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System Shock: *Fontenot* Shows Why North Carolina's Contributory Negligence Rule Must Go*

Only five United States jurisdictions remain shackled to the ancient, draconian rule of contributory negligence.¹ North Carolina is one of them.²

Since 1869,³ contributory negligence has barred North Carolina plaintiffs from recovering in negligence suits when the plaintiff's own negligence contributed to his injuries.⁴ Under this all-or-nothing rule,⁵ even defendants who are ninety-nine percent at fault can completely escape liability for their wrongdoing, while plaintiffs who are merely one percent at fault are prohibited from recovering any damages.⁶ Forty-six states abolished the contributory negligence doctrine prior to or during the twentieth century;⁷ North Carolina codified it in

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1. *Coleman v. Soccer Ass'n of Columbia*, 69 A.3d 1149, 1160 n.3 (Md. 2013) (listing Alabama, Maryland, North Carolina, Virginia, and the District of Columbia); see Peter Nash Swisher, *Virginia Should Abolish the Archaic Tort Defense of Contributory Negligence and Adopt a Comparative Negligence Defense in Its Place*, 46 U. RICH. L. REV. 359, 366 (2011) ("Comparative negligence clearly is the better-reasoned solution to an archaic and obsolete nineteenth century doctrine of contributory negligence in fostering and furthering bedrock tort law principles . . ."); *id.* at 367 n.45 ("There are no serious commentators today who would argue that the archaic contributory negligence defense is superior in any way to comparative negligence in contemporary American tort law.").

2. *Coleman*, 69 A.3d at 1160 n.3.

3. Steven Gardner, *Contributory Negligence, Comparative Negligence, and Stare Decisis in North Carolina*, 18 CAMPBELL L. REV. 1, 6 (1996) (citing *Morrison v. Cornelius*, 63 N.C. 346, 348–51 (1869)). North Carolina had already recognized the rule in dicta for two decades, *id.* (citing *Herring v. Wilmington & Raleigh R.R. Co.*, 32 N.C. (10 Ired.) 402, 409 (1849) (per curiam), and the rule had made its first official appearance elsewhere even earlier in 1809, *Butterfield v. Forrester*, 103 Eng. Rep. 926, 927 (K.B. 1809) ("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."). One might even say contributory negligence is downright biblical. *John* 8:7 (Geneva Bible) ("Let him that is among you without sin[], cast the first stone . . .").

4. *Champs Convenience Stores, Inc. v. United Chem. Co.*, 329 N.C. 446, 455, 406 S.E.2d 856, 861 (1991) ("[T]he breach of the duty of the plaintiff to exercise due care for his own safety in respect of the occurrence about which he complains, and *if his failure to exercise due care for his own safety is one of the proximate contributing causes of his injury, it will bar recovery.*" (emphasis added) (quoting *Holderfield v. Rummage Bros. Trucking Co.*, 232 N.C. 623, 625, 61 S.E.2d 904, 906 (1950))).

5. Gardner, *supra* note 3, at 6.

6. Allison P. Raney, Note, *Stacy v. Jedco Construction, Inc.: North Carolina Adopts a Diminished Capacity Standard for Contributory Negligence*, 31 WAKE FOREST L. REV. 1215, 1220 (1996).

7. Gardner, *supra* note 3, at 3.

1979.⁸ Under North Carolina's Products Liability Act, a product manufacturer or seller cannot be held liable in a negligence suit if the plaintiff was contributorily negligent in the use of the product.⁹

The Act's power to completely insulate manufacturers and sellers from being held accountable for their products shocked the Fourth Circuit in *Fontenot v. Taser Int'l, Inc.*¹⁰ The case involved a seventeen-year-old boy who died after a police officer tased him in the chest for forty-two seconds.¹¹ The victim's mother sued the taser manufacturer for failing to warn law enforcement officers that cardiac harm could result from tasing near the heart.¹² The manufacturer argued contributory negligence, claiming the boy instigated and prolonged his own tasing with his aggressive behavior.¹³ The Fourth Circuit noted, however, that because contributory negligence would be present "in nearly every instance in which a taser is deployed by a law enforcement officer," allowing that defense would leave the manufacturer with "no duty in North Carolina to safely design its products or to provide adequate warnings to law enforcement customers . . ." ¹⁴ Realizing contributory negligence would likely immunize the manufacturer against most negligence suits involving its tasers, the Fourth Circuit held that to be contributorily negligent under North Carolina's Products Liability Act, a plaintiff himself must have actually used the product.¹⁵ Because the victim in *Fontenot* merely had the taser used on him, he could not have been contributorily negligent; thus, his mother could recover against the manufacturer.¹⁶

The majority's holding in *Fontenot* is better seen as an attempt to avoid an unpleasant policy outcome—the unaccountability of the taser manufacturer—than as a faithful interpretation of North Carolina law. As Chief Judge William Traxler pointed out in his dissent, contributory negligence laws like North Carolina's are

8. Products Liability Act, ch. 654, § 99B-4(3), 1979 N.C. Sess. Laws 687, 688–89 (codified as amended at N.C. GEN. STAT. § 99B-4(3) (2013)).

9. N.C. GEN. STAT. § 99B-4(3) (2013) ("No manufacturer or seller shall be held liable in any product liability action if . . . [t]he 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.").

10. 736 F.3d 318 (4th Cir. 2013); see also *infra* Part II.A.

11. *Id.* at 321, 323.

12. *Id.* at 321–22.

13. *Id.* at 322–23.

14. *Id.* at 331.

15. *Id.* at 330–31.

16. *Id.* at 331.

intended to be harsh.¹⁷ This Recent Development argues that the best way to remedy that harshness is not to carve out exceptions to the rule, but instead to carve out the rule itself.

The argument proceeds in four parts. Part I outlines contributory negligence, contrasts the law with comparative negligence, explores North Carolina's common law approach to contributory negligence, and addresses the codification of this approach in North Carolina's Products Liability Act. Part II examines the facts and the Fourth Circuit's interpretation of North Carolina's contributory negligence law in *Fontenot*. Part III argues that the Fourth Circuit's "use" rule is the least unfaithful interpretation of North Carolina law that the majority could offer, given that the majority's other arguments for why contributory negligence should not apply are even clearer contradictions of state law and the facts of *Fontenot*. Part IV demonstrates that the Fourth Circuit's "use" rule is overbroad compared to the policy the Fourth Circuit was trying to advance, and that applying the rule to certain fact patterns leads to outcomes antithetical to the goal of contributory negligence. This Recent Development concludes by suggesting that North Carolina follow the other forty-six states that have abolished contributory negligence and replace it with the "greater than 50%" approach of comparative negligence.

I. CONTRIBUTORY NEGLIGENCE

A. *Contributory Negligence vs. Comparative Negligence*

Before diving into an analysis of *Fontenot*, some background on contributory negligence and its counterpart, comparative negligence, is helpful. Ancient moral law invites only those without sin to cast the first stone.¹⁸ But we are sinners all,¹⁹ and in the legal realm, many plaintiffs file negligence suits with unclean hands. States have taken different approaches in deciding how to proceed when both the plaintiff and the defendant contributed to the plaintiff's harm. The vast majority of states require that jurors compare the fault of both parties and limit the plaintiff's recovery based on the amount of his fault.²⁰ In four states and the District of Columbia, however, any amount of fault on the plaintiff's part will, as a matter of law,

17. See *id.* at 343 n.7 (Traxler, C.J., dissenting).

18. *John* 8:7 (Geneva).

19. *Romans* 3:23 (Geneva).

20. See Gardner, *supra* note 3, at 3, 6.

completely prevent the plaintiff from recovering at all.²¹ Under such contributory negligence schemes, minimally negligent plaintiffs recover nothing, while incredibly negligent defendants escape liability.²²

A driving force behind contributory negligence is the “centuries old sentiment that a plaintiff should not benefit by his or her own negligence”²³ The rule has also been described as “a common sense approach to tort recovery keeping in mind the costs of running businesses, manufacturing products, and providing services to its citizens.”²⁴ Some proponents also point to research demonstrating “dramatic” increases in insurance rates in comparative negligence jurisdictions.²⁵ Other proponents characterize the one percent negligent plaintiff as the snow leopard of torts plaintiffs and cry “strawman” at arguments against contributory negligence based on the rule’s harsh treatment of this elusive creature.²⁶

Undeterred by these arguments, forty-six states have abandoned contributory negligence and replaced it with some form of comparative negligence.²⁷ Under “pure” comparative negligence, any negligent plaintiff—even a plaintiff equally or more negligent than the defendant—may recover, but the recovery is reduced by the amount of the plaintiff’s negligence.²⁸ Meanwhile, under “modified” comparative negligence, a negligent plaintiff can recover only if the plaintiff’s negligence does not exceed a certain threshold.²⁹ Under the “greater than 50%” approach, the plaintiff can recover only if his negligence does not exceed the defendant’s; under the “50% or greater” approach, the plaintiff can recover only if his negligence neither exceeds nor equals the defendant’s.³⁰

21. See *Coleman v. Soccer Ass’n of Columbia*, 69 A.3d 1149, 1160 n.3 (Md. 2013) (listing Alabama, Maryland, North Carolina, Virginia, and the District of Columbia).

22. Raney, *supra* note 6, at 1220.

23. William B. L. Little, “*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, 30 CAMPBELL L. REV. 81, 95 (2007).

24. 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 (1988).

25. Little, *supra* note 23, at 94–95 (citing Gardner, *supra* note 3, at 47–48).

26. *Id.* at 92–93 (citing Richard T. Boyette, *A Case Against Comparative Negligence*, N.C. ST. B.Q., Fall 1991, at 23).

27. Gardner, *supra* note 3, at 3.

28. Swisher, *supra* note 1, at 365 (“Twelve states, and many federal statutes, have adopted a pure comparative negligence regime.”).

29. *Id.*

30. *Id.* at 365–66 (noting that twenty-one states follow the “greater than 50%” approach while twelve follow the “50% or greater” approach).

Proponents of comparative negligence criticize contributory negligence as equal parts anachronistic and inequitable.³¹ Scholars note that the harsh all-or-nothing rule was imported into the United States at the dawn of the Industrial Revolution as a way to “protect infant American industries” by insulating employers of railroad and factory workers from the scorn of “overly sympathetic juries” in personal injury cases.³² These scholars argue that workers’ compensation and comparative negligence have now rendered contributory negligence unnecessary.³³ More fundamentally, however, some scholars have deemed contributory negligence to be antithetical to the fault-based liability concept underlying tort law because it allows an at-fault party to escape all liability.³⁴ This policy problem was what most troubled the Fourth Circuit in *Fontenot*.³⁵

B. North Carolina’s Approach to Contributory Negligence

First slapped on a North Carolina plaintiff in 1869,³⁶ the contributory negligence defense is still alive and well in the state. Under North Carolina case law, “[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.”³⁷ Such a plaintiff will be barred from recovering in a negligence suit if his failure to exercise ordinary care was a proximate cause of his injury.³⁸ For example, in *Braswell v. N.C. A & T State*

31. *Id.* at 362–63.

32. *Id.*

33. *See id.* at 363–64.

34. *Id.* at 366–67 (“Liability based on fault is the cornerstone of tort law, and a system such as contributory negligence—which permits one of the contributing wrongdoers to avoid all liability—simply does not serve any principle of fault liability.” (quoting 3 STUART M. SPIESER ET AL., *THE AMERICAN LAW OF TORTS* § 13:5, at 522–23 (2008))).

35. *See Fontenot v. Taser Int’l, Inc.*, 736 F.3d 318, 331 (4th Cir. 2013) (“Accepting TI’s argument would have additional significant consequences, as TI would essentially have no duty in North Carolina to safely design its products or to provide adequate warnings to law enforcement customers. . . . We do not think that the Supreme Court of North Carolina would create such an extreme result. . . . For these reasons, we hold that the district court did not err in precluding TI from asserting contributory negligence as an affirmative defense.”).

36. *See Morrison v. Cornelius*, 63 N.C. 346, 347–48 (1869).

37. *Nicholson v. Am. Safety Util. Corp.*, 346 N.C. 767, 772, 488 S.E.2d 240, 244 (1997) (quoting *Newton v. New Hanover Cnty. Bd. of Educ.*, 342 N.C. 554, 564, 467 S.E.2d 58, 65 (1996)).

38. *Champs Convenience Stores, Inc. v. United Chem. Co.*, 329 N.C. 446, 455, 406 S.E.2d 856, 861 (1991) (“The breach of the duty of the plaintiff to exercise due care for his own safety in respect of the occurrence about which he complains, and if his failure to exercise due care for his own safety is one of the proximate contributing causes of his injury,

University,³⁹ the North Carolina Court of Appeals prohibited recovery for a plaintiff who joined a mob trying to force open gym doors at a public dance.⁴⁰ A security officer negligently fired a gun at the ground to disperse the mob, and a ricocheting bullet struck the plaintiff, seriously injuring him.⁴¹ The court first held that the plaintiff's decision to join the mob constituted contributory negligence because "a reasonably prudent person, in the exercise of due care for his own safety, would not participate in mob action" that was "clearly" illegal and "contrary to reasonable conduct."⁴² Second, the court held that the plaintiff's contributory negligence was a proximate cause of his injuries because "the illegal conduct of the mob . . . was such as would reasonably be calculated to provoke the security officer into taking some action to disperse the mob."⁴³ The *Braswell* court noted that in joining the mob, the "plaintiff assumed the risk of whatever injury he might receive as a result."⁴⁴ A few years after *Braswell*, the Supreme Court of North Carolina explained that "[i]t is not required that the injury in the precise form in which it occurred should have been foreseeable but only that, in the exercise of reasonable care, consequences of a generally injurious nature might have been expected."⁴⁵

Section 99B-4 of North Carolina's Products Liability Act codifies this common law contributory negligence rule as it applies specifically to products liability cases.⁴⁶ Enacted in 1979⁴⁷ and amended in 1995,⁴⁸ the relevant portion of the Act currently reads, "No manufacturer or seller shall be held liable in any product liability action if[] . . . [t]he 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."⁴⁹

it will bar recovery.'" (emphasis added) (quoting *Holderfield v. Rummage Bros. Trucking Co.*, 232 N.C. 623, 625, 61 S.E.2d 904, 906 (1950))).

39. 5 N.C. App. 1, 168 S.E.2d 24 (1969).

40. *Id.* at 10, 168 S.E.2d at 29.

41. *Id.*

42. *Id.* at 12, 168 S.E.2d at 30.

43. *Id.* at 12, 168 S.E.2d at 31.

44. *Id.*

45. *McNair v. Boyette*, 282 N.C. 230, 236, 192 S.E.2d 457, 461 (1972) (emphasis added).

46. Products Liability Act, N.C. GEN. STAT. § 99B-4 (2013).

47. Products Liability Act, ch. 654, § 99B-4(3), 1979 N.C. Sess. Laws 687, 689 (codified as amended at N.C. GEN. STAT. § 99B-4(3) (2013)).

48. Act to Amend the Law Regarding Products Liability, ch. 522, sec. 1, § 99B-4(3), 1995 N.C. Sess. Laws 1872, 1874 (codified as amended at N.C. GEN. STAT. § 99B (2013)).

49. N.C. GEN. STAT. § 99B-43 (2013).

The Supreme Court of North Carolina has made clear that the purpose of the Act was to “merely codify the doctrine of contributory negligence as it applies to actions brought under Ch. 99B”⁵⁰—*not* to make new rules for contributory negligence in products liability cases.⁵¹ Thus, the standard for contributory negligence in claims brought under the Act and the standard for contributory negligence in claims brought under the common law are one and the same.⁵² It should follow, then, that had the *Braswell* plaintiff attempted to bring a negligence claim under North Carolina’s Products Liability Act against the gun’s manufacturer, he would have been barred from recovery just as he was in his common law negligence claim against the security officer. After all, “[i]n a product liability action founded on negligence, ‘[t]here is no doubt that . . . [a plaintiff’s] contributory negligence will bar his recovery to the same extent as in any other negligence case.’”⁵³

The *Fontenot* court did not get the memo.

II. FONTENOT V. TASER INT’L, INC.

A. Facts

“F**k the police,” he told the officer.⁵⁴

His name was Darryl Wayne Turner.⁵⁵ He was seventeen years old and he had just been fired from a Charlotte Food Lion for

50. *Champs Convenience Stores, Inc. v. United Chem. Co.*, 329 N.C. 446, 453, 406 S.E.2d 856, 860 (1991) (explaining that the only contribution the Act was intended to make to North Carolina’s contributory negligence law was a “set[ing] out or expla[nation of] more specialized fact patterns which would amount to contributory negligence in a products liability action”); *see also Jones v. Owens-Corning Fiberglas Corp.*, 69 F.3d 712, 721 (4th Cir. 1995) (“[T]he North Carolina Supreme Court has expressly stated on two occasions that [the Act] is a codification of contributory negligence . . .”).

51. *Nicholson v. Am. Safety Util. Corp.*, 346 N.C. 767, 773, 448 S.E.2d 240, 244 (1997) (“[The Act] does not create a different rule for products liability actions; it clarifies the common law contributory negligence standard with respect to these actions.”).

52. *See Jones*, 69 F.3d at 720 n.9 (4th Cir. 1995) (“A contrary holding would contravene the intent of the North Carolina legislature . . . and impose a standard of contributory negligence for products liability actions that differs from the general common law.”); *see also Nicholson*, 346 N.C. at 773, 488 S.E.2d at 244 (“Thus, contributory negligence in the context of a products liability action operates as a bar to recovery in the same manner as in an ordinary negligence action.”).

53. *Smith v. Fiber Controls Corp.*, 300 N.C. 669, 672, 268 S.E.2d 504, 506 (1980) (quoting WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 102, at 670 (4th ed. 1971)).

54. *Fontenot v. Taser Int’l, Inc.*, 736 F.3d 318, 337 (4th Cir. 2013) (Traxler, C.J., dissenting).

55. *Id.* at 321 (majority opinion).

insubordination.⁵⁶ Refusing to leave, arguing loudly, and acting aggressively, Turner was approached by a police officer.⁵⁷ In response to Turner's behavior, the officer removed his taser from his holster.⁵⁸ He asked Turner to calm down, but Turner refused.⁵⁹ Acting as he had been trained to do, the officer aimed his taser at Turner's chest.⁶⁰

Turner looked down.⁶¹ He saw where the taser's laser dot was hovering on his shirt.⁶² Undeterred, he advanced towards the officer with a "swaggerly, macho type of walk" and clenched fists.⁶³ The officer deployed the taser.⁶⁴ One of the taser's two darts lodged near Turner's ribcage, the other at the center of Turner's chest, very near his heart.⁶⁵ Instead of collapsing as the officer expected, Turner continued walking around the store, ignoring the officer's instructions to get down,⁶⁶ and at one point even picking up a metal rack and throwing it.⁶⁷ Meanwhile, the officer continued to hold down the taser's trigger.⁶⁸

The taser, manufactured by a company called Taser International, Inc. ("TI"),⁶⁹ had two darts that, upon making contact with a human target like Turner, formed a circuit that delivered an electrical current designed to "incapacitate" the target.⁷⁰ TI's training materials explicitly stated that its tasers had no effect on a target's heart rate.⁷¹ The materials even instructed users to aim for the middle of a target's chest.⁷²

But TI knew its training materials were wrong.⁷³ Two years earlier, TI had been informed of studies indicating that use of its tasers near a target's heart could cause ventricular fibrillation, "the most serious cardiac rhythm disturbance" that can result from a

56. *Id.* at 321–22.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 337 (Traxler, C.J., dissenting).

62. *Id.*

63. *Id.* at 337–38.

64. *Id.* at 323 (majority opinion).

65. *Id.*

66. *Id.*

67. *Id.* at 337 (Traxler, C.J., dissenting).

68. *Id.* at 323 (majority opinion).

69. *Id.* at 321.

70. *Id.* at 323 n.1.

71. *Id.* at 323–24.

72. *Id.* at 324.

73. *Id.* at 324–25.

disordering of the heart's electrical activity.⁷⁴ Nevertheless, TI failed to alter its training materials to warn its customers—primarily law enforcement agencies—of this risk and against deploying their tasers on a target's chest.⁷⁵

After being tased in the chest for forty-two seconds, Darryl Wayne Turner collapsed and died from ventricular fibrillation.⁷⁶ Turner's mother, as the administrator of Turner's estate, sued TI for negligence under North Carolina's Products Liability Act.⁷⁷ TI, relying on the Act's contributory negligence defense, argued Turner's instigation of the dispute and failure to comply with the officer's orders freed TI from any liability.⁷⁸

B. *The Fourth Circuit's Decision*

The Fourth Circuit refused to accept this “extreme result.”⁷⁹ TI's products, the majority noted, were specifically designed and marketed for use against citizens like Turner who engage in disputes and refuse to submit to authority.⁸⁰ Allowing such behavior to constitute contributory negligence would mean that the citizens most likely to be injured by TI's products would be automatically barred from suit.⁸¹ With so many of the likely victims of its negligence unable to hold it accountable for its products, TI “essentially would have no duty in North Carolina to safely design its products or to provide adequate warnings to law enforcement customers.”⁸² Determined to avoid this unpleasant outcome, the majority interpreted North Carolina's Products Liability Act in a way that would allow Turner's estate to subvert North Carolina's contributory negligence rule.⁸³

Asserting that the *Fontenot* facts raised an issue of first impression under North Carolina law, the majority set out to determine how the Supreme Court of North Carolina would decide the case.⁸⁴ Drawing on principles of statutory construction, the majority first noted that it could not interpret any part of North

74. *Id.* at 323 n.2.

75. *Id.* at 324–25.

76. *Id.* at 323.

77. *Id.* at 321–22.

78. *Id.* at 322.

79. *Id.* at 331 (“We do not think that the Supreme Court of North Carolina would create such an extreme result based on the facts presented here.”).

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 326.

Carolina's Products Liability Act as "mere surplusage."⁸⁵ Second, because the majority considered the Act "unambiguous," it refused to consider the Act's legislative history in its interpretation.⁸⁶ Finally, the majority maintained it could not "expand" North Carolina common law by creating new rules for new fact patterns not found in prior North Carolina cases.⁸⁷

Armed with these principles, the majority shot down TI's proposed interpretation of the Act.⁸⁸ The Act itself states that a plaintiff may not recover against a manufacturer if the plaintiff "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."⁸⁹ Under TI's interpretation, where a plaintiff failed to exercise reasonable care while a product is in use, and the plaintiff's failure contributed to his injuries, contributory negligence should bar the plaintiff from recovering *regardless of whether the plaintiff or someone else was the one using the product*.⁹⁰ In support of its interpretation, TI cited the North Carolina legislature's 1995 amendment of the Act.⁹¹ In 1995, the legislature amended the Act by replacing "in *his* [the plaintiff's] use of the product" with "in *the* use of the product."⁹²

The majority found that TI's interpretation violated all three principles of statutory construction. First, TI's interpretation "would render superfluous or redundant the phrase 'in the use of the product.'" ⁹³ The only way to avoid this superfluity and redundancy, argued the majority, is to read the Act as requiring that the plaintiff

85. *Id.* at 327 ("We are guided by the principle of statutory construction that a statute should be 'construed, if possible, so that none of its provisions shall be rendered useless or redundant.'") (quoting *Porsh Builders, Inc. v. City of Winston-Salem*, 302 N.C. 550, 556, 276 S.E.2d 443, 447 (1981)).

86. *Id.* at 328 ("[U]nder North Carolina law, a court interpreting a statute may rely on the statute's legislative history only in instances in which the statutory language is ambiguous. . . . [T]he language of Section 99B-4(3) is unambiguous. . . ." (citing *In re Vogler Realty, Inc.*, 365 N.C. 389, 392, 722 S.E.2d 459, 462 (2012))).

87. *Id.* at 331 ("[I]n construing the common law of a state, we have declined to expand state common law principles to encompass novel circumstances when the courts of that state have not done so first." (citing *Time Warner Entm't-Advance/Newhouse P'ship v. Carteret-Craven Elec. Membership Corp.*, 506 F.3d 304, 314-15 (4th Cir. 2007))).

88. *Id.* at 327.

89. Products Liability Act, N.C. GEN. STAT. § 99B-4(3) (2013).

90. *Fontenot*, 736 F.3d at 327-28.

91. *Id.*

92. Act to Amend the Law Regarding Products Liability, ch. 522, sec. 1, § 99B-4(3), 1995 N.C. Sess. Laws 1872, 1874 (codified as amended at N.C. GEN. STAT. § 99B-4 (2013)) (emphasis added).

93. *Fontenot*, 736 F.3d at 327 (quoting N.C. GEN. STAT. § 99B-4(3) (1979)).

used the product.⁹⁴ Second, TI's interpretation would ask the court to consider the Act's legislative history, which the court can do only when a statute is ambiguous;⁹⁵ the majority did not find North Carolina's Products Liability Act ambiguous.⁹⁶ Finally, given the absence of cases permitting the defense under the novel circumstances presented in *Fontenot*, TI's interpretation would impermissibly extend North Carolina common law.⁹⁷

Limiting itself to a plain-meaning analysis, the majority interpreted North Carolina's Products Liability Act as prohibiting the defense of contributory negligence when the plaintiff did not himself "use" the product in question.⁹⁸ Under the majority's interpretation, TI could not raise the contributory negligence defense because Turner never "used" the taser that killed him—he merely had it used on him by the police officer.

The majority also mentioned two additional reasons, both relating to proximate cause, for denying TI the contributory negligence defense. First, the majority noted that Turner died because the taser's electrical force was applied to his chest rather than to other parts of his body, but nothing Turner did caused the officer to aim the taser at his chest.⁹⁹ Second, the majority suggested that because "the record is devoid of any evidence that [Turner] knew or should have known that police deployment of the taser could cause him to suffer severe cardiac injury[,] none of Turner's actions could have foreseeably led to his death."¹⁰⁰

III. WHY *FONTENOT* GOT IT WRONG

The Fourth Circuit's holding—that to be contributorily negligent in a products liability case, the plaintiff himself must have used the product—is better seen as a forced effort to avoid the unpleasant policy outcome demanded by Turner's undeniably contributorily negligent behavior than as a faithful interpretation of North Carolina law. The majority's concern regarding what it perceived to be TI's nearly complete immunity from negligence suits—particularly the majority's refusal to believe "that the Supreme Court of North

94. *Id.*

95. *Id.* at 328.

96. *Id.*

97. *Id.* at 331.

98. *Id.* at 327.

99. *Id.* at 330.

100. *Id.* at 329.

Carolina would create such an extreme result"¹⁰¹—flies in the face of North Carolina's decision to have a contributory negligence rule notorious for producing extreme results.¹⁰² This irony was not lost on Chief Judge Traxler, who in his dissent noted that the Fourth Circuit's job "is not . . . to judge the wisdom of North Carolina's rule from a policy standpoint, but only to apply it."¹⁰³ By refusing to apply the rule in product liability suits where the plaintiff has not actually used the product, the majority not only contradicted the Supreme Court of North Carolina, but also arguably created a new rule in violation of its own principles of statutory construction.

As Chief Judge Traxler noted, the Supreme Court of North Carolina has made it clear that the Products Liability Act did not create new contributory negligence rules for products liability cases, and that contributory negligence applies in cases brought under the Products Liability Act in the same way it applies in other negligence cases based in common law.¹⁰⁴ Meanwhile, North Carolina common law makes it clear that application of the contributory negligence defense requires only two things: (1) the plaintiff act contrary to the way a reasonably prudent person would act; and (2) the plaintiff's actions be a proximate cause of his injuries.¹⁰⁵ In a products liability negligence suit, the North Carolina courts have never imposed a third requirement that the plaintiff "used" the product.¹⁰⁶

101. *Id.* at 331 ("We do not think that the Supreme Court of North Carolina would create such an extreme result based on the facts presented here.").

102. *Id.* at 343 n.7 (Traxler, C.J., dissenting) ("Because officers generally use their tasers only against suspects who are acting unreasonably, it is true that North Carolina's contributory negligence rule would usually prevent recovery under a negligence theory for these suspects' resulting injuries. However, that is simply the consequence of North Carolina's hard, all-or-nothing contributory negligence rule.").

103. *Id.*

104. *Id.* at 340 ("Fontenot argues that if we do not construe 'in the use of the product' to limit the type of negligence on the part of a claimant that can bar recovery, we are essentially reading that language out of the statute. . . . Unfortunately for Fontenot, however, her argument is clearly in conflict with the North Carolina Supreme Court, which has construed the statute as merely codifying preexisting common law rules and establishing their application in certain particularized fact patterns without making any new rules for products liability cases."); *supra* notes 50–52 and accompanying text.

105. *Champs Convenience Stores, Inc. v. United Chem. Co.*, 329 N.C. 446, 455, 406 S.E.2d 856, 861 (1991) ("[T]he breach of the duty of the plaintiff to exercise due care for his own safety in respect of the occurrence about which he complains, and *if his failure to exercise due care for his own safety is one of the proximate contributing causes of his injury, it will bar recovery.*" (emphasis added) (quoting *Holderfield v. Rummage Bros. Trucking Co.*, 232 N.C. 623, 625, 61 S.E.2d 904, 906 (1950))).

106. *See Fontenot*, 736 F.3d at 342 n.6 (Traxler, C.J., dissenting) ("[T]here is no case *refusing* to apply contributory negligence under North Carolina law on the basis that the plaintiff was not the user of the product.").

Indeed, Chief Judge Traxler argued that the majority's interpretation of North Carolina's Products Liability Act resembles an interpretation of the Act the Fourth Circuit previously rejected on grounds that it wrongly focused on the plaintiffs' use of the product.¹⁰⁷ In *Jones v. Owens-Corning Fiberglas Corp.*,¹⁰⁸ workers, after developing lung cancer while working at a plant that manufactured industrial boilers insulated with asbestos, sued the asbestos manufacturer.¹⁰⁹ The Fourth Circuit concluded that the workers' long-term smoking, which "operated in combination—*i.e.*, 'synergistically'—with their asbestos exposure to increase dramatically their risk of getting lung cancer," constituted contributory negligence.¹¹⁰ Reading the plain language of the statute in its entirety, rather than one section in isolation, and in light of "the definitive interpretation placed thereon by the North Carolina Supreme Court," the Fourth Circuit found it irrelevant that the plaintiffs were not "using" the asbestos "*per se.*"¹¹¹ Rather, recognizing that "the North Carolina Supreme Court has expressly stated on two occasions that Section 99B-4(3) is a codification of the doctrine of contributory negligence, a doctrine which is generally more broad, and often much different, than the product misuse defense,"¹¹² the Fourth Circuit focused instead on whether the plaintiffs "failed to exercise reasonable care under the circumstances . . ." ¹¹³

The *Fontenot* majority responded that unlike Turner, the plaintiffs in *Jones* were still using the product in some manner.¹¹⁴ But by equating the *Jones* plaintiffs' actions with respect to the asbestos as "use" of the asbestos, the majority suggests a very loose definition of "use" at odds with the majority's isolated and hyper-literal interpretation of the word in *Fontenot*. Specifically, if working "with and around Kaylo pipe-covering and block, which are OFC asbestos products,"¹¹⁵ constitutes "use" of those products, then a plaintiff would "use" a product anytime he knowingly comes into contact with the product. Under this definition, Turner arguably "used" TI's

107. *Id.* at 340–41.

108. 69 F.3d 712 (4th Cir. 1995).

109. *Id.* at 715–16.

110. *Id.* at 720.

111. *Id.* at 721–22.

112. *Id.* at 721 n.13 (citing *Dalrymple v. Sinkoe*, 230 N.C. 453, 53 S.E.2d 437 (1949); *A.T. & T. Corp. v. Med. Review of N.C., Inc.*, 876 F. Supp. 91, 93 (E.D.N.C. 1995)).

113. *Id.* at 722.

114. *Fontenot v. Taser Int'l, Inc.*, 736 F.3d 318, 329 (4th Cir. 2013).

115. *Jones*, 69 F.3d at 716 (emphasis added).

product when he chose to advance towards the police officer knowing that the officer had a taser aimed at his chest. Moreover, then, he certainly “used” TI’s product when he continued to walk around the store while the taser’s darts were attached to his chest and discharging an electrical current near his heart. Thus, even if we assume the *Fontenot* majority’s use rule was truly part of North Carolina contributory negligence law, to the extent that the *Jones* plaintiffs “used” the asbestos insulation, so too did Turner “use” TI’s taser.

The other proximate cause arguments the majority offered for why the contributory negligence defense should not apply in *Fontenot* are even less faithful, not only to previous North Carolina case law, but also to the facts of the *Fontenot* case itself. First, the majority’s argument that nothing Turner did caused the officer to aim the taser at Turner’s chest¹¹⁶ is both inaccurate and irrelevant. This is especially clear when Turner is compared to the plaintiff in *Braswell*.¹¹⁷ The *Braswell* plaintiff “knew [the mob was] acting in an unruly and unlawful manner and that the officer had warned them to stop trying to break in the doors.”¹¹⁸ Still, “he voluntarily became a member of the crowd . . . and was rejoining the crowd . . . when he was shot”—*accidentally*—by a ricocheting bullet fired from the security officer’s gun.¹¹⁹ The officer was not even aiming the gun at the plaintiff when the plaintiff was shot; moreover, there was no evidence that the plaintiff knew the officer had a gun, let alone that he was about to fire it.¹²⁰ Nevertheless, the court found that a reasonable person looking out for his own safety would not engage in mob activity.¹²¹ The relevant proximate cause inquiry was only whether the plaintiff’s actions could “reasonably be calculated to provoke the security officer into taking *some action* to disperse the mob”—not whether the plaintiff’s actions were reasonably calculated to provoke the officer into taking action with respect to a particular part of the plaintiff’s body.¹²²

Similar to the *Braswell* plaintiff, the officer told Turner to leave the Food Lion premises and Turner knew that by remaining in the store, shouting, cursing, and acting aggressively, he was acting in an unruly manner, which the officer had warned him to stop.¹²³

116. *Fontenot*, 736 F.3d. at 330.

117. *Braswell v. N.C. A & T State Univ.*, 5 N.C. App. 1, 168 S.E.2d 24 (1969).

118. *Id.* at 12, 168 S.E.2d at 31.

119. *Id.*

120. *Id.* at 9, 168 S.E.2d at 29.

121. *Id.* at 12, 168 S.E.2d at 30.

122. *Id.* at 12, 168 S.E.2d at 31 (emphasis added).

123. See *supra* note 59 and accompanying text.

Nevertheless, Turner voluntarily continued this behavior.¹²⁴ Moreover, unlike the *Braswell* plaintiff, Turner knew the officer had a taser.¹²⁵ Turner knew the taser was aimed at his chest.¹²⁶ Turner knew the taser was discharging into his chest as he continued to walk around the store despite the officer's instructions to get down.¹²⁷ Even granting that Turner did not cause the officer to aim the taser at his chest in the first place, the officer's aiming of the taser is not what caused Turner to suffer ventricular fibrillation.¹²⁸ What caused Turner to suffer ventricular fibrillation was the discharging of the taser—and it was Turner's behavior that caused the officer to discharge, and then to continue discharging, the taser.¹²⁹ Thus, under both the facts of the case and North Carolina law, Turner's actions contributed to his death.

Second, the court's argument that Turner's actions did not foreseeably contribute to his death because Turner did not know and had no reason to know that being tased could result in severe cardiac injury¹³⁰ is an even more direct contradiction of North Carolina case law. According to the Supreme Court of North Carolina, “[i]t is not required that the injury in the precise form in which it occurred should have been foreseeable but only that, in the exercise of reasonable care, consequences of a generally injurious nature might have been expected.”¹³¹ As Chief Judge Traxler noted, Turner, by voluntarily engaging in unruly conduct just as the *Braswell* plaintiff did, assumed the risk of whatever injury he might receive as a result.¹³²

IV. CONSEQUENCES OF *FONTENOT*

The Fourth Circuit's interpretation of North Carolina's law is not only unfaithful, but also overly broad compared to the policy goal it was designed to advance. Following the majority's “use” rule in other cases would lead to outcomes clearly contrary to the goal of contributory negligence.

124. See *supra* notes 57–59 and accompanying text.

125. See *supra* notes 58–60 and accompanying text.

126. See *supra* notes 60–63 and accompanying text.

127. See *supra* notes 61–68 and accompanying text.

128. See *supra* notes 74 and accompanying text.

129. See *supra* notes 54–68, 74 and accompanying text.

130. *Fontenot v. Taser Int'l, Inc.*, 736 F.3d 318, 330 (4th Cir. 2013).

131. *McNair v. Boyette*, 282 N.C. 230, 236, 192 S.E.2d 457, 461 (1972) (emphasis added).

132. *Fontenot*, 736 F.3d at 339 (Traxler, C.J., dissenting) (quoting *Braswell v. N.C. A & T State Univ.*, 5 N.C. App. 1, 12, 168 S.E.2d 24, 31 (1969)).

The majority argued for the “use” rule as a way to prevent TI from achieving what the majority feared would be virtual immunity from suit.¹³³ As the majority realized, TI was a unique defendant in that its products—tasers—were specifically designed and marketed for use against citizens like Turner who engage in disputes and refuse to submit to authority.¹³⁴ Any injuries these citizens received as a result of their tasing would, by definition, be the result of “contributory negligence.”¹³⁵ Thus, the citizens most at risk of being injured by TI’s products would be automatically barred from recovering against TI. With none of its most likely victims able to hold TI accountable, TI would, by the majority’s reasoning, “essentially have no duty in North Carolina to safely design its products or to provide adequate warnings to law enforcement customers.”¹³⁶ The “use” rule that the Fourth Circuit advanced effectively avoids this outcome.

The problem is that this particular outcome is not a danger in every products liability negligence case, yet the rule designed specifically to avoid this outcome will still apply. Most defendants in products liability suits are not like TI—most do not specialize in products designed for use against negligent people. Thus, for most products liability defendants, there will be a sizeable pool of non-negligent plaintiffs able to hold those defendants liable for their products. Nevertheless, the Fourth Circuit’s “use” rule would still apply to those defendants, subjecting them to liability in ways that would make a mockery of North Carolina’s contributory negligence rule.

Consider, for example, a plaintiff who walks through a roped off construction area and is injured when a defective nail gun operated by a nearby construction worker backfires. Under the *Fontenot* majority’s “use” rule, this plaintiff can recover against the nail gun manufacturer, who will be barred from bringing up the plaintiff’s contributory negligence because the plaintiff did not “use” the nail gun. Meanwhile, other plaintiffs—perhaps construction workers injured on the job, who committed no negligence—are also suing and recovering against the nail gun manufacturer. Under the “use” rule, however, the contributorily negligent plaintiff can recover just as much as these non-negligent plaintiffs. The “use” rule, instead of punishing the negligent plaintiff as contributory negligence is

133. See *supra* Part II.B.

134. *Fontenot*, 736 F.3d at 331.

135. *Id.*

136. *Id.*

designed to do, rewards him with a recovery even larger than what a comparative negligence rule would theoretically allow.¹³⁷ Moreover, instead of protecting the nail gun manufacturer from liability as contributory negligence is designed to do, the “use” rule punishes the manufacturer and forces it to pay extra damages.

Similarly, consider a pedestrian who jaywalks and is hit by a car whose brakes malfunctioned. Under the majority’s “use” rule, plaintiff jaywalker can recover against the brake manufacturer, who will be barred from bringing up the plaintiff’s contributory negligence because the plaintiff did not “use” the brakes. Meanwhile, other plaintiffs—perhaps drivers injured when their brakes failed, who committed no negligence—are also suing and recovering against the nail gun manufacturer. Under the “use” rule, however, the jaywalker can recover just as much as these non-negligent plaintiffs. Again, the “use” rule, instead of punishing the jaywalker for his negligence, rewards him with a recovery even larger than what a comparative negligence rule would theoretically allow. And instead of protecting the brake manufacturer from liability, the “use” rule punishes the manufacturer by forcing it to pay extra damages.

Finally, consider the *Braswell* hypothetical mentioned above. The hypothetical *Braswell* plaintiff joins the mob trying to force open the gym doors and is shot when the security officer’s gun misfires due to a defect in the gun itself. Under the majority’s “use” rule, this plaintiff can recover against the gun manufacturer, who will be barred from bringing up the plaintiff’s contributory negligence because the plaintiff did not “use” the gun. Meanwhile, other plaintiffs are already suing the gun manufacturer—perhaps gun users injured when their guns misfired—who committed no negligence. Thus, the contributorily negligent plaintiff could recover just as much as these non-negligent plaintiffs. In the real *Braswell* case, the security officer, unlike the hypothetical gun manufacturer, was able to escape all liability (despite being negligent in his wrongful firing of the gun), and the real plaintiff was able to recover nothing (despite being identical to the plaintiff in the hypothetical). In other words, in addition to producing results that undermine contributory negligence’s goals of punishing negligent plaintiffs and protecting manufacturers from liability, the “use” rule also allows similar and even identical parties to receive vastly different treatment under the law.¹³⁸

137. See *supra* notes 28–30 and accompanying text.

138. Critics could argue that differential treatment of similar parties is appropriate when the legal basis for the parties’ claims—ordinary common negligence instead of statutory products liability—is not the same. That is, it might make sense to allow the

In sum, the Fourth Circuit's "use" rule in *Fontenot* leaves plenty of doubt that, in a negligence suit brought under North Carolina's Products Liability Act, "[a plaintiff's] contributory negligence will bar his recovery to the same extent as in any other negligence case."¹³⁹ The solution is not to carve out exceptions to contributory negligence as the Fourth Circuit attempted, but to replace North Carolina's contributory negligence rule with some form of comparative negligence. The "greater than 50%" approach seems to be the best candidate. This approach, which allows plaintiffs to recover when their negligence is less than or equal to the defendant's, is the least dramatic departure from North Carolina's current contributory negligence scheme and is also sufficient to alleviate the Fourth Circuit's policy concerns in *Fontenot*.

A "pure" comparative negligence approach would require the most dramatic deviation from North Carolina's current contributory negligence rule. Pure comparative negligence allows a plaintiff to recover even if he was more negligent than the defendant.¹⁴⁰ Such an approach solves the Fourth Circuit's policy concern in *Fontenot* because it would absolutely allow negligent plaintiffs like Turner to

Braswell plaintiff to recover against the hypothetical gun manufacturer in a products liability negligence suit, but not against the security guard in a common law negligence suit.

Perhaps a defendant's single act of negligence carries with it a greater potential for harm to others when it occurs in the context of a mass-produced and widely distributed product, and it is this greater potential for harm that justifies increased liability via the denial of otherwise available defenses. Thus, though the hypothetical gun manufacturer's negligence and the security guard's negligence might seem equal at first, when one considers that the gun manufacturer's negligence could harm significantly more people than the security guard's negligence ever could, it seems logical that the gun manufacturer should be subjected to more liability.

But even if disparate treatment of the defendant gun manufacturer and the defendant security guard may be theoretically justified, disparate treatment of two plaintiffs who engaged in exactly the same behavior is not. The justification for treating the two plaintiffs differently would be society's interest in duly punishing manufacturers who endanger thousands of consumers by negligently mass-producing products. But the larger number of plaintiffs with standing to sue the gun manufacturer (compared to the number of plaintiffs with standing to sue the security guard) creates more liability in itself. The danger of rewarding negligent plaintiffs who happen to be able to sue under products liability is not worth the marginal benefit to society of forcing manufacturers to pay a little more in damages than what they're already paying their numerous non-negligent plaintiffs. The fairer and more appropriate solution that allows manufacturers to be held more responsible while still discouraging negligent behavior on the part of plaintiffs is comparative negligence.

139. *Smith v. Fiber Controls Corp.*, 300 N.C. 669, 672, 268 S.E.2d 504, 506 (1980) (quoting WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 102, at 670 (4th ed. 1971)).

140. Swisher, *supra* note 1, at 365.

recover against TI. However, of all the comparative negligence schemes, pure comparative negligence would most reward negligent plaintiffs and least protect defendant manufacturers. Because pure comparative negligence so poorly serves the policy concerns fueling North Carolina's contributory negligence rule, it seems unlikely that North Carolina would even consider adopting pure comparative negligence. If North Carolina were Goldilocks, and the range of comparative negligence schemes were porridge, pure comparative negligence would probably be "too hot."

On the other hand, a "50% or greater" approach would require the least dramatic deviation from North Carolina's current contributory negligence rule. The "50% or greater" approach prevents a plaintiff whose negligence was fifty percent or greater than the defendant's from recovering; in other words, an equally negligent plaintiff cannot recover against an equally negligent defendant.¹⁴¹ However, such an approach would probably not solve the Fourth Circuit's policy concern in *Fontenot* because it might not allow plaintiffs as negligent as Turner to recover against TI. This, of course, is based on the assumption that a jury would probably find plaintiffs like Turner at least equally as negligent as TI. In sum, a "50% or greater" approach would probably be "too cold."

That leaves the "greater than 50%" approach, which prevents only those plaintiffs whose negligence was greater than fifty percent from recovering. Assuming a jury could find Turner no more than equally negligent, this approach would solve the Fourth Circuit's policy concern by allowing plaintiffs like Turner to recover against TI. At the same time, this approach would bar a plaintiff from recovery whenever the plaintiff's negligence exceeded the defendant's. In sum, the rule would discourage both plaintiff and defendant negligence while still completely shielding manufacturers from liability in many cases. Thus, the "greater than 50%" approach would probably be "just right" for a state like North Carolina stubbornly clinging to the contributory negligence priorities of protecting defendant industries and not rewarding negligent plaintiffs.

CONCLUSION

Under North Carolina's contributory negligence law, defendants like TI will too often escape liability for the damages their products cause. The solution to this inequitable result is not to carve out exceptions to the contributory negligence rule. Exceptions like the

141. *Id.* at 365-66.

Fourth Circuit's "use" rule inspire a false sense of security about contributory negligence because they allow consumers to believe that the rule is not really that harsh or capable of producing such extreme results. Additionally, under the Fourth Circuit's holding, plaintiffs like the real *Braswell* plaintiff—barred from recovering against the security officer—and the hypothetical *Braswell* plaintiff—free to recover against the gun manufacturer—would receive blatantly disparate treatment despite engaging in exactly the same negligent behavior. In other circumstances, clearly negligent plaintiffs—like the citizen who walked through a clearly marked construction zone—would be able to recover just as much as clearly non-negligent plaintiffs—like the construction workers in the first hypothetical. The solution is to carve out the rule of contributory negligence itself and replace it with some form of comparative negligence. The "greater than 50%" approach seems to be the best candidate for North Carolina.

HAILEY M. BUNCE**

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