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Myers & Chapman, Inc. v. Thomas G. Evans, Inc.: A Lesson in Reading Between the Lines

In Myers & Chapman, Inc. v. Thomas G. Evans, Inc. the North Carolina Supreme Court alters the law of the state in three significant aspects. The court abandons the doctrine of culpable ignorance as sufficient proof of scienter in a fraud action; it lowers the standard of care for corporate directors and officers to avoid individual liability to third parties for some torts committed on behalf of the corporation; and it finds the statutory treble damages remedy for deceptive trade practices unavailable in misdealings between two businesses that fall short of intentional fraud. Silent on the policy justifications behind these shifts, the court fails even to acknowledge its departure from prior law.

This Note explores the changes the court's language in Myers & Chapman necessarily implies. The Note attempts to discern the legal or policy bases, if any, behind the shifts. It then concludes that the developments hidden between the lines of the Myers & Chapman decision combine to cloak businesses defending commercial disputes in an extra layer of protection.

On April 25, 1984, defendant Thomas G. Evans signed and swore to an application for payment, certifying that heating and air conditioning equipment needed for construction of a High Point shopping center had been ordered and stored in a bonded warehouse. The equipment was to be used by Thomas G. Evans, Inc. (Evans, Inc.), the defendant corporation for which Evans and his wife were sole directors and officers, in performing its subcontract with plaintiff general contractor Myers & Chapman, Inc. According to the terms of the subcontract, Evans, Inc. could receive periodic payment for work completed, minus a ten percent retainage, by submitting the sworn applications. In May 1984 plaintiff paid the corporate defendant for all the materials listed in the application. A second application submitted in June recertified that all the materials had been purchased and stored.

In August 1984 Thomas Evans decided to wind up his business. With

2. Id. at 560-62, 374 S.E.2d at 387-88.
3. Id.
4. Id. at 561, 374 S.E.2d at 387; Plaintiff-Appellant's New Brief, exhibit 2(g), Myers & Chapman (No. 140PA88). The application contained the following statement:

The undersigned Contractor certifies that to the best of his knowledge, information and belief the Work covered by this Application for Payment has been completed in accordance with the Contract Documents, and that all amounts have been paid by him for Work for which previous Certificates for Payment were issued and payments received from the Owner, and that current payments shown herein are now due.

Myers & Chapman, 323 N.C. at 561, 374 S.E.2d at 387. The language of the application in this case is taken from the standard form prescribed by the American Institute of Architects, which is widely used throughout the construction industry. Amicus Curiae Brief at 2, Myers & Chapman (No. 140PA88).
6. Id. at 562, 374 S.E.2d at 388.
7. Id.
plaintiff’s consent, Evans, Inc. subcontracted with Custom Comfort, Inc. to complete the High Point job for the monetary balance remaining on the contract. After Custom Comfort began work, it was unable to locate specialty items covered by the April application, purportedly stored in the warehouse and already paid for by plaintiff. Plaintiff ordered the specialty items, paid for them a second time, and sued Evans, Inc. and Thomas Evans, individually, to recover its loss.

The case against the individual defendant was tried on theories of fraud and gross negligence in permitting fraud. At trial, Thomas Evans admitted that he had no personal knowledge whether the materials were stored in the warehouse when he swore to this fact, to the “best of his knowledge, information and belief,” in the payment application. Evans based the application on a handwritten document prepared by Evans, Inc.’s project manager, which Evans had accepted as true without asking a single question. The jury found Evans individually liable for fraud and gross negligence and awarded $11,731 in compensatory damages. The trial judge concluded that Evans’ actions amounted to an unfair and deceptive trade practice in violation of North Carolina General Statutes section 75-1.1 and trebled the damages.

8. Id.

9. Id. The April application for payment for $33,227 covered some large air handling units as well as $11,731 worth of small electronic equipment specially designed to run the system. Plaintiff-Appellant’s New Brief at 4. The large units were stored in the warehouse, but the specialty items never were stored or purchased by Evans, Inc. Id. Plaintiff received a storage invoice from the warehouse, which provided apparent documentation for the April application. See id.

10. Myers & Chapman, 323 N.C. at 562, 374 S.E.2d at 388. Plaintiff may have named Evans as an individual defendant out of necessity. The record and briefs filed in the case do not indicate whether Evans had completed the dissolution of his corporation. Plaintiff may have been able successfully to execute a judgment only against the individual defendant. See infra note 122.

Thomas Evans’ wife, Brenda, also was named as an individual defendant and was found liable by the jury. Myers & Chapman, 323 N.C. at 563-64, 374 S.E.2d at 388-89. The supreme court vacated the judgment as it applied to Brenda Evans, holding that since she signed the application only in her capacity as a notary, she could not be liable for any misrepresentations it contained. Id. at 573, 374 S.E.2d at 394.

11. Id. at 562, 374 S.E.2d at 388.

12. Id. at 566-67, 374 S.E.2d at 390-91.

13. Id. at 571, 374 S.E.2d at 393.

14. Id. at 562-63, 374 S.E.2d at 388-89. The jury found the corporate defendant liable for unjust enrichment. Id. at 562, 374 S.E.2d at 388. The trial judge entered judgment against the corporate and individual defendants jointly and severally. Id. at 564, 374 S.E.2d at 389. The court of appeals found no error as to the corporate defendant, Myers & Chapman, Inc. v. Thomas G. Evans, Inc., 89 N.C. App. 41, 48, 365 S.E.2d 202, 206, aff’d in part and rev’d in part, 323 N.C. 559, 374 S.E.2d 385 (1988), and the supreme court did not consider this aspect of the court of appeals’ decision.

15. N.C. GEN. STAT. § 75-1.1 (1988). Section 75-1.1, in pertinent part, provides, “Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.” Id. § 75-1.1(a).


A trial judge must award treble damages upon finding a violation of section 75-1.1. N.C. GEN. STAT. § 75-16 (1988). Section 75-16 provides:

If any person shall be injured or the business of any person, firm or corporation shall be broken up, destroyed or injured by reason of any act or thing done by any other person, firm or corporation in violation of the provisions of this Chapter, such person, firm or corporation so injured shall have a right of action on account of such injury done, and if damages are assessed in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict.
Defendants appealed, and the North Carolina Court of Appeals considered two issues: the sufficiency of the evidence of fraud, and the propriety of the trial judge's instruction on gross negligence. The court reversed on the fraud issue, concluding that the language in the payment application made no representations of past or existing facts. Instead, the court characterized a statement to the best of the maker's knowledge, information, and belief as merely a recommendation or opinion that could never be actionable. The court of appeals also found error in the jury instruction on gross negligence and remanded for a new trial on that issue and for a redetermination of the section 75-1.1 claim.

A unanimous supreme court sharply disagreed with the lower court's determination that the language of the payment application was not a representation and could never be actionable. Characterizing the application as a solemn document designed to induce action, the court held that a contractor's sworn statement "to the best of his knowledge, information and belief" could constitute an actionable misrepresentation if the other elements of fraud were proved.

\[17.\) Myers & Chapman, 89 N.C. App. at 42, 365 S.E.2d at 203.
\[18.\) Id. at 45-46, 365 S.E.2d at 205.
\[19.\) Id. at 46, 365 S.E.2d at 205. The court of appeals relied on Myrtle Apartments, Inc. v. Lumbermen's Mut. Casualty Co., 258 N.C. 49, 127 S.E.2d 759 (1962). The representation at issue in Myrtle Apartments was contained in a letter from defendant's engineer, who had inspected plaintiff's boiler. The letter stated, "It is, therefore, recommended that this boiler be replaced ...." Id. at 50, 127 S.E.2d at 760. Plaintiff sued, claiming that the boiler was in proper working order and that it had been fraudulently induced to incur expenses for a new boiler. Id. at 49-50, 127 S.E.2d at 759-60. The court held that a mere statement of opinion or belief cannot constitute fraud. Id. at 52, 127 S.E.2d at 761.
\[20.\) Myers & Chapman, 89 N.C. App. at 47, 365 S.E.2d at 206. The court of appeals found error in the following instruction: "It is immaterial whether the defendants . . . were cognizant of the fact that the equipment was not stored as certified. The law charges them with actual knowledge of the company's affairs and holds them responsible for damages sustained by others by reason of their negligence, fraud or deceit." Id. The court of appeals also found error in the trial court's omission of the following language:

Directors are not guarantors of the solvency of a corporation, nor are they insurers of the honesty and integrity of the officers and agents. Neither are they required to personally supervise all the details of business transactions.

Ordinarily, of course, directors would not be charged with notice by virtue of desultory, occasional or disconnected acts of mismanagement or fraudulent transactions, but in cases where mismanagement and fraud has been persistently and continuously practiced for substantial periods of time a jury must determine whether the directors, in the exercise of that degree of care which the law imposes, should have known of such practices and that persons dealing with the corporation would be injured thereby. Id. at 46-47, 365 S.E.2d at 205. The supreme court agreed with the court of appeals that the given instruction was in error but held that the trial court properly omitted the other language. See infra notes 101-04 and accompanying text.
\[21.\) Myers & Chapman, 89 N.C. App. at 47-48, 365 S.E.2d at 206.
\[22.\) Myers & Chapman, 323 N.C. at 565-66, 374 S.E.2d at 389-90. The court found the language of the payment application to be "very different" from the engineer's letter in Myrtle Apartments. Id. at 565, 374 S.E.2d at 389-90; see supra note 19.
\[23.\) Myers & Chapman, 323 N.C. at 565-66, 569-70, 374 S.E.2d at 390, 392. In finding the payment application to constitute an actionable representation, the court relied heavily on an amicus curiae brief filed by the Carolinas Branch of the Associated General Contractors of America, Inc. (AGC). Id. AGC argued that the standardized document keeps down the overall cost of the project, because the contractor can rely on the application without having to spend time and money.
Justice Meyer, writing for the court, then considered whether the evidence at trial was otherwise sufficient to support the jury's fraud verdict. He determined that plaintiff had offered insufficient proof of scienter, finding that Thomas Evans' admitted ignorance of the truth of his statements did not establish that he knew the application was false or that he intended to deceive plaintiff. Nevertheless, the court found the same evidence sufficient to support the gross negligence claim against Thomas Evans. It agreed with the court of appeals that the jury instruction on gross negligence was erroneous because it suggested that directors and officers could be liable for damages to third parties resulting from simple negligence. The court remanded the case for a new trial on the gross negligence issue. It did not agree, however, with the court of appeals that the section 75-1.1 claim also should be remanded for redetermination. The court disposed of that issue in one sentence, stating that the deceptive trade practices claim was baseless absent proof of fraud.

I. CULPABLE IGNORANCE

The doctrine of culpable ignorance is a well-established method of proving scienter in American common law. The doctrine is stated by one commentator as follows:

A defendant who asserts a fact as of his own knowledge, or so positively as to imply that he has knowledge, under circumstances where he is aware that he will be so understood when he knows that he does not in fact know whether what he says is true, is found to have the intent to deceive, not so much as to the fact itself, but rather as to the extent of his information.

The state jurisdictions uniformly recognize this doctrine.

In North Carolina, the culpable ignorance doctrine was recognized in dicta as early as 1907. A frequently cited statement of the doctrine appears in Zager verifying work that may be outside his area of expertise. Id. at 569, 374 S.E.2d at 392; Amicus Curiae Brief at 5. AGC also pointed out that the application protects the small subcontractor by expediting payment and keeping him from having to finance the contractor. Myers & Chapman, 323 N.C. at 569, 374 S.E.2d at 392; Amicus Curiae Brief at 6.

25. Id. at 569, 374 S.E.2d at 392.
26. Id. at 572, 374 S.E.2d at 394; see supra note 20; infra notes 101-04 and accompanying text.
27. Myers & Chapman, 323 N.C. at 573, 374 S.E.2d at 394.
28. Id.
29. See Cooper v. Schlesinger, 111 U.S. 148, 155 (1884); RESTATEMENT (SECOND) OF TORTS § 526(c) & comment f (1977).
v. Setzer. Plaintiff in Zager owned a motion picture theater. While negotiating its sale to defendant, plaintiff represented that the theater’s gross weekly income under its previous operator had averaged between 600 and 700 dollars. In truth, it had ranged from 222 to 487 dollars. When plaintiff sued to recover the balance due on the sale contract, defendant counterclaimed for rescission and damages from fraud. Defendant produced no evidence tending to show that plaintiff knew of the former operator’s actual gross income. The Zager court held that this gap in the evidence would not bar recovery. The court stated, 

[T]he evidence is sufficient to support the inference that the plaintiff’s representation as to the gross weekly income of the former operator was recklessly made, or positively averred when he was consciously ignorant whether it was true or false, and was intended by him and accepted by the defendant and reasonably relied on as a statement of fact by which the defendant was deceived and caused to suffer loss. The evidence tending to show this state of mind is an adequate substitute for proof of scienter.

North Carolina courts have stated the culpable ignorance doctrine in various, but substantively identical, verbal formulations both before and after the Zager decision.

In three cases decided in the 1980s, the supreme court incorporated the culpable ignorance doctrine into its statement of the essential elements of a fraud claim. Although Britt v. Britt, Johnson v. Phoenix Mutual Life Insurance Co., and Odom v. Little Rock & I-85 Corp. use slightly different language, in substance they all state the elements of fraud as follows:

1. Defendant represented a past or existing fact;
2. the representation was false;
3. defendant knew the representation was false when it was made or made it recklessly, without any knowledge of its truth and as a positive assertion;

34. Id. at 494, 88 S.E.2d at 95.
35. Id.
36. Id. at 494-95, 88 S.E.2d at 95.
37. Id. at 494, 88 S.E.2d at 95.
38. Id. at 495, 88 S.E.2d at 95.
39. Id.
40. Id.
42. 320 N.C. 573, 359 S.E.2d 467 (1987).
43. 300 N.C. 247, 266 S.E.2d 610 (1980).
44. 299 N.C. 86, 261 S.E.2d 99 (1980).
4. defendant made the false representation with the intent that it should be relied on by plaintiffs;
5. plaintiff reasonably relied on the representation and acted upon it; and
6. plaintiff suffered injury.45

This formulation of the elements of fraud, including the emphasized portions concerning the culpable ignorance doctrine, is nearly identical to North Carolina's standard pattern jury instruction for fraud.46 Both plaintiff and defendants in Myers & Chapman requested instructions based on this formula.47

The facts of Myers & Chapman make out a paradigm case for the application of the culpable ignorance doctrine as proof of scienter. The supreme court held that the payment application was a representation.48 The falsity of the application was uncontested. Defendant Evans admitted that he had no personal knowledge upon which to base the statement.49 Evans submitted the application with the intention that Myers & Chapman would make payment based upon it.50 Myers & Chapman relied upon the application in making payment and suffered a loss of more than 11,000 dollars.51

Nevertheless, the supreme court concluded that plaintiff failed to prove scienter.52 The court held that scienter embraces both knowledge of falsity and an intent to deceive, manipulate, or defraud.53 The culpable ignorance doctrine, in the court's view, sometimes may satisfy the element of knowledge of falsity,54 but intent to deceive requires additional proof of the defendant's state of mind.55 The court made no mention of Zager.56 It did expressly disavow Britt, Johnson and Odom, however, concluding that they could be "interpreted to have ex-

45. See Britt, 320 N.C. at 579, 359 S.E.2d at 471; Johnson, 300 N.C. at 253, 266 S.E.2d at 615; Odom, 299 N.C. at 91-92, 261 S.E.2d at 103.
46. NORTH CAROLINA PATTERN JURY INSTRUCTIONS—CIVIL 800.00 (1973).
47. Record at 21-22, 31-32.
49. Id. at 566-67, 374 S.E.2d at 390-91.
50. See id. at 565, 374 S.E.2d at 390.
51. Id. at 561-62, 374 S.E.2d at 388.
52. Id. at 569, 374 S.E.2d at 392.
53. Id. at 568, 374 S.E.2d at 391.
54. See id. The court held that even the knowledge-of-falsity element was not satisfied in the Myers & Chapman case. Id. at 569, 374 S.E.2d at 392. The court pointed to the jury's negative answer to Issue No. 4, which asked whether Thomas Evans submitted an application for payment knowing it to be false. Id. at 567, 374 S.E.2d at 391. The jury did find in answering another issue, however, that Evans had committed fraud. Id. at 562, 374 S.E.2d at 388. Neither party challenged the verdict as inconsistent. See Plaintiff-Appellant's New Brief at 11. The jury's answers regarding fraud and knowledge can be reconciled by taking into account the instruction on culpable ignorance. See Transcript at 269, Myers & Chapman (No. 140PA88). If the jury relied on this doctrine in the verdict, it could have answered the fraud issue affirmatively and still found that Evans did not know the application was false (or true) when he submitted it. The jury's answer to Issue No. 4, therefore, is consistent with Evans' admission that he had no personal knowledge of the application's truth or falsity. See Myers & Chapman, 323 N.C. at 566-67, 374 S.E.2d at 390-91.
56. The Zager facts could be distinguished from those of Myers & Chapman in one respect. The Zager theater owner offered no explanation for the basis of his misrepresentation, whereas Evans testified that he relied on a document prepared by Evans, Inc.'s project manager. The supreme court made this distinction irrelevant, however, holding that the language of the payment application implied first-hand knowledge by Evans as signatory. Id. at 571, 374 S.E.2d at 393.
panded the definition of fraud to the point where the essential element of the defendant's intent to deceive is only implicitly recognized at best."57 The court endorsed the following statement of the elements of fraud: "'(1) False representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party.'"58

The court's failure to recognize that earlier cases such as Zager allowed proof of culpable ignorance alone to satisfy the element of scienter also prevented it from explaining the worthwhile policies it hoped to advance through the change. None is immediately apparent. Before the change, fraud plaintiffs bore a heavy burden of proof. Now that burden will be even heavier in many circumstances.59 Intent is not readily susceptible to proof in any area of the law.60 A defendant rarely announces the true nature of his intentions. Most often, intent must be inferred from the circumstances.61 The culpable ignorance doctrine represents a specialized application of the well-known principle that intent must be judged from the circumstances of the action.62 Without resort to the doctrine, many otherwise meritorious fraud claims will fail for lack of proof of deceptive intent whenever the defendant testifies, and the jury believes, that he was ignorant of the falsity of his representation. The Myers & Chapman court's abandonment of the culpable ignorance doctrine allows the party in the best position to investigate the facts relevant to a transaction to refrain from doing

57. Id. at 569, 374 S.E.2d at 392.
58. Id. at 569, 374 S.E.2d at 391 (quoting Ragsdale v. Kennedy, 286 N.C. 130, 138, 209 S.E.2d 494, 500 (1974)). Defendants in the Ragsdale case counterclaimed for fraud in an action on a note they had executed to secure payment for stock in a corporation. Ragsdale, 286 N.C. at 137, 209 S.E.2d at 499. Plaintiff, president and general manager of the corporation at the time of the sale, had represented the business as a "gold mine" and a "going concern" when the corporation's working capital and income were actually insufficient to meet normal operating expenses. Id. at 137-38, 209 S.E.2d at 499-500. From these facts, the court inferred that plaintiff knew his statements were false. Id. at 139, 209 S.E.2d at 501. Thus the Ragsdale case did not reject the culpable ignorance doctrine; its facts merely did not present the issue.

Three other cases upon which the court relies in requiring independent proof of deceptive intent, see Myers & Chapman, 323 N.C. at 568, 374 S.E.2d at 391, actually recognize the culpable ignorance doctrine. See Foster v. Snead, 235 N.C. 338, 339-40, 69 S.E.2d 604, 606 (1952); Vail v. Vail, 233 N.C. 109, 113, 63 S.E.2d 202, 205 (1951); Ward v. Heath, 222 N.C. 470, 472-73, 24 S.E.2d 5, 8 (1943). The strongest statement of the doctrine appears in Ward:

It is well recognized with us that under certain conditions and circumstances if a party to a bargain avers the existence of a material fact recklessly or affirms its existence positively when he is consciously ignorant whether it be true or false he must be held responsible for a falsehood.

Ward, 222 N.C. at 473, 24 S.E.2d at 8.

59. See supra text accompanying note 45 for a statement of the six elements plaintiff had to prove to make out a prima facie case of fraud.

60. See W. Keeton, supra note 30, § 8, at 33-37.


62. See Keeton, supra note 61, at 592-98. The intent to be inferred from the defendant's ignorant representation in a culpable ignorance case is the intent to conceal the extent of his knowledge. See supra text accompanying note 30. The ignorant representation, however, would only be actionable if it turned out to be false.
so, secure in the knowledge that he can make statements in ignorance and even gain an advantage. If he does not know the truth of a statement, he also cannot know its falsity. Thus he cannot intend to deceive. While some other remedy, such as an action for negligent misrepresentation,63 may be available to the victim of an ignorant falsehood, Myers & Chapman at minimum forecloses the possibility of punitive damages.64 A negligence remedy, for which only compensatory damages are recoverable, likely will prove to be an inadequate deterrent to ignorant misrepresentations. When a solvent contracting business ignorantly and mistakenly certifies that work has been completed, it no doubt will complete the work eventually. Compensatory damages in a case such as this will be minimal—probably not worth the expense of litigation. The negligent contractor nevertheless has gained the advantage of use of the money before he was entitled to it under the terms of the contract.

The outcome of this case is particularly troubling for the construction industry. The Carolinas Branch of Associated General Contractors of America, Inc. (AGC), as amicus curiae, asked the supreme court to reverse the holding that the construction industry's form application for payment could never be an actionable representation.65 In its brief, AGC predicted that the court of appeals' holding, if left undisturbed, would result in construction delays and higher costs.66 By recognizing the form application as an actionable representation but nevertheless holding that an ignorant submission cannot be fraudulent, the supreme court has given comfort to the construction industry with one hand and taken it away with the other. If contractors can tender their payment applications in ignorance, risking nothing more than the actual cost of their errors,67 the same problems arise. Each party to a construction transaction must undertake independent investigation of the work completed by those below them in the contracting chain, “result[ing] in construction delays and higher costs, burdens that will be ultimately borne by the consuming public.”68

The North Carolina Supreme Court clearly rejected culpable ignorance as sufficient proof of intent to deceive.69 It expressly overruled three cases that, in its view, gave inadequate emphasis to that aspect of scienter.70 The policies underlying this emphasis on clear proof of deceptive intent remain puzzling, how-

63. See infra notes 76-79 and accompanying text (discussing general availability of this remedy).
64. Punitive damages are recoverable in North Carolina only upon a showing of malicious, willful or wanton conduct. Hinson v. Dawson, 244 N.C. 23, 27, 92 S.E.2d 393, 396 (1956). Because fraud by its very nature involves intentional wrongdoing, proof of fraud automatically entitles plaintiff to submission of a punitive damages claim to the jury. Newton v. Standard Fire Ins. Co., 291 N.C. 105, 113-14, 229 S.E.2d 297, 302 (1976). A negligent, or even a grossly negligent, misrepresentation, however, is insufficient for punitive damages absent proof of some other outrageous or aggravated conduct. See Hinson, 244 N.C. at 27-28, 92 S.E.2d at 396-97.
65. Amicus Curiae Brief at 6.
66. Id. at 5-6.
67. See supra note 64 and accompanying text.
68. Amicus Curiae Brief at 6, Myers & Chapman (No. 140PA88).
69. Myers & Chapman, 323 N.C. at 568, 374 S.E.2d at 391; see supra notes 52-55 and accompanying text.
70. Myers & Chapman, 323 N.C. at 569, 374 S.E.2d at 391-92; see supra note 57 and accompanying text.
ever. The court should revisit this issue soon to explain its determination that statements by know-nothings will be countenanced along with statements by those in the know.\textsuperscript{71}

II. TORT LIABILITY OF CORPORATE DIRECTORS AND OFFICERS

The \textit{Myers & Chapman} court acknowledged that Thomas Evans' payment application, while falling short of intentional fraud, still could be actionable under a negligence theory.\textsuperscript{72} Nevertheless, the court set aside that portion of the judgment as well, stating that the trial court's instructions impermissibly permitted the jury to find Evans liable for simple negligence.\textsuperscript{73} The court's reasoning was based, not on the essential elements of the tort, but on the standard of care applicable to those acting on behalf of a corporation.\textsuperscript{74} As a result, the agents of a corporation enjoy greater protection from liability, at least as regards the tort of negligent misrepresentation,\textsuperscript{75} than do individuals who speak on their own behalf.

North Carolina recognizes the tort of negligent misrepresentation as described in the \textit{Restatement (Second) of Torts.}\textsuperscript{76} Section 552 states:

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.\textsuperscript{77}

The tort has a more restricted reach than fraud, requiring that the defendant know the use to which his statement is to be put and to intend to supply it for that purpose.\textsuperscript{78} The \textit{Restatement} makes clear, however, that corporate officers

\textsuperscript{71.} In the portion of the \textit{Myers & Chapman} opinion recognizing possible liability under a gross negligence theory, the court made clear that it did not endorse Thomas Evans' conduct. "If the applicant truly has no knowledge, he should refrain from certifying that the work has been done." \textit{Myers & Chapman}, 323 N.C. at 571, 374 S.E.2d at 393. To put that admonition in proper perspective, it is important to realize that in allowing individual liability for corporate officers who make grossly negligent misrepresentations, the court is only expanding the number of individuals who may be held liable, not the total amount of liability. See supra note 64 and accompanying text.

\textsuperscript{72.} \textit{Myers & Chapman}, 323 N.C. at 569, 374 S.E.2d at 392.

\textsuperscript{73.} \textit{Id.} at 572, 374 S.E.2d at 393-94.

\textsuperscript{74.} \textit{See id.} at 570-73, 374 S.E.2d at 392-94.

\textsuperscript{75.} \textit{See infra} notes 113-22 and accompanying text.


\textsuperscript{77.} \textit{RESTATEMENT (SECOND) OF TORTS} § 552(1) (1977).

\textsuperscript{78.} \textit{Id.} § 552 comment a.
can be liable to third parties if they are merely negligent in making representations on behalf of the corporation.79

The general rule in North Carolina holds a corporate director or officer individually liable to third parties for any tort she commits, even though the tortious actions are taken on behalf of the corporation.80 A separate basis of liability exists when she breaches her duty of care in supervising corporate agents and those agents then injure third parties.81 The key factor distinguishing these alternate bases of liability is the officer or director's active participation in the injurious act.82

In Palomino Mills, Inc. v. Davidson Mills Corp.83 the North Carolina Supreme Court considered a claim against the president of a corporation who had signed a fraudulent bill of sale.84 The court held that because the president had actively participated in the transaction, he would be jointly and severally liable with the corporation.85 Although Palomino Mills concerned intentional fraud, the language of the case applies the principle of joint and several liability for an actively participating corporate officer to negligent torts as well.86

The Palomino Mills court relied on dicta from Minnis v. Sharpe,87 a case that came before the court three times. Defendants in Minnis were directors of a lending corporation.88 The lender's corporate officers had induced plaintiffs to execute multiple deeds of trust to secure what had been represented as single mortgages on their property.89 When the multiple creditors demanded payment, plaintiffs sued the lending corporation's directors, alleging that they were negligent and reckless in delegating control of the corporation to the managing

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79. Id. § 552 comments d & e.
82. Feed v. Burleson's, Inc., 244 N.C. 437, 441, 94 S.E.2d 351, 354 (1956); Palomino Mills, 230 N.C. at 292, 52 S.E.2d at 919; Cone v. United Fruit Growers' Ass'n, 171 N.C. 530, 531, 88 S.E. 860, 861 (1916); Esteel Co., 82 N.C. App. at 697-98, 348 S.E.2d at 157; Air Traffic Conference, 69 N.C. App. at 182-83, 316 S.E.2d at 644-45.
83. 230 N.C. 286, 52 S.E.2d 915 (1949).
84. Id. at 292, 52 S.E.2d at 919. Plaintiff buyer sued the seller corporation and its president in state court. The corporate defendant sought removal to federal court and claimed misjoinder of the corporate president, a North Carolina resident. Id. at 289, 52 S.E.2d at 917. The trial judge denied the removal petition, and the supreme court affirmed, holding that the president properly was joined because he had actively participated. Id. at 292-93, 52 S.E.2d at 919-20.
85. Id. at 291-93, 52 S.E.2d at 918-20.
86. Id. at 293, 52 S.E.2d at 920 ("if a party to a bargain avers the existence of a material fact recklessly, or affirms its existence positively, when he is consciously ignorant whether it be true or false, he may be held responsible for a falsehood").
88. Minnis II, 202 N.C. at 302, 162 S.E. at 607. Officers of the corporation also were named as defendants, but they were not parties to the appeals. See infra notes 90 & 93 and accompanying text.
89. Minnis II, 202 N.C. at 301, 162 S.E. at 606.
Plaintiffs offered strong evidence at trial that the managing officers' scheme had been in operation for eight years. The directors, although not actively participating in the scheme, had failed to discover the wrongdoing. After a jury verdict for plaintiffs, the directors appealed the gross negligence judgment.

In *Minnis II* the court affirmed the judgment against the directors, holding that the evidence of mismanagement and fraud, "persistently and continuously practiced for substantial periods of time," was sufficient to submit the gross negligence claim to the jury. The court explained the standard of care for nonparticipating directors as follows:

Directors are not guarantors of the solvency of a corporation, nor are they insurers of the honesty and integrity of the officers and agents. Neither are they required to personally supervise all the details of business transactions. . . . "Directors and managing officers of a corporation are deemed by law to be trustees, or quasi-trustees, in respect to the performance of their official duties incident to corporate management and are therefore liable for either wilful or negligent failure to perform their official duties." . . . To the same tenor is the principle . . . "that the directors are liable for gross neglect of their duties, and mismanagement—though not for errors of judgment made in good faith—as well as for fraud and deceit." Thus, nonparticipating directors can be held liable to third-party victims of a corporate agent's misrepresentations only for gross negligence in corporate management.

The facts of *Palomino Mills* closely paralleled those of *Myers & Chapman*. Thomas Evans personally signed the false payment application on behalf of his corporation. Thus Evans was an active participant in the alleged wrongdoing. Plaintiff extensively briefed *Palomino Mills*, but the court made no mention of

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90. *Id.* *Minnis I* concerned the directors' demurrer to the complaint. The court approved the trial judge's overruling of the demurrer, stating, "Where third persons are injured by a wrong done by the corporation, the corporation can act only by officers or agents, hence third persons should be entitled to recover from the officers or agents who are wrongdoers." *Minnis I*, 198 N.C. at 367, 151 S.E. at 737. Because plaintiffs had alleged that the directors failed to exercise a proper degree of care to discover the wrongdoing of the managing officers, the court concluded that plaintiffs had stated a claim against the directors. *Id.* at 368-69, 151 S.E. at 737-38. The managing officers, who also were named as defendants, did not demur; the complaint alleged that they had actively participated in misappropriating plaintiff's assets. *Id.* at 365-66, 151 S.E. at 736.


92. *Id.* at 302, 162 S.E. at 607.

93. *Id.* The managing officers were not parties to the *Minnis II* appeal. The *Minnis II* opinion does not indicate clearly whether the participating officers were found liable at trial.


95. *Id.* at 303, 162 S.E. at 607.

96. *Id.* (citations omitted) (quoting *State v. Harnett County Trust Co.*, 192 N.C. 246, 248, 134 S.E. 656, 657 (1926); *Caldwell v. Bates*, 118 N.C. 323, 325, 24 S.E. 481, 482 (1896)).

97. The last phrase of the aforementioned quotation from *Minnis II*—"as well as for fraud and deceit"—clearly envisions individual liability for directors and officers who are active tortfeasors. This is dictum, however, since the plaintiffs admitted that the *Minnis* directors did not participate in the fraud. *Minnis II*, 202 N.C. at 302, 162 S.E. at 607.

98. *Myers & Chapman*, 323 N.C. at 571, 374 S.E.2d at 393.

it and instead relied heavily on the inapposite Minnis cases.100

The Myers & Chapman court recognized that the Minnis cases concerned the liability of nonparticipating directors for their gross neglect in permitting tortious acts by corporate agents and employees.101 The court also recognized that the Myers & Chapman case presented it with a different set of facts: "Here, defendants were being sued for their own alleged personal misrepresentations, not the alleged misrepresentations of their project manager. The representations made ... were those of Thomas Evans."102 Despite this recognition, the court held the following jury instruction to be erroneous: "It is immaterial whether the defendants ... were cognizant of the fact that the equipment was not stored as certified. The law charges them with actual knowledge of the company's affairs and holds them responsible for damages sustained by others by reason of their negligence, fraud or deceit."103 The court regarded this instruction as erroneous "because it suggested to the jury that directors and managing officers are chargeable with an omniscient knowledge of the company's affairs and are liable for damages to third parties resulting from simple negligence. This is not the law of North Carolina."104

The law of North Carolina before Myers & Chapman did indeed hold directors and officers individually liable whenever they were active tortfeasors, whether negligently or intentionally.105 The court's concern that the instruction charged directors and officers with omniscient knowledge appears to be the key rationale for its decision.106 Imputing constructive knowledge of all wrongdoing by corporate agents certainly would impose an onerous burden on directors and officers in today's complex corporate world.107 The law as it stood before Myers & Chapman protected corporate leaders from any requirement of omniscience. The participant-nonparticipant distinction served this purpose.108 Had Evans' project manager signed the application for payment, there would be no basis for

100. Myers & Chapman, 323 N.C. at 570-72, 374 S.E.2d at 392-94.
101. Id. at 572, 374 S.E.2d at 393. The court misspoke by labeling this principle a type of vicarious liability. See id. Vicarious liability, most often called respondeat superior, imposes liability in damages upon an innocent employer for the torts of an employee acting in the course and scope of his employment. See W. Keeton, supra note 30, §§ 69-70. The liability at issue in the Minnis cases was based on fault.
102. Myers & Chapman, 323 N.C. at 572, 374 S.E.2d at 393.
103. Id. at 572, 374 S.E.2d at 393-94. This instruction, requested by plaintiff, Record at 24, is a paraphrase from dicta in Minnis I dealing with the liability of directors and officers who are active tortfeasors. See Minnis I, 198 N.C. at 368, 151 S.E.2d at 737.
104. Myers & Chapman, 323 N.C. at 572, 374 S.E.2d at 394.
105. See supra notes 83-86 and accompanying text (discussing Palomino Mills and its imposition of liability on active corporate tortfeasors).
106. See Myers & Chapman, 323 N.C. at 572, 374 S.E.2d at 394.
107. The court of appeals shared the supreme court's concern that directors and officers not be held accountable for omniscient knowledge:
A corporate contractor may have dozens of agents in his employ, dispersed at sundry work sites scattered over a wide geographical area. A project site may be hundreds of miles from the home office. Directors and corporate management must rely, and our settled law permits them reasonably to rely, on their agents and employees.
108. See supra notes 80-97 and accompanying text.
holding Evans individually liable.\textsuperscript{109} Evans, however, signed the application himself, in ignorance of its truth.\textsuperscript{110} As the court correctly noted, "If the applicant truly has no knowledge, he should refrain from certifying that the work has been done."\textsuperscript{111} Evans himself made a false certification, thereby becoming an active participant in tortious conduct.\textsuperscript{112} Active negligence, not omniscience, is the issue.

As the law now stands, corporate officers and directors are liable to third parties for their statements on behalf of the corporation only if the representation is grossly negligent or fraudulent. The question remains whether the gross negligence standard of care applies to other torts committed by a corporate leader on behalf of the corporation.\textsuperscript{113} The posture of \textit{Myers & Chapman} as pleaded and tried suggests a negative answer to this question. Plaintiff sued on a theory of gross, not simple, negligence.\textsuperscript{114} At trial, plaintiff requested and received a jury instruction based on the language from \textit{Minnis II} that defines the duty of care required of an officer or director who was not a participant in the wrongdoing.\textsuperscript{115} The nature of plaintiff's claim made it simple for the court to adopt the gross negligence standard for a corporate leader's nonfraudulent representations without elaborating on the proper standard of care for other torts committed on behalf of the corporation. When faced with the case of a corporate officer whose careless driving while on business in a company car causes an automobile accident, however, the court most likely will hold him liable for simple negligence.

The court nonetheless may have intended to raise the threshold of liability in another category of torts that corporate officers are likely to commit. Defendants urged the court to adopt a good-faith exception to the general rule that corporate officers and directors are individually liable for torts committed by them on behalf of the corporation.\textsuperscript{116} This exception is recognized in other ju-

\textsuperscript{109} The evidence at trial from both plaintiff and defendants indicated that Evans' project manager was trustworthy. \textit{Myers & Chapman}, 323 N.C. at 570, 374 S.E.2d at 392. Therefore, this misrepresentation would be the sort of isolated incident that would be insufficient for a finding of gross negligence on the part of a nonparticipating officer. See \textit{Minnis II}, 202 N.C. at 303, 162 S.E.2d at 607.

\textsuperscript{110} \textit{Myers & Chapman}, 323 N.C. at 566-67, 374 S.E.2d at 390-91.

\textsuperscript{111} \textit{Id.} at 571, 374 S.E.2d at 393.

\textsuperscript{112} Evans' conduct clearly falls within the tort of negligent misrepresentation as it is recognized in the \textit{Restatement}. See supra text accompanying note 77. Evans was acting in the course of his employment as president of Evans, Inc. when he supplied false information for the guidance of plaintiff. Plaintiff suffered pecuniary loss when it paid Evans, Inc. for nonexistent equipment in reliance upon the payment application, which Evans had prepared. Whether Evans failed to exercise reasonable care in preparing the application is a question the jury answered in the affirmative. See \textit{Myers & Chapman}, 323 N.C. at 563, 374 S.E.2d at 388.

\textsuperscript{113} The court did not expressly limit its language to torts based on representations. See \textit{Myers & Chapman}, 323 N.C. at 572, 374 S.E.2d at 393-94. Similar language in the court of appeals' opinion caused plaintiff's counsel to conclude that the gross negligence standard governed the liability of corporate leaders for their accidents as well as their representations. See Plaintiff-Appellant's New Brief at 16.

\textsuperscript{114} Plaintiff-Appellant's New Brief at 17. The record and briefs filed in the case provide no clue to explain plaintiff's choice of gross negligence as its theory.

\textsuperscript{115} Record at 23-25; Transcript at 270-72. For the pertinent language from \textit{Minnis II}, see supra text accompanying note 96.

\textsuperscript{116} Defendant-Appellees' New Brief at 28-29, \textit{Myers & Chapman} (No. 140PA88).
risdictions, particularly New York. The good-faith exception applies only when the officer or director was acting solely for the benefit of the corporation. If he were pursuing some personal benefit, he would still be liable. A good-faith defense makes most sense when a corporation, through the actions of its officers, breaches a contract. When a corporate leader gains no personal benefit from the breach, holding him individually liable for tortious interference with contract may be unduly harsh. Imposing individual liability for the merely negligent misrepresentation of a corporate actor who has no personal stake in the transaction arguably carries the same element of harshness.

If the North Carolina Supreme Court had the good-faith exception in mind when it decided Myers & Chapman, it should have stated it explicitly. The court has done a disservice to the state's corporate officers and directors by further muddying this vague area of the law. Corporate leaders now must carry out their duties without certainty as to the extent of their individual liability. Until the court chooses to elaborate on its reasoning, however, the result of Myers & Chapman provides authority that North Carolina holds directors and officers to a lower standard of care for a category of torts they may commit on behalf of the corporation.

III. DECEPTIVE TRADE PRACTICES

North Carolina General Statutes section 75-1.1 prohibits unfair or deceptive acts and practices that affect commerce. Section 75-16 gives persons in-
jured by a violation of section 75-1.1 a private right of action and an automatic treble damages remedy. In the years following the adoption of the statute, North Carolina courts considered proof of intent or bad faith to be an essential element of a claim under section 75-1.1. In Marshall v. Miller, however, the supreme court held that the intent or good faith of the actor is irrelevant to proof of a violation of section 75-1.1. The Marshall decision prompted an outcry in the state, and critics charged that the court's expanded application of section 75-1.1 left the statute unconstitutionally vague, at least as applied to actions sounding in contract between sophisticated commercial parties. The supreme court never has addressed directly the constitutionality of section 75-1.1, despite at least one opportunity to do so. The court's one-sentence disposition of the Myers & Chapman plaintiff's section 75-1.1 claim, however, can be interpreted as a silent concession that its Marshall decision impermissibly extended the reach of the statute.

Plaintiffs in Marshall sued the owner-operator of a mobile home park for breach of agreements to lease lots and sell mobile homes, alleging that defendant had promised to provide a variety of facilities and services that never materialized. The trial judge concluded that defendant's misrepresentations were un-


126. N.C. GEN. STAT. § 75-16 (1988). For the text of this statute, see supra note 16. After the jury finds the facts in a case, the trial judge determines as a matter of law whether the defendant's actions constitute an unfair or deceptive act or practice. Hardy v. Toler, 288 N.C. 303, 310, 281 S.E.2d 342, 346-47 (1975). If a violation is found, the trial judge has no discretion but must treble the damages pursuant to section 75-16. Marshall v. Miller, 302 N.C. 539, 547, 276 S.E.2d 397, 402 (1981).


129. Id. at 548, 276 S.E.2d at 403.

130. See, e.g., Farr, Unfair and Deceptive Legislation: The Case for Finding North Carolina General Statutes Section 75-1.1 Unconstitutionally Vague as Applied to an Alledged [sic] Breach of a Commercial Contract, 8 CAMPBELL L. REV. 421 (1986). Farr argues that the language of section 75-1.1 is impermissibly vague on its face. Id. at 426-27. In his view, cases construing it as requiring no elaboration and as delegating to trial judges the responsibility for applying it on a case-by-case basis do not alleviate the vagueness. See id. Additionally, he argues, cases construing section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (1982) [hereinafter FTC Act], upon which section 75-1.1 is based, provide no cure to the statute's constitutional infirmity. Farr, supra, at 430. Because the FTC Act is strictly remedial and can be enforced only by the Federal Trade Commission in civil cease and desist actions, Farr contends that cases brought under it are inapposite to actions brought under section 75-1.1, which is at least partly penal. Id. at 431-32.

The North Carolina Court of Appeals also has noted that the language of section 75-1.1 "is extremely broad, so broad and vague, indeed, as to render the triple damage penalty provided by G.S. 75-16 in a private action brought for violation of the vague language of G.S. 75-1.1 at least of questionable validity," Hammers v. Lowe's Cos., 48 N.C. App. 150, 154, 268 S.E.2d 257, 260 (1980). Finding no violation, however, the Hammers court did not attempt to resolve the constitutional question. Id.


132. Myers & Chapman, 323 N.C. at 573, 374 S.E.2d at 394.

133. Marshall, 302 N.C. at 540, 276 S.E.2d at 398.
fair or deceptive acts in violation of section 75-1.1 and trebled the damages.\textsuperscript{134} The North Carolina Court of Appeals reversed the trial judge, holding that bad faith must be shown to make out a valid section 75-1.1 claim.\textsuperscript{135} The supreme court disagreed, concluding that the general assembly intended to provide relief whenever an act or practice is unfair or has a tendency to deceive.\textsuperscript{136} According to the supreme court, "the intent of the actor is irrelevant. Good faith is equally irrelevant. What is relevant is the effect of the actor's conduct on the consuming public."\textsuperscript{137}

The court's emphasis on the effect of deceptive practices on consumers caused a federal district court to conclude that section 75-1.1 could not apply to alleged breaches of service contracts between businesses. \textit{Bunting v. Perdue, Inc.}\textsuperscript{138} centered on the termination of a contract that required plaintiff to raise to maturity baby chicks owned by defendant.\textsuperscript{139} Plaintiff sued for breach of contract and violation of federal and state statutes, including section 75-1.1.\textsuperscript{140} The United States District Court for the Eastern District of North Carolina dismissed plaintiff's section 75-1.1 claim, holding that the statute's protections were limited to individual consumers.\textsuperscript{141} Although the court took note of the debate over the constitutionality of applying section 75-1.1 to unintentional violations in a commercial, as opposed to a consumer, context, it elected to limit the application of the statute in lieu of reaching the constitutional question.\textsuperscript{142}

The North Carolina Court of Appeals found the federal court's reasoning

\textsuperscript{134} \textit{Id.} at 541, 276 S.E.2d at 398-99.


\textsuperscript{136} Marshall, 302 N.C. at 548, 276 S.E.2d at 403. The court reaffirmed the definitions of section 75-1.1's terms announced a year earlier in Johnson v. Phoenix Mut. Life Ins. Co., 300 N.C. 247, 266 S.E.2d 610 (1980), relying heavily on cases construing the FTC Act. An unfair practice "offends established public policy," or is "immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers," or "amounts to an inequitable assertion of ... power or position." \textit{Id.} at 263-64, 266 S.E.2d at 621-22. An act or practice is deceptive whenever it has "the capacity or tendency to deceive ... In determining whether a representation is deceptive, its effect on the average consumer is considered." \textit{Id.} at 265-66, 266 S.E.2d at 622.

\textsuperscript{137} Marshall, 302 N.C. at 549, 276 S.E.2d at 403-04 (citations omitted).

\textsuperscript{138} Drawing on the \textit{Johnson} case, the \textit{Marshall} court went on to enunciate the overall purpose of the treble damages remedy. The court concluded,

\textit{[S]tate statutes such as ours were enacted to supplement federal legislation, so that local business interests could not proceed with impunity, secure in the knowledge that the dimensions of their transgression would not merit federal action. Given the small dollar amounts often involved in such suits, statutory provision for treble damages found in G.S. 75-16 serves two purposes. First, it makes more economically feasible the bringing of an action where the possible money damages are limited, and thus encourages private enforcement. Second, it increases the incentive for reaching a settlement.}

\textit{Marshall,} 302 N.C. at 549, 276 S.E.2d at 403-04 (citations omitted).

\textsuperscript{139} Marshall, 302 N.C. at 548, 376 S.E.2d at 403.

\textsuperscript{140} \textit{Id.} at 683-84.

\textsuperscript{141} \textit{Id.} at 691-92. Because the contract did not involve the sale of any chicks, the court explained, "Plaintiff certainly cannot be characterized as a 'consumer,' and thereby deserving of the statute's protection." \textit{Id.}

\textsuperscript{142} \textit{Id.} at 691.
unpersuasive a year later in *Olivetti Corp. v. Ames Business Systems, Inc.* and held that the remedy provided under section 75-1.1 was not limited to consumers.\(^{143}\) *Olivetti* sued to collect a debt incurred pursuant to a distributorship agreement, and defendant counterclaimed for fraud and violation of section 75-1.1.\(^{144}\) The trial court entered judgment for *Olivetti* on the debt and for defendant on the fraud and section 75-1.1 counterclaims.\(^{146}\) The court of appeals affirmed, holding that the statutory language as well as prior case law clearly indicated that individual consumers are not the only ones provided a remedy under sections 75-1.1 and 75-16.\(^{147}\) The court also concluded that the statute was not unconstitutionally vague as applied to this case, since the language of section 75-1.1 "provides adequate notice that conduct constituting fraud is prohibited."\(^{148}\) The supreme court reversed the judgment in favor of the defendant's counterclaim, concluding that defendant had failed to prove that it was damaged by *Olivetti*'s misrepresentations.\(^{149}\) Because there were no damages


\(^{144}\) Id. at 22-23, 344 S.E.2d at 94-95. The court noted that plaintiff had relied primarily on the federal court's analysis in *Bunting*, see supra notes 138-42 and accompanying text, in arguing that section 75-1.1 should be limited to consumers and should not be applied to a distributor-dealer relationship. *Olivetti*, 81 N.C. App. at 23, 344 S.E.2d at 95. The court of appeals found *Bunting* to be "distinguishable and unpersuasive on this issue and certainly not controlling on this court." Id.

\(^{145}\) *Olivetti* at 3-4, 344 S.E.2d at 84.

\(^{146}\) Id. at 12-13, 344 S.E.2d at 88-89. The judgment illustrates the effect section 75-1.1's treble damages remedy can have in commercial disputes. The trial court ordered defendant to pay *Olivetti* $57,800 and to return nine computers or pay the purchase price. Id. at 13, 344 S.E.2d at 89. Defendant, however, was awarded $406,200 as compensation for lost profits, trebled to $1,218,600 pursuant to section 75-16. Id.

\(^{147}\) Id. at 23, 344 S.E.2d at 94-95. The court of appeals relied on the purpose clause of section 75-1.1 as originally enacted, which stated:

> The purpose of this section is to declare, and to provide civil legal means to maintain, ethical standards of dealings between persons engaged in business, and between persons engaged in business and the consuming public within this State, to the end that good faith and fair dealings between buyers and sellers at all levels of commerce be had in this State.


The court also relied on a case it had decided just three months previously. In Concrete Serv. Corp. v. Investors Group, Inc., 79 N.C. App. 678, 340 S.E.2d 755, cert. denied, 317 N.C. 333, 346 S.E.2d 137 (1986), the court explicitly held that businesses are within the protection of the statute, even when the wrongdoing falls short of fraud. *Id.* at 685-86, 340 S.E.2d at 760. Subsequent cases reflect the court of appeals' view that section 75-1.1 broadly applies to interbusiness disputes that do not involve fraud. See *Process Components, Inc. v. Baltimore Aircell Co.*, 89 N.C. App. 649, 656, 266 S.E.2d 907, 912 (upholding judgment that corporate defendant violated section 75-1.1 while finding no error in directed verdict for defendant on corporate plaintiff's fraud claim), *aff'd*, 323 N.C. 620, 374 S.E.2d 116 (1988) (per curiam); *La Notte, Inc. v. New Way Gourmet, Inc.*, 83 N.C. App. 480, 485-86, 350 S.E.2d 889, 892 (1986) (purchaser corporation entitled to jury determination of facts underlying section 75-1.1 claim against vendor corporation, even though jury had found no fraud), *appeal dismissed, cert. denied*, 319 N.C. 459, 354 S.E.2d 888 (1987); *see also* *Jennings Glass Co. v. Brummer*, 88 N.C. App. 44, 52, 362 S.E.2d 578, 583 (1987) (plaintiff glass contractor entitled to treble damages pursuant to section 75-1.1 upon proof that it had been defrauded by individual customer), *disc. rev. denied*, 321 N.C. 473, 364 S.E.2d 921 (1988).

\(^{148}\) *Olivetti*, 81 N.C. App. at 24, 344 S.E.2d at 95.

that could be trebled, the court stated, "We need not reach the question of whether Chapter 75 applies to this transaction." This language leaves unresolved both whether section 75-1.1 protects only individual consumers and, if not, whether businesses injured by conduct short of fraud or bad faith constitutionally can invoke its treble damages remedy.

Myers & Chapman provided the supreme court with a perfect opportunity to settle both of these questions. Plaintiff was a general contractor, not a consumer. The supreme court concluded that Evans' false certification that the specialty items had been purchased and stored was sufficient to support a jury finding of gross negligence. Such grossly negligent certifications fall well within the scope of unfair and deceptive trade practices as previously defined by the court. Furthermore, the jury's unchallenged findings that defendants' conduct was "in commerce" and misled or deceived plaintiff provided an independent basis for the trial judge's determination that Evans violated section 75-1.1.

If the court answered the questions concerning section 75-1.1's reach and constitutionality at all, its response was cryptic. The court addressed only one sentence to the section 75-1.1 issues. After finding insufficient evidence to support the fraud verdict, the court stated, "Accordingly, because of the absence of fraud, plaintiff's claim of an unfair trade practice under N.C.G.S. § 75-1.1 is without basis." The court cited no authority for the statement.

Myers & Chapman's terse language prevents any certain determination of whether the court intended to curtail the applicability of section 75-1.1. The brief disposition of the claim may indicate merely that the court did not consider the pervasive questions surrounding section 75-1.1's reach and constitutional-
ity. The court's choice of words—"because of the absence of fraud"—suggests, however, that the court of appeals was correct in *Olivetti* when it concluded that intentional fraud constitutes a sufficient basis for finding a violation of 75-1.1 even when the plaintiff is not a consumer. It is more problematic to glean from the court's few words the constitutional limits of the statute in purely commercial disputes with no bad faith or intentional wrongdoing. The court may be stating merely that the trial judge was in error as a matter of law in concluding that the false certifications at issue in *Myers & Chapman* were unfair or deceptive. Such a conclusion would stand in sharp contrast, however, to some of the unintentional misdeeds that North Carolina courts have held to constitute section 75-1.1 violations in the consumer context. A more plausible deduction is that the supreme court agrees with critics of its *Marshall* decision who contend that the vagueness of the statute and decisions interpreting it unconstitutionally prevent defendants in interbusiness disputes from regulating their conduct in compliance with the law.

One reading of the *Myers & Chapman* opinion would apply different standards to the determination of section 75-1.1 violations in consumer and commercial contexts. Under this reading, a consumer plaintiff would need only to show that defendant's conduct had a tendency to deceive. A plaintiff complaining of misdeeds in an interbusiness context would carry the additional burden of showing intentional deception or bad faith. This distinction is wise as a matter of policy. Commercial transactions easily can go sour. The prior state of the law left parties to such deals in an uncertain predicament in which arbitrary enforcement of the statute by trial judges could lead to wide disparities in damage awards.

Litigants and judges should not be compelled to search for a change in the law governing section 75-1.1 between the lines of a supreme court opinion. Until the court chooses clearly to announce a consumer-commercial distinction, if

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156. Defendants did not brief these issues. Instead, Thomas Evans contended that he was not liable for fraud or gross negligence, and, therefore, he could not be individually liable for any judgment against Evans, Inc. Defendant-Appellees' New Brief at 21.

157. *See supra* note 147 and accompanying text; *see also supra* note 151 (discussing case allowing corporate plaintiff to invoke section 75-1.1 against corporation that induced third party to breach a contract).


159. *See supra* note 130.


indeed it intends to create one, many attorneys and judges likely will miss the
message. In the meantime, litigation of section 75-1.1 claims will continue to
proceed in a cloud of uncertainty.

The net result of Myers & Chapman provides additional protection to busi-
nesses embroiled in commercial disputes. When the plaintiff is not a consumer,
the defendant may not be liable for treble damages under section 75-1.1 unless
the plaintiff can prove bad faith or intentional fraud. Proof of fraud will be
more difficult, because the court has abandoned the culpable ignorance doc-
trine. For the corporate directors and officers whose own conduct prompted
the dispute, the court has provided greater protection from individual liability
for negligent misrepresentations and possibly for other torts.

By failing to proclaim these changes directly, the North Carolina Supreme
Court leaves to guesswork the legal and policy bases for its rulings. The court
has shirked its highest duty to develop the law of the state in a clear and rational
manner. Litigants, practicing attorneys, and judges should not be forced to read
between the lines.

DINITA L. JAMES

163. Justice Meyer, as the author of both the Marshall and Myers & Chapman opinions, should
have realized that the court never had limited Marshall's liberal reading of section 75-1.1 to con-
sumer plaintiffs. If Myers & Chapman was an attempt to so limit Marshall, Justice Meyer should
have cited Marshall and explicitly distinguished it.
164. See supra notes 125-62 and accompanying text.
165. See supra notes 29-71 and accompanying text.
166. See supra notes 72-124 and accompanying text.