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Without an agency relationship on the part of the creditor or salesman with the insurer, an action to reform the insurance contract to meet the reasonable expectations of the insured as orally represented upon application cannot be maintained.

CONCLUSION

Due to the present state of the law, the insurance companies are completely insulated from any liability for misrepresentation caused by the creditors and salesmen who service the consumer from their group credit insurance policies. It is the responsibility of the North Carolina Legislature to require the licensing of credit life, accident and health, and property insurance agents so that they may be policed by the insurance commissioner. The licensing of credit insurance agents is the initial step in developing case law holdings of agency relationships between the insurance companies and creditor institutions which purchase group credit insurance policies. If the courts were to find such an agency relationship to exist without an act of the legislature requiring the licensing of credit insurance agents, they would be writing social policy without an adequate basis in law.

WILLIAM G. REED

North Carolina General Statute Section 7A-227¹ Denies Litigant a Meaningful Right to Trial by Jury

One of our most sacred rights is the right to be judged by our peers. Judicially, of course, this means the right to a trial by jury.

The right to a trial by jury is safeguarded by both the United States and North Carolina Constitutions. Article I Section 25 of the North Carolina Constitution 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." Actions for replevin and detinue have always been considered actions at law in North Carolina.

The "Catch 22" of this right in North Carolina is the Magistrate's

1. N.C. GEN. STAT. 7A-227 (1967) provides that an appeal from judgment of a magistrate does not stay execution. Execution may be stayed by order of the clerk of superior court upon petition by the appellant accompanied by undertaking in writing executed by one or more sufficient sureties approved by the clerk to the effect that if judgment be rendered against appellant the sureties will pay the amount thereof with costs awarded against the appellant.

Court. This can best be shown by example: Let's suppose that merchant *A* files a complaint in Small Claims Court. The complaint alleges that *B*, a consumer, has fallen behind in payments to *A*. Let's assume that *B* purchased goods from *A* and has paid \$800 for the goods but still owes *A* \$200. *A* is asking the magistrate for return of the goods because there was a security agreement within the sales contract. *A* claims the value of the goods are now \$400. *B* answers the complaint, *B* denies all allegations made by *A*, *B* also counterclaims asking for damages and demands a trial by jury pursuant to Article I Section 25 of the North Carolina Constitution. *B* also makes a motion for dismissal because he claims the true amount in controversy is \$800, and the issue is, therefore, not within the jurisdiction of the magistrate.²

The magistrate denies *B*'s motion for dismissal and rules in favor of *A*. *B* is informed by the magistrate that execution will be made on the goods within 3 days, but *B* has a right to appeal. In order to appeal, *B* must notify the magistrate when the judgment is announced, or give written notice within 10 days after the judgment is given. However, an appeal bond, or as it is statutorily called an undertaking, is required of *B* to delay collection of the goods.³

What has happened to *B*'s right to a trial by jury? The magistrate might say that *B* has a right to appeal for a trial *de nova* in the District Court and there be given a trial by jury on the merits.⁴ The unreasonableness of this answer lies in the fact that unless *B* can post the undertaking required by N.C.G.S. Section 7A-227, *B* will still lose possession of the goods in controversy until the District Court, sitting with jury, renders a decision.

A litigant on appeal from a Magistrate's Court can stay execution of the judgment only by providing an undertaking in writing executed by one or more sufficient sureties approved by the Clerk of Superior Court. If judgment is rendered against the appellant, the sureties are liable for the amount of said judgment including costs awarded against the appellant. Thus undertaking is tailored to assure that the judgment obtained in Magistrate's Court is preserved on appeal.

Let's suppose the goods in controversy happen to be all the beds in *B*'s home. If *B* is unable to comply with the undertaking because of his or her economic status or for other bona fide reasons, must *B* and his or her children sleep on the floor in order to obtain a constitutional right to a trial by jury? Is this actually a meaningful right to a trial by jury, since one has already lost possession of his or her

2. N.C. GEN. STAT. §§ 7A-210(1) (1974), -243(5) (1965).

3. N.C. GEN. STAT. § 7A-227 (1967).

4. N.C. GEN. STAT. § 7A-228 (1969).

property and may have to wait several months before the appeal is heard? Is this equal protection under the law?

This author feels this system is unjust because it requires defendant to stand trial and subject himself or herself to the judicial process twice to secure a constitutional right. It also discriminates against the poor, since they are in the class which is prospectively unable to post the undertaking and therefore less likely to pursue the action to the District Court, where they would have the right to be judged by their peers.

Looking at this problem from a historical viewpoint to see how some of the first General Assemblies in North Carolina viewed the right to a trial by jury on appeal from a justice of the peace court, one finds that a security was not initially required to stay execution.⁵ During those years, a stay of execution was automatic for given periods of time allowing appellant to obtain a trial without posting security.⁶ Another interesting discovery was that certain necessities of life, such as a bed and its necessary furniture were held exempt from execution.⁷

On the criminal side of our judicial system, progress has been made down to the municipal court level to assure equal protection for the indigent.⁸

A state denies equal protection of the law to an indigent defendant if the court refuses to supply him with a free transcript of his trial for purposes of appeal.⁹ Although the United States Supreme Court has repeated that wealth is not a suspect criteria such as race, sex, or religion, it has made strong statements to indicate that wealth is suspect in many situations. The Court stated in *Griffin v. Illinois*, "There can be no equal justice when the kind of trial a man gets depends on the amount of money he has."¹⁰

An indigent convicted in Ohio was held entitled under the equal protection clause to an appeal to the Ohio Supreme Court without payment of filing fees in advance.¹¹

An indigent inmate of a state penitentiary is entitled to file an application for a writ of *habeas corpus* in state court without pre-payment of filing fees, under the same constitutional guarantee.¹²

Although during this past term, the United States Supreme Court

5. Laws of North Carolina ch. 414(1) (1794).

6. *Id.*

7. Laws of North Carolina ch. 746(2) (1808).

8. *Oregon ex rel. Mainor v. City of Eugene* (Pre. Cir. Ct. No. 87391) (1968).

9. *Griffin v. Illinois*, 351 U.S. 12 (1956).

10. *Id.* at 19.

11. *Burns v. Ohio*, 360 U.S. 252 (1959).

12. *Smith v. Bennett*, 365 U.S. 708 (1961).

handed down an unfavorable ruling relating to equal protection for the indigent,¹³ setting aside some of the impact of an earlier equal protection case,¹⁴ one hopes that the trend is still in favor of equal access to the courts for the poor.

On the civil side of our judicial system, there has been a strong trend toward equality for the indigent. The best example of this trend was illustrated by the United States Supreme Court when it held in *Brodie v. Connecticut*¹⁵ that the Due Process Clause of the 14th Amendment prohibited the state from denying welfare recipients access to the courts for a divorce because they were unable to pay court fees and service costs.

North Carolina statutorily complies with the spirit of this decision allowing any judge or Clerk of the Superior Court to authorize a person to sue as a pauper in their respective courts when such person proves by one or more witnesses that he or she has a good cause of action, and swears by affidavit that he or she is unable to pay court costs or fees.¹⁶

North Carolina law has also extended this waiver of court fees to allow a defendant by order of the Clerk of the Superior Court to bring an appeal *in forma pauperis*.¹⁷ One can use this statutory authority to waive the cost of an appeal from the Magistrate's Court.¹⁸

This author also contends that by the plain language of N.C.G.S. Section 1-228, the Clerk or Court has not only inherent power but express statutory authorization to relieve defendants from the undertaking required to stay execution. N.C.G.S. Section 1-228 provides defendant with the right to appeal *in forma pauperis* in a case where a defendant is unable by reason of poverty to make the deposit "or to give the security required by law for said appeal."

This author submits that the words "or to give the security" must encompass the undertaking provided for in N.C.G.S. Section 7A-227, otherwise those words would serve no useful purpose. But N.C.G.S. Section 7A-227 expressly states the requirements for a stay of execution and in so doing the meaning of N.C.G.S. Section 1-228 becomes ambiguous and unclear in this context.

The appeal bond required of appellants by California law is waivable.¹⁹ The Court stated that it was the power and duty of the Court

13. *Ross v. Moffet*, 42 U.S.L.W. 4940 (1974).

14. *Douglas v. California*, 372 U.S. 358 (1968).

15. 401 U.S. 371 (1971).

16. N.C. GEN. STAT. § 1-110 (1969).

17. N.C. GEN. STAT. § 1-288 (1969).

18. *Porter v. Cahill*, 1 N.C. App. 579, 581 (1968).

19. *Roberts v. California Superior Ct.*, 264 A.C.A. 282 (1968).

to waive the undertaking when the petitioner seeks to appeal *in forma pauperis* from a justice of the peace court to obtain a trial *de novo*.

No cases in North Carolina could be found which say that the Clerk of Superior Court or that the court itself is without power to dispense with an undertaking. This type of power would help relieve the defect in the magistrate's system. Many times necessities of life may be involved in small claims actions, certainly since the monetary jurisdiction has been raised from \$300 to \$500²⁰ and it is quite possible that it will be raised again in the near future.

The Clerk of the Superior Court should at least weigh the loss which will be suffered if execution is not stayed until the appeal is heard before a jury in the District Court, and if the Clerk, or alternatively the Court, feels that a necessity of life is involved it should waive the undertaking required by N.C.G.S. Section 7A-227.

The United States Supreme Court this past term in *Pernell v. Southall Realty*²¹ held that under the Seventh Amendment either party has a right to a trial by jury in any action that existed at common law. The Court stated, "Our courts were never intended to serve as rubber stamps for landlords seeking to evict their tenants, but rather to see that justice be done before a man is evicted from his home."²²

In *McKelton v. Bruno*²³ the court set out the standard for assessing a litigant's ability to bear the costs of a lawsuit. Although it was a summary eviction case, the legal tests are equally relevant to the example earlier given:

The Courts must pay some attention to the nature of the particular litigation. In many General Sessions cases there is not a large amount of money at stake. This is especially so in landlord-tenant's actions where the issue being litigated, the tenant's right to remain in his home, will often be of great personal, but of little monetary value. Although he has a valid defense to the landlord's action, a tenant who is barely able to make ends meet, and for whom a victory would not bring a large monetary judgment, might well decide not to defend or appeal if he were forced to pay all court costs. All courts must be careful lest the financial burdens of litigating preclude the poor from litigating meritorious issues.²⁴

One may query as to why the individual litigant or low income consumer would bother to question a small claims system, since this sys-

20. N.C. GEN. STAT. § 7A-210(1) (1974) "substituted five hundred dollars (\$500.00) for three hundred dollars (\$300.00) in subdivision (1).

21. 42 U.S.L.W. 4595 (1974).

22. *Id.* at 4601.

23. 428 F.2d 718 (D.C. Cir. 1970).

24. *Id.* at 720.

tem was set up primarily for his benefit.²⁵ Reginald Heber Smith praised the small claims system when he wrote *Justice and the Poor*, claiming that small claims courts could eliminate the defects of the traditional administration of justice.²⁶

Recent studies have shown this, in fact, not to be the case.²⁷ These studies have revealed that the individual litigant appeared most often in small claims court as a defendant, and that he usually lost. Corporations, proprietorships and government agencies were plaintiffs in over 80% of the cases surveyed, while the individual appears as defendant in 93.3% of the cases.²⁸

These studies revealed that finance companies, typically those specializing in credit sales of furniture and appliances have discovered the ease and efficiency of the small claims court as a collection device.

The elimination of N.C.G.S. Section 7A-227 would help prevent ultimate abuse at the small claims level. The law should be rewritten to specifically compel the Clerk of the Superior Court or the Court itself, when there is an appeal *de novo* to the District Court, to waive all costs including undertakings when necessities of life are involved in the litigation.

The elimination of N.C.G.S. Section 7A-227, and the writing of a statute which compels the Clerk or Court to stay execution would guarantee the litigant that his constitutional right to a trial by jury is not abridged by the present web of the small claims system. This elimination and building of new statutory law would promote due process and equal protection under the law.

RICHARD G. MILLER

The Working Man's Nemesis—The Polygraph

Much has been said about the use of the polygraph by employers in both the public and private spheres. Vociferous objections against and strong justifications for the use of the polygraph permeate any discussion pertaining to the submission to a polygraph examination as a

25. *Report of Committee on Small Claims and Conciliation Procedure* 10 A.B.A.J. 828 (1924).

26. Moulton, *The Persecution and Intimidation of the Low-Income Litigant as Performed by the Small Claims Court in California*, 21 STAN. L. REV. 1658 (1969).

27. Ragter, McCloskey, Reinis, *The California Small Claims Court*, 52 CAL. L. REV. 876, 885 (1964); Doty, *Small Claims Court as Collection Agencies*, 4 STAN. L. REV. 237 (1951); Moulton, *supra* note 26.

28. Moulton, *supra* note 26, at 1660.