

WORLD WIDE MEATS, INC., DISTRIBUTION)
 TRUST, SUCCESSOR IN INTEREST TO)
 WORLD WIDE MEATS, INC.,)

CLERK SUPREME COURT

Filed December 23, 1980

Plaintiffs-Appellants,)

vs.)

CLARKE T. KNOWLES, RAYMOND LEE)
 SHUBAT, AND LARRY L. REBUCK,)

0-221

2-62713

Defendants-Appellees.)

Appeal from Crawford District Court - David J. Blair, Judge.

Plaintiff Distribution Trust, successor in interest to predecessor corporation, appeals from trial court's judgment in favor of defendants, former officers, in an action for an accounting arising from defendants' allegedly improper expenditures of corporate funds. Plaintiff alleges trial court erred 1) in concluding that the legal concept of de minimis exonerated defendants from an accounting, 2) in concluding that defendants' misappropriations were de minimus, 3) in concluding that a mutual release foreclosed plaintiff's claim, 4) in holding that plaintiff's demand for an accounting from defendants was a condition precedent to filing suit, 5) in failing to find that defendants were equitably estopped to assert their affirmative defenses, and 6) in failing to address plaintiff's assertion that defendants' oral testimony violated the parol evidence and best evidence rules. REVERSED AND REMANDED.

Michael Mundt of Raun, Franek, Mundt & Nepper, Denison, Iowa, for plaintiffs-appellants.

Thomas R. Eller of Nash, Eller, Brink & Claussen, Denison, Iowa, for defendants-appellees.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

Plaintiff, World Wide Meats, Inc., Distribution Trust, appeals from trial court's judgment in favor of defendants, former officers in plaintiff's predecessor corporation, rendered in this action for an accounting arising from defendants' allegedly improper expenditures of corporate funds. Plaintiff alleges trial court erred 1) in concluding that the legal concept of "de minimis" exonerated defendants from an accounting for misappropriation of corporate funds, 2) in concluding that defendants' misappropriations were de minimis, 3) in concluding that a mutual release foreclosed plaintiff's claim, 4) in holding that plaintiff's demand for an accounting from defendants was a condition precedent to filing suit, 5) in failing to find that defendants were equitably estopped to assert their affirmative defenses, and 6) in failing to address plaintiff's assertion that defendants should have been precluded from offering oral testimony regarding certain accounting matters when such testimony violated the parol evidence and best evidence rules. We reverse.

Plaintiff is the successor in interest to World Wide Meats, Inc., a corporation which was dissolved on March 31, 1975. Defendants were officers of the corporation; Clarke Knowles was executive vice-president; Larry Rebuck was treasurer and comptroller; Raymond Shubat was president. In August of 1975, plaintiff filed an action in equity against each defendant, alleging that each had used corporate funds in various ways for which no appropriate accounting was made.¹ Plaintiff requested the court to order defendants to make a full disclosure of their conduct and management of the corporation, to make a full and complete accounting, and to reimburse World Wide for corporate funds improperly spent. Subsequent amendments to the petition contain specific allegations of improper expenditures of corporate funds. Defendants filed answers and amended answers denying plaintiff's allegations and claiming legitimate business purposes for the challenged expenditures. Defendants also alleged as affirmative defenses 1) that plaintiff was precluded from bringing this action because it did not demand nor did defendants refuse an accounting before the petitions were filed and that such demand and refusal were conditions precedent to filing plaintiff's action and 2) that plaintiff was precluded from bringing this action against defendants Knowles and Shubat because they entered into a mutual release with the corporation discharging all claims and obligations between the parties.

¹ The actions were consolidated on October 7, 1975.

Trial commenced on June 13, 1978, and concluded on August 23rd. On October 11, 1978, trial court entered its judgment denying plaintiff's claim for relief on three grounds: 1) plaintiff's failure to demand an accounting before filing suit; 2) the mutual release entered into by the corporation and defendants Shubat and Knowles precluded plaintiff's claims against those defendants; and 3) any misapplication of corporate funds by the defendants was de minimis when compared to the scope of the overall business and defendants' contributions to it. This appeal followed.

I. Scope of Review. Because this action is in equity, our review is *de novo*. Iowa R. App. P. 4.

II. Whether Plaintiff's Demand is a Condition Precedent to Filing Suit. We first must determine whether plaintiff was required to demand an accounting from defendants as a condition precedent to bringing this action. If the trial court was correct in so holding, plaintiff may not maintain its suit because the evidence clearly establishes that no demand was made. All three defendants testified that they were never asked to account for their various uses of corporate funds. In addition, two former members of the corporate board of directors testified that they did not ask defendants for an accounting.

There is some authority for the proposition that an action for an accounting must contain an allegation that an accounting was demanded and refused. Carbin v. Madison, 12 Wash. App. 318, 327, 529 P.2d 1145, 1151-52 (1974); State v. Taylor, 58 Wash. 2d 252, 262, 362 P.2d 247, 253 (1961); Starks v. Field, 198 Wash. 593, 600-01, 89 P.2d 513, 516 (1939); American Woodmen's Life Insurance Co. v. Supreme Camp, 37 Colo. App. 311, 316, 549 P.2d 423, 427 (1976). See generally, 1 C.J.S. Accounting § 28 (1936). 1 Am. Jur. 2d Accounts and Accounting § 46 (1962).

Demand-and-refusal, however, does not appear to be the majority rule. In setting forth the requisite elements of an accounting action, the courts of most jurisdictions make any requirement of a prior demand and refusal to give an accounting conspicuous by its absence. For example, some states appear to require only an allegation of a fiduciary or confidential relationship, together with a duty to account. Dayle v. Jack Mathis General Contractor, Inc., 253 Or. 57, 59, 453 P.2d 174, 175 (1969). Others require allegations of a relationship requiring an accounting as well as the amount claimed to be due. Kritzer v. Lancaster, 96 Cal. App. 2d 1, 7, 214 P.2d 407, 411 (1950). In some states, a mere allegation of a fiduciary relationship appears to be sufficient. Orkin Exterminating Company of North Alabama v. Krawcheck, 271 Ala. 305, 311, 123 So. 2d

149, 156 (1960); Zeltser v. Mark, 7 App. Div. 2d 851, 852, 181 N.Y.S.2d 546, 547 (1959). Finally, at least one state requires plaintiff to show only the likelihood of being entitled to recover some judgment. Charles S. Martin Distributing Co. v. Roberts, 219 Ga. 525, 532, 134 S.E.2d 587, 592 (1964).

Iowa case law does not reveal a specific demand-and-refusal requirement. For example, in Warren County v. Elmore, 250 Iowa 348, 353, 93 N.W.2d 756, 759 (1958), the court said that a plaintiff seeking an accounting "has the burden of proving there was something due it before it was entitled to an accounting." Oskaloosa Savings Bank v. Mahaska County State Bank, 205 Iowa 1351, 1360, 219 N.W. 530, 534 (1928). See generally Gibson v. Deuth, 220 N.W.2d 893, 897 (Iowa 1974). Even this rule, however, does not apply in cases where a trustee who is under a duty to account is asked to do so.² We are aware of the rule in the somewhat related area of shareholder derivative suits. "Authority to sue for corporate injuries ordinarily reposes in corporate management." Berger v. General United Group, Inc., 268 N.W.2d 630, 635 (Iowa 1978). Thus before shareholders can sue to enforce the rights of the corporation, they generally must make a demand upon the proper corporate officers, trustees, or other shareholders to bring suit unless such a demand would be a useless gesture. Holi-Rest, Inc. v. Treloar, 217 N.W.2d 517, 523 (Iowa 1974); Des Moines Bank & Trust Co. v. Bechtel & Co., 243 Iowa 1007, 1083, 51 N.W.2d 174, 217 (1952); Iowa R. Civ. P. 44. The rationale behind this demand rule is that

... courts should not interfere in internal affairs of private corporations until all intracorporate remedies have been exhausted. The demand provides opportunity for directors to occupy their usual status as corporate managers and gives the corporation a chance to take control of litigation to be brought on its own behalf.

Id. The policy considerations underlying the above rule are not involved where a corporation's successor-in-interest sues former corporate officers.

Based upon our review of the authorities, we conclude that Iowa law does not require a plaintiff in an accounting action to demand an accounting from defendant before filing suit. It follows, therefore, that trial court erred in holding plaintiff's action was foreclosed by its failure to demand a pre-petition accounting.

III. Defendants' Duty to Account. We next determine the nature and extent of the duty, if any, defendants owed the corporation and whether that duty was violated.

² See Burkey v. American State Bank, (per curiam opinion not contained in Iowa reports), 256 N.W. 300, 302 (Iowa 1934).

Benson v. Charles Weitz' Sons, 211 Iowa 489, 492, 231 N.W. 431, 432 (1930). The nature of the relationship between a corporation and its officers has been described as follows:

The fiduciary relation of the corporate officers to the corporation and its stockholders as a whole imposes upon them the obligation to serve the purpose of their trust with fidelity, and forbids the doing of any act by them, or by any one of them, by which the assets of the corporation are wrongfully diverted from corporate purposes.

3A Fletcher Cyc. Corp. § 1102 (1975 rev. vol.). Iowa law also imposes this duty. See Rowen v. LeMars Mutual Insurance Company of Iowa, 282 N.W.2d 639, 650 (Iowa 1979).

Not only are the officers bound by this obligation, but the corporation and its stockholders may also presume that the officers will perform their duties diligently and honestly.

The court fully explained this obligation as follows:

[T]he promoters, officers and directors of a corporation are the agents of and act for it, and indirectly for its stockholders, and they are the trustees or quasi trustees, at least, of the property of the corporation for the company and its stockholders. They occupy a fiduciary relation to the corporation on which relation the stockholders may rely. The corporate entity and the stockholders, in particular, may presume that these trustees will perform their duties with diligence, honesty, and the utmost good faith, inherent and implicit in their functions. They are not required to be ever on their guard and watchful lest those trustees misapply, destroy, embezzle, steal the corporate assets, or defraud them.

Bechtel, 243 Iowa at 1081, 51 N.W.2d at 216. See Atlas Coal Co. v. Jones, 245 Iowa 506, 514, 61 N.W.2d 663, 667 (1954). One example of this fiduciary duty is that officers may not lawfully use corporate funds to pay their personal obligations unless given express or implied authority to do so. 3A Fletcher, § 1109 at 149.

Utilizing these principles, we have reviewed the entire record *de novo* and conclude that there is sufficient evidence to support plaintiff's claim that defendants violated their fiduciary responsibilities by misappropriating corporate assets. Wayne Woodbury, a CPA who audited the corporation's books, testified that he got the impression of a wholesale drain of corporate assets in favor of the three defendants due to their failure to report many of their expenses to the board of directors, which consequently were not authorized by the board. Jim Langenfeld, a former World Wide stockholder, testified that he met defendant Knowles in a bar sometime in 1977. Langenfeld expressed to Knowles his displeasure regarding Knowles' conduct as a corporate officer. Knowles, before leaving, said "Langenfeld, there's suckers born like you every day; there's guys like us who take your money." Helen Stolz, a bookkeeper for the corporation, testified that, when defendant Shubat was president of the corporation,

she told him expenses were higher than under the prior president and that Shubat merely replied "Helen, do your job."

We refer to these incidents to illustrate the general attitudes defendants apparently held toward their roles as corporate officers. Without a detailed recitation from the record, we conclude there is considerable evidence of defendants' specific actions of misappropriation or, at least, of involvement in questionable and undocumented activities using corporate funds. The evidence clearly shows that defendants were using corporate funds for nonbusiness-related purposes. Shubat testified at his deposition hearing that the corporation paid the officers' country club dues. According to the former chairman of the board, those payments were never authorized by the board. Knowles and Rebuck testified that their wives accompanied them on various short business trips at the corporation's expense. According to Shubat, the wives' expenses were paid "basically for a sort of a little extra as far as employees was [sic] concerned." Knowles could not explain why three checks for the sum of \$22.00 were written to Mrs. Knowles from the corporate account. There was considerable evidence that the corporation paid for many of defendants' meals for which the business purpose was negligible or nonexistent. Shubat himself testified that some of his meal expenses were charged to the corporation even though they were purely personal expenses. Rebuck said he occasionally had a few drinks by himself but charged them to the corporation.

On at least two occasions the corporation paid for tickets and bus fare for defendants and a number of other people for the Iowa State-Nebraska football game. Although many of those who went along had no connection with the corporation, and Shubat admitted that these trips served "very little" business purpose, he nonetheless testified that "it was a proper thing to do as far as we were concerned." Shubat also had a girlfriend named Mary Mejia, who lived in St. Joseph, Missouri. He went to St. Joseph on many occasions at corporate expense, even though only some of the trips were arguably related to business. The corporation also paid, without any reimbursement, Mejia's expenses when she flew to California to meet Shubat. Rebuck took a female friend to San Francisco, also at corporate expense.

In addition, the corporation apparently paid a number of defendants' miscellaneous personal expenses. Shubat used the corporation's Bank AmeriCard to buy clothes, but did not reimburse the corporation. For some time he also submitted his personal telephone bills to the corporation. Knowles and Rebuck decided that the corporation should pay the officers' personal credit card bills. Diane Harm, a former corporate

employee in the bookkeeping department, became aware that Shubat's home utility and telephone bills were being paid by the corporation. Those bills included several lengthy long-distance calls to Mejia in St. Joseph.

One of defendants' major problems in trying to explain or justify these numerous expenses was their admittedly poor record keeping practices and their lack of memory as to the purpose of many of their activities. For example, Knowles claimed that he could not remember why the corporation issued a check to him for \$173 after the corporation had already gone out of business. He also said that he did not always indicate the business purpose for meals paid by corporation. Shubat admitted that the accounting firm which examined the corporate books was critical of his failure to submit vouchers or expense receipts to substantiate his expenses. Knowles' and Shubat's employment contracts specifically required them to provide vouchers to substantiate their travel and entertainment expenses. Rebuck testified that many expense vouchers were paid without any review. When questioned about an entertainment expense of \$55.50, Shubat admitted his negligence in failing to indicate who it was that he entertained. Betty Walker, who worked in the corporation's accounts payable department, said that there often was no verification of expenses when she wrote corporate checks to pay such expenses.

Defendants also had difficulty in explaining why certain checks were written to them on the corporate account. For example, Knowles ceased working for the corporation in early November, 1974, but nonetheless received a check on December 20, 1974, for \$430.90. He could not explain with certainty why he got that check. Shubat could not explain why he took \$650 in checks written on the corporate account. Rebuck could not explain a corporate check written to him in the amount of \$200.

From this review, we conclude that the evidence is sufficient to support plaintiff's contention that defendants violated their fiduciary duties owed to the corporate entity itself and to the stockholders. Defendants frequently used corporate funds to pay for their own personal obligations and expenses. They could not explain a large number of corporate expenditures. Defendants thus failed in their duty to account. As a result, they violated their duty under Iowa law to act with utmost fidelity and good faith in relation to the corporation. Trial court erred in reaching a contrary finding.

IV. Doctrine of De Minimis. Trial court apparently gave little weight to the above evidence and ruled in defendants' favor in the following terms:

These defendants used best efforts to provide effective management for plaintiff's business. They had a direct interest in the success of the company. The defendants' misapplications of corporate funds were de minimis in the context of their overall diligence and the scope of this meat packing enterprise.

We cannot agree with this conclusion. When all the evidence is considered, it reveals an overall consistent course of conduct by defendants in which corporate funds were improperly diverted for noncorporate purposes. At the very least, defendants inadequately explained and did not account for a large number of sizeable corporate expenditures.

Even if defendants' misconduct was relatively minor, as trial court evidently believed, we conclude that the concept of de minimis has no applicability in the context of the fiduciary duty owed by these corporate officers and directors to their corporation and its stockholders. In Holden v. Construction Machinery Co., 202 N.W.2d 348, 358 (Iowa 1972), the court held that equity holds fiduciaries strictly accountable for their conduct. No exception is made for relatively small violations of this duty "to at all times act in utmost good faith, and . . . exercise powers held for the sole benefit of the corporation and its stockholders, never for their personal gain." 202 N.W.2d at 358 (emphasis added). This was made even more clear in Hoyt v. Hampe, 206 Iowa 206, 220, 214 N.W. 718, 725 (1928), where the court said:

[A]n act by the fiduciary in which personal interest and duty conflict is voidable at the mere option of the beneficiary, regardless of good faith or result. The court will not inquire into its profitableness to the trustee or prejudice to the beneficiary. (emphasis added).

From these authorities, we conclude it is immaterial whether a fiduciary's violation of duties of good faith and fidelity is relatively large or small. In either case, the person or group to whom the duty is owed is entitled to an accounting. Trial court therefore erred in applying the concept of de minimis to this case.

V. Mutual Release as an Affirmative Defense. As an affirmative defense, defendants claim that plaintiff is precluded from recovery because of a release executed by defendants Knowles and Shubat and the corporation, discharging all claims and obligations between the parties. We note that Rebeck was not a party to this agreement; he therefore cannot claim exoneration from the action against him on this basis. We further conclude that the release does not preclude plaintiff's suit against defendants Shubat and Knowles and that trial court's finding to the contrary is erroneous.

The relevant language in the release agreement appears, on first impression, to be all-inclusive: "the parties hereto do hereby cancel and set aside any and all claims and obligations that any one may have against the other" A careful reading of the release, however, in combination with testimony, demonstrates that, at least in the minds of the members of the board of directors, the scope of the release was much

narrower. As part of their original contract of employment, defendants Knowles and Shubat were permitted to buy two hundred ninety-one thousand (291,000) shares of common stock in World Wide Meats, Inc., for the total sum of four hundred eighty-two thousand four hundred seventy-eight dollars (\$482,478.00) to be paid in total by May 15, 1979, together with interest at six percent per annum. They also held options to purchase eighty-one thousand (81,000) shares of World Wide common stock for one dollar (\$1.00) per share.

After discussing the above terms, the release then recited that the corporation had sold a large part of its assets to Dubuque Packing Company, that the sale was contingent upon the approval of the stockholders of the corporation and upon Dubuque obtaining the services and being permitted to employ defendants Shubat and Knowles, and that to fulfill the contract with Dubuque, the parties,

... believing it is mutually beneficial to all of them to cancel all of their obligations one to the other agree as follows:

1. That the contracts of employment with Ray Shubat and Clarke T. Knowles shall terminate as of November 4, 1974, excepting that they will continue to aid First Party [the corporation] in disposing of their meat inventories as agreed to in the contract of sale with the Dubuque Packing Company, Denison, Iowa, which is herein referred to and made a part hereof.
2. That Ray Shubat and Clarke T. Knowles will resign as officers of World Wide Meats as of November 4, 1974.
3. That the contract of purchase of the 291,000 shares of common stock in World Wide Meats, Inc., is hereby cancelled and held for naught.
4. That the second parties [the defendants] hold and own 81,000 option shares at \$1 per share of the common stock of World Wide Meats, Inc. which options are hereby cancelled, set aside and held for naught.
5. That the parties hereto do hereby instruct the First National Bank of Denison, Iowa, the escrow holder of said common stock and option shares to return the same to World Wide Meats, Inc., hereby, cancelling and setting aside the escrow agreement heretofore signed by the parties.

But the parties hereto do hereby cancel and set aside any and all claims and obligations that any one may have as against the other excepting only that each of the parties of the Second Part [defendants] shall retain as their own any common stock that they may hold in World Wide Meats, Inc. other than that mentioned in this agreement and exercise their rights thereto as any other stockholder might or could do.

Further, Frank Crabb, one of the former directors, testified that he thought the release extended only to releasing Knowles and Shubat from their obligations under the stock

purchase agreement. He said that he did not think the Board of Directors was releasing defendants from any and all claims of whatever nature. We thus conclude that the reasonable interpretation of the release is that it covered only the obligations surrounding the employment contracts of defendants Shubat and Knowles.

Even if the release was not limited in effect to defendants' obligations under the stock purchase agreement, we do not agree that the release forecloses plaintiff's request for relief because we conclude defendants concealed their misconduct. Under Iowa law, a fiduciary has the duty to make a full and fair disclosure of all relevant facts relating to the subject matter of a fiduciary relationship. Vertman v. Drayton, 223 Iowa 380, 383, 272 N.W. 438, 439 (1937). In the specific context of a release, the general rule is stated as follows:

There may be a fraudulent and wrongful concealment of the facts involved in the giving of a release as well as a misrepresentation, and a false suggestion or suppression of truth affords a sufficient ground to set aside a release, where a duty to disclose or a confidential relation exists between the parties, silence as to material facts involved in the giving of a release constitutes fraud and will avoid the release.

76 C.J.S. Release § 27 (1952). See also Nixon v. Temple Terrace Estates, 97 Fla. 392, 396-97, 121 So. 475, 476-77 (1929); Norris v. Cohen, 223 Minn. 471, 477-78, 27 N.W.2d 277, 281 (1947). A release executed in the context of a fiduciary relationship is examined with the closest scrutiny. Allen v. Moushegian, 320 Mass. 746, 757, 71 N.E.2d 393, 400 (1947); 76 C.J.S. Release § 24 (1952). Plaintiff carries the burden to show by clear, satisfactory and convincing evidence that the release is not binding. Syester v. Banta, 257 Iowa 613, 623, 133 N.W.2d 666, 673 (1965). This burden is facilitated in the present case by the fact that a fiduciary relationship is involved. Under Vertman, therefore, defendants already had a duty to disclose all material facts.

The record reveals much evidence that defendants in fact concealed their misconduct from the board of directors or, at least, failed to make a full disclosure of their various personal uses of corporate funds. Dennis Lindberg, George Berry, Earl McCollough, and Frank Crabb were all former corporate directors and were unanimous in their testimony that they had no knowledge of defendants' financial misconduct at the time the release was executed. They also testified that at one of the monthly directors' meetings, they questioned defendant Knowles about a claimed expense of \$4,000 for travel and entertainment. At this point Knowles became very upset, said he was tired of being humiliated by the board, and wanted the board to meet less

frequently. The reasonable implication from this incident is that Knowles did not want the board looking too closely into his claimed expenses. Shubat admitted that the board would not have intended to release claims such as those relating to corporate payment of expenses incurred by his girlfriend had the board known of such claims. As already indicated, the auditor believed that there was some attempt by defendants to conceal their actions. In light of all these considerations, we conclude that the release was ineffective and did not preclude plaintiff's action against defendants Knowles and Shubat since their apparent acts of concealment violated their duty to expose all relevant facts.

VI. Admission of Testimony. Plaintiff also argues that trial court erred in allowing certain oral testimony at trial. In light of our disposition of the other issues, we will not address this question.

Because trial court erred in holding that plaintiff was required to make a demand for an accounting prior to filing suit, that the release precluded plaintiff's suit, and that defendant's misconduct was de minimis, we must reverse trial court's judgment and remand this case with directions for entry of judgment consistent with this opinion.

REVERSED AND REMANDED.

All judges concur except Donielson, J., and Carter, J., who dissent.

DONIELSON, J. (dissenting)

I would affirm the trial court's judgment for the defendants for two reasons.

First, I fail to find enough evidence on this record to overrule the trial court's finding that the defendants were not guilty of misuse of corporate funds. I think that the evidence considered as a whole reveals that the defendants generally spent corporate funds in a responsible and appropriate manner, although they may not have accounted for a large number of expenditures. In short, I can accept the trial court's de minimus ruling.

Second, and possibly more importantly, I agree with the trial court that the mutual release executed by defendants Knowles and Shubat and the corporation operates to bar recovery by the plaintiff against those two defendants. I find it inconceivable that the words "[b]ut the parties . . . cancel and set aside any and all claims and obligations that anyone may have as against the other" could be construed to mean anything other than that the parties intended to release any and all claims they may have had against each other. This language, it seems to me, is abundantly clear. Furthermore, the provision itself, coming as it does after five numbered and specifically-worded provisions, appears intended to operate as a sort of catch-all wherein all claims and obligations are set aside. Moreover, seldom has a word been so significant as the word "but" in this provision. For me, the inclusion of that word entirely forecloses the majority's argument that the provision refers back to the stock purchase arrangements. Although testimony by one of the directors lends credence to the majority's argument, the only reasonable interpretation of the language of this provision is that the provision was intended to bar all claims.

Even if the release should be interpreted to bar plaintiff's claim against Knowles and Shubat, however, the majority maintains that the release is ineffective because defendants failed to reveal their financial misconduct at the time the release was executed. I think the corporation should be held to this release whether or not the directors were aware of the claims that they were agreeing to release. The board, which was presumably very anxious to see this sale go through, signed this release at the risk of the corporation; in essence, since the release was signed by the board in return for the defendants' agreement to buy the stock, the corporation received a kind of consideration for signing the release. If the directors were not aware of possible claims against the corporation, they should have somehow narrowed the language of the release

or simply not have signed it. Considering the circumstances and the fact that I do not concur in the limited reading given this release by the majority, I would affirm the trial court.

Carter, J., joins in this dissent.