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A Survey of Decisions under the New North Carolina Rules of Civil Procedure

Martin B. Louis

A SURVEY OF DECISIONS UNDER THE NEW NORTH CAROLINA RULES OF CIVIL PROCEDURE

MARTIN B. LOUIS†

On January 1, 1970, the new North Carolina Rules of Civil Procedure[1] became effective as to all pending and new actions.[2] Since then they have been applied in a substantial number of appellate decisions, enough certainly to venture a tentative assessment of their impact on local practice and of their reception by the judiciary, which was not involved in their promulgation.[3] Two generalizations seem possible. First, despite understandable resistance initially by many members of the bar to the new rules and the wholesale relearning process they necessitated, many attorneys have unhesitatingly seized upon the many advantages the new procedures offer. For example, a large number of appellate decisions deal with the new motions for summary judgment, directed verdict, and judgment notwithstanding the verdict. Secondly, it can be said that the appellate courts, with only one notable exception,[4] have given the new rules a sympathetic reception and have endeavored to interpret them consistently with the Federal Rules of Civil Procedure from which they were in substantial part derived. This example of judicial statesmenship is in rather sharp contrast to the hostile reception other courts have sometimes given such reforms.

Surveying so large a body of precedent here imposes an obvious Hobson's choice between depth of analysis and comprehensiveness. Fortunately two factors have reduced the magnitude of the dilemma. Most of the decisions and the rules announced in their support are obviously correct and are readily discoverable in the annotations to the new rules.

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†Associate Professor of Law, University of North Carolina School of Law. This article was prepared in cooperation with the North Carolina Law Center.

[1]N.C.R. CIV. P. 1-84, N.C. GEN. STAT. § 1A-1 (1969). Reference throughout this article will be to the North Carolina rules unless otherwise indicated.

[2]The rules were made applicable "to actions and proceedings pending on that date as well as to actions and proceedings commenced on and after that date." Ch. 803, § 1, [1969] N.C. Sess. L. 842, *amending* ch. 954, § 10, [1967] N.C. Sess. L. 1354; Sutton v. Duke, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970).

[3]The North Carolina rules were enacted directly by the General Assembly of North Carolina, whereas the Federal Rules of Civil Procedure, and most similar state rules, were promulgated by the courts pursuant to enabling legislation.

[4]Cutts v. Casey, 278 N.C. 390, 180 S.E.2d 297 (1971). This decision is discussed in text accompanying notes 114-59 *infra*.

Furthermore, most of the significant decisions have involved those aspects of the new practice in which the most important and far-reaching changes have occurred. Consequently this survey is restricted to an analysis in depth of these decisions and the areas of the new practice they affect.

PLEADING

In *Sutton v. Duke*,[5] defendants' workmen negligently permitted a pony to escape confinement. It wandered onto nearby premises and apparently incited four mules[6] confined there to break out of their enclosure. One of the mules wandered onto a road and was struck by a car driven by plaintiff, who subsequently sued those responsible for the pony. Defendants demurred to the plaintiff's complaint on the ground that their acts and omissions, if they constituted negligence, were not the proximate cause of plaintiff's injuries. The demurrer was sustained and the action dismissed. Plaintiff appealed to the court of appeals, which reversed.[7] The North Carolina Supreme Court then granted certiorari and affirmed.

The opinion by Justice Sharp was grounded on the assumption that plaintiff could have established proximate cause easily if his car had struck the pony.[8] In the actual situation, however, it was necessary to show that the mule's escape was a reasonably foreseeable consequence of defendants' negligence in permitting the pony to escape.[9] Although plaintiff did not allege such reasonable foreseeability, he apparently said nothing suggesting that he could not.[10] The question presented then was whether his conclusory allegation of proximate cause[11] was a sufficient statement to withstand a demurrer. This question was never reached by the supreme court, however, because the new North Carolina Rules of Civil Procedure, which abolished demurrers,[12] had taken effect and retroactively governed the case.[13] Consequently, the court chose to treat

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[5]277 N.C. 94, 176 S.E.2d 161 (1970).

[6]For those unfamiliar with animal husbandry, it should be noted that a mule is the miscegenous progeny of a male ass and a mare and apparently possesses some sexual attraction for its progenitors. The opinion, however, did not note the sex of the pony.

[7]Sutton v. Duke, 7 N.C. App. 100, 171 S.E.2d 343 (1969).

[8]277 N.C. at 106-07, 176 S.E.2d at 168.

[9]*Id.* at 107, 176 S.E.2d at 168-69.

[10]7 N.C. App. at 102, 171 S.E.2d at 345.

[11]*Id.*

[12]N.C.R. Civ. P. 7(c).

[13]277 N.C. at 98, 176 S.E.2d at 163. *See* note 2 and accompanying text *supra*.

the appeal as if an equivalent motion to dismiss for failure to state a claim for relief under rule 12(b)(6) had challenged the complaint.[14] This conclusion compelled an examination of the rules' new pleading standards,[15] which require, as the court recognized, less specificity of allegation and factual detail than the now repealed North Carolina Code. After a lengthy examination, the court held that these new standards required only that the complaint identify the claim sufficiently to distinguish it from all others and give defendant notice adequate to prepare his defense.[16] Since plaintiff's complaint obviously did this and otherwise showed on its face no insurmountable bar to recovery, it stated a claim for relief. Further disclosure and evaluation of the claim's factual basis was reserved for discovery and summary judgment.

These conclusions recognize in the new rules a fundamental alteration in the allocation of pretrial functions. The function of factual disclosure is now assigned primarily to the discovery process, with an attendant decrease in reliance on the pleadings. And the function of intercepting claims and defenses insufficient *as a matter of fact* is now assigned primarily[17] to the motion for summary judgment. The motion to dismiss, which replaces the demurrer, and the motions to strike and for judgment on the pleadings retain their traditional function of interpreting claims and defenses insufficient *as a matter of law*.[18] These devices were also employed under the Code, which did not make summary judgment available, to challenge pleadings that omitted essential allegations *of fact*. Indirectly, these challenges were attempts to intercept claims insufficient *as a matter of fact* because, in effect, it was assumed that a party could not prove those ultimate facts he did not allege and would not allege under oath those he knew he could not prove. Both assumptions were obviously often incorrect. More importantly, the resulting search for the "well rounded" pleading often wasted considerable time and effort, occasionally deprived litigants apparently possessing meritorious claims or defenses of their day in court,[19] and

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[14] *Id.*

[15] N.C.R. Civ. P. 8(a)(1).

[16] 277 N.C. at 102, 104, 109, 176 S.E.2d at 165, 167, 170.

[17] The motion to dismiss may still be used when a complaint discloses on its face an unconditional affirmative defense or facts fatally inconsistent with an otherwise well-pleaded element of the claim. *Id.* at 102, 176 S.E.2d at 166.

[18] *Id.* at 106, 176 S.E.2d at 168. The court analogized the proper use of the motion to dismiss to the use of a Code demurrer against a complaint that disclosed "a defective cause of action," as opposed to "a defective statement of a good cause of action." *Id.*

[19] *E.g.*, Webb v. Eggleston, 228 N.C. 574, 46 S.E.2d 700 (1948) (amendment to plaintiff's

created, mostly for defendants, a formidable weapon for harassment and delay.

The new rules, by assigning this function to the motion for summary judgment, should eliminate this involved, frequently unproductive hassle over what is a "defective statement." Thus the defendant in the *Sutton* case may ascertain through discovery whether plaintiff has sufficient evidence to reach a jury on the question of reasonable foreseeability and, if not, may move successfully for summary judgment.[20] Meanwhile, plaintiff can get through the courthouse door long enough to discover what information is available. Useless debates over the differences among conclusions of law, ultimate facts, and evidentiary facts are eliminated.[21] And claims are now dismissed only when their factual insufficiency is demonstrated rather than assumed.

Viewed in this light, the court's decision in *Sutton* was undeniably correct. A contrary result would have compelled plaintiff to amend and allege reasonable foreseeability in conclusory terms or in terms of facts that could establish it. The latter would have required an abundance of factual detail the disclosure of which was best left to discovery.[22] Indeed, it might have been most unfair under the circumstances to require plaintiff to ascertain and state these facts before he could initiate discovery.

Unfortunately the opinion, despite its wealth of citations and quotations, leaves a number of important questions unanswered. Thus it carefully notes that the new pleading standard, though obviously less demanding of pleading specificity than the Code provision it replaces, was obviously intended to be more demanding than the federal standard, from which it departs in significant ways.[23] Such greater specificity cannot be enforced by the motion to dismiss, however, because the court effectively adopted the federal limitations upon its use.[24] How then will the court effectuate this legislative purpose? (Actually it was the purpose of some members of the North Carolina General Statutes Commis-

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defectively stated complaint not permitted to relate back, even though it clearly amplified and explained the original claim arising out of a fatal rear end auto collision).

[20]277 N.C. at 109, 176 S.E.2d at 170.

[21]*Id.* at 101, 104, 176 S.E.2d at 165, 166.

[22]*Id.* at 108-09, 176 S.E.2d at 169-70.

[23]*Id.* at 100-01, 176 S.E.2d at 163.

[24]*Id.* at 105-06, 176 S.E.2d at 168. The court quoted the familiar statement of the United States Supreme Court in Conley v. Gibson, 355 U.S. 41, 45-46 (1957), that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 277 N.C. at 102, 176 S.E.2d at 165-66; *see* notes 17, 18 *supra*.

sion,[25] the sponsor of the new rules, who were opposed on general principles to "notice" pleading, a concept the court ironically embraces in its opinion.[26]) The opinion does not specifically say.[27] The only way is through the motion for a more definite statement under rule 12(e). But the identical Federal Rules of Civil Procedure 12(e), which has occasionally been used like a watered-down special demurrer,[28] was amended in 1946 to eliminate all reference therein to bills of particulars and preparation for trial on the theory that these functions were better served by discovery.[29] Thus, to use North Carolina rule 12(e) regularly in this way virtually requires the reinsertion by judicial construction of words specifically removed more than two decades ago.[30] Furthermore, such a regular use would otherwise be most unfortunate. Although the motion lacks the same potential for mischief[31] as the "special" demurrer,[32] it can serve almost as well as a tactical tool for delay and harassment. It should be employed, therefore, only when complaints are unusually vague or ambiguous. Admittedly this would hardly increase pleading specificity or do much to effectuate the attendant legislative purpose. But the fact is that more specificity would serve no significant purpose not already better served by discovery and summary judgment. This dilemma illustrates the mischief inherent in the piecemeal amendment of an integrated statutory scheme through legislative compromise.

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[25]277 N.C. at 100, 176 S.E.2d at 164.

[26]*Id.*

[27]The opinion does note the availability of the motion for a more definite statement under rule 12(e), but does not state whether it should be available in circumstances going beyond the limited federal uses of the motion. *Id.* at 106, 176 S.E.2d at 168.

[28]*E.g.*, Lodge 743, Int'l Ass'n of Machinists v. United Aircraft Corp., 30 F.R.D. 142 (D. Conn. 1962); Bush v. Skidis, 8 F.R.D. 561 (E.D. Mo. 1948).

[29]Comment, *Federal Civil Procedure—Federal Rule 12(e): Motion for More Definite Statement—History, Operation and Efficacy*, 61 MICH. L. REV. 1126 (1963).

[30]N.C.R. CIV. P. 12(e) requires that the pleading be "so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading." A party answering a complaint short on factual detail ordinarily faces no such problem, since he need not respond to that which has not been alleged. *See* Kuenzell v. United States, 20 F.R.D. 96 (N.D. Cal. 1957).

[31]When a demurrer or motion to dismiss is sustained, leave to amend must be obtained and often the amendment must relate back. These two hurdles may, if not surmounted, result in a bar to the claim on the merits. No such problem arises in the grant of a motion for a more definite statement if the plaintiff is able to conform his complaint to the order granting the motion. If he cannot, his action could be dismissed with prejudice under N.C.R. CIV. P. 41(b).

[32]Under the North Carolina Code, all demurrers were "special" in that they required the movant to specify the alleged defect in the pleading attacked. Under the common law, however, only demurrers attacking the sufficiency of the statement, as opposed to the sufficiency of the cause of action, were so denominated and regulated. J. KOFFLER & A. REPPY, COMMON LAW PLEADING § 198 (1969).

Perhaps it also provides some excuse for a judicial resolution that gives the compromise something less than the full measure of respect to which it might otherwise be entitled.

A final problem, wisely left for future cases, is the question of how defectively stated or ambiguous a pleading must be before it will fall below the court's generous minimum standards. All concede, for example, that a complaint alleging only an unspecified wrong does not state a claim for relief.[33] Suppose, however, that a complaint identifies the source of the plaintiff's discontent but fails to allege enough facts to identify sufficiently some applicable theory of law supporting recovery,[34] or that a complaint falls short of the official forms set forth in the rules.[35] Even the federal courts have not yet resolved these questions. The most frequently encountered deficiency is the "missing essential allegation"—that is, the total omission from a complaint of one or more of the essential elements of the claim or defense asserted. The New York pleading rule,[36] from which the North Carolina text was undoubtedly borrowed,[37] requires a pleading additionally to set forth "the material elements of each cause of action or defense," words the North Carolina rulemakers wisely omitted. Does it follow that such omissions in a North Carolina complaint are not fatal? An affirmative reply seems required, at least where the omitted elements are not at the heart of the claim and their existence is likely and can be inferred from the events alleged in the complaint. This approach is generally followed by the federal courts.[38] But suppose the complaint omits a crucial essential

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[33]277 N.C. at 105, 176 S.E.2d at 167; 2A J. MOORE, FEDERAL PRACTICE ¶ 8.13, at 1705 & n.24 (2d ed. 1962, Supp. 1971) [hereinafter cited as MOORE].

[34]*E.g.*, Hoard v. Gilbert, 205 Wis. 557, 238 N.W. 371 (1931) (complaint seeking recovery of expenses incurred in supporting defendant's child failed to allege facts to bring it within any of the accepted rules allowing such a recovery).

[35]N.C.R. CIV. P. 84 provides that the illustrative forms are "sufficient" under the rules. Although the converse may be true of a compalint that falls below them, does it follow that a motion to dismiss, as opposed to a motion for a more definite statement, should be granted? For example, what motion is proper if a negligence complaint fails to specify, as rules 84(3) and (4) require, the acts or omissions that constitute the negligent acts? Such a complaint still meets the minimum "notice" standard set forth in *Sutton v. Duke*, and, therefore, perhaps a motion for a more definite statement should be granted. Note, *Civil Procedure—Specificity in Pleading under North Carolina Rule 8(a)(1)*, 48 N.C.L. REV. 636, 646 (1970).

[36]N.Y. CIV. PRAC. LAW § 3013 (McKinney 1963).

[37]277 N.C. at 100, 176 S.E.2d at 164.

[38]*E.g.*, Garcia v. Hilton Hotels Int'l, Inc., 97 F. Supp. 5 (D.P.R. 1951). For an excellent discussion of the federal approach here, see 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1216 (1969) [hereinafter cited as WRIGHT & MILLER].

element the existence of which is unclear or doubtful and cannot be inferred from other allegations in the complaint. Some courts and commentators believe a motion to dismiss should be granted here, provided that leave to amend is freely given.[39] Others, fearing perhaps the judicial enlargement of this narrow exception followed by a discretionary, almost irreversible denial of leave to amend, would grant only a motion for a more definite statement.[40] The fact that this motion, unlike the motion to dismiss under rule 12(b)(6), is waived if not made at the first opportunity favors its use in this situation because the waiver goes only to the adequacy of the pleading. The missing essential allegation must still be proved, and the pleader's ability to do so may still be challenged by a motion for summary judgment.

The real importance of *Sutton v. Duke* may lie in its general tone rather than in its specific holding. It was the first important case to construe the new rules. Consequently, its generous consideration of their novel approach to pleading and the pretrial system seems to advise all North Carolina judges to give these changes and any others a sympathetic respect.

II. SUMMARY JUDGMENT

In General

Although summary judgment is a procedure new to North Carolina,[41] it is already in wide use and clearly meets a felt need. Conceived originally as a device to identify deadbeat debtors who preferred to defend rather than to default,[42] it has proved to be equally efficient in dispatching before trial plaintiffs who lack sufficient evidence to reach a jury. The mechanics of the procedure are not involved and have presented few problems.[43] The real problem is to recognize and articulate

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[39]F. JAMES, CIVIL PROCEDURE § 2.11 (1965).

[40]Garcia v. Hilton Hotels Int'l, Inc., 97 F. Supp. 5 (D.P.R. 1951); *see* additional cases cited in 5 WRIGHT & MILLER § 1216 n.85. The Supreme Court of North Carolina has held that under the Code a motion for more definite statement was sometimes appropriate where a complaint omitted essential allegations. Gaskins v. Hartford Fire Ins. Co., 260 N.C. 122, 131 S.E.2d 872 (1963).

[41]Patterson v. Reid, 10 N.C. App. 22, 178 S.E.2d 1 (1970). A form of summary proceedings was formerly employed in North Carolina where the plaintiff's complaint disclosed on its face the defense of the statute of limitations. *E.g.*, City of Reidsville v. Burton, 269 N.C. 206, 152 S.E.2d 147 (1967); Little v. Stevens, 267 N.C. 328, 148 S.E.2d 201 (1966).

[42]Prigden v. Hughes, 9 N.C. App. 635, 177 S.E.2d 425 (1970); C. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING § 88 (2d ed. 1947).

[43]The denial of a motion for summary judgment is not appealable immediately as the denial

the circumstances under which the grant of the motion is appropriate. Rule 56(c) provides that summary judgment shall be rendered when the papers offered in support of and in opposition to the motion "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." The North Carolina Supreme Court has defined the principal terms as follows:

> An issue is material if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action. The issue is denominated "genuine" if it may be maintained by substantial evidence.[44]

These definitions are not significantly inaccurate. I should prefer, however, to define "material fact" as a fact that constitutes or irrevocably establishes any material element of a claim or defense. And the term "substantial evidence,"[45] which is more applicable to administrative than to judicial fact findings, is too general to provide significant guidance in the myriad situations to which summary judgment may be applicable. Unfortunately, the decisions are seldom more helpful because too often there is an unarticulated leap between the principles stated and the conclusion reached. Consequently, rather than presenting here a detailed analysis of a select decision or group of decisions, the discussion will attempt to identify systematically the ways in which the problem of summary judgment may appear and to suggest approaches for dealing with each. In the process those decisions that illustrate the various situations or grapple with the suggested approaches shall be cited.

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of a substantial right, but certiorari is available. Motyka v. Nappier, 9 N.C. App. 579, 176 S.E.2d 858 (1970). Several cases have held that the requirement of rule 56(c) that "[t]he motion shall be served at least 10 days before the time fixed for the hearing" is mandatory and cannot be waived, thus barring a spontaneous hearing by consent at the pretial conference. Britt v. Allen, 12 N.C. App. 399, 183 S.E.2d 303 (1971); Ketner v. Rouzer, 11 N.C. App. 483, 182 S.E.2d 21 (1971). By contrast, federal cases have held that if the opposing party fails to object, the error is harmless and waived. Fender v. General Elec. Co., 380 F.2d 150 (4th Cir. 1967); Oppenheimer v. Morton Hotel Corp., 324 F.2d 766 (6th Cir. 1963); Feng Yeat Chow v. Shaughnessy, 151 F. Supp. 23, 25 (S.D.N.Y. 1957). The federal approach seems to be the better one if the opposing party indicates he has available all his evidence and has no need of the ten days to gather more.

[44]Koontz v. City of Winston-Salem, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972). *See also* Singleton v. Stewart, 280 N.C. 460, 186 S.E.2d 400 (1972); Kessing v. National Mortgage Corp., 278 N.C. 523, 180 S.E.2d 823 (1971).

[45]The use of this term in setting standards for directed verdict has been criticized. Boeing Co. v. Shipman, 411 F.2d 365, 393-94 (5th Cir. 1969) (dissenting opinion); 9 WRIGHT & MILLER § 2524, at 546 (1971).

All claims for relief and all affirmative defenses incorporate legal syllogisms.[46] The major premise of the syllogism is the legal theory or rule of law on which the claim or defense is based. The minor premise consists of those ultimate facts or essential elements the existence of which invokes the major premise. The conclusion is the demand for relief. Since the major premise need not be specifically stated,[47] ordinarily it must be implied from the body of the pleading, which is devoted almost exclusively to the statement of the minor premise.

Procedural systems ordinarily provide devices for intercepting faulty claims and defenses before trial. The devices provided by the Code and common law—the demurrer and the motions to dismiss, to strike, and for judgment on the pleadings—were designed primarily to challenge the validity of the major premise. They could be used to challenge the existence of the minor premise only if a material fact or essential element was fatally admitted,[48] omitted,[49] or alleged in conclusory terms only.[50] What was lacking was a pretrial method of demonstrating that the existence *vel non* of the minor premise, though placed in issue by the pleadings, was in fact not in doubt and that a trial was, therefore, unnecessary.[51] The motion to strike a pleading as sham was a half-hearted pass at this problem;[52] summary judgment is its complete and final solution.

Summary Judgment for the Party with the Burden of Proof

Summary judgment takes two basic forms: one in which the party who asserts the syllogism as a claim or defense and bears the burden of persuasion thereon seeks to establish that all the essential elements of the minor premise in issue are indubitably true, and another in which the party against whom the syllogism is asserted seeks to show the indubitable falsity of one or more of its essential elements. The first

[46]M. GREEN, BASIC CIVIL PROCEDURE 91 (1972); P. BLISS, CODE PLEADING §§ 136-37 (3d ed. 1894). There are certain problems with the syllogistic theory of pleading. They do not, however, impair its usefulness here and therefore have not been stated.

[47]Conaughty v. Nichols, 42 N.Y. 83 (1870); Whittier, *The Theory of a Pleading*, 8 COLUM. L. REV. 523 (1908).

[48]Leggett v. Montgomery Ward & Co., 178 F.2d. 436 (10th Cir. 1949).

[49]Glidden v. Bath Iron Works Corp., 143 Me. 24, 54 A.2d 528 (1947).

[50]Webb v. Eggleston, 228 N.C. 574, 46 S.E.2d 700 (1948).

[51]Kessing v. National Mortgage Corp., 278 N.C. 523, 180 S.E.2d 823 (1971).

[52]*E.g.*, Walter v. Walter, 35 N.J.L. 262 (Sup. Ct. 1871); Wayland v. Tysen, 45 N.Y. 281 (1871); C. CLARK, *supra* note 42, § 88; Brandis & Bumgarner, *The Motion To Strike Pleadings in North Carolina*, 29 N.C.L. REV. 3 (1950).

form of the motion is functionally equivalent to the direction of a verdict in favor of the party which the burden of proof.[53] Consequently, the movant must establish each element of the minor premise so overwhelmingly that no fact finder can reasonably find against him on any of them.[54] It follows that the motion should be denied if the opposing party submits affidavits or other supporting materials or points to portions of the movant's supporting materials[55] that place the existence of any of the essential elements in doubt or impeach the credibility[56] of any of the movant's material witnesses.[57]

The directed verdict approach remains applicable even where the opposing party fails to submit affadavits or other supporting materials or where those he proffers are rejected as unacceptable. He cannot rely upon his well pleaded denials, because of the provisions of rule 56(e).[58] But this section of the rule further provides that summary judgment may be granted only "if appropriate,"[59] and, for the party with the burden of persuasion, this means in effect that he must still succeed on the strength of his own evidence.[60] Consequently, the motion should ordinarily be denied, even though the opposing party makes no response, if (1) the supporting evidence is self contradictory or circumstantially sus-

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[53]Pridgen v. Hughes, 9 N.C. App. 635, 177 S.E.2d 425 (1970) (summary judgment for defendant on defense of contributory negligence); 6 MOORE ¶ 56.15[3] (2d ed. 1965).

[54]Mihalchak v. American Dredging Co., 266 F.2d 875, 877 (3d Cir.), *cert. denied*, 361 U.S. 901 (1959); 9 WRIGHT & MILLER § 2535.

[55]6 MOORE ¶ 56.15[3], at 2340 & n.17 (2d ed. 1965). On a motion for directed verdict or compulsory non-suit, the opposing party may similarly rely upon favorable evidence introduced by the movant. *Cf.* Champion v. Waller, 268 N.C. 426, 150 S.E.2d 783 (1966).

[56]A general prerequisite for granting a directed verdict for the party with the burden of proof or persuasion is that his evidence must be disinterested, unimpeached, and uncontradicted. 5A MOORE ¶ 50.02[1] (2d ed. 1966).

[57]A motion for summary judgment may be supported by depositions as well as by affidavits. Thus the term "witness" is used here to describe any person generating appropriate supporting materials and, as N.C.R. CIV. P. 56(e) requires, capable of testifying at trial from personal knowledge.

[58]Jarrell v. Samsonite Corp., 12 N.C. App. 673, 184 S.E.2d 376 (1971). For the text of this section of the rule, *see* note 77 *infra*; for a background understanding of its purpose, see 6 MOORE ¶ 56.11[3] (2d ed. 1965). The North Carolina Court of Appeals has held that the rule may be satisfied if the opposing party's pleading is verified. Brevard v. Barkley, 12 N.C. App. 665, 184 S.E.2d 370 (1971). This exception seems improper unless the verified pleading, which is functionally the equivalent of a supporting affidavit, meets the requirements for affidavits set forth in rule 56(e). 6 MOORE ¶ 56.11[3] (2d ed. 1965).

[59]Robinson v. McMahan, 11 N.C. App. 275, 181 S.E.2d 147 (1971).

[60]Correctly speaking, materials supporting a motion for summary judgment are not evidence, but evidence of evidence. Since the relationship is one to one, however, the simpler, though technically inaccurate, term is employed.

picious[61] or the credibility of a witness is inherently suspect either because he is interested in the outcome of the case and the facts are peculiarly within his knowledge[62] or because he has testified[63] as to matters of opinion involving a substantial margin for honest error,[64] (2) there are significant gaps in the movant's evidence or it is circumstantial and reasonably allows inferences inconsistent with the existence of an essential element,[65] or (3) although all the evidentiary or historical facts are established, reasonable minds may still differ over their application to some principle such as the prudent man standard for negligence cases.[66]

When the movant relies upon testimonial evidence, credibility is automatically in issue. To grant his motion, the court must find that the jury is not at liberty to disbelieve the testimony[67] and, in effect, must assign it credibility as a matter of law, an act that is now forbidden in North Carolina.[68] Other jurisdictions have no such compunctions if the

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[61]*Cf.* Ferdinand v. Agricultural Ins. Co., 22 N.J. 482, 126 A.2d 323 (1956); Cooper, *Directions for Directed Verdicts: A Compass for Federal Courts*, 55 MINN. L. REV. 903, 946 (1971) [hereinafter cited as Cooper]; Bobbe, *The Uncontradicted Testimony of an Interested Witness*, 20 CORNELL L. REV. 33, 35 (1934). A good illustration perhaps is the defendant who seeks to prove the affirmative defense of payment exclusively by oral testimony under circumstances suggesting that he would ordinarily have obtained from plaintiff some written acknowledgment.

[62]Typical cases involve testimony by taxpayers seeking refunds, Wood v. Commissioner, 338 F.2d 602 (9th Cir. 1964), and by persons seeking entry into the country on the basis of citizenship, Quock Ting v. United States, 140 U.S. 417, 424 (1891) (dissenting opinion). The testimony of the sole survivor of an auto collision would often also create such a case. Dead man statutes obviate this possibility, however. C. MCCORMICK, EVIDENCE § 65 (2d ed. 1972).

[63]The term "testified" or "testimony" is used here in a technically inaccurate sense to cover supporting materials such as affidavits or depositions, since they represent previews of admissible testimonial evidence.

[64]The uncontradicted and unimpeached testimony of a witness about the speed of an automobile is so fraught with the possibility of honest error that a court might reasonably hesitate to direct a verdict in reliance thereon.

[65]5A MOORE ¶ 50.02[1] (2d ed. 1966).

[66]Robinson v. McMahan, 11 N.C. App. 275, 181 S.E.2d 147 (1971); Pridgen v. Hughes, 9 N.C. App. 635, 177 S.E.2d 425 (1970); 6 MOORE ¶ 56.17[42] (2d ed. 1965).

[67]Cooper 928-40.

[68]Cutts v. Casey, 278 N.C. 390, 180 S.E.2d 297 (1971) (discussed in text accompanying notes 114-59 *infra*). *But see* Jarrell v. Samsonite Corp., 12 N.C. App. 673, 184 S.E.2d 376 (1971) (credibility assigned to answers to interrogatories submitted by co-defendant on defendant's motion seeking to establish an affirmative defense). This prohibition is inapplicable, of course, where the movant relies upon the admissions in an opposing party's own testimony, as is often the case where a defendant moves for directed verdict or summary judgment on the issue of contributory negligence, on which he bears the persuasion burden. It should also be inapplicable if the movant's evidence consists entirely of documents the authenticity of which is admitted. Peaseley v. Virginia Iron, Coal & Coke Co., 12 N.C. App. 226, 182 S.E.2d 810 (1971).

evidence, though testimonial, has been given by disinterested witnesses and is uncontradicted and unimpeached.[69] Some will even assign credibility to the testimony of an interested witness if without explanation the opposing party fails to challenge it,[70] sometimes on the theory that his silence constitutes an admission.[71] Thus most courts will grant an *unchallenged* motion for summary judgment by a claimant on a note or instrument if the motion is supported by his affadavit authenticating the obligation and the maker's signature.[72] To deny the motion and require a wasteful trial in this situation (as North Carolina courts apparently must) because the witness's credibility obstensibly is, of constitutional necessity, always for the jury seems ludicrous in this day of overcrowded dockets.

Summary Judgment Against the Party With the Burden of Proof

Summary judgment is apparently more frequently used in North Carolina in the other basic situation, in which the movant, ordinarily the defendant, seeks to prove the nonexistence of an essential element of a minor premise asserted by the opposing party, ordinarily the plaintiff. The general rule here is that the movant bears the burden of showing there is no genuine issue of fact.[73] Several principles seem to follow from this rule. First, if the movant fails to meet this burden his motion must fail, even though the opposing party submits no affidavits or other supporting materials in opposition.[74] Secondly, if the movant discharges his burden, which as is contended below is essentially only a burden of coming forward, his motion must be granted if the opposing party does not respond or responds inadequately.[75] Thirdly, if the movant discharges his burden of coming forward with respect to a specific essential elements, the opposing party need only respond with respect to that

[69]Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 624 (1944); 5A MOORE ¶ 50.02[1] (2d ed. 1966); 9 WRIGHT & MILLER § 2535; Cooper 928-40. For an excellent illustration, *see* Lundeen v. Cordner, 354 F.2d 401 (8th Cir. 1966).

[70]*E.g.*, Chesapeake & O. Ry. v. Martin, 283 U.S. 209, 216 (1931) (directed verdict).

[71]Sunderland, *Directing a Verdict for the Party Having the Burden of Proof*, 11 MICH. L. REV. 198 (1913).

[72]6 MOORE ¶ 56.17[8] (2d ed. 1965).

[73]*Id.* ¶ 56.13[3]; Pridgen v. Hughes, 9 N.C. App. 635, 177 S.E.2d 425 (1970).

[74]Lineberger v. Colonial Life & Accident Ins. Co., 12 N.C. App. 135, 182 S.E.2d 643 (1971); *see* authorities cited note 73 *supra*.

[75]Haithcock v. Chimney Rock Co., 10 N.C. App. 696, 179 S.E.2d 865 (1971); 6 MOORE ¶ 56.15[3] (2d ed. 1965).

element and not with his entire proof.[76] These principles are not specifically stated in rule 56. They are, however, consistent with its text if it is assumed that summary judgment is "appropriate" under rule 56(e)[77] whenever the movant discharges his burden of coming forward and the opposing party does not respond.[78]

The essential problem is to define the movant's burden. Obviously he falls short if his evidence, though believed, still does not establish the non-existence of the challenged essential element.[79] On the other hand, he obviously succeeds if his evidence meets the standard imposed upon a movant who also bears the burden of persuasion.[80] The question then is whether something less will do. If not, it appears that the opposing party would seldom be put to his proof. It must be remembered, however, that the unchallenged affidavit of an interested person may suffice if the facts are apparently within the knowledge of the opposing party.[81] From here it is a short step to the position that the movant discharges his burden of coming forward and imposes upon the opposing party a duty to respond whenever the motion is supported with evidence that if true would negate the existence of the challenged essential element.[82]

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[76]6 MOORE ¶ 56.15[3] (2d ed. 1965). It follows that the movant and especially the judicial opinion should specifically identify the challenged essential element or, for that matter, the claim or defense the movant seeks to establish, something the courts sometimes fail to do. *See, e.g.*, Pridgen v. Hughes, 9 N.C. App. 635, 177 S.E.2d 425 (1970) (no mention whatsoever of the ground for granting the motion, which was apparently aimed not at the plaintiff's claim but at his admissions with respect to the movant's affirmative defense of contributory negligence).

[77]When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

N.C.R. CIV. P. 56(e). *See* Pridgen v. Hughes, 9 N.C. App. 635, 177 S.E.2d 425 (1970). Under some circumstances, this rule may not apply if the opposing party's pleading has been verified. *See* note 58 *supra*.

[78]Haithcock v. Chimney Rock Co., 10 N.C. App. 696, 179 S.E.2d 865 (1971).

[79]6 MOORE ¶ 56.15[3], at 2340-41 (2d ed. 1965); Lee v. Shor, 10 N.C. App. 231, 178 S.E.2d 101 (1970).

[80]*See* text accompanying notes 54, 67-69 *supra*.

[81]*See* note 70 *supra*.

[82]Patterson v. Reid, 10 N.C. App. 22, 178 S.E.2d 1 (1970) (affidavit of interested defendants meets their burden of coming forward, even though arguably the facts were peculiarly within their knowledge). *But cf.* Lee v. Shor, 10 N.C. App. 231, 178 S.E.2d 101 (1970) (jury trial must be held to test credibility of interested affiants where facts peculiarly within their knowledge). Federal cases hold that the opposing party must establish by an affidavit under FED. R. CIV. P. 56(f) that he cannot respond because the facts are peculiarly within the movant's knowledge, which apparently means that the affidavit of an interested witness discharges his burden of coming forward. United States ex rel. Kolton v. Halpern, 260 F.2d 590, 591 (3d Cir. 1958); 6 MOORE ¶ 56.24 (2d ed. 1965).

Ideally the opposing party will respond with his proof. But since he can also defeat or at least delay decision on the motion with a response satisfying the requirements of rule 56(f),[83] he can hardly complain that the movant's burden has been unnecessarily lightened.

This position is also consistent with the pretrial structure of the new rules and the apparent function of summary judgment within it. It is much simpler now to plead a claim or defense acceptably than it was under the Code, which required the assertion of each essential element in some detail. As a result, the task of intercepting inadequate claims or defenses has shifted from the demurrer or motion to dismiss to the motion for summary judgment. Consequently, to facilitate such interception, the burden upon the movant who challenges the existence of the minor premise asserted by the pleading should be defined not in terms of what is sufficient to grant summary judgment but in terms of what is sufficient to put the pleader to his proof[84] or to a satisfactory explanation of why he presently lacks it. Thus it makes no sense to impose upon the movant the same onerous burden carried by one who also bears the persuasion burden. Otherwise an opposing party whose evidence was insufficient to make out a prima facie case could too often defeat a motion for summary judgment by withholding his proof, even though the motion would probably be granted if he proffered it.

A final question remains. Should the motion be denied if the movant's papers are circumstantially suspicious or self-contradictory on their face, or the opposing party's response consists only of affidavits or other materials affirmatively impeaching the credibility of a material witness of the movant? There is no clear choice here. Since the impeached testimony can still support a jury verdict against the opposing party, it is arguably sufficient to put him to his proof. On the other hand, forcing him to preview his evidence before trial or pretrial conference is arguably so great an imposition that perhaps something more is required to discharge the movant's burden of coming forward than the supporting affidavit of someone accused under oath of perjury or prior

[83]Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

N.C.R. Civ. P. 56(f).

[84]Pridgen v. Hughes, 9 N.C. App. 635, 638, 177 S.E.2d 425, 427 (1970)., *citing* Bland v. Norfolk & S.R.R., 406 F.2d 863, 866 (4th Cir. 1969).

inconsistent statements. A majority of courts probably would deny summary judgment here because of the stress they place upon the movant's burden and their attendant propensity to deny the motion whenever there is doubt.[85]

Finally, it should be noted that the movant faces no problem in discharging his burden when proof is generally lacking all around. He may simply depose the opposing party or submit interrogatories and then support his motion with the answers showing that the opposing party, who bears the production burden, cannot make out a prima facie case.[86] This approach is also useful when the movant bears the persuasion burden himself,[87] since the opposing party's answers are admissions that present no problem of credibility.

When the opposing party does respond with his proof, the situation is again analagous to a motion for directed verdict made at the close of all the evidence. Consequently the movant's burden should be forgotten,[88] and attention should be focused upon the opposing party's production burden and, therefore, upon whether he has sufficient evidence to reach the jury on the challenged essential element.[89] This test, which is virtually identical to the test previously employed under the Code in ruling on a motion for compulsory nonsuit, is well established in North Carolina already and requires no explication here.[90]

In this situation, the court obviously may not weigh or consider evidence offered by the movant that contradicts or impeaches direct evidence offered by the opposing party, whose witnesses are assumed to be credible for the purposes of the motion.[91] Suppose, however, that the

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[85]In support of the position that a question of credibility will, without more, ordinarily defeat the movant, see 6 MOORE ¶ 56.15[3], at 2339, 2348, ¶ 56.15[4] (2d ed. 1965).

[86]Haithcock v. Chimney Rock Co., 10 N.C. App. 696, 179 S.E.2d 865 (1971).

[87]American Airlines, Inc. v. Ulen, 186 F.2d 529 (D.C. Cir. 1949) (establishing defendant's negligence); Pridgen v. Hughes, 9 N.C. App. 635, 177 S.E.2d 425 (1970) (establishing contributory negligence).

[88]It is actually unclear whether summary judgment should be granted if the movant has not actually met his burden of coming forward but the opposing party responds with evidence insufficient to make out a prima facie case on the challenged essential element. The question is even more problematical if the opposing party responds in the alternative, first with the assertion that the movant has not met his burden and secondly with his insufficient proof.

[89]Haithcock v. Chimney Rock Co., 10 N.C. App. 696, 179 S.E.2d 865 (1971). *See also* Page v. Sloan, 12 N.C. App. 433, 183 S.E.2d 813 (1971) (defendant's motion denied because of availability to plaintiff of res ipsa loquitur).

[90]*See generally* Louis, *Motions Testing the Sufficiency of the Evidence*, in TRIAL, JUDGMENTS AND APPEALS UNDER NORTH CAROLINA'S NEW RULES OF CIVIL PROCEDURE IV-1, IV-5 (N.C. Bar Ass'n Inst. 1969).

[91]Kessing v. National Mortgage Corp., 278 N.C. 523, 180 S.E.2d 823 (1971).

movant proves physical facts that render the opposing party's testimony incredible as a matter of law;[92] or suppose that the opposing party's case, though sufficient to reach the jury, relies upon circumstantial evidence, and the movant offers uncontradicted and unimpeached direct evidence from a disinterested witness that requires a contrary, fatal inference.[93] To give effect in either situation to the movant's evidence, if testimonial, it must be assigned credibility, as if he bears the burden of persuasion. Consequently, the two situations should be treated alike.[94] Most commentators[95] and many federal courts take this position[96] despite a contrary dictum by the United States Supreme Court.[97] Curiously, although the reasons given are somewhat different, many North Carolina cases reach the same result,[98] despite the fact that such a holding is logically inconsistent with the rule that credibility is always for the jury.[99]

Where the Opposing Party Lacks Evidence that may be Available at Trial

The discussion thus far has assumed arguendo that the supporting materials available to the opposing party constitute an adequate preview of the evidence he can present at trial. If that is not in fact true, the analogy to directed verdict obviously breaks down. When the opposing party finds himself in this situation, he is required to present an explanatory affidavit under rule 56(f).[100] Such an affidavit is presumably inadequate if it fails to show he can do better at trial,[101] makes the suggestion but fails to point specifically to additional sources of evidence,[102] points

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[92]Cooper, *supra* note 61, at 951.

[93]*See, e.g.*, First Nat'l Bank v. Cities Serv. Co., 391 U.S. 253, 277 (1968).

[94]Cooper 948-50.

[95]5A MOORE ¶ 50.02[1] (2d ed. 1966); WRIGHT & MILLER § 2539; Cooper 948-50.

[96]*E.g.*, Simblest v. Maynard, 427 F.2d 1, 5 (2d Cir. 1970); Dehydrating Process Co. v. A.O. Smith Corp., 292 F.2d 653, 656 (1st Cir.), *cert. denied*, 368 U.S. 931 (1961).

[97]Wilkerson v. McCarthy, 336 U.S. 53 (1949). For a scathing critique of this dictum, see Cooper 948-50.

[98]*See* cases cited in 2 A. MCINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE § 1488.15 nn. 68-69 (Supp. 1970). This rule was recently invoked by the North Carolina Court of Appeals in Jenkins v. Starrett Corp., 13 N.C. App. 437, 186 S.E.2d 198 (1972), without mentioning the apparently contrary teaching of Cutts v. Casey, 278 N.C. 390, 180 S.E.2d 297 (1971).

[99]Louis, *supra* note 90, at IV-6. *See also* Jarrell v. Samsonite Corp., 12 N.C. App. 673, 184 S.E.2d 376 (1971) (credibility improperly assigned to uncontradicted answers to interrogatories of one defendant to justify summary judgment for another on an affirmative defense on which it bore the burden of proof).

[100]*See* note 83 *supra* for pertinent text of N.C.R. CIV. P. 56(f).

[101]Dyer v. MacDougall, 201 F.2d 265 (2d Cir. 1952).

[102]Radio City Music Hall Corp. v. United States, 135 F.2d 715 (2d Cir. 1943).

to possible additional sources of evidence but does not explain his failure to tap them already through investigation or discovery,[103] or fails to seek a postponement of the hearing until he can initiate or complete discovery or investigation. On the other hand, he should ordinarily be accorded a postponement if he shows his investigation or discovery is still incomplete and there is no indication of undue delay on his part.[104]

A more difficult problem is presented if the facts are peculiarly within the knowledge of the moving party and his employees or allies.[105] If he also has the burden of persuasion, he often could not get a directed verdict in the federal courts, even though his evidence is uncontradicted and unimpeached.[106] Consequently, summary judgment should also be denied, especially since cross-examination of the witnesses at trial might be more productive of admissions than their depositions.

The problem is more complex if the opposing party has the burden of persuasion. Without affirmative evidence he cannot get to the jury simply because it might disbelieve the denials made by the movant or his allies when called as hostile witnesses as on cross examination.[107] Should summary judgment then be granted if such denials are offered in support of the motion? The opposing party will argue that cross examination of these hostile witnesses at trial may be productive and that he is at least entitled to try.[108] Some judges agree, especially if the witnesses when deposed were hostile and evasive and might, therefore, tell more before a judge at trial.[109] Suppose, however, that the witnesses were cooperative and unevasive on deposition[110] or that the opposing party has failed to depose them.[111] Should a trial still be held on the

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[103]Lundeen v. Cordner, 354 F.2d 401 (8th Cir. 1966); Orvis v. Brickman, 95 F. Supp. 605 (D.D.C. 1951), *aff'd*, 196 F.2d 762 (D.C. Cir. 1952).

[104]*See generally* Lee v. Shor, 10 N.C. App. 231, 178 S.E.2d 101 (1970) (no summary judgment for defendants who have not answered or objected to plaintiff's interrogatories); 6 MOORE ¶ 56.24 (2d ed. 1965).

[105]Lee v. Shor, 10 N.C. App. 231, 178 S.E.2d 101 (1970); 6 MOORE ¶¶ 56.24, at 2875 & n.21, 56.14[4], [5].

[106]Cooper 941-46. An additional factor sometimes considered in such cases is the nature of the testimony and the general propensity of interested witnesses to fabricate with respect to it. Thus, summary judgment for a taxpayer seeking a refund on the basis of his own testimony is infrequent, especially in cases involving his motives or intent, knowledge of which is peculiarly available to him. Gross v. United States, 336 F.2d 431 (2d Cir. 1946).

[107]Dyer v. MacDougal, 201 F.2d 265 (2d Cir. 1952).

[108]Lee v. Shor, 10 N.C. App. 231, 178 S.E.2d 101 (1970).

[109]Dyer v. MacDougal, 201 F.2d 265, 269 (2d Cir. 1952).

[110]Hoover v. Gaston Memorial Hosp., Inc., 11 N.C. App. 119, 180 S.E.2d 479 (1971); 3 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 1232.2 (C. Wright rev. 1958).

[111]Lundeen v. Cordner, 354 F.2d 401 (8th Cir. 1966). *But see* Subin v. Goldsmith, 224 F.2d 753 (2d Cir. 1955).

unlikely chance that they may make admissions on cross-examination? Some courts think not.[112] The opposing party has failed to present any realistic possibility that he can do better at trial and usually he will not. Arguably the system cannot, therefore, waste scarce resources on a large number of unsuccessful attempts in order to make possible a few successful ones.

The analysis is the same when the plaintiff has some affirmative evidence but not enough to reach the jury. Nevertheless, the federal courts have evidenced great reluctance in this situation to grant summary judgment, especially in antitrust cases involving such slippery concepts as conspiracy or improper motive or intent.[113] All that can be said here is that the closer the plaintiff's affirmative evidence is to being sufficient, the less he has access to the facts, the more suspicious or heinous is the conduct of which he complains, the more complex is the web of evidence and events he must unravel, and the more favored he or his cause of action is, the more likely it is he will be allowed to reach trial.

III. THE SUFFICIENCY OF THE EVIDENCE

Directing a Verdict for the Party With the Burden of Proof

Cutts v. Casey[114] was an action of trespass to try title to land, together with a cross-action or counterclaim by defendants for a declaration of title and the right to immediate possession in themselves. Defendants claimed the land by virtue of a conveyance of land known as the Bishop tract from a larger parcel known as the Batson grant. The problem was that two conflicting surveys located the boundaries of the Bishop tract so as to produce an overlap between it and a subdivision, now owned by plaintiff, of the remainder of the Batson grant.

Because of the conflicting surveys, both sides attempted to locate the disputed boundaries by oral testimony. At the close of all the evidence, the trial judge denied a motion by defendants for directed verdict on plaintiff's claim but granted plaintiff's motion for directed verdict on defendants' cross-action. The jury then found for defendants on plaintiff's claim, but the trial judge granted plaintiff's motion for

[112]Hoover v. Gaston Memorial Hosp., Inc., 11 N.C. App. 119, 180 S.E.2d 479 (1971); *see* authorities cited note 111 *supra*.

[113]Poller v. Columbia Broadcasting Sys., Inc., 368 U.S. 464 (1962).

[114]278 N.C. 390, 180 S.E.2d 297 (1971).

judgment notwithstanding the verdict under rule 50(b). Upon motion of all parties, the case was certified for review to the North Carolina Supreme Court before determination by the court of appeals.

The supreme court first affirmed the rulings on the two motions for directed verdict. Noting that plaintiff did not prevail by default because defendants' cross action failed and that he must succeed on the strength of his own title,[115] the court then considered his successful motion for judgment notwithstanding the verdict. It held that the grant of this motion was error, reinstated the jury verdict for defendant, and remanded for entry of final judgment on the verdict.

This final determination was, for two reasons, absolutely correct. First, plaintiff apparently did not move at the close of all the evidence for a directed verdict *on his own claim*,[116] such a motion being under rule 50(b) a prerequisite to a motion for judgment notwithstanding the verdict.[117] The court failed to notice this, however. Secondly, all the justices agreed that plaintiff's evidence locating the disputed boundaries, which evidence was in important part testimonial, was not undisputed and unimpeached as is generally required to warrant a directed verdict, or the equivalent motion for judgment notwithstanding the verdict, in favor of the party with the burden of proof.[118]

Either reason was sufficient to dispose of the appeal. The court, however, went on to hold that testimonial evidence could never support a directed verdict in favor of the party with the burden of proof.[119] The justification given is not a model of logical exposition, but the gist of it is apparent. North Carolina has not heretofore permitted a directed verdict in these circumstances.[120] The sources of this rule are alleged to be the constitutional guarantee of jury trial[121] and a statutory provision dating back to 1796[122] that prohibits a trial judge from commenting to

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[115]*Id.* at 411, 180 S.E.2d at 307.

[116]Plaintiff's motion was apparently directed only at defendants' cross action. *See id.* at 405, 180 S.E.2d at 306.

[117]*Glen Forest Corp. v. Bensch*, 9 N.C. App. 587, 176 S.E.2d 851 (1970).

[118]278 N.C. at 422, 423, 180 S.E.2d at 314, 319.

[119]*Id.* at 417, 180 S.E.2d at 311.

[120]*Id.* at 417-18, 180 S.E.2d at 311-12.

[121]N.C. CONST. art. I, § 19 (recodified as art. I, § 25, effective 1 July 1971) provides: "In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and shall remain sacred and inviolable." Curiously, the Court did not mention N.C. CONST. art. IV, § 13, the text of which is even more to the point, though still inconclusive.

[122]Ch. 452, [1796] Potter's Revisal 800.

the jury on the evidence.[123] Consequently, the rules of civil procedure could not constitutionally authorize a directed verdict in these circumstances and, because of the incorporation into rule 51(a) of the no-comment statute, did not so intend.[124]

The alleged constitutional source of the rule is easier to deal with. First, there is no precedent for asserting it. None of the cases cited by the court[125] even mentions the constitution. None of the more than thirty other uncited North Carolina cases I have found that mentions the rule relies upon the constitution either. Old cases from other states announce the rule,[126] but none I have found derives it from constitutional sources.[127] On the contrary, such constitutional challenges to the accepted uses of the directed verdict have almost uniformly been denied.[128] Furthermore, an increasing number of state and federal decisions—an overwhelming majority of the more recent ones—allow this use of the directed verdict.[129] All of these decisions find, impliedly at least, no such constitutional infirmity. Justice Sharp did not seek to differentiate this contrary common constitutional experience from the text[130] or history of the North Carolina provision. For the most part, she simply ignored it, despite its persistent invocation by Justice Huskins in his concurring opinion.

In short, *Cutts v. Casey* announces new constitutional doctrine contrary to the established rule elsewhere and based solely on the court's unsupported assertion that it is so. Constitutional innovation is obviously not per se bad, but minimally its presence should be recognized

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[123]The latest version thereof, found in N.C.R. CIV. P. 51(a) and virtually identical to N.C. GEN. STAT. § 1-180 (1969) (which is now inapplicable to civil cases), provides that "[i]n charging the jury in any action governed by these rules, no judge shall give an opinion whether a fact is fully or sufficiently proved, that being the true office and province of the jury . . . ."

[124]278 N.C. at 417-18, 180 S.E.2d at 311.

[125]*Id.* at 418, 180 S.E.2d at 311.

[126]See Sunderland, *supra* note 71.

[127]As some confirmation of my own inability to locate such authority, it should be noted that two relevant articles do not even mention the possibility that the right to jury trial might impose so particular a limitation on the use of the directed verdict. Cooper, *supra* note 61, at 976; Sunderland, *supra* note 71.

[128]Galloway v. United States, 319 U.S. 372 (1943); Lyon v. Mutual Benefit Health & Accident Ass'n, 305 U.S. 484 (1939) (directed verdict for claimant); 53 AM. JUR. TRIAL § 334 (1945).

[129]*See* cases cited by Justice Huskins in his concurring opinion. 278 N.C. at 427, 180 S.E.2d at 319.

[130]There is no support for the court—and indeed it sought none—in the constitutional text, which is quoted in note 121 *supra*. The words are quite general and do not mention the directed verdict. To find in them a textual imperative barring the motion in one situation while permitting it in another is not possible.

and its results justified.[131] Neither was done by Justice Sharp. Instead we are asked, like the emperor and his subjects, to take on faith that the new clothes do exist, when everything else tells us they do not. Hopefully the court will at some future date reject this contention as unnecessary and unwarranted dictum. In the meantime, however, its effects are pernicious. Had the court simply construed rules 50 and 51, its holding could have been overturned by the next general assembly. Now a constitutional amendment is necessary and obviously will not be forthcoming. It is hard to believe that this effect was not foreseen.

Furthermore, if granting a directed verdict on testimonial evidence for the party with the burden of proof invades the province of the jury, granting summary judgment for him ineluctably also does.[132] This further consequence, which would deal an even sterner blow to the new rules, would also constitute some kind of ultimate irony, since summary judgment was originally designed to spare certain deserving claimants the necessity for trial. Justice Huskins raised this terrible possibility in his concurring opinion, but the majority ignored it, leaving judges and attorneys throughout the state to wonder what the result will be. Needless to say, one disaster should not be piled upon another and any meaningless or inadequate distinction that could prevent this unwelcome second coming might be acceptable.[133] But even if the court were to hold its hand here, it would still create an inexcusable inconsistency in the law.

The relationships between the no-comment statute and the directed verdict for the party with the burden of proof are more complex. The

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[131]*See, e.g.*, the carefully researched and reasoned opinion of the California Supreme Court overruling earlier cases holding that the grant of an additur similarly violated the right to jury trial. Dorsey v. Barba, 38 Cal. 2d 350, 240 P.2d 604 (1952).

[132]278 N.C. at 426, 180 S.E.2d at 319 (Huskins, J., concurring). Summary judgment is, in essence, a preview on affidavits of the motion for directed verdict at trial. If the judicial assignment of credibility to uncontradicted and unimpeached evidence at trial invades the jury's province, the same assignment of credibility to the same evidence in an affidavit must also. Thus, in the reverse situation, New York rejected such a constitutional attack on summary judgment because directed verdict for the party with the burden of proof had already been approved. The New York court said: "To say that a false denial, which defendants are unable to justify, must nevertheless put the plaintiff to his common-law proof before a jury, although the result would be a directed verdict in plaintiff's favor as a matter of law, is to exalt the shadow above the substance." Hanna v. Mitchell, 202 App. Div. 504, 518, 196 N.Y.S. 43, 55 (1922), *aff'd*, 235 N.Y. 534, 139 N.E. 724 (1923).

[133]It has been argued that the two motions are possibly distinguishable because allowing summary judgment saves a trial, whereas allowing a motion for directed verdict at the close of the evidence cannot. But if the latter is forbidden and the jury finds the other way, a new trial probably must be granted anyway. Thus it has been suggested that the difficulties with this argument "are too obvious to require further comment." Cooper 954.

two concepts are not inconsistent, however, and manage to exist side by side in a number of states.[134] Even the converse situation is possible. Thus, the common law, which allowed comment, did not allow a directed verdict for the party with the burden of proof.[135] The explanation for these seeming incongruities is simple. At common law it was believed that while credibility was always for the jury, the guidance of the court was still desirable.[136] Some states believe that while a judge, by directing a verdict, can give credence to evidence that is disinterested, uncontradicted, and unimpeached, he should not, by comment, meddle with the jury function when the evidence is not.[137] North Carolina denies him both powers; the federal courts grant him both. *In other words, there is no necessary connection between the two concepts, because they are based on different considerations.*

The considerations opposing the directed verdict for the party with the burden of proof are summed up in the statement that credibility is always for the jury. The North Carolina Supreme Court clearly believes this should remain the rule in civil cases, as it has everywhere, for special reasons, in criminal cases.[138] Others would argue to the contrary as follows:

> To permit a jury to say that it will not believe competent, uncontradicted and unimpeached testimony and to return a verdict in the teeth of such evidence, is to give the jury plenary power to take a man's life or property as caprice or willfulness may dictate. If this is the power of a jury in this State, then courts are unnecessary, and the study of the law a waste of time, for what shall it profit us to carefully sift the grain of competent testimony from the bushel of chaff of hearsay testimony, if after it is all done, the jury can capriciously, arbitrarily, perhaps wantonly, say, "We don't believe it," and find for the litigant who has introduced no testimony and has not impeached the testimony that has been introduced. Briefly, bluntly, I say this is not the law.[139]

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[134]A majority of states prohibit the trial judge, by statutory or constitutional provisions, from commenting to the jury on the evidence. A. VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 229 (1949). Some of these states that also have allowed a directed verdict in favor of the party with the burden of proof are Maine, Kansas, Missouri, Minnesota, Washington, Colorado, Alabama, and Georgia. *See* cases cited in Sunderland, *supra* note 71, at 204-06.

[135]J. KOFFLER & A. REPPY, COMMON LAW PLEADING § 296 (1969); 2 A. MCINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE § 1488 (2d ed. 1956).

[136]Johnson, *Province of the Judge in Jury Trials*, 7 TENN. L. REV. 107 (1929); Wright, *The Invasion of Jury: Temperature of the War*, 27 TEMP. L.Q. 137 (1953).

[137]See note 134 *supra*.

[138]The rule barring directed verdicts for the state was announced in North Carolina as early as 1849. *See* State v. Shule, 32 N.C. 153 (1849).

[139]Gannon v. Laclede Gas Light Co., 145 Mo. 502, 549 (1898) (dissenting opinion).

This passage failed to note that a trial judge who cannot direct a verdict may still set aside a contrary verdict because it is against the weight of the evidence. But a new trial is then required. This is more than an offense to good sense: it is a waste of scarce judicial resources in a day of crowded dockets. Each day a judge spends unnecessarily retrying a case, a prisoner unable to raise bail may languish unnecessarily another day in jail. Courts everywhere recognize they can no longer afford the unhurried justice of the nineteenth century. Therefore, they should not permit a civil defendant to hide behind his denials and postpone his financial Armageddon until the last possible moment while seeking to tire his pursuer into an unfavorable settlement. Modern procedure has trained a whole battery of weapons upon this laggard. Directed verdict and summary judgment are two of them; restrictions on the general denial,[140] requests for admissions,[141] and the pretrial conference are others. Courts that set themselves against this irresistible trend cannot in the end succeed. Circumstances will not permit them.

The North Carolina Supreme Court did not address itself to these considerations. It chose instead to rely almost exclusively on the alleged historical connection in North Carolina between the re-enacted no-comment statute and the directed verdict rule and the connection's effect upon the construction of rule 50.

As was demonstrated above, this connection is not inevitable or necessary. Not surprisingly, it is also not very historical. None of the cases cited by Justice Sharp even assert it. Her secondary authorities, McIntosh[142] and Phillips,[143] do. But the former cites nothing in support of his bare assertion; the latter cites only a single case that does not even mention the no-comment statute and goes on to show that the connection is logically unnecessary. With all due respect, it cannot be said that even the historical existence of the connection was established by the court.

My research has uncovered four opinions, all written by the same two judges within a space of three years, that allege the existence of a connection between the no-comment statute and the directed verdict rule.[144] But none attempts to prove it; all merely assert it or quote an

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[140]N.C.R. Civ. P. 8(b), 11.

[141]N.C.R. Civ. P. 36.

[142]2 A. McINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE § 1516 (2d ed. 1956).

[143]*Id.* § 1488.20 (Supp. 1970). The supplement to *McIntosh* is authored by Dean Phillips.

[144]Neal v. Carolina Cent. R.R., 126 N.C. 634, 36 S.E. 117 (1900); Gates v. Max, 125 N.C. 139, 34 S.E. 266 (1899); Cable v. Southern Ry., 122 N.C. 892, 29 S.E. 377 (1898); Anniston Nat'l Bank v. School Comm., 121 N.C. 107, 28 S.E. 134 (1897).

earlier one's assertion. On the other hand, at least thirty other opinions that cite the directed verdict rule do not even mention it. More significantly, the case to which the announcement of the directed verdict rule is attributed relies exclusively on English common law precedent,[145] which did not prohibit comment and which is undoubtedly derived from the similar prohibition on the analogous demurrer to the evidence.[146] Furthermore, nothing in the language or history of the Act of 1796 even suggests such an intent,[147] which is historically unlikely since the practice of directing verdicts or findings for the party with the burden of proof did not appear in North Carolina cases until a century later.[148]

With the connection unestablished and tenuous at best, the court had no reason to deny rule 50 its natural meaning. It provides that the motion for directed verdict is available to "any party," which includes, under the settled construction of its federal counterpart, the party with the burden of proof.[149] And, when the general assembly borrows statutory language, it presumably intends also to adopt its settled construction.[150] Further evidence of this intention is found in the summary judgment procedure of rule 56. This motion, which is in essence a preview on affidavits of the motion for directed verdict, is explicitly made available to claimants by rule 56(a). To find that the parallel motion for directed verdict has not been similarly made available is to conclude that the General Assembly intended an illogical, unharmonious result.[151] Only the strongest evidence of such an unlikely intent should suffice. The re-enactment of the no-comment statute in Rule 51 is not such evidence, because its historical connection to directed verdict is unproved and there is no essential conflict between the two concepts.

Finally, even though the court did not do so, let us examine briefly

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[145]Wittkowsky & Rintels v. Wasson, 71 N.C. 451 (1874).

[146]See 2 A. McINTOSH, *supra* note 135.

[147]II S. ASHE, HISTORY OF NORTH CAROLINA 44-45, 46-47, 51-54, 149 (1925).

[148]Neal v. Carolina Cent. R.R., 126 N.C. 639, 36 S.E. 117 (1900) (first successful directed finding for party with burden of proof; here, for defendant on issue of contributory negligence). Furthermore, while the concept of directing verdicts was not unknown to the common law in the eighteenth century, "there is no reason to believe that the notion at that time even approximated in character the present directed verdict . . . ." Galloway v. United States, 319 U.S. 372, 391-92 n.23 (1943).

[149]Rule 50(a) also provides: "A motion for a directed verdict which is not granted is not a waiver of trial by jury *even though all parties to the action have moved for directed verdicts.*" N.C.R. CIV. P. 50(a) (emphasis added).

[150]Ashley v. Brown, 198 N.C. 369, 151 S.E. 725 (1930); Ledford v. Western Union Tel. Co., 179 N.C. 63, 101 S.E. 533 (1919).

[151]See note 132 *supra*.

the ultimate merits of the assertion that credibility is always for the jury. Witnesses are often mistaken[152] and sometimes lie. The fact that their testimony is disinterested, uncontradicted, and unimpeached does not eliminate either possibility; at best, it merely reduces the likelihood thereof. It arguably follows that credibility should always present a question for the jury, which can, by observing the demeanor of a witness, separate truth from falsehood. But this argument is not convincing unless the jury is able to succeed more often than not in this effort. Otherwise, in disbelieving testimony and finding for the opposite party, it will do injustice more often than not. Our received wisdom suggests the jury can make this determination with sufficient accuracy. Regrettably all available data suggest it cannot.[153] Reliable empirical data on this question are obviously hard to come by. Periodically, however, trial judges have revealed their own rules of thumb for judging demeanor. Some of these have been so patently absurd[154] that one can only wonder what is persuasive to the untrained layman. In addition, the initial results of psychological experimentation into the question are beginning to become available. Although the results are still tentative and the experiments cannot actually reproduce the courtroom situation, the emerging data strongly suggest that juries *cannot* judge demeanor with sufficient accuracy.[155] In fact, they are apparently *less* accurate observing live testimony than they are studying recordings or transcripts.[156]

These findings are discomforting, but are they necessarily that surprising? We now know that some people can successfully conceal their perjury from themselves, as well as from others, and may project a very favorable image on the witness stand.[157] On the other hand, many honest persons are understandably uncomfortable there and will sometimes manifest it in ways that suggest they are less than honest. And, jurors, who are not necessarily familiar with these pressures, may sometimes fail to make sufficient allowance for such nervousness. Consequently,

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[152]For a review of the literature describing the ways in which a witness may err in perceiving, recollecting, and relating experiences, see Cooper, *supra* note 61, at 931 n.83.

[153]*Id.* at 932.

[154]*See, e.g.*, Quercia v. United States, 289 U.S. 466, 468 (1933) (suggestion that a juror who wipes his hands while testifying is usually lying); J. FRANK, COURTS ON TRIAL 247, 335 (1949); Sahm, *Demeanor Evidence: Elusive and Intangible Imponderables*, 47 A.B.A.J. 580, 582 (1961).

[155]*See* authorities cited in Cooper 934 nn. 93-95.

[156]*Id.* at 934 n.95.

[157]*Id.*

they may actually evaluate the demeanor of the witness on the basis of their assumed reaction to him in a face-to-face confrontation outside the courtroom, where he ordinarily would behave differently. After reviewing the available data and these possible explanations, one commentator has written:

> In short, there are many reasons for hesitating to put much confidence in the ability of juries to discover the truth by discerning evaluation of witness demeanor. The jury's main factfinding advantages lie in the contribution of a variety of everyday experience in the world; ordinary experience seems to offer little help in the adjudicatory task of assessing credibility. Any attempt to draw from the lessons of ordinary experience, indeed, may simply make matters worse, unless the lesson is the wise one that the courtroom situation is like nothing the juror has previously encountered.[158]

And, after reviewing conflicting judicial statements on the problem, he concluded:

> The arguments canvassed above suggest that the majority rule of enforced belief is the proper one. Such a rule leads to mistaken decision when the witness is mistaken, as often happens, or is simply lying. But if jurors are left free to reject testimony where the only reasonable basis for disbelief is the demeanor of one or more witnesses, the great difficulty of the task and the unfamiliarity of the setting suggest that perhaps more mistakes will be made and that there is little reason indeed to suspect that fewer mistakes will result. Nor is there any significant reason to suspect that trial judges, even though more experienced, are likely to do better. And overriding the speculative nature of the possibility that juries can by some sophisticated process improve on the results of a flat rule is the fact that often they simply will not try. A general verdict which apparently is based on rejection of uncontradicted testimony will often be based not on calculations of credibility, but simply on misunderstanding, misapplication or wilful rejection of the law. It might be urged that, since juries may improve the law by ignoring it, they should nonetheless have broad freedom, or at least freedom in areas of law which are in need of some contemporaneous community tuning. The more reasonable conclusion appears to be that the law-preserving rule of directed verdicts requires the majority rule.[159]

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[158] *Id.* at 937.

[159] *Id.* at 940 (footnote omitted).

Giving a Second Chance to the Party Whose Evidence is Insufficient

King v. Lee[160] involved a special proceeding for a partition sale of lands in an intestate father's estate. Two defendants, a son and his wife, alleged by denial and cross action that the son was the sole owner of a parcel of the land. This plea converted the proceeding into an action as in ejectment to try title to that parcel. At the close of all the evidence at trial, both sides moved for a directed verdict. The trial judge granted plaintiffs' motion. The court of appeals reversed, found that the defendants' motion should have been granted, and remanded with directions to enter judgment in their favor.[161] The supreme court granted certiorari and affirmed on the merits. It concluded, however, that the remand should be modified to permit plaintiffs to seek from the trial judge a voluntary dismissal under rule 41(a)(2) in order to give them a chance to fill the gaps in their evidence.[162]

It is difficult to fault the court's conclusion that plaintiffs should be accorded an opportunity to seek a second chance. Their initial effort to establish title was based upon an inapplicable technical rule, and consequently they eschewed more conventional proof that may well have been available.[163] Arguably this "misapprehension of the applicable law" was excusable. Furthermore, they were required by the court to show on remand "that additional evidence is available which, if brought forward and presented in a new proceeding, would establish their right to partition."[164]

These ingredients—that evidence sufficient to make a prima facie case is probably available and that failure to present it at the first trial was somehow excusable—are recognized as requirements by the federal courts.[165] In fact, unless they appear as findings in the order granting a second chance, an abuse of discretion has probably occurred.[166]

No such requirements prevailed under the Code. But under that

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[160]279 N.C. 100, 181 S.E.2d at 400 (1971).

[161]King v. Lee, 9 N.C. App. 369, 176 S.E.2d 394 (1970).

[162]279 N.C. at 106, 181 S.E.2d at 404-05.

[163]Plaintiffs had relied upon the common source doctrine, which was inapplicable because defendants did not claim through plaintiffs' intestate. 279 N.C. at 105, 181 S.E.2d at 403.

[164]279 N.C. at 106-07, 181 S.E.2d at 404.

[165]Boaz v. Mutual Life Ins. Co., 146 F.2d 321, 323 (8th Cir. 1944); Western Union Tel. Co. v. Dismang, 106 F.2d 362 (10th Cir. 1939).

[166]*E.g.*, Safeway Stores v. Fannon, 308 F.2d 94 (9th Cir. 1962); International Shoe Co. v. Cool, 154 F.2d 778 (8th Cir. 1946); Western Union Tel. Co. v. Dismang, 106 F.2d 362 (10th Cir. 1939).

system technical limitations on things like amendment[167] and variance[168] often prevented a party from making his case sufficient. Consequently, allowing him to "mend his licks" was a necessary escape valve from possible injustice.[169]

That is no longer so. The new rules have, for the most part, eliminated the technical rigors of the Code and common law. Consequently, it may now be assumed, at least until the party makes a showing to the contrary, that he has had his day in court and, since others are awaiting theirs, is not automatically entitled to another.

Unfortunately, the opinion does not state explicitly that these showings are prerequisites to the exercise of the trial court's discretion and that appropriate findings should accompany its exercise.[170] As a result, trial judges nostalgic for the old ways or unfamilar with the new ones may be overly generous in granting second chances, especially since the supreme court has traditionally refused, almost pro forma, to review any of their discretionary decisions.[171]

The opinion also fails to state whether the court of appeals, after concluding that the wrong cross motion for directed verdict[172] had been granted, had any option other than to remand the case for a discretionary determination by the trial judge.[173] This situation, to which the new rules do not speak, is directly analogous to one, now resolved by the United States Supreme Court,[174] in which an appellate court concludes

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[167]An amendment at trial to conform the pleadings to the proof was forbidden if it altered the cause of action, even though there was no apparent prejudice to the opposing party. Perkins v. Langdon, 233 N.C. 240, 63 S.E.2d 565 (1951).

[168]An objection to materially variant evidence could be raised for the first time by motion of the opposing party for compulsory nonsuit. Whichard v. Lipe, 221 N.C. 53, 19 S.E.2d 14 (1942).

[169]Louis, *The Sufficiency of a Complaint, Res Judicata and the Statute of Limitations—A Study Occasioned by Recent Changes in the North Carolina Code*, 45 N.C.L. REV. 659, 666 (1967).

[170]The language quoted in the text accompanying note 164 *supra* comes very close to establishing the first prerequisite, although it does not put it in such terms.

[171]Louis, *Civil Procedure (Pleading and Parties), Survey of North Carolina Case Law*, 45 N.C.L. REV. 823, 837 (1967).

[172]The problem is virtually identical if cross motions for summary judgment are involved. *Cf.* Fountain v. Filson, 336 U.S. 681 (1949).

[173]The opinion clearly holds that the court of appeals erred in directing entry of judgment for defendant. 279 N.C. at 106, 181 S.E.2d at 404-05. But it does not state that such a direction would always be inappropriate in other fact situations in which the correctness of giving plaintiff an opportunity to seek another chance was not so apparent on the face of the record. Nor does it state whether the court of appeals could itself give plaintiff a new trial or voluntary dismissal.

[174]Neely v. Martin K. Eby Constr. Co., 386 U.S. 317 (1967). The analogy between the two situations was drawn in Fountain v. Filson, 336 U.S. 681 (1949) and Globe Liquor Co. v. San Roman, 332 U.S. 571 (1947).

that a motion for judgment notwithstanding the verdict has been erroneously denied. Unfortunately, although the North Carolina Supreme Court recognized the analogy,[175] it overlooked the controlling federal decision[176] and consequently failed to recognize and articulate the difficulties inherent in the situation.

The problem is this. Suppose an appellate court concludes that a motion for judgment notwithstanding the verdict, for directed verdict, or for summary judgment was erroneously denied and remands the case to the trial judge for the exercise of his discretion. Whichever way the trial judge rules, the losing party may challenge his ruling in a second appeal as an abuse of discretion.[177] This possibility is obviated if the appellate court itself makes the determination, but that is a task for which it is ordinarily not suited.[178] Faced with this dilemma, the United States Supreme Court found a middle course.[179] Noting that rule 50(d) of the Federal Rules of Civil Procedure specifically gives the appellate court the option of granting a new trial itself, the Court held that the

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[175]The court cited federal precedent governing FED. R. CIV. P. 50(b). 279 N.C. at 106, 181 S.E.2d at 404.

[176]Neely v. Martin K. Eby Constr. Co., 386 U.S. 317 (1967). Neither side cited this case in its brief in the supreme court.

[177]If a second chance is denied, there can of course be an appeal, alleging an abuse of discretion, from the final judgment entered in accordance with the grant of the motion for judgment notwithstanding the verdict, directed verdict, or summary judgment. If the second chance is granted, it will take the form of a new trial or a voluntary dismissal under rule 41(a)(2). North Carolina, unlike the federal courts, allows an appeal from the *grant* of a new trial. N.C. GEN. STAT. § 1-277 (Supp. 1971). Although no statute directly allows an interlocutory appeal by the opposing party from the grant of a voluntary dismissal, federal courts have allowed it. *Cf.* Safeway Stores v. Fannan, 308 F.2d 94 (9th Cir. 1962). North Carolina probably also would allow an appeal as the denial of a substantial right under N.C. GEN. STAT. § 1-277 (Supp. 1971). Needless to say, the federal courts are more concerned with the possibility of a second appeal because they sometimes will find an abuse of discretion. Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212 (1947); *see* cases cited notes 165-66 *supra*. North Carolina appellate courts, however, almost never make such a finding. *See* Louis, *supra* note 171. But because of the federal decisions construing their identical rules and the greater degree of discretion the new rules give the trial judge, North Carolina appellate courts may begin reviewing such determinations more carefully in the future.

[178]This is obviously not true when the party whose evidence is found insufficient asserts error in the exclusion of evidence that would have made his case sufficient, in the erroneous imposition upon him of the burden of coming forward, or in the erroneous imposition upon him of a higher degree of proof than the law requires. Neely v. Martin K. Eby Constr. Co., 386 U.S. 317, 327 (1967). Even when the request for a second chance is based upon the possibility of obtaining additional evidence, the appellate court is not at a complete disadvantage here. Having just reversed the trial judge on the sufficiency of the evidence, it is quite familiar with the facts of the case and is able to evaluate the request without a substantial additional investment in time and effort. *Id.*; King v. Lee, 279 N.C. 100, 181 S.E.2d 400 (1971).

[179]Neely v. Martin K. Eby Constr. Co., 386 U.S. 317 (1967).

party who won below must present his argument for a second chance to the appellate court contingently in his brief, his oral argument, or—in appropriate circumstances, whatever they may be—directly in a petition for rehearing.[180] If no such presentation is made, or if it is clearly without merit, the appellate court may direct entry of judgment. If, however, the presentation has sufficient merit to support a finding that a second chance should be accorded, the appellate court may either grant a new trial itself or remand to the trial judge for a discretionary determination.[181]

Although this federal solution is complex, it will probably minimize the incidence of time-consuming second appeals without prejudicing the party who won below. Furthermore, it represented a settled construction of the language of identical North Carolina rule 50(d) arguably binding on North Carolina courts in the directly analogous cross-motion situation as well as the one actually considered. Fortunately, nothing in the opinion in *King v. Lee* is inconsistent with such an expanded solution of the problem. Even the result is consistent, since a federal appellate court presumably also would have similarly remanded the case.

In its remand the court limited plaintiffs to an application for a voluntary dismissal under rule 41(a)(2). This is an appropriate medium for a second chance. It is also the one plaintiff traditionally seeks in the trial court in order to avoid the grant or anticipated grant of a motion for summary judgment or directed verdict.[182] But when an appellate court vacates a final judgment on the merits because the trial judge erroneously denied either motion or a motion for judgment notwithstanding the verdict, a new trial clearly also may be granted. In fact, rule 50 mentions only the new trial and clearly prefers it as the medium for giving a second chance. There are good reasons for this preference. A new trial avoids the additional paperwork required by a new action. Furthermore, the case will ordinarily be retried more quickly, and, as a result, the plaintiff will be forced to fish or cut bait at an earlier time. This is a compelling reason. The second chance is an exception to the modern notion that one day in court is ordinarily sufficient. Since the voluntary dismissal may, depending on the time remaining on the statute of limitations and any extensions thereof,[183] permit the plaintiff to

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[180] *Id.* at 329.

[181] Iacurci v. Lummus Co., 387 U.S. 86 (1967); *cf.* Weade v. Dichmann, Wright & Pugh, Inc., 337 U.S. 801 (1949).

[182] Louis, *supra* note 90, at IV-3.

[183] N.C.R. Civ. P. 41(a)(2) provides that if a timely action is dismissed with permission of

keep the initially victorious defendant on tenterhooks a longer time, it should be and clearly is the disfavored remedy.[184] Admittedly, a plaintiff who has dismissed will probably not commence a new action if he is unable to obtain additional evidence. In that case, however, he would also be ill-advised to embark upon a retrial.[185] Furthermore, he cannot ordinarily obtain a second chance unless he shows that new evidence is probably available.[186] Thus, the commencement of a new action is likely, and unnecessary retrials will ordinarily not be prevented.

There is arguably one major difference between the erroneous denial by the trial judge of a motion for judgment notwithstanding the verdict and of a motion for directed verdict or summary judgment. It is settled that a verdict loser who does not move for judgment notwithstanding the verdict waives his right to a direction that judgment be entered in his favor, and can only obtain a new trial, if he successfully appeals the erroneous denial of a motion for directed verdict made by him at the close of all the evidence.[187] The United States Supreme Court has held that a similar waiver occurs by analogy in the cross-motion situation and that to avoid it the party whose motion is denied by the trial court must move under federal rule 50(b), after judgment is entered against him, for judgment in accordance with his earlier rejected motion.[188] This holding, which was not required in *King v. Lee* because defendants made such a motion,[189] has been strongly criticized because the reason for the settled rule no longer applies in this situation.[191] For

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the trial judge, a new action may be commenced, even though the statute of limitations has run, within a year or such shorter time as the judge may specify in his order.

[184]To obtain a second chance, the verdict winner ordinarily must show that new evidence is available. *See* cases cited notes 164-65 *supra*. When he can only show a significant possibility, but persuades the court to let him try, he should perhaps then be given a voluntary dismissal. In that case, if he fails to obtain new evidence, he will probably not institute a new action.

[185]If the same evidence is offered at the second trial, it should be automatically found insufficient through the application of that principle of res judicata known as direct estoppel. Walker v. Story, 256 N.C. 453, 124 S.E.2d 113 (1962).

[186]*See* cases cited notes 164-65 *supra*.

[187]Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212 (1947); N.C.R. Civ. P. 50(b)(2).

[188]Fountain v. Filson, 336 U.S. 681 (1949); Globe Liquor Co. v. San Roman, 332 U.S. 571 (1947).

[189]279 N.C. at 104, 181 S.E.2d at 403.

[190]5A Moore ¶ 50.12 (2d ed. 1966); Louis, *supra* note 90, at IV-14.

[191]A trial judge who denies a motion for directed verdict and sends the case to the jury may very well grant a motion for judgment notwithstanding the verdict if the jury finds against the moving party. If he does, he will go on to consider the request of the party deprived of his verdict for a second chance under Fed. R. Civ. P. 50(c)(2), and the whole matter may then be settled in a single appeal. Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212 (1947). Where, however,

this reason, the General Statutes Commission, in sponsoring related amendments to North Carolina rule 50(b) in 1969, specifically rejected this holding for the new rules. The language of rule 50(b) was not specifically changed to bar it, however, only because the rule does not speak to the otherwise analogous cross-motion problem in the first place,[192] and it was considered inappropriate and unnecessary to insert such a negative in the rule.[193]

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the trial judge himself terminates the action before it reaches the jury, by granting one of two cross motions for directed verdict or summary judgment, he will almost never change his mind if confronted a day later with a motion by the losing party under federal rule 50(b). Consequently, he will not have reached the question of whether the winner would be entitled to a second chance if the appellate court holds that the cross motion of the losing party should have been granted. That request will ordinarily have to be presented first to the appellate court, which will often remand to the trial court for a discretionary ruling thereon, thus making possible a second appeal anyway. Neely v. Martin K. Eby Constr. Co., 386 U.S. 317 (1967). Thus the second appeal can always be avoided if the trial judge grants a motion for judgment notwithstanding the verdict. Since there is a chance he will when the case is sent to the jury, the motion for judgment notwithstanding the verdict is required. Since there is almost no chance he will after he grants a motion for summary jugment or directed verdict, the equivalent rule 50(b) motion should not be required.

[192]N.C.R. Civ. P. 50(b) applies only when "a motion for a directed verdict made at the close of all the evidence is denied."

[193]There is no explicit legislative history to this effect. As the principal draftsman of these amendments, however, I know that that was the case. *See generally* Louis, *supra* note 90, at IV-12 to -14.