visitation rights with his minor son. *Woodruff v. Woodruff*, 350.

DIVORCE AND ALIMONY—Continued

§ 26.1. Modification of Foreign Orders

In an action to enforce a N.Y. decree awarding child support to plaintiff, defendant waived any defect in authentication of the foreign judgment, and there was no merit to defendant's contention that the court issued the decree without giving him notice and an opportunity to be heard. *McGinnis v. McGinnis*, 381.

The portion of a N.Y. child support decree which adjudged defendant in contempt and ordered his incarceration was properly denied full faith and credit recognition by the N.C. district court. *Ibid.*

ELECTRICITY

§ 5. Position of Wires

The evidence on motion for summary judgment presented a genuine issue as to defendant town's negligence in the maintenance of its electric power lines over a building on which plaintiff was working. *Letchworth v. Town of Ayden*, 1.

EMBEZZLEMENT

§ 6. Sufficiency of Evidence

Defendant was in a fiduciary relationship where he was a promoter of a limited partnership in which the prosecutors invested, and the money was not used by defendant as promised and was not returned to those who invested it. *S. v. Seay*, 301.

§ 6.1. Instructions

Trial court in a prosecution for embezzlement in violation of G.S. 14-90 properly defined a fiduciary as "a person having a duty created by his undertaking to act primarily for another's benefit." *S. v. Seay*, 301.

EMINENT DOMAIN

§ 1. Nature and Extent of Power

Plaintiff landowners could not invoke the aid of a court of equity to enjoin a county from condemning their land for a public purpose. *Development Co. v. County of Wilson*, 469.

§ 2.2. Taking Through Closing of Road or Construction of Highway

In an action to condemn a small portion of defendant's property, trial court did not err in refusing to instruct the jury that the dead-ending of a former U.S. highway abutting the front of defendant's property is a compensable damage item and in instructing the jury that defendant is not entitled to compensation for any circuity of travel resulting from the dead-ending of the highway. *Board of Transportation v. Warehouse Corp.*, 81.

§ 2.6. Taking Through Water Division

Trial court in a highway condemnation action properly instructed the jury that the "reasonable use" rule governed the rights and liabilities of the parties with respect to changes in drainage of surface waters resulting from plaintiff's construction of a highway project. *Board of Transporation v. Warehouse Corp.*, 81.

FALSE IMPRISONMENT

§ 1. Nature and Essentials of Right of Action

An order of a superior court judge under which plaintiff was arrested, although erroneous, was not void, and it protected against an action for false imprisonment both the officer who made the arrest and the defendant who procured the order. *Koury v. John Meyer of Norwich*, 392.

FRAUD

§ 7. Constructive Fraud

The evidence on motion for summary judgment failed to present an issue as to constructive fraud by defendant attorney in failing to give plaintiff certain advice. *Clodfelter v. Bates*, 107.

§ 12. Sufficiency of Evidence

In an action to recover damages for the collapse of a portion of a building which had been constructed over an underground corrugated metal drain pipe, representation by defendant that the pipe was concrete did not constitute actionable fraud since the evidence tended to show that the way in which the pipe was installed rather than the kind of pipe created the problem. *Feibus & Co., Inc. v. Construction Co.*, 133.

Evidence was sufficient for the jury in an action to recover for fraud by defendant which had been given the exclusive right to negotiate a permanent mortgage loan for plaintiff partners to construct a shopping center. *Johnson v. Insurance Co.*, 210.

Trial court erred in entering summary judgment for defendant in plaintiffs' action to recover damages for fraud and deception where there was a genuine issue of fact as to whether plaintiffs were entitled to rely on representations of defendant's agent with respect to the boundaries of a lot sold by defendant to plaintiffs. *Kleinfelter v. Developers, Inc.*, 561.

Evidence was insufficient for the jury in an action to recover for fraud in the sale of a mobile home. *Trust Co. v. Smith*, 685.

In an action to recover damages to plaintiff's house occurring because masonry veneer was not anchored with properly spaced metal ties as required by the city building code, plaintiff's evidence was insufficient to establish fraud by defendant builder. *Brickell v. Collins*, 707.

FRAUDULENT CONVEYANCES

§ 3.4. Sufficiency of Evidence

Evidence was sufficient to support the court's findings that deeds from defendant son and wife to defendant father and mother were voluntary, unsupported by consideration, and executed with fraudulent intent. *Distributing Corp. v. Schofield*, 521.

GUARANTY

§ 1. Generally

In an action to recover on an installment sales contract where defendants contended that they were not purchasers under the contract but merely guarantors, there was sufficient consideration to support their obligation under the contract

INCEST

§ 1. Generally

Evidence was sufficient for the jury where it tended to show that defendant had sexual intercourse with his stepchild. *S. v. Collins*, 27.

Statutory rape is not a lesser included offense of incest. *Ibid.*

INDICTMENT AND WARRANT

§ 17.2. Variance as to Time

There was no fatal variance between an indictment charging felonious breaking and entering and larceny on 13 March 1978 and evidence tending to show that defendant committed the crimes on 22 March 1978. *S. v. Oden*, 61.

INJUNCTIONS

§ 2. Inadequacy of Legal Remedy

Plaintiff landowners could not invoke the aid of a court of equity to enjoin a county from condemning their land for a public purpose. *Development Co. v. County of Wilson*, 469.

INSANE PERSONS

§ 1. Commitment to Hospitals

The proposed record on appeal from a civil commitment order should have been served on the special advocate who represented the State at the commitment hearing rather than on the Attorney General. *In re Rogers*, 713.

§ 3. Conclusiveness of Finding or Adjudication

Defendant could not collaterally attack a competency hearing and appointment of a general guardian for plaintiff upon motion for substitution of the general guardian as the plaintiff in an action against defendant. *Hearon v. Hearon*, 361.

INSURANCE

§ 2.2. Liability of Agent for Failure to Procure Insurance

Summary judgment was properly entered for defendant bank in an action to recover damages for the alleged failure of defendant to procure fire insurance on property purchased by plaintiff and financed by defendant. *Wells v. Bank*, 592.

§ 17. Life Insurance; Waiver of Prompt Payment of Premiums

The materials before the trial court on motion for summary judgment raised a material issue of fact as to whether defendant insurer waived or was estopped from asserting forfeiture of a life insurance policy for nonpayment of premiums. *Thompson v. Insurance Co.*, 668.

§ 18.1. Life Insurance; Misrepresentation as to Health

Trial court's instructions in an action on a credit life insurance policy in which defendant denied liability on the ground of misrepresentations by insured concerning medical treatment were not supported by the evidence. *Eubanks v. Insurance Co.*, 224.

Trial court erred in instructing the jury that a misrepresentation in an application for a credit life insurance policy will prevent recovery on the policy if it is "false and material." *Ibid.*

INSURANCE—Continued

§ 22. Life Insurance; Reinstatement After Forfeiture

An insured's application for reinstatement of a lapsed life insurance policy which contained his signed assurance that he was in good health and had not suffered any injuries or illnesses since the issuance of the policy constituted evidence of insurability which must be deemed satisfactory to defendant insurer as a matter of law in this case. *Thompson v. Insurance Co.*, 668.

§ 38.2. Admissibility of Evidence of Extent of Disability

In an action to recover under a disability insurance policy, trial court did not err in permitting plaintiff's medical witness to give his opinion that plaintiff was unable to engage in any occupation, business or profession during the time in question. *Hendrix v. Casualty Co.*, 464.

§ 44. Disability Insurance; Action to Recover Benefits

In an action to recover under a disability insurance policy, evidence of plaintiff's employment record was inadmissible. *Hendrix v. Casualty Co.*, 464.

§ 77. Automobile Theft Policies

In an action by plaintiff to recover as the loss payee in a policy of insurance issued by defendant insurance company to individual defendant to cover loss or damage to a boat purchased by individual defendant in which plaintiff held a security interest, a genuine issue of fact existed as to whether individual defendant gave notice to defendant insurer "as soon as practicable" as required by the insurance policy concerning the theft of the boat. *Trust Co. v. Insurance Co.*, 414.

§ 80. Liability Insurance Issued Pursuant to Financial Responsibility Statutes

Trial court properly affirmed the order of the Comr. of Motor Vehicles suspending plaintiffs' licenses under G.S. 209-279.13 for failure to pay a judgment. *Lupo v. Powell*, 35.

§ 100. Liability Insurance; Duty of Insurer to Defend

Trial court erred in dismissing plaintiff's complaint against defendant insurance company where the complaint alleged that plaintiff had a validly existing insurance contract with defendant, that plaintiff gave defendant notice of a pending claim for which defendant denied coverage, and that denial of coverage constituted a breach of defendant's contract. *Lupo v. Powell*, 35.

§ 116. Fire Insurance Rates; Approval by Commissioner of Insurance

Order of the Commissioner of Insurance disapproving an entire rate filing for homeowners insurance is vacated. *Comr. of Insurance v. Rate Bureau*, 75.

§ 127. Forfeiture; Provision Against Additional Insurance

There was no merit to plaintiffs' contention that the "other insurance" forfeiture provisions in an insurance policy covering their farm dwelling were void for ambiguity. *Burgess v. Insurance Co.*, 441.

§ 128. Waiver of Forfeitures

There was no merit to plaintiffs' argument that acceptance of premiums by defendant with knowledge of the existence of other insurance constituted a waiver of the "other insurance" forfeiture clause. *Burgess v. Insurance Co.*, 441.

INSURANCE—Continued

§ 149. Liability Insurance

The evidence failed to show as a matter of law that fire damage to an egg packing plant arose out of a "completed operations hazard" which was excluded from coverage in a contractor's liability policy issued by defendant insurer. *Woodard v. Insurance Co.*, 282.

JUDGMENTS

§ 30. Procedure to Attack Judgment

Plaintiffs improperly brought an independent action seeking to attack directly a judgment entered by the clerk of superior court wherein she ordered the foreclosure on plaintiffs' land to proceed. *Hassell v. Wilson*, 434.

§ 36. Estoppel; Parties Concluded

Plaintiff's action to recover in her individual capacity as beneficiary of a life insurance policy was not barred by her prior action on the policy brought as executrix of deceased insured's estate. *Thompson v. Insurance Co.*, 668.

LARCENY

§ 7.5. Sufficiency of Evidence of Aiding and Abetting

Trial court erred in denying defendants' motions for nonsuit where the evidence tended to show that defendants were present at the crime scene but there was no evidence to show participation, assistance or encouragement in the perpetration of the crimes. *S. v. Ross*, 323.

§ 7.8. Sufficiency of Evidence of Felonious Breaking or Entering and Larceny

Evidence that thieves took guns from a gun case and placed them in a box behind the case was sufficient to support a conviction of larceny. *S. v. Speller*, 59.

§ 7.13. Insufficiency of Evidence of Felonious Breaking or Entering and Larceny

Evidence was insufficient for the jury in a prosecution for breaking and entering an apartment and larceny therefrom where none of the evidence placed defendant in the apartment or with any property that was stolen therefrom. *S. v. Campbell*, 69.

LIMITATION OF ACTIONS

§ 4.2. Accrual of Negligence Action

Plaintiff's action alleging negligent construction of a drainage line and fill over which defendants built a warehouse for plaintiff was barred by the statute of limitations. *Feibus & Co., Inc. v. Construction Co.*, 133.

§ 8.1. Fraud as Exception to Operation of Limitation Laws

Plaintiffs' claims of fraud and unfair and deceptive trade practices against defendant, who was to negotiate a permanent mortgage loan for them to construct a shopping center, were not barred by the statute of limitations where plaintiffs only gradually became aware of the facts constituting fraud, and plaintiffs were not made aware of such facts by the time a bank terminated its construction loan commitment with plaintiffs. *Johnson v. Insurance Co.*, 210.

MASTER AND SERVANT—Continued

§ 108.1. Right to Unemployment Compensation; Effect of Misconduct

A truck driver's deliberate and unjustifiable refusal to make a trip which the employer had a right to ask of him constituted wilful misconduct which disqualified him from receiving unemployment insurance benefits. *In re Cantrell*, 718.

MORTGAGES AND DEEDS OF TRUST

§ 30. Foreclosure Sale; Upset Bids

Plaintiff's evidence was sufficient for the jury on the issue of the individual defendant's liability for the deficiency caused by default on an upset bid at a foreclosure sale. *Hotel Corp. v. Foreman's, Inc.*, 126.

§ 32. Foreclosure and Sale; Deficiency

Defendants who were makers of the promissory note in question but who did not pledge any collateral as security could not raise the one year statute of limitations under G.S. 1-54(6) as a bar to plaintiff's action for a deficiency. *Trust Co. v. Martin*, 261.

§ 40.1. Suit to Set Aside Foreclosure; Practice and Procedure

In an action to have an order of foreclosure entered by the clerk of court set aside where defendants counterclaimed for damages for wrongful occupancy of their property, trial court erred in determining that, because plaintiffs' action was dismissed, the foreclosure proceedings were in all respects confirmed and adjudicated lawful and proper, and the court's order directing the clerk to issue a writ of possession was unauthorized. *Hassell v. Wilson*, 434.

MUNICIPAL CORPORATIONS

§ 2. Territorial Extent and Annexation

A corporation is not denied equal protection because it has no right to vote in an annexation referendum. *Texfi Industries v. City of Fayetteville*, 268.

Notice by publication of a public hearing on annexation complies with due process. *Ibid.*

§ 2.1. Annexation; Compliance with Statutory Requirements

There was no merit to petitioners' contention that the trial court erred in concluding that respondent's ordinance and plan for annexation complied with the provisions of G.S. 160A-48, nor was there merit to their contention that the tests of G.S. 160A-48(c) must be applied to the entire tract sought to be annexed by respondent. *In re Annexation Ordinance*, 274.

The requirements of G.S. 160A-49(d) were basically complied with though a report of a proposed annexation was read without any explanation. *Ibid.*

§ 2.4. Remedies to Attack Annexation

A corporation had standing to assert that an annexation statute had been applied to it in an unconstitutional manner. *Texfi Industries v. City of Fayetteville*, 268.

§ 2.6. Extension of Utilities to Annexed Area

There was no merit to petitioners' contention that respondent failed to comply with provisions of G.S. 160A-47(3) pertaining to the extension of municipal services to the area to be annexed and the timetable for so doing. *In re Annexation Ordinance*, 274.

MUNICIPAL CORPORATIONS—Continued

§ 21. Liability of City for Injuries in Connection with Sewers

A municipality is not liable for damages resulting from negligence in the maintenance of its sewer system unless it has expressly waived its immunity. *Roach v. City of Lenoir*, 608.

§ 30.6. Zoning; Special Use Permits

There was substantial competent evidence in the record to support a decision by a board of adjustment to grant a special use permit for off-street parking on property in a residential zone. *Robinhood Trails Neighbors v. Board of Adjustment*, 539.

Two tax map lots were properly considered together as a single "lot" for the purpose of determining whether a third tax map lot met the requirements for a parking special use permit. *Ibid.*

§ 30.20. Procedure for Amendment of Zoning Ordinances

A county board of commissioners violated the procedural provisions of a county's zoning ordinance in rezoning a tract of land by amendment to the ordinance without giving notice to adjoining landholders required by the ordinance. *Lee v. Simpson*, 611.

NEGLIGENCE

§ 6. Res Ipsa Loquitur

Res ipsa loquitur was inapplicable in an action to recover damages sustained when a garbage truck owned by one defendant and leased by the other caught fire and burned. *Poindexter v. Sanco Corp.*, 694.

§ 6.1. Res Ipsa Loquitur; Application of Doctrine

Res ipsa loquitur was inapplicable in an action to recover for personal injuries sustained by plaintiff while using a rubber strap manufactured by one defendant. *Cockerham v. Ward*, 615.

§ 29.2 Sufficiency of Evidence of Negligence; Warnings

In an action to recover for injuries sustained by plaintiff while she was bouncing on a "moonwalk" at defendant's amusement park, trial court erred in entering summary judgment for defendant where there were genuine issues of fact as to failure to warn patrons of danger. *Buck v. Railroad*, 588.

§ 30. Nonsuit Generally

In an action to recover for damages to plaintiff's gasoline pump and building sustained when a garbage truck owned by one defendant and leased by the other caught fire and burned, trial court erred in granting summary judgment for defendants where there were genuine issues of fact as to the safety of the gas tank on the truck and as to defendant lessee's inspection and warning of the condition of the truck. *Poindexter v. Sanco Corp.*, 694.

§ 37. Instructions on Negligence Generally

Plaintiff was not prejudiced by the trial judge's instruction that if he had to define "negligence" in one word he would probably use the word "fault." *Billings v. Trucking Corp.*, 180.

NEGLIGENCE—Continued

§ 57.5. Sufficiency of Evidence in Actions by Invitees; Obstructed Floors

Evidence that plaintiff nurse tripped and fell over boxes which were obstructing a hallway in a nursing home was sufficient to raise a jury question as to negligence and contributory negligence. *Penland v. Rehabilitation Center*, 183.

§ 57.11. Insufficiency of Evidence in Actions by Invitees

Summary judgment was properly entered for defendant in an action to recover for injuries received by plaintiff when she slipped on a sheet of ice on defendant's parking lot. *Phillips v. Industries, Inc.*, 66.

PARTNERSHIP

§ 1.1. Formation of Partnership

Trial court's instructions on the law applicable to the formation of partnerships were inadequate. *Hardesty v. Ferrell*, 354.

§ 7. Actions by Partners Against Third Person

The statute giving limited partners the same rights as general partners to have "dissolution and winding up by decree of court" does not include bringing a lawsuit on behalf of the partners to recover damages to the limited partnership based on the negligence of defendants in overcertifying to a construction lender the amount of work performed on an apartment complex owned by the partnership. *Browning v. Levien & Co.*, 701.

In an action by limited partners in a partnership formed to build an apartment complex to recover damages based on negligence by defendant architectural firm in overcertifying to the construction lender the amount of work performed on the project by a contractor who defaulted, evidence of plaintiffs' investment in a limited partnership which did not require a performance bond from the contractor required submission of an issue of contributory negligence to the jury. *Ibid.*

Plaintiff limited partners had standing to bring an action against defendant architectural firm based on defendant's negligence in overcertifying to the construction lender the amount of work performed on an apartment project owned by the limited partnership, although there was no privity of contract between plaintiffs and defendant. *Ibid.*

Knowledge by the general partners of a limited partnership of defendant's overcertification to the construction lender of the amount of work completed on an apartment complex project owned by the partnership did not bar plaintiff limited partners from maintaining an action against defendant because of such overcertification. *Ibid.*

PHYSICIANS, SURGEONS AND ALLIED PROFESSIONS

§ 13. Limitations of Action for Malpractice

Plaintiff mother's suit for medical expenses and loss of services of her son based on defendant physician's alleged negligent failure to discover that plaintiff's son had a certain condition at birth was barred by the statute of limitations. *Flippin v. Jarrell*, 518.

§ 15. Malpractice; Competency and Relevancy of Evidence

Trial court in a medical malpractice action erred in excluding evidence of a conversation in which a surgeon expressed an opinion concerning the quality of care offered by defendant hospital. *Bost v. Riley*, 638.

QUASI CONTRACTS AND RESTITUTION

§ 1.2. Unjust Enrichment

The fact that plaintiff made improvements on defendants' property upon the good faith belief that a life estate in such property was promised him, and that such improvements inured to defendants' benefit, was sufficient to support recovery under the unjust enrichment doctrine. *Clontz v. Clontz*, 573.

RAILROADS

§ 5.8. Crossing Accidents; Sufficiency of Evidence of Contributory Negligence

Plaintiff motorcyclist was contributorily negligent as a matter of law in failing to see an unlighted boxcar at a grade crossing at night. *Hall v. Railroad Co.*, 295.

RAPE

§ 10. Carnal Knowledge of Female Under 12; Competency and Relevancy of Evidence

In a prosecution for first degree rape of a female child under the age of 12, trial court did not err in admitting into evidence photographs which depicted defendant and a young female person engaging in a variety of sexual activities, nor did the court err in permitting defendant to be cross-examined concerning the photographs. *S. v. Turgeon*, 547.

§ 12. Carnal Knowledge of Female Between 12 and 16 Generally

Statutory rape is not a lesser included offense of incest. *S. v. Collins*, 27.

RECEIVING STOLEN GOODS

§ 7. Verdict and Judgment

Judgment is arrested in a prosecution for felonious possession of stolen goods where the written verdict submitted to the jury was improper and where the jury's verdict of "guilty of possession of stolen property" failed to find defendant guilty of any crime. *S. v. Hicks*, 166.

ROBBERY

§ 3.2. Competency of Evidence; Physical Objects

In an armed robbery prosecution where the victim told investigating officers that defendant held a knife to her throat during commission of the crime, trial court did not err in admitting into evidence a knife taken from defendant's pocketbook without a warrant. *S. v. Horton*, 343.

§ 4.2. Sufficiency of Evidence of Common Law Robbery

Evidence that defendant took money from the prosecuting witness but did not leave her home with it was sufficient evidence of asportation for the jury to convict defendant of common law robbery. *S. v. Norwood*, 174.

RULES OF CIVIL PROCEDURE

§ 4. Process

Delivery of summons to a person who was the son of one defendant and brother of the other at defendants' place of business instead of their respective residences was not in compliance with G.S. 1A-1, Rule 4(j)(1). *Hall v. Lassiter*, 23.

RULES OF CIVIL PROCEDURE—Continued

Complaint and summons directed to defendant named as "Michigan Tool Company, a division of Ex-Cell-O Corporation" was not service on Ex-Cell-O Corporation even if the complaint and summons reached the hands of someone obligated to receive service in behalf of Ex-Cell-O. *Crawford v. Surety Co.*, 368.

§ 4.1. Service of Process by Publication

Trial court properly set aside default judgments against defendants and dismissed plaintiff's claim upon a finding of insufficient service of process where the evidence tended to show that plaintiff gave notice by publication without first exercising due diligence in ascertaining addresses for defendants. *Fountain v. Patrick*, 584.

§ 6. Time

Where the trial judge denied defendant's motion for summary judgment during term, the court could thereafter sign the order out of term and out of the district. *Feibus & Co., Inc. v. Construction Co.*, 133.

§ 8. General Rules of Pleading

In an action to recover compensatory and punitive damages for alienation of affections and criminal conversation where defendant refused to answer the allegations of plaintiff's complaint, claiming his constitutional privilege against self-incrimination, trial court erred in deeming the allegations as admitted. *Byrd v. Hodges*, 509.

§ 9. Pleading Special Matters

Plaintiff administrator's failure to make an affirmative averment in the complaint showing his capacity and authority to sue was cured by amendment at the close of the evidence. *Eubanks v. Insurance Co.*, 224.

§ 15. Amended Pleadings

Plaintiff whose complaint named defendant as "Michigan Tool Company, a Division of Ex-Cell-O Corporation," could not amend his complaint claiming that the words, "Michigan Tool Company, a Division of" were a misnomer or mere surplusage since the amendment would substitute a party defendant that had never been properly served. *Crawford v. Surety Co.*, 368.

§ 25. Substitution of Parties

Defendant could not collaterally attack a competency hearing and appointment of a general guardian for plaintiff upon motion for substitution of the general guardian as the plaintiff in an action against defendant. *Hearon v. Hearon*, 361.

§ 32. Use of Depositions in Court Proceedings

Plaintiff made a sufficient showing that a witness was unavailable to testify to permit the introduction of the witness's deposition. *Hotel Corp. v. Foreman's, Inc.*, 126.

§ 41. Dismissal of Actions

Where plaintiff suffered an injury on 24 July 1974 and commenced action by filing complaint on 23 June 1977, but defendants were not properly served with summons, the action was discontinued before plaintiff voluntarily attempted to dismiss the action, and the action was barred by the statute of limitations before plaintiff instituted the new action on 1 August 1978. *Hall v. Lassiter*, 23.

RULES OF CIVIL PROCEDURE—Continued

§ 42. Separate Trials

Defendants were not prejudiced by the trial court's granting of plaintiff's motion for separate trials in an action by plaintiff to recover the amount owed on a note which defendants executed for the purchase of a mobile home where defendants brought a third party action against the seller of the mobile home. *Trust Co. v. Smith,* 685.

§ 56.3. Summary Judgment; Necessity for and Sufficiency of Moving Party's Supporting Material

Trial court did not err in allowing supplemental affidavits filed four days before hearing on a summary judgment motion to be considered on the day of the hearing, but the trial court erred in considering a portion of an affidavit which was not supported by sworn or certified copies of papers to which the affidavit referred. *Trust Co. v. Insurance Co.,* 414.

§ 60.2. Grounds for Relief from Judgment

Trial court did not err in setting aside judgment for defendant on the ground of "surprise" pursuant to Rule 60(b)(1) where plaintiff's attorney was tardy in arriving in court because of an appearance in another court. *Endsley v. Supply Corp.,* 308.

SALES

§ 6.3. Limitations of Implied Warranty

In an action to recover damages for the collapse of a portion of a building which had been constructed over an underground drainage pipe, plaintiff's cause of action based upon a breach of implied warranty of fitness of the building was barred by the statute of limitations. *Feibus & Co., Inc. v. Construction Co.,* 133.

§ 22. Manufacturer's Liability for Defective Goods or Materials

A manufacturer is not strictly liable for injuries resulting from a defect in product design. *Smith v. Fiber Controls Corp.,* 422.

Trial court did not err in instructing the jury that a product may be improperly and materially altered or improperly maintained by the purchaser so as to relieve the manufacturer of liability for an injury resulting from such improper alteration or maintenance. *Ibid.*

Evidence was insufficient to justify a trial on the issue of manufacturer negligence in an action for personal injuries sustained by plaintiff while using a rubber strap manufactured by defendant. *Cockerham v. Ward,* 615.

§ 22.1. Seller's Liability for Defective Goods or Materials

Summary judgment was properly entered for defendant seller of a rubber strap which allegedly broke and caused injury to plaintiff, since a vendor is not required to inspect goods for latent defects and since plaintiff failed to produce at least some evidence as to whether the strap was defective and such defect could have been discovered by defendant vendor upon reasonable inspection. *Cockerham v. Ward,* 615.

§ 22.2. Action for Personal Injuries; Sufficiency of Evidence of Defective Goods

Summary judgment was properly entered for defendant in plaintiff's action to recover for damages to its bulldozer allegedly caused by defendant's defective

SALES — Continued

design, construction and installation of a fire suppressant system on the bulldozer. *City of Thomasville v. Lease-Afex, Inc.*, 506.

SCHOOLS

§ 13.1. Re-election of Teachers

A school board could be found to have acted arbitrarily and capriciously in failing to rehire plaintiff, a probationary teacher who would have become a career teacher upon renewal of his contract, solely because plaintiff refused to sign a letter of conditional employment which would have had no practical effect. *Hasty v. Bellamy*, 15.

SEARCHES AND SEIZURES

§ 8. Search and Seizure Incident to Warrantless Arrest

An officer's warrantless search of a purse worn by defendant at her waist was lawful as an incident of defendant's arrest for possession of cocaine, although the officer had not formally placed defendant under arrest for possession of cocaine before announcing his intention to search. *S. v. Booker*, 492.

§ 10. Search and Seizure on Probable Cause

There was no merit to defendant's contention that he was entitled to suppression of drugs seized at the time of his warrantless arrest. *S. v. Collins*, 141.

§ 11. Warrantless Search and Seizure of Vehicles

The automobile search exception did not apply to justify the warrantless search of a suitcase removed from defendants' car subsequent to their arrest when both the car and suitcase were under police control. *S. v. Gauldin*, 19.

§ 13. Search and Seizure by Consent

Trial court did not err in denying defendant's motion to suppress a briefcase which defendant had entrusted to a friend for safekeeping where it found that upon request of law enforcement officers the friend delivered the briefcase to them. *S. v. Turgeon*, 547.

§ 24. Application for Warrant; Sufficiency of Evidence of Probable Cause

An officer's affidavit was sufficient to support a finding of probable cause for issuance of a warrant to search defendant's residence for controlled substances. *S. v. King*, 31.

§ 33. Items in Plain View

In a prosecution of defendant for placing poisonous foodstuffs in a public place and thereby causing injury or death to a neighbor's dogs, trial court properly admitted into evidence a pie pan and its contents taken from defendant's patio without a warrant. *S. v. Trimble*, 659.

§ 34. Plain View

The search of a suitcase removed from defendants' car was not justified under the plain view or "plain smell" exception because an officer, while standing outside the car, was able to detect a strong odor of marijuana emanating from the rear portion of the car where the suitcase was located. *S. v. Gauldin*, 19.

SEARCHES AND SEIZURES—Continued

§ 36. Search of Clothing and Personal Effects Incident to Arrest

In an armed robbery prosecution where the victim told investigating officers that defendant held a knife to her throat during commission of the crime, trial court did not err in admitting into evidence a knife taken from defendant's pocketbook without a warrant. *S. v. Horton*, 343.

§ 47. Hearing on Motion to Suppress; Admissibility of Evidence

Under G.S. 15A-978(c) the court should have considered defendant's evidence offered to show the nonexistence of a confidential informant, and failure to do so at the suppression hearing was prejudicial error. *S. v. Collins*, 141.

SOCIAL SECURITY AND PUBLIC WELFARE

§ 2. Recovery of Amount Paid to Recipient

Mortgage payments required to be made by defendant father constituted child support, and where plaintiff mother received public assistance under the AFDC program, the mortgage payments were assigned to the State both by operation of law and by her written assignment. *Cox v. Cox*, 339.

STATE

§ 12. State Employees

Where the State Personnel Commission determined that petitioner was wrongfully discharged from his employment, the Commission erred in failing to order reimbursement for the employee's net pecuniary loss from the date of his dismissal to the date of reinstatement, and in failing to restore to petitioner all benefits of employment as if he had never been dismissed. *Jones v. Dept. of Human Resources*, 116.

TAXATION

§ 41. Foreclosure of Tax Lien Under G.S. 105-414

Trial court properly entered judgment on the pleadings for plaintiff town in an action to obtain and foreclose a tax lien against defendants' property. *Town of Bladenboro v. McKeithan*, 459.

TRESPASS

§ 8.2. Damages for Injuries to Property Attached to or Forming Part of Realty

In an action to recover for the wrongful cutting of timber, there was no merit to plaintiffs' contention that the court erred in instructing the jury to determine the amount of damages and then double it to arrive at their verdict rather than instructing the jury to find the amount of damages and then double it himself. *Pridgen v. Callaway*, 163.

TRIAL

§ 12. Rights of Parties

Defendant who elected to represent himself could not complain on appeal that the trial court erred in allowing him to elect to go to trial without the assistance of counsel. *Young v. Wood*, 376.

TROVER AND CONVERSION

§ 2. Nature and Essentials of Action for Possession of Personalty

Summary judgment was improperly entered for defendant in an action to recover for the wrongful conversion of personalty by defendant during the repossessing of plaintiff's mobile home in which defendant had a security interest since there was a genuine issue of fact as to whether plaintiff abandoned her personal property. *Kitchen v. Trust Co.*, 332.

TRUSTS

§ 5. Trusts for Private Beneficiaries; Construction and Operation

Where the settlor of an inter vivos trust retains extensive powers over the trust assets, those assets should be considered part of the settlor's estate for the purpose of determining the right of his wife to dissent to his will and of computing the share of his estate to which his wife is entitled pursuant to her dissent. *Moore v. Jones*, 578.

§ 10.2. Distribution of Corpus

A will did not create a gift by implication of the trust corpus to the great nieces and great nephews of testator or to their estates, but the corpus passed by intestate succession to testator's heirs at law at the time of his death with possession postponed until termination of the trust, and upon the death of a great niece or great nephew, the income share of such beneficiary should be paid to the beneficiary's estate until the trust terminates. *Wing v. Trust Co.*, 402.

§ 13. Creation of Resulting Trusts

Summary judgment was properly entered for defendants in plaintiff's action for breach of contract to reconvey property to him. *Clodfelter v. Bates*, 107.

§ 14.2. Creation of Constructive Trusts; Transactions Involving an Acquisition by Breach of Confidence

Where a church deacon promises to a church member who is elderly, illiterate and in poor health a loan to allow her to purchase property she lost through foreclosure, the church member is entitled to have a constructive trust impressed upon the land if the deacon purchases it for himself rather than abiding by his promise to make the loan. *Lowe v. Murchison*, 488.

UNFAIR COMPETITION

§ 1. Unfair Trade Practices in General

Defendant who was engaged in the commerce of selling its services as a loan finder for plaintiffs' permanent loan was regulated by G.S. Chapter 75 prohibiting unfair and deceptive trade practices. *Johnson v. Insurance Co.*, 210.

Where there was no evidence of willful deception or bad faith, the existence of defects in a mobile home sold by third party defendant to defendants and third party defendant's failure to perform stated services with respect to the mobile home did not constitute unfair and deceptive trade practices. *Trust Co. v. Smith*, 685.

UNIFORM COMMERCIAL CODE

§ 3. Application

A disputed claim for compensation for employment is extinguished when the debtor employer tenders to the creditor employee a check marked "account in full" and the creditor deposits the check after striking these words from the check and notifying the debtor that he is reserving his right to contend for the balance of the claim. *Brown v. Coastal Truckways*, 454.

§ 8. Sales Contract; Statute of Frauds

Trial court did not err in failing to instruct on the statute of frauds where defendant waived the statute by failing to plead it and where the exhibits at trial showed a written contract had been entered. *Danjee, Inc. v. Addressograph Multigraph Corp.*, 626.

§ 12. Implied Warranties; Merchantability

In an action to recover the purchase price of a tractor where plaintiffs alleged the tractor was sold to satisfy a lien which existed at the time of the sale, summary judgment was improperly granted for plaintiffs where they neither alleged nor offered evidence to show that they had no knowledge of the existence of the lien. *Smith v. Taylor*, 363.

§ 13. Implied Warranty of Merchantability; Particular Cases

Summary judgment was properly entered for defendant vendor on plaintiff's claim of breach of implied warranty of merchantability of a rubber strap since plaintiff presented no evidence tending to show a defective condition aside from the fact that the strap broke. *Cockerham v. Ward*, 615.

§ 28. Commercial Paper; Definitions; Execution

Trial court erred in entering summary judgment for plaintiff in an action to recover on a guaranty executed by defendant where defendant alleged and offered evidence of nondelivery of the instrument. *Trust Co. v. Creasy*, 289.

§ 31. Rights of Holder in Due Course

In an action to recover on a guaranty executed by defendant where defendant raised an issue of nondelivery, evidence was insufficient to show that plaintiff was a holder in due course of the guaranty as a matter of law. *Trust Co. v. Creasy*, 289.

§ 34. Commercial Paper; Acceptance and Endorsement

Defendant bank's issuance of its cashier's check in payment of a check to plaintiff drawn on an account of defendant's depositor constituted a final acceptance and an engagement by the bank to honor the cashier's check as presented without any right by the bank to countermand the check. *Lowe's v. Trust Co.*, 365.

§ 46. Default and Enforcement of Security Interest; Public Sale of Collateral

A lender conducted a valid public sale of a repossessed automobile pursuant to a purchase money security agreement where no third person bid at the sale and the lender, pursuant to a guaranty and repurchase agreement with defendant automobile dealer, treated defendant dealer as having placed a bid in the amount due under the debtor's contract and transferred title to the automobile to defendant dealer for such amount. *Shields v. Bobby Murray Chevrolet*, 427.

VENDOR AND PURCHASER

§ 6. Responsibility for Condition of Premises; Failure to Disclose Material Facts

In an action to recover damages to plaintiff's house occurring because masonry veneer was not anchored with properly spaced metal ties as required by the city building code, plaintiff's evidence was insufficient to establish fraud by defendant builder. *Brickell v. Collins*, 707.

§ 6.1. Liability of Vendor of New Structure

Defendant who sold a newly completed house and lot to plaintiff impliedly warranted to her that, at the time of passing the deed, the dwelling together with all the fixtures was substantially free from major structural defects and was constructed in a workmanlike manner. *Brickell v. Collins*, 707.

VENUE

§ 7. Motions to Remove as Matter of Right

Where defendant's compulsory counterclaim was the only claim left to be adjudicated, defendant was not entitled to a change of venue as a matter of right from the county of plaintiff's residence to the county of defendant's residence. *Manufacturing Co. v. Manufacturing Co.*, 347.

WATERS AND WATERCOURSES

§ 1. Surface Waters; Drainage and Interference with Natural Flow

Trial court in a highway condemnation action properly instructed the jury that the "reasonable use" rule governed the rights and liabilities of the parties with respect to changes in drainage of surface waters resulting from plaintiff's construction of a highway project. *Board of Transportation v. Warehouse Corp.*, 81.

§ 7. Marsh and Tidelands

The Marine Fisheries Commission acted arbitrarily and capriciously in denying a permit to dredge or fill in estuarine waters for the purpose of constructing a public boat ramp on the ground that the project would have an adverse effect on a riparian owner. *In re Community Association*, 554.

WILLS

§ 48. Whether Adopted Children Take as Members of Class

The adopted children of testatrix' nephew were included with those normally taking as descendants under the will since there was no expression of an intent to exclude adopted children within the terms of the will. *Trust Co. v. Chambless*, 95.

§ 61. Dissent of Spouse and Effect Thereof

Where the settlor of an inter vivos trust retains extensive powers over the trust assets, those assets should be considered part of the settlor's estate for the purpose of determining the right of his wife to dissent to his will and of computing the share of his estate to which his wife is entitled pursuant to her dissent. *Moore v. James*, 578.

WITNESSES

§ 6.1. Evidence Competent to Impeach Witness; Inconsistent or Contradictory Statements

Because statements which a surgeon allegedly made to intestate's father concerning the quality of care offered at defendant hospital were pertinent and material to whether all or any of defendant physicians were negligent, plaintiff was not required to afford a surgeon an opportunity to deny or explain the statements prior to impeaching him through the testimony of another witness. *Cockerham v. Ward*, 615; *Bost v. Riley*, 638.

WORD AND PHRASE INDEX

Printed By
COMMERCIAL PRINTING COMPANY, INC.
Raleigh, North Carolina