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# **“It is Much Easier to Find Fault With Others, Than to be Faultless Ourselves”: Contributory Negligence as a Bar to a Claim for Breach of the Implied Warranty of Merchantability**

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## INTRODUCTION

A warranty claim, expressed or implied, is grounded in contract law.<sup>2</sup> As Justice Bobbit stated in *Wyatt v. North Carolina Equipment Co.*, “[w]hether considered collateral thereto or an integral part thereof, a warranty is an element of a contract of sale.”<sup>3</sup>

Negligence actions are, of course, based in tort jurisprudence and are not contractual in nature.<sup>4</sup> An elegantly simple differentiation

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1. “It is much easier to find fault with others, than to be faultless ourselves.” THE COLUMBIA WORLD OF QUOTATIONS (Robert Andrew et al. eds., 1996), available at <http://www.bartleby.com/66/16/46516.htm> (attributed to Samuel Richardson (1689-1761), British novelist).

2. *Boudreau v. Baughman*, 368 S.E.2d 849, 854 (N.C. 1988) (“A warranty, express or implied, is contractual in nature.”) (citing *Wyatt v. N.C. Equip. Co.*, 117 S.E.2d 21, 24 (N.C. 1960)); see also *Miller v. C.W. Myers Trading Post, Inc.*, 355 S.E.2d 189, 195 (N.C. Ct. App. 1987) (“The action for a rent abatement for breach of an implied warranty is wholly contractual.”); *Spillman v. American Homes of Mocksville, Inc.*, 422 S.E.2d 740, 741 (N.C. Ct. App. 1992) (“Absent the existence of a public policy exception, as in the case of contracts involving a common carrier, innkeeper or other bailee, a tort action does not lie against a party to a contract who simply fails to properly perform the terms of the contract, even if that failure to properly perform was due to the negligent or intentional conduct of that party, when the injury resulting from the breach is damage to the subject matter of the contract.”) (citing *N.C. State Ports Auth. v. L. A. Roofing Co.*, 240 S.E.2d 345, 350-51 (N.C. 1978), *overruled in part* by *Trs. of Rowan Technical Coll. v. J. Hyatt Hammond Assoc.*, 328 S.E.2d 274 (N.C. 1985)).

3. 117 S.E.2d at 24.

4. *Bowen v. Mewborn*, 11 S.E.2d 372, 374-75 (N.C. 1940) (“Actionable negligence in the law of torts is a breach of some duty imposed by law or a want of due

between tort and contract law was stated by Chief Judge Hedrick in *Labarre v. Duke University*:

“[A]n action in tort must [ordinarily] be grounded on a violation of a duty imposed by operation of law, and the right invaded must be one that the law provides without regard to the contractual relationship of the parties, rather than one based on an agreement between the parties.” Moreover, “[a] tort action does not lie against a promisor ‘for his simple failure to perform his contract, even though such failure was due to negligence or lack of skill.’”<sup>5</sup>

A claim alleging the breach of a warranty does not immediately bring to mind the affirmative defense of contributory negligence.<sup>6</sup> Moreover, the vast majority of jurisdictions hold that the doctrine of contributory negligence is *not* a defense, affirmative or otherwise, against an injured party who seeks to recover upon a breach of an implied warranty of a good or product that allegedly caused injury to a person or property.<sup>7</sup> Notwithstanding instincts regarding the contractual nature of warranty claims, North Carolina counsel should look to avail themselves of this familiar arrow<sup>8</sup> from his or her quiver in order

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care?commensurate care under the circumstances? which proximately results in injury to another.”) (citing *State v. Cope*, 167 S.E.2d 456, 457 (N.C. 1933)).

5. 393 S.E.2d 321, 324 (N.C. Ct. App. 1990) (citing *Asheville Contracting Co. v. City of Wilson*, 303 S.E.2d 365, 373 (N.C. Ct. App. 1983); *Holland v. Edgerton*, 355 S.E.2d 514, 518 (N.C. Ct. App.1987)).

6. See 57B AM. JUR. 2D *Negligence* § 840 (2007) (“Ordinarily, the contributory negligence of a plaintiff . . . does not preclude his or her recovery for a breach of contract by the defendant, although the negligence of the plaintiff may be a material consideration in fixing the amount of the damages to be recovered by him or her.”) (citing 17A AM. JUR. 2D, *Contracts* § 627 (2007)).

7. See J. Stanley McQuade, *Products Liability - Emerging Consensus and Persisting Problems: An Analytical Review Presenting Some Options*, 25 CAMPBELL L. REV. 1, 55-56 (2002) (“1. *Contributory Negligence*. An objective standard is used: what a reasonable person with the knowledge and experience of the plaintiff would do to protect themselves under the circumstances. . . . In the tiny minority of states that retain the contributory negligence doctrine (including North Carolina) user negligence is a complete defense, totally barring recovery.”) (emphasis added); see also 57B AM. JUR. 2D *Negligence* § 840 (2007) (“[W]here a plaintiff seeks to recover for personal injuries sustained by reason of a breach of an implied warranty for fitness for use of an article which is a dangerous instrumentality, contributory negligence is not a defense where it serves simply to put the warranty to the test.”) (citing *Brown v. Chapman*, 304 F.2d 149 (9th Cir. 1962)).

8. See *Newton v. New Hanover County Bd. of Educ.*, 467 S.E.2d 58, 65 (N.C. 1996), *abrogated by* *Nelson v. Freeland*, 507 S.E.2d 882 (N.C. 1998) (“A plaintiff is contributorily negligent when he fails to exercise such care as an ordinarily prudent person would exercise under the circumstances in order to avoid injury.”)

to bar a plaintiff's claim for breach of the implied warranty of merchantability.

Under North Carolina law, it is well-settled, albeit perhaps not well-recognized, that an action arising under § 25-2-314 for the breach of the implied warranty of merchantability may be barred under § 99B-4 of the North Carolina Products Liability Act<sup>9</sup> (Chapter 99B) by the plaintiff's contributory negligence.<sup>10</sup> Specifically, the North Carolina Supreme Court has held that this affirmative defense is available when the claim asserting the breach of the implied warranty of merchantability alleges injury or damage to person or property caused by the non-merchantable *good*.<sup>11</sup>

The statutory and common law framework involved in the assertion of this archetypical affirmative tort defense involves the interplay between Chapter 99B, North Carolina's adoption of the Uniform Commercial Code,<sup>12</sup> and the State's long-standing affinity for the common law doctrine of contributory negligence.

To better understand the policy underpinnings of the statutory bar of certain implied warranty merchantability claims, this Article first reviews the origins and the continued vibrancy of the doctrine of contributory negligence in North Carolina. The doctrine is then examined in the context of North Carolina's enactment of the Products Liability Act and the doctrine's applicability to the implied warranty of merchantability.

#### NORTH CAROLINA'S CONTINUED EMBRACE OF THE COMMON LAW DOCTRINE AND AFFIRMATIVE DEFENSE OF CONTRIBUTORY NEGLIGENCE

North Carolina is known by many as the Tar Heel State. According to one source, this moniker's origin putatively relates to soldiers from North Carolina holding their ground in battle when all others had fled in retreat.<sup>13</sup> Perhaps this indigenous stubborn streak helps to explain why North Carolina is one of only five jurisdictions that con-

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9. 9 N.C. GEN. STAT. §§ 99B-1 to -11 (2005).

10. See *Nicholson v. Am. Safety Util. Corp.*, 488 S.E.2d 240, 243 (N.C. 1997).

11. See *id.* ("We have said that N.C.G.S. § 99B-4(1), (3) [of Chapter 99B] 'merely codify the common law doctrine of contributory negligence' as it applies in products liability actions.") (citing *Champs Convenience Stores, Inc. v. United Chem. Co.*, 406 S.E.2d 856, 860 (N.C. 1991)).

12. See N.C. GEN. STAT. §§ 25-1 to -11 (2005).

13. Tar Heel Traditions, <http://www.unc.edu/about/traditions.html> (last visited Oct. 2, 2007).

tinue to adhere to the doctrine of contributory negligence.<sup>14</sup> Further explanation is provided by one commentator as follows: “Some suggested reasons for these states’ continued adherence to the archaic doctrine of contributory negligence include the fact that most of these states are located in an area of the country where tradition dies hard and a possible legislative intent to preserve a climate favorable to industry.”<sup>15</sup>

This intransigence on the part of the North Carolina Legislature and the Appellate Court ? the staunch refusal to both disavow the doctrine of contributory negligence and opt for the path of forty-six other states who have adopted comparative negligence<sup>16</sup> ? has engendered some harsh criticism. One commentator states that the “nearly universal” primary disparagement concerning the contributory negligence doctrine is that it is “inherently unfair” and that it is difficult, if not impossible, to find an advocate in either current case law or academic scholarship.<sup>17</sup>

What has engendered this criticism? In *Godwin v. Atlantic Coast Line R.R.*, the North Carolina Supreme Court stated the following regarding the doctrine of contributory negligence:

It is the prevailing and permissible rule of practice to enter judgment of nonsuit in a negligence case, when it appears from the evidence offered

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14. The jurisdictions which still retain the doctrine of contributory negligence are Alabama, Maryland, North Carolina, Virginia, and the District of Columbia. See *Berbog v. Scrushy*, 855 So. 2d 523, 531 (Ala. Civ. App. 2002) (“Contributory negligence is an affirmative and complete defense to a claim based on negligence.”) (citing *Ridgeway v. CSX Transp. Inc.*, 723 So. 2d 600, 606 (Ala. 1998)); *Abraham v. Moler*, 252 A.2d 68, 70 (Md. 1969) (“Contributory negligence is an affirmative defense which was available to appellants and they had the burden of proving not only that a reasonably prudent person would, in the circumstances, have taken precautions but also that [the plaintiff] failed to take those precautions and that her failure so to do directly contributed to her injury.”); *Estate of Moses v. Sw. Va. Transit Mgmt. Co.* (643 S.E.2d 156, 159 (Va. 2007) (“Contributory negligence is an affirmative defense that must be proved according to an objective standard whether the plaintiff failed to act as a reasonable person would have acted for his own safety under the circumstances.”) (citing *Jenkins v. Pyles*, 611 S.E.2d 404, 407 (Va. 2005)); *Wingfield v. Peoples Drug Store, Inc.*, 379 A.2d 685, 687 (D.C. 1977) (“The rule is simply that contributory negligence bars a plaintiff’s recovery.”). Whether based upon a *pure* or a *modified* comparative fault, the remaining forty-six states have adopted some form of comparative negligence.

15. Alison P. Raney, Note, *Stacy v. Jedco Construction, Inc.: North Carolina Adopts a Diminished Capacity Standard for Contributory Negligence*, 31 WAKE FOREST L. REV. 1215, 1218 n.42 (1996).

16. Steven Gardner, *Contributory Negligence, Comparative Negligence, and Stare Decisis in North Carolina*, 18 Campbell L. Rev. 1, 2 (1996).

17. *Id.* at 25.

on behalf of the plaintiff that his own negligence was the proximate cause of the injury or one of them. The plaintiff thus proves himself out of court. It need not appear that his negligence was the sole proximate cause of the injury as this would exclude any idea of negligence on the part of the defendant. It is enough if it contributes to the injury. The very term "contributory negligence" *ex vi termini* implies that it need not be the sole cause of the injury. The plaintiff may not recover, in an action like the present, when his negligence concurs with the negligence of the defendant in proximately producing the injury.<sup>18</sup>

The common argument against the doctrine of contributory negligence is that a plaintiff is barred from recovery "even if the plaintiff's fault is very small and the defendant's fault is very large. It is an all-or-nothing proposition . . ."<sup>19</sup> Thus, theoretically, even if the jury finds that the plaintiff was only 1% at fault and the defendant 99% at fault, the severely injured plaintiff recovers nothing, regardless of the grievousness of his or her injury.<sup>20</sup>

While the issue of negligence, both plaintiff's and defendant's, is customarily the province of the jury, courts will on occasion decide the issue as a matter of law, although one commentator states that there is an "appropriate reluctance" by North Carolina courts to take the issue from the jury.<sup>21</sup> Judicial reluctance notwithstanding, this

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18. *Godwin v. Atl. Coast Line R.R.*, 17 S.E.2d 137, 139-40 (N.C. 1941) (citing *Battle v. Cleave*, 101 S.E. 555 (N.C. 1919); *Wright v. S. R.R.*, 71 S.E. 306 (N.C. 1911); *Beck v. Hooks*, 10 S.E.2d 608 (N.C. 1940); *Horne v. Atl. Coast Line R.R.*, 87 S.E. 523 (N.C. 1916); *Absher v. City of Raleigh*, 190 S.E. 897 (N.C. 1937); *Wright v. D. Pender Grocery Co.*, 187 S.E. 564 (N.C. 1936); *Fulcher v. Pine Lumber Co.*, 132 S.E. 9 (N.C. 1926); *W. Constr. Co. v. Atl. Coast Line R.R.*, 113 S.E. 672 (N.C. 1922)).

19. *Gardner*, *supra* note 13, at 2.

20. *See Raney*, *supra* note 12, at 1220.

21. *Gardner*, *supra* note 13, at 18, 22 ("Beginning in the mid-1950s ? and continuing through today ? the supreme court (sic) backed away from its previously aggressive and expansive view of contributory negligence as a matter of law.") (citing in part *Dennis v. City of Albermarle*, 87 S.E.2d 561 (N.C. 1955); *Miller v. Miller*, 160 S.E.2d 65 (N.C. 1968)). Mr. Gardner cited the following from *Taylor v. Walker* as representing the Supreme Court's "modern" view concerning the judiciary finding contributory negligence as a matter of law:

Only in exceptional cases is it proper to enter a directed verdict or a judgment notwithstanding the verdict against a plaintiff in a negligence case. Issues arising in negligence cases are ordinarily not susceptible of summary adjudication because application of the prudent man test, or any other applicable standard of care, is generally for the jury. Greater judicial caution is therefore called for in actions alleging negligence as a basis for plaintiff's recovery or, in the alternative, asserting contributory negligence as a bar to that recovery.

affirmative defense is a common defense in North Carolina concerning negligence actions.<sup>22</sup>

Contributory negligence dominated American jurisprudence for much of the nineteenth century and the twentieth century.<sup>23</sup> For the past 138 years the following admonition by the North Carolina Supreme Court, as stated in the State's seminal case concerning the doctrine of contributory negligence, *Morrison v. Cornelius*,<sup>24</sup> has provided guidance for the courts and practitioners alike: "Let us see if the plaintiff was guilty of no act of omission or commission, which contributed to his misfortune."<sup>25</sup> Given North Carolina's continued adherence to the contributory negligence doctrine, a review of the doctrine's early development, policy justifications, and foundational logic is appropriate.

#### I. THE ORIGINS OF THE DOCTRINE OF CONTRIBUTORY NEGLIGENCE

Negligence, as an independent action, began to take hold in the seventeenth and early eighteenth centuries. It is not surprising that the concept of a plaintiff's negligence acting as a bar to his or her recovery for damages suffered by the negligent actions of others formally arrived on the scene in the early nineteenth century. The 1809 English case of *Butterfield v. Forrester* is generally credited as the first decision to recognize contributory negligence.<sup>26</sup> Despite the near universal acknowledgement of *Butterfield's* pedigree, the origins of the concepts

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*Taylor v. Walker*, 360 S.E.2d 796 (N.C. 1987). However, North Carolina appellate courts still exercise their prerogative regarding holding a plaintiff contributorily negligent as a matter of law with some frequency where appropriate. See e.g. *Thornton v. F.J. Cherry Hosp.*, 644 S.E.2d 369 (N.C. Ct. App. 2007) (holding plaintiff, an involuntarily committed patient at a North Carolina mental hospital, to be contributorily negligent so as to preclude his recovery under the North Carolina Tort Claims Act for injuries suffered after plaintiff provoked a physical altercation with other patients); *Seay v. Snyder*, 638 S.E.2d 584 (N.C. Ct. App. 2007) (holding there was sufficient evidence at trial to support a jury instruction on plaintiff's contributory negligence); *Taylor v. Coats*, 636 S.E.2d 581 (N.C. Ct. App. 2006) (holding plaintiff was contributorily negligent for riding in a car in which plaintiff knew, or should have known, that the driver was intoxicated).

22. See Lucinda L. Fraley, Note, *The Evolution and Status of the Contributory Negligence Defense to Medical Malpractice Actions in North Carolina* - *McGill v. French*, 16 *Campbell L. Rev.* 103, 109 (1994).

23. See Fleming James, Jr., *Contributory Negligence*, 62 *Yale L. J.* 691, 691-92 (1940).

24. 63 N.C. 346 (1869).

25. *Id.* at 351.

26. 11 *East* 60, 103 *Eng. Rep.* 926 (K.B. 1809), available at <http://books.google.com/books?id=DGkyAAAIAAJ&pg=PA189&dq=butterfield+v+forrester&ie=ISO->

underlying the contributory negligence doctrine actually pre-date this 1809 King's Bench decision.<sup>27</sup>

In *Butterfield*, the facts disclose that the defendant:

[F]or the purposes of making some repairs to his house, which was close by the road side at one end of the town, had put up a pole across this part of the road, a free passage being left by another branch or street in the same direction. That the plaintiff left a public house not far distant from the place in question at 8 o'clock in the evening in August, when they were just beginning to light candles, but while there was light enough left to discern the obstruction at 100 yards distance: and the witness, who proved this, said that if the plaintiff had not been

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8859-1; James, *supra* note 20; Fraley, *supra* note 19, at 108; Gardner, *supra* note 13, at 5; Raney, *supra* note 12, at 1219.

27. See *Hoffman v. Jones*, 280 So.2d 431, 442 (Fla. 1973) (abrogating the doctrine of comparative negligence in favor of comparative fault) (Roberts, J., dissenting):

Although the case of *Butterfield v. Forrester*, 11 East 60, 103 Eng.Rep. 926 (K.B.1809), is recognized as a leading case in the area of contributory negligence, such case was not the first pronouncement of the common law doctrine of contributory negligence. Lord Ellenborough wrote in *Butterfield v. Forrester*, *supra*,

"One person being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action, an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff." 11 East 60, 61.

The brief opinions of Bayley, J. and Lord Ellenborough in [*Butterfield v.*] *Forrester* were merely a restatement of the concept of common law contributory negligence . . . .

I note with much interest the comment by Wex S. Malone in, 'The Formative Era of Contributory Negligence,' 41 Illinois Law Review, 151, to the following effect: "The concise opinions of Bayley and Lord Ellenborough in *Butterfield v. Forrester* (1809) afford no indication that either of those judges felt at the time that he was charting new paths for law."

Contributory negligence was adopted much earlier as a part of the common law. In *Bayly v. Merrell*, *Cro.Jac.* 386, 79 Eng.Rep. 331 (1606), the Court explicated,

"(I)f he doubted of the weight thereof, he might have weighed it; and was not bound to give credence to another's speech; *and being his own negligence*, he is without remedy." (Emphasis supplied) *Cro.Jac.* 386, p. 387, 79 Eng.Rep. 331.

Charles Beach in 1882 traced the doctrine of contributory negligence back to its origin in his treatise on contributory negligence, wherein he set out,

"Our Anglo-American law of Negligence, including, as of course, that of Contributory Negligence, has come down to us, in ordinary generation, from the civil law of imperial Rome. It is a part of that great debt which the common law owes to the classical and the scholastic jurisprudence." (citations omitted).



riding very hard he might have observed and avoided it: the plaintiff however, who was riding violently, did not observe it, but rode against it, and fell with his horse and was much hurt in consequence of the accident; and there was no evidence of his being intoxicated at the time. On this evidence Bayley, J. directed the jury, that if a person riding with reasonable and ordinary care could have seen and avoided the obstruction, and if they were satisfied that the plaintiff was riding along the street extremely hard, and without ordinary care, they should find a verdict for the defendant: which they accordingly did.<sup>28</sup>

The plaintiff moved for a new trial, citing the following rule in Buller's Law of Nisi Prius: "[I]f a man lay logs of wood across a highway; though a person may with care ride safely by, yet if by means thereof my horse stumble and fling me, I may bring an action."<sup>29</sup>

Chief Judge Lord Ellenborough denied the plaintiff's motion, and provided the basic framework for modern contributory negligence by opining:

*A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do [sic] not himself use common and ordinary caution to be in the right. In cases of persons riding upon what is considered to be the wrong side of the road, that would not authorize another purposely to ride up against them. One person being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action, an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff.*<sup>30</sup>

Modern contributory negligence doctrine states that a finding of contributory negligence necessarily requires that both the plaintiff and the defendant be at fault in both proximately causing the injury.<sup>31</sup> The North Carolina Supreme Court stated the obvious in *West Construction Co. v. Atlantic Coast Line Railroad Co.*<sup>32</sup>:

Contributory negligence, as understood and used in legal parlance, is such an act or omission on the part of a plaintiff, amounting to a want of due care, as, concurring and co-operating with the negligent act of the defendant, is a proximate cause or occasion of the injury sustained. Two elements, at least, are necessary to constitute contributory negligence: (1) A want of due care on the part of the plaintiff; and (2) a proximate connection between the plaintiff's negligence and the injury. These are the vital questions to be determined upon the issue of con-

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28. 11 East at 60.

29. *Id.* at 61.

30. *Id.* (emphasis added).

31. Gardner, *supra* note 13, at 62.

32. 113 S.E. 672 (1922).

tributory negligence. There must be not only negligence on the part of the plaintiff, but contributory negligence, a real causal connection between the plaintiff's negligent act and the injury, or it is no defense to the action . . . .

. . . .

. . . If the plaintiff's negligence be the sole and only cause of the injury, it would not be contributory negligence at all, but rather the source of a self-inflicted injury.<sup>33</sup>

It should be noted that Judge Bayley posited in *Butterfield* that the plaintiff was the sole proximate cause of the accident when he stated that:

The plaintiff was proved to be riding as fast as his horse could go, and this was through the streets of Derby. *If he had used ordinary care he must have seen the obstruction; so that the accident appeared to happen entirely from his own fault.*<sup>34</sup>

Thus, supreme irony finds that *Butterfield*, while "set[ting] the stage for a litigation revolution,"<sup>35</sup> was in actuality a case involving a horseman whose actions at dusk were the *sole proximate cause* of self-inflicted injury.

Nonetheless, the rule cited to by the plaintiff in *Butterfield*, "if a man lay logs of wood across a highway,"<sup>36</sup> was eventually annotated in the seventh edition of Sir Francis Buller's *An Introduction to The Law Relative to Trials at Nisi Prius* with the following: "To support this action, two things must concur, an obstruction on the road by the fault of the defendant, and no want of ordinary care to avoid it on plaintiff's part. Per Lord Ellenborough, C.J. in *Butterfield v. Forrester*, 11 East, 60."<sup>37</sup>

By 1824 the contributory negligence doctrine entered into American jurisprudence via a Massachusetts case, *Smith v. Smith*.<sup>38</sup> As one commentator states, "almost from the very beginning there has been serious dissatisfaction with the Draconian rule sired by a medieval

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33. *Id.* at 673 (citation omitted).

34. 11 East at 61 (emphasis added).

35. Fraley, *supra* note 19, at 108.

36. 11 East at 61; Raney *supra* note 12, at 1220.

37. SIR FRANCIS BULLER, AN INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS, 26(a) n.a (Richard W. Bridgean 7th ed. 1817) (1806), available at <http://books.google.com/books?id=aJEDAAAQAAJ&pg=RA1-PA1&dq=An+Introduction+to+The+Law+Relative+to+Trials+at+Nisi+Prius&rie=ISO-8859-1#PRA1-PA26,M1>.

38. Gardner, *supra* note 13, at 6 (citing *Smith v. Smith*, 19 Mass. 621 (1824)).

concept of cause, out of a heartless laissez-faire."<sup>39</sup> The doctrine soon "became a tenet of American tort law."<sup>40</sup>

## II. NORTH CAROLINA'S ADOPTION OF CONTRIBUTORY NEGLIGENCE

North Carolina first recognized, via dicta, the contributory negligence doctrine in the 1849 case of *Herring v. Wilmington & Raleigh Railroad Co.*, and would eventually apply it in the 1869 case of *Morrison v. Cornelius*.<sup>41</sup>

Commentators have discussed various reasons why the contributory negligence doctrine gained relatively rapid acceptance in nineteenth century American jurisprudence, including: a policy intent to limit liability to the rapidly burgeoning industrial base of the United States, and in particular the railroad industry;<sup>42</sup> a "distrust of plaintiff-sympathetic juries;"<sup>43</sup> an alleged inability to apportion fault amongst the plaintiff and defendant;<sup>44</sup> an inclination by the judiciary to seek a

39. James, *supra* note 20, at 704.

40. Raney, *supra* note 12, at 1219.

41. Gardner, *supra* note 13, at 6 (citing *Herring v. Wilmington & Raleigh R.R. Co.*, 32 N.C. 402 (1849); *Morrison v. Cornelius*, 63 N.C. 346 (1869)).

42. See Raney, *supra* note 12, at 1223, (citing James L. Hunt, Note, *Private Law and Public Policy: Negligence Law and Political Change in Nineteenth-Century North Carolina*, 66 N.C. L. REV. 421, 426 (1988) (proposing that economic considerations concerning the railroad industry in the State drove North Carolina's acceptance of the doctrine of contributory negligence); see also Gardner, *supra* note 13, at 11-12 (dismissing any overt railroad industry bias by the courts as being unsubstantiated). Mr. Gardner states:

Several commentators attribute the United States' quick acceptance of the contributory negligence doctrine on courts' alleged desire to aid the industrial revolution, particularly railroads . . . . Nearly all of the published nineteenth-century negligence cases decided by the North Carolina Supreme Court that discuss the contributory negligence doctrine involve a railroad.

43. Fraley, *supra* note 19, at 109; see also LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 353 (3rd ed. 2005).

[Contributory Negligence] became a favorite method through which judges kept tort claims away from the jury. The trouble with the jury (people thought) was they always decided for the plaintiff, in pitiful cases where crippled men sued big corporations. Even people who respect general rules find it hard to resist from bending them once in a while, especially if the victim hauls his battered body into the courtroom, or a widow or orphans stare into a jury box . . . . But if plaintiff was clearly negligent himself, there could be no recovery; there would be no facts to be found, and a judge might take the case from the jury and dismiss it.

44. See James, *supra* note 20, at 694 and Fraley, *supra* note 19, at 109.

Another factor which may have contributed to the all-or-nothing form of the rule was the nearly complete lack of precedent for any alternative solution, except perhaps in maritime law. It is probable that neither ancient law nor

single cause for injury;<sup>45</sup> that the doctrine is simply “an aspect of assumption of risk” and its application deters careless conduct;<sup>46</sup> and that the doctrine “serves a penal function as it denies recovery to the plaintiff due to his own lack of due care.”<sup>47</sup>

The North Carolina Supreme Court in *Morrison v. Cornelius*<sup>48</sup> stated the basic rule which has continued to embody the heart of the doctrine of contributory negligence in North Carolina today:

In all cases where a person, in the lawful use of his own property, causes injury to another, the party injured, before he can recover damages at law, must show that he has exercised proper care, and is free from blame in regard to the matter. If it appears that the party injured has, by any act of omission or commission on his part, contributed to the injury complained of, it is generally *damnum absque injuria*.<sup>49</sup>

#### A. North Carolina's Intent to be Last Man Standing

Perhaps in response to the commentary regarding the alleged unfairness of the contributory negligence doctrine in its initially unadulterated King's Bench form, both the North Carolina General Assembly and the Supreme Court have over time enacted laws and rendered decisions which have taken the edge off of the harsher aspects of the doctrine. These efforts have included: (1) placing the burden of pleading and proving the plaintiff's contributory negligence upon the defendant;<sup>50</sup> (2) promulgating the *last clear chance* doctrine which allows the plaintiff to assert that the defendant had actual or constructive notice of the impending peril to the plaintiff and had an opportunity to avoid the injury to the plaintiff but unreasonably did not do so;<sup>51</sup> (3) holding that willful and wanton conduct by the defendant denies him or her the defense of contributory negligence;<sup>52</sup> (4) adopting the rescue doctrine which generally excludes the contributory neg-

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contemporaneous continental European law had developed any well defined procedure for dividing or apportioning loss in these situations.

45. Raney, *supra* note 12, at 1219 (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 65, at 452 (5th ed. 1984)).

46. James, *supra* note 20, at 698.

47. Fraley, *supra* note 19, at 109-10.

48. 63 N.C. 346.

49. *Id.* at 348-49; *see also* Thomason v. Seaboard Air Line Ry., 55 S.E. 205, (1906) (“[T]he maxim ‘damnum absque injuria,’ . . . ‘is used to designate damage which is not occasioned by anything which the law esteems an injury.’”).

50. Act of Jan. 26, 1887, ch. 33, § 1, 1887 N.C. Sess. Laws 81; N.C. GEN. STAT. § 1-139 (2005).

51. *See* Gunter v. Wicker, 85 N.C. 310 (1881).

52. *See* Brendle v. Spencer, 125 N.C. 474 (1899).

ligence doctrine for suits by plaintiffs attempting a rescue;<sup>53</sup> (5) that minors of certain ages either did not have the capacity to act with negligence or that such was a rebuttable presumption;<sup>54</sup> (6) holding that the contributory negligence of a person of diminished capacity must be determined pursuant to a subjective standard of someone of like mental capacity;<sup>55</sup> and (7) the general abrogation by the North Carolina General Assembly of tort law as it relates to claims by employees injured in a work-related accident via the Workers' Compensation Act.<sup>56</sup>

Moreover, the doctrine of contributory negligence is not without its defenders.<sup>57</sup> One commentator argues that North Carolina is more conservative than most jurisdictions in its tort jurisprudence.<sup>58</sup> He buttressed this opinion, in part, with North Carolina's continued application of the contributory negligence doctrine as the method for apportioning tort liability, "despite intense pressure in recent years for its rejection."<sup>59</sup> The contributory negligence doctrine, asserts the commentator, along with statutory measures concerning the North Carolina Products Liability Act, evidences that "North Carolina has taken a common sense approach to tort recovery keeping in mind the costs of running businesses, manufacturing products, and providing services to its citizens."<sup>60</sup>

Another commentator asserts that there are "valid policy reasons" for the past opposition to legislative proposals which would replace contributory negligence in North Carolina with comparative fault.<sup>61</sup> The commentator argues numerous and substantial grounds for the General Assembly's past rejection of comparative fault legislation, including, but not limited to: concerns that the adoption of comparative fault would substantially increase premiums; that the often cited *one percent negligent plaintiff* being denied *any* recovery is in actuality a "strawman" in that such an outcome is only hypothetical or, "at most, anecdotal" given that cases which are privately settled between

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53. See Gardner, *supra* note 13, at 24-25.

54. *Id.* at 24.

55. See Stacy v. Jedco Constr., Inc., 119 N.C. App. 115, *disc. rev. denied*, 341 N.C. 421 (1995); see also Raney, *supra* note 12.

56. See N.C. Gen. Stat. Chapter 97 §§ 97-1 to 97-101.

57. See e.g. John P. Marshall, *The Battle at Little Big Horn has Moved to Raleigh - Is this Custer's Last Stand Against Tort Reform?*, 10 Campbell L. Rev. 439, 443-44 (1988).

58. *Id.* at 443.

59. *Id.*

60. *Id.*

61. Richard T. Boyette, *A Case Against Comparative Negligence*, N.C. St. B.Q., Fall 1991, at 22.

the parties many times arrive at a payment amount which has been adjusted downward by an analysis approximating comparative fault performed by the parties' respective counsel; and the fact that there are numerous substantive safeguards, such as placing the burden of proof on the contributory issue upon the defendant, the "last clear chance" doctrine, and contributory negligence not being a defense for a defendant's gross or willful and wanton conduct.<sup>62</sup>

Lastly, there is a viewpoint amongst lawyers, many practicing in North Carolina, that juries understand the "all or nothing" nature associated with the contributory negligence doctrine and therefore at times see fit not to find the plaintiff contributorily negligent even where appropriate. Instead such juries, acting in a manner commonly referred to as "rough justice," will equitably split the baby between the plaintiff's and defendant's respective faults by awarding the plaintiff diminished damages through the application of a *de facto* comparative fault rationale.<sup>63</sup>

#### B. *The General Assembly and the Doctrine of Contributory Negligence*

For the past forty years the prevailing trend of other jurisdictions has been the abrogation of the doctrine of contributory negligence, either by legislation or judicial fiat, in favor of the comparative fault scheme.<sup>64</sup> Proponents of the comparative negligence doctrine have made repeated legislative attempts in the North Carolina General Assembly to abrogate the doctrine of contributory negligence in North Carolina in favor of comparative fault.<sup>65</sup> As to the relationship between contributory and comparative negligence, 57B AM. JUR. 2D *Negligence* states:

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62. *Id.*

63. See Gardner, *supra* note 13, at 30-31; see also Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973):

Those who defend the doctrine of contributory negligence argue that the rule is also not as harsh in its practical effect as it is in theory. This is so, they say, because juries tend to disregard the instructions given by the trial judge in an effort to afford some measure of rough justice to the injured party.

*Id.* at 437.

64. See 57B AM. JUR. 2D *Negligence* § 801 n.1 (2004) ("Between 1920 and 1969, a few states began utilizing the principles of comparative fault in all tort litigation. Then, between 1969 and 1984, comparative fault replaced contributory negligence in 37 additional states." (quoting McIntyre v. Balentine, 833 S.W.2d 52 (Tenn. 1992))).

65. See Raney, *supra* note 12, at 1224 ("[I]n the late 1980s and early 1990s, activity in the state legislature indicated some legislators' willingness to consider major changes to the negligence scheme.").

The concepts of contributory negligence and comparative negligence both apportion fault in accordance with the plaintiff's and defendant's negligence and affect the plaintiff's entitlement to damages, although the law of contributory negligence generally addresses the effect of the plaintiff's fault, if any, on the plaintiff's entitlement to recover damages at all, whereas the doctrine of comparative negligence considers those circumstances under which the plaintiff's contributory fault does not bar recovery, but does serve to reduce the damages he or she would otherwise be entitled to receive.<sup>66</sup>

In 1933 a bill providing for the abrogation of contributory negligence in favor of comparative negligence was first introduced in the North Carolina House of Representatives of the General Assembly but was never addressed by the full House.<sup>67</sup> The issue lay dormant until 1953 and 1957, when bills providing for comparative negligence were introduced but eventually failed.<sup>68</sup> The 1970s saw bills introduced but not being enacted in 1973, 1977, and 1979.<sup>69</sup> Repeated attempts in 1981, 1983, 1985, and 1987 were again denied passage.<sup>70</sup> More recent attempts have been made in the 1990s and this century but without success and it appears that the attempt in the current legislative session in 2007 has failed as well.<sup>71</sup>

While some of these bills came within a few votes of passage, a combination of factors caused the efforts to be for naught.<sup>72</sup> Perhaps most important of these was the concern by lawmakers that liability insurance rates would escalate if the contributory negligence doctrine were abrogated in favor of comparative negligence.<sup>73</sup> Although this contention was much debated, a set of empirical studies showing a dramatic increase in insurance rates for those jurisdictions that have

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66. 57B AM. JUR. 2D *Negligence* § 804 (2004).

67. Gardner, *supra* note 13, at 38.

68. *Id.* at 39.

69. *Id.*

70. *Id.* at 40-47.

71. The General Assembly's most recent attempt to end contributory negligence with a comparative fault substitute has come in the 2007 Session during which House Bill 1571 was filed on April 17, 2007 (House Bill 1571 "Uniform Apportionment of Tort Responsibility"). However, the bill has since been revised to now simply authorize the Legislative Research Commission to study the doctrine of contributory negligence and to consider whether it should be replaced by comparative negligence or some other scheme for determining tort liability, and to also consider joint and several liability. The bill presently sits in the Committee on Rules, Calendar, and Operations of the House.

72. Gardner, *supra* note 13, at 39.

73. *Id.* at 47-48.

adopted comparative negligence appeared to provide substantial foundation for such belief.<sup>74</sup>

At times it was argued that these proposed bills were simply intended to increase revenues for attorneys.<sup>75</sup> The now centuries old sentiment that a plaintiff should not benefit by his or her own negligence was again expressed.<sup>76</sup> Legislators even considered the abolishment of joint and several liability in the hope of attaining passage of a comparative negligence bill, but to no avail.<sup>77</sup>

Thus, after repeated attempts over the years the North Carolina General Assembly has not enacted a bill requiring that comparative negligence be the method for determining tort liability. Instead, as will be discussed below, the North Carolina General Assembly has, by relatively recent legislative action, *reaffirmed* the State's commitment to the doctrine of contributory negligence.

#### THE DEVELOPMENT OF PRODUCTS LIABILITY LAW AND THE NORTH CAROLINA PRODUCTS LIABILITY ACT

Contemporary products liability jurisprudence is a relative newcomer to legal jurisprudence, with the first landmark decision being rendered in the 1916 case of *MacPherson v. Buick Motor Co.*<sup>78</sup> Subsequently, little change in the law occurred until the 1960s, 1970s, and early 1980s during which the law witnessed both "radical changes" in the development of products liability litigation, including the adoption by the vast majority of jurisdictions of the strict liability doctrine,<sup>79</sup> and plaintiffs winning larger recoveries with greater ease.<sup>80</sup>

#### I. PRODUCTS LIABILITY JURISPRUDENCE PRIOR TO THE NORTH CAROLINA PRODUCTS LIABILITY ACT

In the years preceding the acceptance of the strict liability doctrine in products liability actions, plaintiffs typically pled claims based

74. *Id.*

75. *Id.* at 40-41.

76. *Id.* at 42-43.

77. *Id.* at 45-46.

78. 111 N.E. 1050 (N.Y. 1916); McQuade, *supra* note 7, at 4.

79. See Charles F. Blanchard & Doug B. Abrams, *North Carolina's New Products Liability Act: A Critical Analysis*, 16 WAKE FOREST L. REV. 171, 185 (1980) (noting that, by 1980, all but approximately six jurisdictions had adopted the strict liability doctrine).

80. See McQuade, *supra* note 7, at 4; see also Robert A. Van Kirk, Note, *The Evolution of Useful Life Statutes in the Products Liability Reform Effort*, 1989 DUKE L.J. 1689, 1689 (1990).



in negligence and breach of warranty theory.<sup>81</sup> However, the requirements of privity and proof of negligent manufacture produced sizeable roadblocks for an injured party to recover for damages caused by a defective product.<sup>82</sup>

For years, the archetypical defense to a products liability action grounded in either negligence or warranty theory was that the original purchaser lacked privity with the manufacturer and distributor, and that a secondary purchaser lacked privity with the manufacturer, distributor, and retailer.<sup>83</sup> The view that there had to exist a duty between plaintiff and defendant, whether the action lay in tort or warranty, before the defendant could recover derived from the 1847 English case of *Winterbottom v. Wright*.<sup>84</sup>

Another obstacle to an injured party's recovery for his or her injuries in a products liability case was the requirement that the plaintiff prove that the product was *negligently* manufactured; such an evidentiary showing is considered quite difficult given modern production systems.<sup>85</sup> Particular issues of whether proper safety measures would have revealed the defect, or that the defect was even caused by the defendant's actions, proved thorny for many plaintiffs seeking recovery for their injuries.<sup>86</sup>

#### A. *The Pendulum Swings: Leveling the Playing Field Between Consumer and Manufacturer*

Not unlike the judiciary's past attempts to ameliorate the more severe aspects of contributory negligence via such devices as the last clear chance doctrine, courts proceeded to gradually relax certain privity and evidentiary impediments to recovery so that manufacturers could not blithely introduce defective and dangerous products into the stream of commerce in an atmosphere of limited liability.<sup>87</sup>

For example, juries were enabled by the use of *res ipsa loquitur* to presume negligence via the mere existence of an accident or injury.<sup>88</sup>

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81. See Van Kirk, *supra* note 77, at 1693.

82. See McQuade, *supra* note 7, at 10-12.

83. See Blanchard and Abrams, *supra* note 76, at 177-78.

84. 152 Eng. Rep. 402 (Ex. 1842); see also McQuade, *supra* note 7, at 10-11.

85. McQuade, *supra* note 7, at 12.

86. See Van Kirk, *supra* note 77, at 1693.

87. See McQuade, *supra* note 7, at 10-12.

88. See *Cockerham v. Ward*, 262 S.E.2d 651, 656 (1980) ("It is well settled that negligence is never presumed from the mere fact that an accident or injury has occurred, except in the narrow class of cases to which the doctrine of *res ipsa loquitur* is applicable."); see also *Page v. Sloan*, 183 S.E.2d 813 (N.C. Ct. App. 1971). As one commentator observed concerning the present-day employment of *res ipsa loquitur*:

This presumptive theory notwithstanding, North Carolina case law has held that *res ipsa loquitur* required that the defendant have maintained control regarding the product.<sup>89</sup>

In the 1940 decision of *Simpson v. American Oil Co.*,<sup>90</sup> the North Carolina Supreme Court held that where the manufacturer expressly warrants its product directly to the *ultimate consumer*, then privity is irrelevant as a defense.<sup>91</sup> Unfortunately, the ruling in *Simpson* was somewhat muddled by the Supreme Court into a rather narrow exception by the following statement in *Perfecting Serv. Co. v. Prod. Dev. & Sales, Co.*<sup>92</sup> which declared:

There is an exception to [the rule requiring privity between the manufacturer and the ultimate consumer] where the warranty is addressed to the ultimate consumer, and *this exception has been limited to cases involving sales of goods, intended for human consumption, in sealed packages prepared by the manufacturer and having labels with representations to consumers inscribed thereon.*<sup>93</sup>

It was not until 1979 that the Supreme Court's decision in *Kinlaw v. Long Mfg. Co.*<sup>94</sup> made clear *Simpson's* rule and its importance. Stating that the "rationale of *Simpson* was diluted in" *Perfecting Service*, the Supreme Court in *Kinlaw* stated:

Our holding today simply reaffirms the vitality of *Simpson*. Authority from most other jurisdictions holds that a purchaser who relies upon a manufacturer's representations can recover for breach of

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The expression, "res ipsa loquitur" is not heard much in recent products cases and may not even be allowable in some jurisdictions, but circumstantial evidence is commonly allowed to plaintiffs in cases where it would be difficult, if not impossible, to prove that there was something wrong in the manufacture of a product. A typical example would be the "pop bottle" case where a jury question may be raised by the fact of the bottle exploding spontaneously, if it can be shown that a similar explosion had occurred recently with another drink bottled by the same defendant. It should be noted that this relaxation of the requirements of proof by the plaintiff does not normally apply in design or warnings cases, being more appropriate to manufacturing defects.

McQuade, *supra* note 7, at 12-13, (citing *Davis v. Coca-Cola Bottling Co.*, 44 S.E.2d 337 (N.C. 1947)).

89. *Arrington v. Brad Ragan, Inc.*, 289 S.E.2d 122, 124 (N.C. Ct. App. 1982) ("We hold that the original defendant did not retain control of the heater which makes *res ipsa loquitur* inapplicable.").

90. 8 S.E.2d 813 (1940).

91. *Id.* at 816.

92. 136 S.E.2d 56 (N.C. 1964); *see also* Blanchard and Abrams, *supra* note 76, at 178.

93. *Perfecting Serv.*, 136 S.E.2d at 62-63. (emphasis added).

94. 259 S.E.2d 552 (1979); *see also* Blanchard and Abrams, *supra* note 76, at 178.

an express warranty despite lack of privity. The privity bound procedure whereby the purchaser claims against the retailer, the retailer against the distributor, and the distributor, in turn, against the manufacturer, [citation omitted] is unnecessarily expensive and wasteful. We find no reason to inflict this drain on the court's time and the litigants' resources when there is an express warranty directed by its terms to none other than the plaintiff purchaser.

Plaintiff has alleged an express warranty running directly to him, breach of that warranty, and damages caused by the breach. The absence of an allegation of privity between plaintiff and the warrantor in the sale of the warranted item is not fatal to the claim.<sup>95</sup>

By 1979 most jurisdictions had adopted the *strict liability* doctrine regarding products liability.<sup>96</sup> Strict liability in products liability - in essence means that the plaintiff only has to prove that his or her injuries were proximately caused by a defective product in order to recover - effectively ended the legal and mental gymnastics generally necessary for an injured consumer to prevail upon a products liability action sounded in negligence or warranty theory.<sup>97</sup>

In 1944, the concept of strict liability in products liability was first broached by *Escola v. Coca Cola Bottling Co.*,<sup>98</sup> and later firmly adopted, in 1960 and 1963 respectively, as the law of the land for New Jersey and California by the decisions rendered in *Henningsen v. Bloomfield*<sup>99</sup> and *Greenman v. Yuba Power Prod., Inc.*<sup>100</sup> As one commentator states:

Generally, under the doctrine of strict liability a manufacturer incurs liability upon proof that he manufactured a defective and unreasonably dangerous product which causes an injury while the product was being used as the manufacturer intended.<sup>101</sup>

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95. *Kinlaw*, 259 S.E.2d at 557; see also *Blanchard and Abrams*, *supra* note 76, at 178 n.67 (stating, somewhat sardonically, that in *Perfecting Service Company* Justice Moore "inaccurately" speaks of *Simpson* as having provided a *limited* exception to the privity requirement for sale of goods "*intended for human consumption, in sealed packages*" when, in fact, *Simpson* concerned a breach of warranty action involving an insecticide.

96. See *supra* note 76.

97. See *Van Kirk*, *supra* note 77, at 1696 ("The doctrine allows the trier of fact to infer negligent conduct on the part of the manufacturer upon a showing that the product was originally defective.").

98. 150 P.2d 436 (C.A. 1944).

99. 161 A.2d 69 (N.J. 1960).

100. 27 Cal.Rptr. 697 (C.A. 1963).

101. *Blanchard and Abrams*, *supra* note 76, at 185 (citing Restatement (Second) of Torts § 402A (1965)).

The equity rationale underlying the widespread adoption of the strict liability doctrine in products liability litigation was that the liability was simply part of a manufacturer's cost of doing business and comports with the reasoning behind the enactment of workers' compensation.<sup>102</sup> Strict liability for a manufacturer was seen as logical given that: it provided the manufacturer with an economic incentive to take proper precautions for the public's safety, the mere fact that the manufacturer placed the product into the marketplace was in effect an implied warranty regarding the product's safety, and cost efficiency dictated that the manufacturer was the party who was best situated to discover and correct any defect or danger.<sup>103</sup> With the belief that strict liability would enable consumers to more easily recover, with the additional benefit that manufacturers would redouble their efforts in consumer safety, jurisdictions adopted *en mass* strict liability pursuant to the Restatement (Second) of Torts § 402A.<sup>104</sup>

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102. See Blanchard and Abrams, *supra* note 76, at 185-186; see also Justice Traynor's concurrence in *Escola v. Coca Cola Bottling Co.*:

... I believe the manufacturer's negligence should no longer be singled out as the basis of a plaintiff's right to recover in cases . . . In my opinion it should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings. . . . Even if there is no negligence, however, public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot. Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business. It is to the public interest to discourage the marketing of products having defects that are a menace to the public. If such products nevertheless find their way into the market it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market. However intermittently such injuries may occur and however haphazardly they may strike, the risk of their occurrence is a constant risk and a general one. Against such a risk there should be general and constant protection and the manufacturer is best situated to afford such protection (citations omitted).

24 150 P.2d 436, 440 - 441 (C.A. 1944).

103. See Van Kirk, *supra* note 77, at 1695.

104. Restatement (Second) of Torts § 402A (1965). § 402A ("Special Liability of Seller of Product for Physical Harm to User or Consumer") states as follows:

B. *The Pendulum Swings Back: Tort Reform Attempts to Stem the Tide*

During the 1970s and 1980s there came a recognition by many that there existed a crisis within the insurance industry.<sup>105</sup> In large part, it was argued, the doctrine of strict liability provided injured consumers an easier path to obtain recovery against manufacturers.<sup>106</sup> Moreover, interested parties, including manufacturers, wholesalers and other business interests, argued that larger and larger recoveries seemingly went hand in hand with an increased success rate for plaintiffs,<sup>107</sup> including those involved in products liability actions.<sup>108</sup> Representatives for manufacturers and business advocates in general decried this trend, arguing that such a climate would result in insurance companies raising their rates precipitously in response, and forcing many corporations to take into consideration a jurisdiction's

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- (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
    - (a) the seller is engaged in the business of selling such a product, and
    - (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
  - (2) The rule stated in Subsection (1) applies although
    - (a) the seller has exercised all possible care in the preparation and sale of his product, and
    - (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

*Id.*; see also McQuade, *supra* note 7, at 16-17.

105. See Van Kirk, *supra* note 77, at 1689-90.

106. *Id.* at 1689-90.

107. See Blanchard and Abrams, *supra* note 76, at 171.

108. See Van Kirk, *supra* note 77, at 1701. As it relates to the "insurance crisis," Mr. Van Kirk offered, in part, the following:

In the 1970s, studies showed an alarming increase in both lawsuits and recoveries. Product liability awards rose from approximately 143,000 in the 1960s to nearly 377,000 in the years between 1975 and 1979. Moreover, the success rate and amount of damages awarded for product liability suits also increased during this period. Not surprisingly, insurance rates rose rapidly. These developments were attributed to a number of factors, including the increased ability of attorneys in this area, the increased awareness of consumers' rights, carelessness among consumers and manufacturers, and changes in the tort system itself. In the face of such daunting statistics and almost universal cries for tort reform, state legislatures sprang into action.

*Id.* (footnotes omitted).

product liability laws in the preparation of their business plans.<sup>109</sup> As one commentator stated:

In response to a perceived onslaught of frivolous lawsuits and skyrocketing damage awards, a tort reform movement has steadily spread throughout the United States. . . . [S]tates have attempted to contain the apparent litigation explosion . . . with a wide array of legislation, including damage caps and other changes in procedural and substantive law.<sup>110</sup>

Out of these concerns, "tort reform" was recognized as a movement and gained momentum.<sup>111</sup> State legislative initiatives, such as limits on recovery, statutes of repose governing products liability, and modifying the plaintiff's burden of proof, were enacted.<sup>112</sup>

### C. *The Federal Response: Pre-Emption Lite*

Concerns regarding the ever-increasing litigious nature of American society were not solely reflected in the halls of the various state capitals. The federal government has had a long-term interest in tort reform, including the enactment of the Federal Employers' Liability Act<sup>113</sup> in 1909 and the Longshore and Harbor Workers' Compensation Act in 1927.<sup>114</sup>

Contemporary federal initiative in the field of products liability tort reform took the form of the Federal Interagency Task Force on Product Liability ("Task Force"), under the control of the United States

109. See Blanchard and Abrams, *supra* note 76, at 171-72.

110. Matthew William Stevens, *Strictly No Strict Liability: The 1995 Amendments to Chapter 99B, The Products Liability Act*, 74 N.C. L. REV. 2240 (1996) (footnotes omitted).

111. See Van Kirk, *supra* note 77, at 1701-02.

112. See Henry Cohen and Nathan Brooks, Congressional Research Service Issue Brief, *Products Liability: A Legal Overview* (June 3, 2005):

During the 1980s, in response to the liability insurance "crisis," many states enacted tort reforms intended to limit the rights of injured parties. Some states limited the right of plaintiff to sue product sellers other than the manufacturer; some states permitted awards of punitive damages only upon proof by "clear and convincing" evidence, or required that a portion of punitive damages be paid to a state fund; some states enacted caps on punitive damages or on non-economic damages, such as pain and suffering; some states limited or eliminated joint and several liability or the collateral source rule; and some enacted a statute of repose.

*Id.* at 6.

113. Victor E. Schwartz, *White House Action on Civil Justice Reform: A Menu for the New Millennium*, 24 HARV. J.L. & PUB. POL'Y 393, 394 (2001) (citing 45 U.S.C. § 51 *et seq.* (2000)).

114. Schwartz, *supra* note 110, at 394 (citing 33 U.S.C. § 901 *et seq.* (2000)).

Department of Commerce.<sup>115</sup> Acting between 1976 and 1980, during the Carter and Ford administrations, the Task Force drafted the Model Uniform Product Liability Act (MUPLA) to cure what it deemed the problems for interstate commerce generated by the states' divergent laws.<sup>116</sup> While many states adopted the MUPLA, the number was not deemed sufficient to create a standardized statutory framework.<sup>117</sup> In response, two House resolutions were introduced during the 96th Congress, but neither was enacted.<sup>118</sup> Although the MUPLA was not enacted, Congress subsequently responded with industry-specific legislative reform as it deemed necessary.<sup>119</sup>

#### D. *Strict Liability in North Carolina . . . Not!*

Despite the foregoing two decades long trend favoring the adoption of the strict liability doctrine in products liability, North Carolina arguably had not yet definitively embraced the doctrine by the time the General Assembly enacted the state's Products Liability Act in 1979.<sup>120</sup> In fact, even with the North Carolina General Assembly's passage of the 1979 Products Liability Act,<sup>121</sup> some commentators remained somewhat unclear whether, in products liability, strict liability was available in North Carolina.<sup>122</sup>

Clarity regarding the non-applicability of the strict liability doctrine in products liability was soon provided by North Carolina decisions in a string of cases beginning with *Smith v. Fiber Controls Corp.*<sup>123</sup> The Supreme Court of North Carolina, in *Smith v. Fiber Controls Corp.*, stated:

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115. See COHEN & BROOKS, *supra* note 109, at 1.

116. See Schwartz, *supra* note 110, at 394.

117. See *Id.* at 394-95.

118. COHEN & BROOKS, *supra* note 109, at 2.

119. Schwartz, *supra* note 110, at 395 (citing General Aviation Revitalization Act of 1994, Pub.L. No. 103-298, 108 Stat. 1552 and Biomaterials Access Assurance Act of 1998, Pub. L. No. 105-230, 112 Stat. 1519); see also Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135; Y2K Act, Pub. L. No. 106-37, 113 Stat. 185 (1999); National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3779; Product Liability Risk Retention Act of 1981, Pub. L. No. 97-45, 95 Stat. 949.

120. See Blanchard & Abrams, *supra* note 76, at 185.

121. N.C. GEN. STAT. §§ 99B-1 to 99B-11 (2005).

122. See Blanchard & Abrams, *supra* note 76, at 187.

123. 268 S.E.2d 504 (N.C. 1980); see also *Bryant v. Adams*, 448 S.E.2d 832 (N.C. Ct. App. 1994); *Warren v. Colombo*, 377 S.E.2d 249 (N.C. Ct. App. 1989); *Holley v. Burroughs Wellcome Co.*, 330 S.E.2d 228 (N.C. Ct. App. 1985), *aff'd*, 348 S.E.2d 772 (N.C. 1986); *Byrd Motor Lines, Inc. v. Dunlop Tire & Rubber Corp.*, 304 S.E.2d 773 (N.C. Ct. App. 1983).

[W]e note that recent comprehensive legislation in this area by the General Assembly does not adopt strict liability in product liability cases. Significantly, the Products Liability Act specifically reaffirms the applicability of contributory negligence as a defense in product liability actions. G.S. 99B-4(3). Suffice it to say, that given the recent legislative activity in this area, we are not presently inclined to consider adoption of the rule of strict liability in product liability cases.<sup>124</sup>

Shortly thereafter, in a case alleging damages resulting from defective tires and based upon negligence, breach of warranty and strict liability, the Court of Appeals of North Carolina rendered its decision in *Byrd Motor Lines, Inc. v. Dunlop Tire & Rubber Corp.* The court addressed the status of strict liability in North Carolina as it relates to a products liability action by simply stating, "North Carolina does not recognize this doctrine . . . ."<sup>125</sup>

In *Holley v. Burroughs Wellcome Co.*, a 1985 decision involving allegations of negligence by the defendants regarding the marketing and promotion of their products, the Court of Appeals of North Carolina addressed the inapplicability of the strict liability doctrine as follows:

North Carolina does not recognize strict liability in products liability actions. Therefore, whether defendants can be held liable in this case must be determined in accordance with ordinary negligence principles. In order to establish a *prima facie* case of negligence on a products liability action, a party must show, "(1) evidence of a standard of care owed by the reasonably prudent person in similar circumstances; (2) breach of that standard of care; (3) injury caused directly or proximately by the breach, and; (4) loss because of the injury."<sup>126</sup>

Thus, in North Carolina it is established law that a plaintiff may recover for injuries based upon a manufacturer's negligence,<sup>127</sup> breach of express warranty,<sup>128</sup> and breach of an implied warranty.<sup>129</sup>

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124. 268 S.E.2d 504, 509-10 (N.C. 1980) (internal citation omitted).

125. *Byrd Motor Lines, Inc.*, 304 S.E.2d at 778.

126. *Holley*, 330 S.E.2d at 232 (citations omitted).

127. *Jolley v. General Motors Corp.*, 285 S.E.2d 301, 303 (N.C. Ct. App. 1982) ("In an action to recover for injuries resulting from the negligence of a manufacturer, plaintiff must present evidence which tends to show that the product manufactured by defendant was defective at the time it left defendant's plant, and that defendant was negligent in its design of the product, in its selection of materials, in its assembly process, or in its inspection of the product.") (citation omitted).

128. See *Crews v. W.A. Brown & Son, Inc.*, 416 S.E.2d 924, 929 (N.C. Ct. App. 1992).

129. *Jolley*, 285 S.E.2d at 303 ("To make out a case of breach of implied warranty, the plaintiff must prove that the goods bought and sold were subject to an implied warranty of merchantability, that the goods did not comply with the warranty in that



## II. 99B - THE NORTH CAROLINA PRODUCTS LIABILITY ACT

While in 1979 the General Assembly neither expressly disavowed the doctrine of strict liability in Chapter 99B<sup>130</sup> nor changed “substantially either the traditional law of negligence or express warranty,”<sup>131</sup> the North Carolina Products Liability Act was enacted with multiple pro-business provisions providing manufacturers and merchants with defenses against liability. The primary pro-business statutory decrees involved: (1) section 99B-3(a) which relieved the manufacturer and seller of any liability for any alteration or modification not done by either of these two parties so long as the alteration or modification were not done according to instructions or specifications or were not performed with either the manufacturer’s or seller’s express consent;<sup>132</sup> (2) amending section 1-50 to include a six-year statute of repose for “the recovery of damages for personal injury, death or damage to property based upon or arising out of any alleged defect or any failure in relation to a product” as measured from the purchase date;<sup>133</sup> and (3) perhaps of the greatest significance is section 99B-4, which codified the doctrine of contributory negligence thereby reaffirming North Carolina’s adherence to a conservative, pro-business philosophy.<sup>134</sup>

### A. *The Implied Warranty of Merchantability*

In the late eighteenth and early nineteenth centuries, English and American jurisprudence integrated Roman law concerning the implied warranties of merchantability and fitness for a particular purpose.<sup>135</sup> In the 1815 English case *Gardiner v. Gray*, the court stated:

[T]he purchaser has a right to expect a salable article answering the description in the contract. Without any particular warranty, this is an implied term in every such contract. When there is no opportunity to inspect the commodity, the maxim of ‘caveat emptor’ does not apply. It cannot, without a warranty insist that it shall be of any particular qual-

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the goods were defective at the time of sale, that his injury was caused by the defective nature of the goods, and that damages were suffered as a result; the burden is upon the purchaser to establish a breach by the seller of the implied warranty by showing that a defect existed at the time of sale.”) (citation omitted).

130. See *Blanchard & Abrams*, *supra* note 76, at 185 (“In North Carolina strict liability remains an extremely confused area of products liability law.”).

131. *Id.* at 173.

132. *Id.* at 175.

133. *Id.* at 196; see also N.C. GEN. STAT. §§ 1-52(16), 1-53(4) (2005) (containing additional amendments added by the Act).

134. See *Blanchard & Abrams*, *supra* note 76, at 175.

135. McQuade, *supra* note 7, at 14.

ity or fineness, but the intention of both parties must be taken to be that it shall be salable in the market under the denomination mentioned in the contract between them. The purchaser cannot be supposed to buy goods to lay them on a dunghill.<sup>136</sup>

Citing to Lord Ellenborough's opinion in *Gardiner v. Gray*, the commentator George Ross, in his 1855 treatise, *Leading Cases in the Commercial Law of England and Scotland*, stated that Lord Ellenborough's proposition was that "without any particular warranty it is an implied term in every contract, that the purchaser shall have a saleable article answering the description in the contract . . . ."<sup>137</sup>

In the 1840 case *Howard & Ryckman v. Hoey*, the Supreme Court of Judicature of New York commented upon the concept of merchantability as follows:

[W]here there is a contract to deliver an article, e. g. a note for one hundred bushels of wheat, merchantable or marketable quality is always intended by the parties; such as would bring the average market price at least.<sup>138</sup>

A leading North Carolina decision regarding the implied warranty of merchantability, *W. F. Main Co. v. Fields*,<sup>139</sup> was rendered in 1907 and cited to *Gardiner v. Gray*, among other authorities, for the following propositions: (1) sales by sample involve an implied warranty that the quality of the bulk of the goods equal that of the sample;<sup>140</sup> (2) sales where the buyer purchases without an opportunity to inspect creates an implied warranty that the goods be at a minimum *merchantable*, meaning that they not be first or second quality, but that they are not so *inferior* such that they are *unsalable* between dealers of the article;<sup>141</sup> (3) selling a good creates a warranty of merchantability, meaning that it is fit for some purpose, as opposed to selling it for a *particular purpose*, which warrants it to be fit for that purpose;<sup>142</sup> (4)

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136. Annotation, *Implied condition or warranty of merchantability on sale of goods without particular description or warranty, or present opportunity for inspection*, 21 A.L.R. 367, 377 (1922) (quoting *Gardiner v. Gray*, (1815) 4 Camp. 144, 171 Eng. Rep. 46 (Nisi Prius)).

137. 2 GEORGE ROSS, *LEADING CASES IN THE COMMERCIAL LAW OF ENGLAND AND SCOTLAND* 231 (Philadelphia, T. & J. W. Johnson 1855) (citing *Gardiner v. Gray*, (1815) 4 Camp. 144, 171 Eng. Rep. 46 (Nisi Prius)).

138. *Howard & Ryckman v. Hoey*, 23 Wend. 350 (N.Y. Sup. Ct. 1840) (citation omitted).

139. 56 S.E. 943 (N.C. 1907).

140. *Id.* at 944 (citing *BENJAMIN ON SALES*, 683).

141. *Fields*, 56 S.E. at 944 (citing *BENJAMIN ON SALES*, 686) (first emphasis in original).

142. *Id.* at 311, citing *Jones v. Bright*, 5 Bing. 544.

in sales involving the lack of any particular warranty, a buyer expects an implied right to a “salable article answering the description in the contract”;<sup>143</sup> (5) merchantable means that the article not have any “remarkable defect”;<sup>144</sup> and (6) an article shall be merchantable if it is to be manufactured and delivered in the future.<sup>145</sup>

Another early North Carolina case concerning the implied warranty of merchantability was *Ashford v. H. C. Schrader Co.*<sup>146</sup> The case concerned a dispute between orange dealers in which the plaintiff asserted that the oranges sold to him by the defendant were substantially rotten and unfit for sale.<sup>147</sup> The North Carolina Supreme Court held that an implied warranty of merchantability means that the goods must at least be “salable.”<sup>148</sup>

The North Carolina Supreme Court in *Aldridge Motors, Inc. v. Alexander*,<sup>149</sup> quoted *Swift & Co. v. Aydlett*,<sup>150</sup> for the proposition that the doctrine of implied warranty should be extended as it relates to sales of personal property,<sup>151</sup> and then opined that exacting applications of *caveat emptor* had become incompatible with contemporary business transactions. The court then held that the doctrine of implied warranty was “more in accord with the principle that ‘honesty is the best policy’ and that both vendor and vendee, by fair exchange of values, profit by a sale.”<sup>152</sup>

In 1965, the State of North Carolina adopted the Uniform Commercial Code.<sup>153</sup> As such, the Supreme Court of North Carolina holds that the Uniform Commercial Code governs implied warranty claims in actions based upon products liability.<sup>154</sup> Section 25-2-314 of the

143. *Id.* at 944 (quoting *Gardiner v. Gray*, 4 Campb. 144 (English 1815)).

144. *Id.* at 944 (quoting *McClung v. Kelley*, 21 Iowa 508 (1866)).

145. *Id.* at 944 (citing *Gaylord Mfg. Co. v. Allen*, 53 N. Y. 515 (1873)).

146. 83 S.E. 29 (N.C. 1914).

147. *Id.* at 29.

148. *Id.* at 31.

149. 9 S.E.2d 469 (N.C. 1940).

150. 135 S.E. 141 (N.C. 1926).

151. *Aldridge Motors, Inc.*, 9 S.E.2d at 472 (citing *Swift & Co.*, 135 S.E. at 143).

152. *Id.* at 472.

153. See N.C. GEN. STAT. §§ 25-1-101 to 25-11-108 (1965).

154. See *Boudreau v. Baughman*, 368 S.E.2d 849, 854 (N.C. 1988) (“... actions for breach of implied warranty are now governed by the Uniform Commercial Code, adopted in North Carolina in 1965 as chapter 25 of the General Statutes. The Uniform Commercial Code applies to warranty claims in products liability actions.”) (citing *Morrison v. Sears, Roebuck & Co.*, 354 S.E.2d 495 (N.C. 1987); *Bernick v. Jurden*, 293 S.E.2d 405 (N.C. 1982); *Smith v. Cessna Aircraft Co.*, 571 F.Supp. 433 (M.D.N.C.1983)).

North Carolina General Statutes concerns the implied warranty of merchantability, and states as follows:

- (1) Unless excluded or modified (G.S. 25-2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.
- (2) Goods to be merchantable must be at least such as
  - (a) pass without objection in the trade under the contract description; and
  - (b) in the case of fungible goods, are of fair average quality within the description; and
  - (c) are fit for the ordinary purposes for which such goods are used; and
  - (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
  - (e) are adequately contained, packaged, and labeled as the agreement may require; and
  - (f) conform to the promises or affirmations of fact made on the container or label if any.
- (3) Unless excluded or modified (G.S. 25-2-316) other implied warranties may arise from course of dealing or usage of trade.<sup>155</sup>

#### B. Chapter 99B Codification of Contributory Negligence

The General Assembly's 1979 enactment of § 99B-4<sup>156</sup> codified a general "catch-all" provision for the doctrine of contributory negli-

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155. See N.C. GEN. STAT. § 25-2-314 (1965); see also *Reid v. Eckerd Drugs, Inc.*, 253 S.E.2d 344, 349 (N.C. Ct. App. 1979) ("In its pure form, an action for breach of implied warranty of merchantability under G.S. § 25-2-314 (and all other analogous state enactments of U.C.C. 2-314) entitles a plaintiff to recover without any proof of negligence on a defendant's part where it is shown that (1) a merchant sold goods, (2) the goods were not "merchantable" at the time of sale, (3) the plaintiff (or his property) was injured by such goods, (4) the defect or other condition amounting to a breach of the implied warranty of merchantability proximately caused the injury, and (5) the plaintiff so injured gave timely notice to the seller.").

156. N.C. GEN. STAT. § 99B-4 as enacted in 1979 states as follows:

Knowledge or reasonable care.

No manufacturer or seller shall be held liable in any product liability action if:

- (1) The use of the product giving rise to the product liability action was contrary to any express and adequate instructions or warnings delivered with, appearing on, or attached to the product or on its original container or wrapping, if the user knew or with the exercise of reasonable and diligent care should have known of such instructions or warnings; or

gence as it relates to a products liability action filed by an injured consumer, along with two fact specific provisions concerning the consumer's contributory negligence.<sup>157</sup> Thus, § 99B-4 *statutorily* extended a common law affirmative defense based in tort law to a cause of action grounded in contract. While Chapter 99B not only remained silent to the issue of strict liability, it explicitly reaffirmed the State's commitment to the doctrine of contributory negligence.

Thus, it is not surprising that by 1979, the North Carolina Court of Appeals stated the following:

It is now generally acknowledged that the action for breach of warranty is an offspring of mixed parentage, aspects of it sounding in both tort and contract, but following strictly the rules and precedents of neither.<sup>158</sup>

In 1995, the North Carolina General Assembly made plain its intent regarding the inapplicability of strict liability in products liability actions when it amended Chapter 99B,<sup>159</sup> in part, by enacting § 99B-1.1 which stated the following: "There shall be no strict liability in tort in product liability actions."<sup>160</sup> In addition to expressly rejecting strict liability, the General Assembly set the requirements for what must be proven by the plaintiff in order to succeed upon claims involving either (1) inadequate warning or instruction,<sup>161</sup> or (2) inadequate design or formulation.<sup>162</sup>

The General Assembly also amended Chapter 99B by enacting § 99B-1.2 which expressly stated that nothing in the Act amending Chapter 99B would prohibit a products liability action for breach of warranty, in addition to stating that the defenses provided for in the Chapter would apply to warranty actions unless the Chapter expressly excluded them. It is suggested by one commentator that there may have been concern that warranty actions could be considered as being

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(2) The user knew of or discovered a defect or dangerous condition of the product that was inconsistent with the safe use of the product, and then unreasonably and voluntarily exposed himself or herself to the danger, and was injured by or caused injury with that product; or

(3) The claimant failed to exercise reasonable care under the circumstances in the use of the product, and such failure was a proximate cause of the occurrence that caused the injury or damage complained of.

157. See Blanchard and Abrams, *supra* note 76, at 176.

158. Reid v. Eckerd Drugs, Inc., 253 S.E.2d 344, 347 (N.C. Ct. App. 1979).

159. See 1995 N.C. Sess. Laws 522.

160. See N.C. GEN. STAT. § 99B-1.1 (1995); see also Stevens, *supra* note 107, at 2246.

161. See N.C. GEN. STAT. § 99B-5 (1995).

162. See N.C. GEN. STAT. § 99B-6 (1995).

excluded from Chapter 99B given the amended Act's emphasis on negligence actions versus warranty.<sup>163</sup>

### III. RECENT CASE LAW CONCERNING CONTRIBUTORY NEGLIGENCE ACTING AS A BAR TO A CLAIM ALLEGING BREACH OF THE IMPLIED WARRANTY OF MERCHANTABILITY

Upon passage of § 99B-4, the North Carolina Court of Appeals, in the 1989 case of *Steelcase, Inc. v. Lilly Co., Inc.*, rendered a decision on the statute's applicability in a products liability action, based upon the Uniform Commercial Code's implied warranty of fitness for a particular purpose.<sup>164</sup> The defendant had allegedly supplied wood stains to plaintiff which, upon application, allegedly caused plaintiff's furniture to discolor.<sup>165</sup> The plaintiff, a furniture maker, alleged breach of contract, breach of express warranty, breach of implied warranty of merchantability, breach of implied warranty of fitness for a particular purpose, negligence, and unfair and deceptive trade practices.<sup>166</sup> The defendant asserted, among other defenses, the plaintiff's contributory negligence.<sup>167</sup>

When the trial court submitted the issues to the jury, such issues did not touch upon whether the defendant had breached the implied warranty of merchantability.<sup>168</sup> Instead, as to the issue of breach of an implied warranty, the issues submitted to the jury only addressed the alleged breach of the *implied warranty of fitness* for a particular purpose.<sup>169</sup>

As it relates to the alleged breach of an implied warranty of fitness for a particular purpose, the defendant in *Steelcase* successfully argued that the plaintiff's claim was in actuality a products liability action, and that § 99B-4(1),<sup>170</sup> which concerns the plaintiff's contributory negligence as it relates to the product's instructions or warnings, acted to preclude the plaintiff from recovering as a matter of law upon any

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163. See Stevens, *supra* note 107, at 2256.

164. 379 S.E.2d 40 (N.C. Ct. App. 1989).

165. *Id.* at 41.

166. *Id.* at 42.

167. *Id.*

168. *Id.*

169. *Id.*

170. See N.C. GEN. STAT. § 99B-4 (1979) ("No manufacturer or seller shall be held liable in any product liability action if: (1) [t]he use of the product giving rise to the product liability action was contrary to any express and adequate instructions or warnings delivered with, appearing on, or attached to the product or on its original container or wrapping, if the user knew or with the exercise of reasonable and diligent care should have known of such instructions or warnings . . .").

implied warranty.<sup>171</sup> Given that the jury had answered in the affirmative upon the issue of whether the plaintiff had used the stain “contrary to any express and adequate instructions . . . [which plaintiff] knew or with the exercise of reasonable and diligent care should have known,” the Appellate Court granted the defendant’s motion for judgment notwithstanding the verdict on the implied warranty issue, but denied it concerning the breach of contract claim, reasoning that Chapter 99B did not apply to plaintiff’s breach of contract claim.<sup>172</sup>

In *Westover Products, Inc. v. Gateway Roofing Co.*,<sup>173</sup> the Court of Appeals for the first time directly addressed the applicability of § 99B-4 to a cause of action based upon the breach of the implied warranty of merchantability.<sup>174</sup> The matter involved the installation of a roof system in the construction of a building.<sup>175</sup> There, a third-party defendant cross-claimed against a fellow third-party defendant by alleging negligence and breach of the express and implied warranties.<sup>176</sup> The Court of Appeals held that section 99B-4 (1) would have applied to bar the cross-claim’s plaintiff from recovery *had not* the cross-claim defendant obligated itself to instruct the cross-claim’s plaintiff on installation procedures, and in fact, also assisted the cross-claim’s plaintiff in the installation.<sup>177</sup>

The North Carolina Supreme Court directly addressed the applicability of section 99B-4 to a cause of action based upon the breach of the implied warranty of merchantability in its 1992 decision, *Goodman v. Wenco Foods, Inc.*<sup>178</sup> *The matter arose from the plaintiff customer allegedly being injured by a bone while eating a hamburger which was served by the co-defendant restaurant and containing meat supplied by the co-defendant meat supplier.*<sup>179</sup>

*The defendant meat supplier asserted, in part, that § 99B-4 (1) and (3) entitled it to summary judgment on the issue of implied breach of merchantability.*<sup>180</sup> *Of particular note, the Supreme Court in Goodman*

171. *Steelcase*, 379 S.E.2d at 42-43.

172. *Id.* at 43.

173. 380 S.E.2d 369 (N.C. Ct. App. 1989).

174. *Id.* at 374.

175. *Id.* at 371.

176. *Id.*

177. *Id.* at 374.

178. 423 S.E.2d 444 (N.C. 1992).

179. *Id.* at 446.

180. *Id.* at 456-57 (citing N.C. GEN. STAT. § 99B-4 (1)-(3) (2005)). Subsection (3) is § 99B-4’s catchall provision to bar a plaintiff from recovery in a products liability action arising from the plaintiff’s contributory negligence, and reads as follows: “The claimant failed to exercise reasonable care under the circumstances in the use of the

cited to its prior decision in *Morrison v. Sears, Roebuck & Co.*<sup>181</sup> in which it concluded that:

“[A]n action for breach of implied warranty of merchantability under the Uniform Commercial Code is a ‘product liability action’ within the meaning of the Products Liability Act if . . . the action is for injury to person or property resulting from a sale of a product. . . . [I]n products liability actions arising from breaches of implied warranties . . . the defenses provided by N.C.G.S. § 99B-2(a) [concerning seller’s lack of opportunity to inspect as relieving liability] are available to defendants.”<sup>182</sup>

The Supreme Court then asserted in *Goodman* that “[i]t follows that defendants may avail themselves of defenses provided elsewhere in the Products Liability Act.”<sup>183</sup>

Thus, the North Carolina Supreme Court held that (1) the implied breach of merchantability under the Uniform Commercial Code was within the purview of Chapter 99B only if the action is for *injury to person or property resulting* from a sale of the product, thereby requiring injury to person or property other than that of the product sold; and (2) that all defenses found in Chapter 99B were available to potentially preclude such a claim for the breach of the implied warranty of merchantability.<sup>184</sup>

In *Morgan v. Cavalier Acquisition Corp.*,<sup>185</sup> a 1993 court of appeals decision, in which an action was filed based upon negligence, breach of implied warranty and strict liability, involving a plaintiff suffering fatal injuries from a vending machine falling upon him.<sup>186</sup> The Court of Appeals ruled that it was a products liability action because it had been brought due to a death caused by or resulting from the “manufacture, construction, design, formulation, development of standards, preparation, processing, assembly, testing, listing, certifying, warning, instructing, marketing, selling, advertising, packaging, or labeling” of a product.<sup>187</sup>

While citing *Morrison v. Sears, Roebuck & Co.*<sup>188</sup> for the proposition that an action for the breach of an implied warranty of

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product, and such failure was a proximate cause of the occurrence that caused the injury or damage complained of.” N.C. GEN. STAT. § 99B-4 (3) (2005).

181. *Morrison v. Sears, Roebuck & Co.*, 354 S.E.2d 495 (N.C. 1987).

182. *Id.* at 498-99.

183. *Goodman*, 423 S.E.2d at 456.

184. *Id.* at 457.

185. 423 S.E.2d 915 (N.C. Ct. App. 1993).

186. *Id.* at 524.

187. *Id.* at 527 (citing N.C. GEN. STAT. § 99B-1 (3) (2005)).

188. *Morrison v. Sears, Roebuck & Co.*, 354 S.E.2d 495 (N.C. 1987).



merchantability involving injury to a person resulting from the sale of product is a products liability action,<sup>189</sup> the Court of Appeals in *Morgan* determined, in part, that the record could not support summary judgment for the defendants based upon § 99B-4 even though the defendants' evidence included expert witness testimony that the vending machine was in proper working condition, had been set up properly, and that it was close to inconceivable that the machine could have fallen without someone deliberately tipping it over.<sup>190</sup>

In *Bryant v. Adams*,<sup>191</sup> the Court of Appeals held, in part, that there were genuine issues of material fact which precluded summary judgment for the defendants as to the issue of the plaintiff's contributory negligence under § 99B-4 (1) and (3).<sup>192</sup> The plaintiff, having suffered catastrophic injuries on a trampoline resulting in his quadriplegia,<sup>193</sup> brought a products liability action based upon claims of negligence and breach of express and implied warranties.<sup>194</sup> The claim stemmed from defendants' alleged negligent failure to properly or sufficiently warn of the trampoline's dangers, breach of express and implied warranties and strict liability.<sup>195</sup>

In reversing the trial court's order dismissing the plaintiff's claim against a defendant for breach of the implied warranty of merchantability, the Court of Appeals in *Bryant* cited *Champs Convenience Stores v. United Chemical Co.*<sup>196</sup> for the proposition that "if the instructions themselves were not adequate or if the plaintiff did not read the instructions but the jury determined that the plaintiff still exercised reasonable care, a plaintiff should not be found contributorily negligent."<sup>197</sup>

The last North Carolina Supreme Court case directly addressing § 99B-4 barring a claim based upon a breach of the implied warranty of merchantability was *Nicholson v. American Safety Utility Corp.*<sup>198</sup> The litigation involved an electrical lineman who was electrocuted of by an energized line resulting in severe injuries from which he filed a product liability action based upon claims of negligence and breach of warranty against several defendants, including both the manufacturer

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189. *Morgan*, 423 S.E.2d at 919.

190. *Id.* at 922-23.

191. 448 S.E.2d 832 (N.C. Ct. App. 1994).

192. *Id.* at 845.

193. *Id.* at 835.

194. *Id.*

195. *Id.*

196. 406 S.E.2d 856 (N.C. 1991).

197. *Bryant*, 448 S.E.2d at 845.

198. 488 S.E.2d 240 (N.C. 1997).

and the seller of the gloves which the plaintiff was wearing at the time of the accident.<sup>199</sup> The trial court granted these defendants' motion for summary judgment based, in part, upon the finding that the plaintiff was contributory negligent as a matter of law.<sup>200</sup> The Court of Appeals affirmed the trial court's order granting summary judgment for the defendant seller on the issue of implied warranty and to both defendants on the issue of expressed warranty, but reversed the trial court as to the issues of plaintiff's contributory negligence, the defendants' negligence, and the defendant manufacturer's alleged breach of the implied warranty.<sup>201</sup> The Supreme Court affirmed the Court of Appeals' reversal of summary judgment entered in favor of the defendants on the issues of plaintiff's contributory negligence, defendants' negligence, and the manufacturer's breach of the implied warranty of merchantability.<sup>202</sup>

However, in affirming, the Supreme Court in *Nicholson* found that the Court of Appeals' reading of § 99B-4 (3) - limiting the defense to the misuse of the product by the plaintiff - was too narrowly drawn.<sup>203</sup> The Supreme Court cited to its prior decision in *Champs Convenience Stores* for the rule that § 99B-4 simply codifies for product liability actions the common law doctrine of contributory negligence in addition to providing specialized fact patterns which would amount to contributory negligence by the plaintiff in a products liability action; in essence, § 99B-4 (3) did not provide a *different* rule, but simply a clarification of the doctrine as it relates to product liability actions.<sup>204</sup> Of particular note, the Supreme Court further stated that the plaintiff's use of the product was not the focus of the statute but instead, "all of the circumstances during the plaintiff's use of the product must be considered, not just plaintiff's conduct with respect to the product itself."<sup>205</sup>

Following *Nicholson*, the Court of Appeals has twice revisited the doctrine of contributory negligence acting as a bar to a plaintiff's product liability claim based upon the breach of the implied warranty of merchantability.

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199. *Id.* at 241-42.

200. *Id.* at 243.

201. *Id.*

202. *Id.*

203. *Id.* at 241, 244-45

204. *Id.* at 243-44.

205. *Id.* at 244.

In its 2001 decision, *Dewitt v. Eveready Battery Co.*,<sup>206</sup> a matter involving a leaking battery causing injury to the plaintiff, the Court of Appeals addressed, in part, the issue of whether the plaintiff was contributorily negligent thereby barring his claim against a battery manufacturer for its alleged breach of the implied warranty of merchantability.<sup>207</sup> Finding that the record was bereft of any evidence that plaintiff knew that the moisture on his sock was from the defendant's leaking batteries, the Court of Appeals reversed the trial court's award of summary judgment in favor of the defendant, explaining that it could not hold as matter of law that, under the circumstances, "an ordinarily prudent person" would be conscious he had come into contact with battery fluid or even if known, would have taken immediate action to remove the fluid.<sup>208</sup>

The 2003 Court of Appeals decision rendered in *Swain v. Preston Fall East, L.L.C.*<sup>209</sup> involved an action alleging negligence, breach of the implied warranties of merchantability and fitness for a particular purpose, negligent misrepresentation, gross negligence, unfair and deceptive practices, and negligence *per se*.<sup>210</sup> The claims were made by the plaintiff in connection with, in part, the alleged negligent selection and application or supervision of synthetic stucco to the plaintiff's townhouse.<sup>211</sup> Although the decision did not expressly state that the action was grounded in products liability law, the basic gravamen of plaintiff's action appears to be that defendants had negligently selected and applied defectively designed synthetic stucco which had caused moisture damage to the townhouse, and which would need to be replaced or further damage would be incurred.<sup>212</sup>

The Court of Appeals in *Swain* affirmed the trial court entry of summary judgment in favor of the defendants, finding that the plaintiffs had notice of problems with the synthetic stucco prior to their purchase such that it gave rise to a duty to properly inspect the property, and that by not doing so, the plaintiffs were contributorily negligent as a matter of law.<sup>213</sup>

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206. 550 S.E.2d 511 (N.C. Ct. App. 2001), *aff'd*, 565 S.E.2d 140 (N.C. 2002).

207. *DeWitt*, 550 S.E.2d at 516-17.

208. *Id.* at 517.

209. 576 S.E.2d 699 (N.C. Ct. App. 2003).

210. *Id.* at 702.

211. *Id.*

212. *Id.*

213. *Id.* at 703-04.

## CONCLUSION

One view of contributory negligence, widely held by those who are members of the plaintiff's bar, is that the doctrine is "antiquated and unfair" and should be rejected in favor of comparative fault.<sup>214</sup> An opposite view held by many, especially those advocates representing North Carolina commercial interests, asserts that a "change would . . . hurt the favorable business climate in our state."<sup>215</sup>

Whether one views the doctrine of contributory negligence with favor or chagrin, it should be recognized that in order to obtain the political support necessary in the General Assembly to enact legislation abrogating the doctrine of contributory negligence in favor of comparative fault, the doctrine of *joint and several liability* would quite likely be abolished as a statutory *quid pro quo*.<sup>216</sup> Thus, those who demand that North Carolina join the vast majority of jurisdictions who have adopted comparative fault may benefit from a realistic cost-benefit analysis regarding the benefits of comparative fault measured against the detriments attendant with an abolition of joint and several liability. Moreover, the doctrine of contributory negligence serves as a rational and legitimate statutory buffer against, and disincentive for, the filing of frivolous suits, resulting in greater public confidence as a whole in the State of North Carolina's legal system.

The foregoing analysis notwithstanding, North Carolina has steadfastly maintained its allegiance to the doctrine of contributory negligence and affirmed the doctrine with its codification in the North Carolina Products Liability Act. North Carolina has not only expressly confirmed the applicability of the affirmative defense of contributory negligence to products liability claims based on the negligent acts and omissions of the manufacturer and seller, the State has also rejected strict liability in tort in product liability actions. Perhaps of greatest significance is the statutory extension by North Carolina of the doctrine of contributory negligence to products liability actions based in warranty law, thus signaling its steadfast support for the doctrine. The

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214. North Carolina Academy of Trial Lawyers, 2005-2006 Legislative Agenda, <http://ncatl.org/?p=17559> (last visited Oct. 2, 2007).

215. Joseph Menn, *Many Claims Face Delays, Other Hurdles*, CHARLOTTE OBSERVER, Feb. 9, 1992, at 7C (quoting Phil Kirk, past president of the N.C. Citizens for Business and Industry).

216. See e.g. *Bill Requesting Study of Contributory Negligence Gets Favorable Report*, NCMS BULL. (N.C. MED. SOC'Y, Raleigh, N.C.), Mar. 30, 2007 at 2 ("Any debate about repealing contributory negligence will spark discussion of repealing or attenuating joint and several liability."), available at <http://ncmedsoc.org/bulletins/ViewNewsletter?newsletterid=237>.

practitioner's ability to assert the doctrine of contributory negligence as an affirmative defense to a claim based upon the breach of the implied warranty of merchantability implicitly recognizes this State's continuing acceptance and belief in the policy underpinnings of the doctrine.