Recent Developments in North Carolina Statutory and Case Law

North Carolina Law Review

RECENT DEVELOPMENTS IN NORTH CAROLINA STATUTORY AND CASE LAW*

Civil Procedure

Appellate Procedure

Earlier cases have never actually considered the effect of a reversal by the Supreme Court, at the trial level. In a prior decision the court had set aside a Charlotte recorder's court judgment enjoining enforcement of statutes prohibiting "brown-bagging" in Mecklenburg county.[1] The Superior Court attempted to postpone enforcement, stating that the reversed judgment remained in force pending entry of a judgment in the Superior Court in conformity with the Supreme Court's opinion.[2] However, in *D. & W., Inc. v. City of Charlotte*,[3] the Supreme Court declared this action by the Superior Court a nullity. Thus, to the extent that the certified opinion involves a declaration of a point of law, the mandate of the Supreme Court is immediately efficacious.

Argument to the Jury: Reading Law

In his argument to the jury, defense counsel in *Wilcox v. Glover Motors, Inc.*[4] read excerpts from three Supreme Court opinions[5] applying the doctrine of sudden emergency. Defendant had the verdict but the Supreme Court reversed, stating:

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* Editor's Note: This section will appear in the four regular issues of Volume 47 of the *North Carolina Law Review*. The coverage is limited to those statutes and cases that, in the opinion of the Editorial Board with the advice of the faculty, constitute significant developments in the various areas of the law. The analysis is not extensive, but simply purports to bring these developments to the attention of the practitioner. If a case has been noted or will be noted in the *Law Review*, it will not be discussed in this section.

[1] D. & W., Inc. v. City of Charlotte, 268 N.C. 577, 151 S.E.2d 241 (1966), *discussed in* Pollitt & Strong, *Survey of North Carolina Case Law: Constitutional Law*, 45 N.C.L. REV. 855, 895 (1967).

[2] It has been said that "while a certified decision is binding on the court of original jurisdiction, the cause is not terminated until the authority of the superior court has been exercised." Goodson v. Lehmon, 225 N.C. 514, 517-18, 35 S.E.2d 623, 625 (1945). *See generally* 2 A. MCINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE § 1800 (2d ed. 1956) [hereinafter cited as MCINTOSH]; McCall, *Appellate Practice and Procedure in North Carolina*, 7 N.C.L. REV. 130, 146 (1929).

[3] 268 N.C. 720, 152 S.E.2d 199 (1966).

[4] 269 N.C. 473, 153 S.E.2d 76 (1967).

[5] It is impermissible to read a dissenting opinion to the jury if the adverse party objects. Conn v. Seaboard A.L. Ry., 201 N.C. 157, 159 S.E. 331 (1931).

> [C]ounsel may not properly argue: The facts in the reported case where thus and so; in that case there was no negligence (or was negligence); the facts in the present case are the same or stronger; therefore the verdict in this case should be the same as the decision there.[6]

By statute,[7] counsel in North Carolina may argue both facts and law to the jury. And the Supreme Court has said that the decision whether the trial judge will interfere upon objection to an improper remark or argument, or wait and instruct the jury in his charge to disregard it, is discretionary.[8] However, if the comment or argument is held to be a gross abuse of the privilege of counsel and manifestly calculated to prejudice the jury,[9] there is a duty resting upon the trial judge to interfere at once when objection is made, stop counsel, and instruct the jury to disregard the remarks.[10] In *Wilcox*, the trial court's failure to correct the impropriety by any of these methods was held reversible error.

Clerk of Superior Court

In North Carolina, primary jurisdiction in probate matters, as well as in a number of "special proceedings," is vested in the clerk of Superior Court, with provisions for transfer to the Superior Court for trial of issues of fact.[11] Though traditionally described as an "arm of the Superior Court,"[12] the clerk, in the exercise of probate jurisdiction, has often been regarded as an inferior court.[13] *In re Estate of Lowther*[14] illustrates one facet of this relationship.

Petitioner, representing herself to be the widow of the deceased, was appointed administratrix of his estate, but upon motion the clerk removed her, finding as fact that she had never actually been married to the deceased. She excepted to the entry of the clerk's order and appealed to the Superior Court. The judge vacated the clerk's order and directed determination of the issue of fact by a jury. The Supreme Court re-

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[6] 269 N.C. 473, 479, 153 S.E.2d 76, 81 (1967).
[7] N.C. GEN. STAT. § 84-14 (1965).
[8] State v. Bowen, 230 N.C. 710, 55 S.E.2d 466 (1949); State v. Brackett, 218 N.C. 369, 11 S.E.2d 146 (1940).
[9] State v. Tyson, 133 N.C. 528, 45 S.E.2d 838 (1903).
[10] *Id.*; State v. Dockery, 238 N.C. 222, 77 S.E.2d 664 (1953); State v. Tucker, 190 N.C. 708, 130 S.E. 720 (1925).
[11] N.C. GEN. STAT. §§ 1-174, 1-273 (1953). *See In re* Estate of Wallace, 267 N.C. 204, 147 S.E.2d 922 (1966).
[12] Hunt v. Sneed, 64 N.C. 180 (1870).
[13] See F. JAMES, CIVIL PROCEDURE § 11.3 (1965) [hereinafter cited as JAMES]; R. POUND, APPELATE PROCEDURE IN CIVIL CASES 185-97, 355-56, 367 (1941).
[14] 271 N.C. 345, 156 S.E.2d 693 (1967).

versed and stated that her general exception carried to the judge the single question of whether the clerk's finding that she had never been married to Lowther sustained his order revoking her letters of administration, which obviously it did. Therefore the judge was powerless to vacate the clerk's judgment and order jury trial on that issue. Had petitioner specifically excepted to the clerk's findings, she would have been entitled to have the judge, in his discretion, submit the issue to a jury.

Discovery: Admission of Adverse Examination in Related Case

The adverse examination of a party, if not otherwise barred, is admissible without regard to the availability of the party-deponent as a live witness. In the usual case, a party offers in evidence a deposition he has taken of another party directly aligned against him. However, the North Carolina statute[15] governing admissibility is unclear on two points:[16] (1) whether an examination may be introduced in any action other than the one in which it is taken and (2) whether only those parties adversely aligned to the party-deponent in the action in which the examination was taken may introduce it into evidence. Three recent cases partially answer these questions.

In *Watson v. Stallings*,[17] the Supreme Court affirmed the right of a party to introduce his own pretrial examination in evidence. The trial judge in *Glenn v. Smith*[18] allowed the defendant to introduce in evidence an adverse examination taken in an earlier action arising out of the same automobile accident. The Supreme Court ordered a new trial on grounds that the plaintiff was not a party in the earlier action and had no opportunity to cross examine the deponent. In *Pearce v. Barham*,[19] the plaintiff in a later related action argued that since the deponent was not a party but a witness *when the deposition was offered*, and since the defendant in the later action had failed to satisfactorily account for the depo-

[15] N.C. GEN. STAT. § 1-568.24(a) (1953) provides:
Upon the trial of the action or at any hearing incident thereto, any party may offer in evidence the whole, but, if objection is made, not a part only, of any deposition taken pursuant to this article, but such deposition shall not be used against a party not notified of the taking thereof as provided by G.S. § 1-568.14.

[16] McINTOSH § 2285 n.23.36 (Supp. 1964).

[17] 270 N.C. 187, 154 S.E.2d 308 (1967).

[18] 264 N.C. 706, 142 S.E.2d 596 (1965), *discussed in* Baer, *Survey of North Carolina Case Law: Trial Practice*, 44 N.C.L. REV. 1054, 1057-58 (1966).

[19] 271 N.C. 285, 156 S.E.2d 290 (1967). This case is discussed in the *Recent Developments: Torts*, p. 276 *infra*. An earlier version of the same action, 267 N.C. 707, 149 S.E.2d 22 (1966), is discussed in Brandis, *Survey of North Carolina Case Law: Evidence*, 45 N.C.L. REV. 934, 937 n.12 (1967).

nent's absence, the deposition was inadmissible. The Supreme Court rejected this reasoning and stated that the status of the deposition follows that of the deponent at the time of its taking, and at trial the deposition may be offered by any party subject only to the notice requirements of N. C. GEN. STAT. § 1-568.14.

These seem to be the holding of the cases:

(1) That a party may introduce his own adverse examination in evidence in the action in which it was taken, in lieu of testifying himself;
(2) That an examination properly taken may be introduced in evidence in a second related action, though the deponent is not a party to the second action, provided all parties to the second action had both notice and an opportunity to cross examine at the time of the taking of the deposition;
(3) That for purposes of determining whether the deposition is that of a party or a witness, the status of the deponent at the time of its taking is determinative.

Discovery: Disclosure of Medical Report

At present, the judge in child custody hearings has authority to make the hearings as broad or as narrow as he, in his discretion, deems necessary. In *Gustafson v. Gustafson*,[20] custody of a child was awarded after a hearing at which *ex parte* affidavits were submitted to establish the mental stability of the successful spouse. The husband's request to cross examine the affiants and to examine the treating physicians was refused, and the Supreme Court found that not only had the judge not abused his discretion, he was not authorized under the proviso of the physician-patient privilege statute[21] to compel the disclosures sought, since he was not a "presiding judge of the Superior Court in term."[22] A statutory amendment will be necessary to extend the proviso power to a judge presiding at custody hearings, thus avoiding the inconsistency of having, in effect, two physician-patient privilege statutes—one absolute, one qualified.

[20] 272 N.C. 452, 158 S.E.2d 619 (1967), *noted in* 46 N.C.L. REV. 956 (1968).
[21] N.C. GEN. STAT. § 8-53 (1953) provides:
No person duly authorized to practice physic or surgery, shall be required to disclose any information which he may have acquired in attending a patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a surgeon: Provided, that the presiding judge of a Superior Court may compel such disclosure if in his opinion the same is necessary to a proper administration of justice.
[22] *See* Lockwood v. McCaskill, 261 N.C. 754, 136 S.E.2d 67 (1964).

Discovery: Scope

Prior to *Craddock v. Queen City Coach Co.*,[23] discovery of the identity of an adverse party's possible witnesses appeared proscribed by the statutory statement of purpose, which limited discovery to "obtaining *evidence* to be used at the trial." Earlier decisions seemed to require that such discovery relate to the direct procurement of evidence itself, rather than the mere means of obtaining it. But in *Craddock* the Supreme Court held that the plaintiff was entitled to the names and addresses of all the passengers on the defendant's bus at the time of the accident.

Furr v. Simpson[24] raised the question of whether a claim of privilege can foreclose discovery of a prospective witness, for generally the rules of privilege apply as fully to discovery as to trial.[25] The plaintiff, upon pretrial examination, declined to disclose the name of the doctor who had first treated the condition she contended was aggravated by the accident in suit.[26] The Supreme Court remanded the case with orders that the plaintiff supply this name, but pointed out that the physician-patient privilege[27] might still be applicable to any information obtained from him.[28] The decision seems reasonable. Certainly inquiry into the circumstances surrounding allegedly privileged matter may be more freely undertaken at a pretrial stage than in the midst of litigation, when such an inquiry may distract the jury from the central issues in the case. On the other hand, as it appeared from the pleadings that the introduction of the privileged matter would be essential to the plaintiff's case, it might have been preferable to deal with the question of privilege forthwith.[29]

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[23] 264 N.C. 380, 141 S.E.2d 798 (1965), *discussed in* Baer, *Survey of North Carolina Case Law: Trial Practice*, 44 N.C.L. REV. 1054, 1056-57 (1966); Brandis, *Survey of North Carolina Case Law: Evidence*, 44 N.C.L. REV. 1005, 1019-20 (1966).

[24] 271 N.C. 221, 155 S.E.2d 746 (1967).

[25] United States v. Reynolds, 345 U.S. 1 (1953); *Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 1009 (1961).

[26] The physician was her former husband. *Cf.* Note, *Evidence—Privileged Communications Between Husband and Wife*, 46 N.C.L. REV. 643, 645-47 (1968).

[27] *Cf.* Waldron Buick Co. v. General Mtrs. Corp., 251 N.C. 201, 110 S.E.2d 870 (1959) (holding that the defendant may not take the deposition of plaintiff's physician).

[28] 271 N.C. at 223, 155 S.E.2d at 747.

[29] *See generally* JAMES § 6.8.

Issues for Submission to Jury: Contributory Negligence

In *Jackson v. McBride*,[30] the plaintiff alleged in his complaint that he was struck by the defendant's car as he was standing on the shoulder of the road. In his answer, however, the defendant stated that the plaintiff was lying motionless at night on the hard surface of the road. The jury found for the plaintiff. Though reversing on other grounds, the Supreme Court approved the trial judge's refusal to submit an issue of contributory negligence to the jury. The court reasoned that since the answer did not allege any negligence *concurrent with* the negligence of the defendant as alleged in the complaint, there was, technically speaking, no contributory negligence presented. The decision makes clear that when parties plead directly contrary contentions, it is not sufficient to allege "contributory negligence." To assert this defense, the pleading must be structured to conditionally accept the plaintiff's allegations, and then allege his concurring negligence within that hypothetical situation.[31]

Jurisdiction and Venue

In *Carolina Plywood Distributors, Inc. v. McAndrews*,[32] a practice that has probably been widely followed in effecting service of process under the Non-Resident Motorists statute was held invalid.[33] The defect related to the form of the summons used. It commanded the sheriff to summon the "Commissioner of Motor Vehicles." This is fatal form. The correct form commands the sheriff to summon the *defendant* by name.

Fleek v. Fleek[34] was a divorce action by a North Carolina resident against her husband, a resident of either Switzerland or Italy. Following a judgment of absolute divorce, the plaintiff moved for an order that the defendant be required to pay child support. Notice was published in the local newspaper and copies mailed to the defendant's last known address. Through counsel the defendant entered a special appearance and moved that the court deny the motion on the ground that service

[30] 270 N.C. 367, 154 S.E.2d 468 (1967); *accord*, Dennis v. Voncannon, 272 N.C. 446, 158 S.E.2d 489 (1968).

[31] *See generally* JAMES § 3.6.

[32] 270 N.C. 91, 153 S.E.2d 770 (1967); *accord, In re* Harris, 273 N.C. 20, 159 S.E.2d 539 (1968).

[33] *See* Brief for Appellee at 3, Sink v. Schafer, 266 N.C. 347, 145 S.E.2d 860 (1966); Brief for Appellee at 26, Pressley v. Turner, 249 N.C. 102, 105 S.E.2d 289 (1958).

[34] 270 N.C. 736, 155 S.E.2d 290 (1967). *See generally* Baer, *The Law of Divorce Fifteen Years after Williams v. North Carolina*, 36 N.C.L. REV. 265, 277 (1958).

by publication would not support an *in personam* judgment. The trial court granted the defendant's motion, and on appeal the Supreme Court affirmed, following the general rule that it is possible for a valid divorce decree to be entered by a court that has no jurisdiction to deal with the other incidents of marriage, such as child support. While this is the accepted rule, it has been criticized as anomalous;[35] for if the state has sufficient interest in the marriage status to dissolve it in the absence of a spouse who has been constructively served, the interest should warrant the court in dealing with the other incidents of that status on the same basis.[36]

The problem of determining whether an action is one concerning the title to land, and hence local for venue purposes, continues to arise in new contexts.[37] It is generally held that an action for breach of covenants in a deed is an action for breach of contract and thus transitory. Although it has long been held that an action for specific performance of a contract to convey land is local,[38] the Supreme Court recently held in *Rose's Stores, Inc. v. Tarrytown Center, Inc.*[39] that an action to compel compliance with a restrictive covenant on land use was not local, but transitory.

Rose's involved an action to enjoin a shopping center from encroaching upon parking and driveway rights guaranteed in the lease of the plaintiff's store. The Supreme Court held that the action was transitory, because "[t]he only result, should plaintiff prevail, would be the personal enforcement of rights granted under a contract of lease."[40] Perhaps the decision ignores some of the policy considerations underlying venue in general, such as the enforceability of decrees and trial convenience.[41] As the subsequent contempt proceedings may indicate, there are diffi-

[35] *See, e.g.*, Vanderbilt v. Vanderbilt, 354 U.S. 416, 419 (1957) (dissenting opinion of Frankfurter, J.); Vanderbilt v. Vanderbilt, 1 N.Y.2d 342, 353, 135 N.E.2d 553, 559, 153 N.Y.S.2d 1, 10 (1956) (dissenting opinion of Fuld, J.).

[36] J. EHRENZWEIG, CONFLICT OF LAWS § 80 (1962).

[37] *See generally* Stevens, *Venue Statutes: Diagnosis and Proposed Cure*, 49 MICH. L. REV. 307 (1951).

[38] Vaughan v. Fallin, 183 N.C. 318, 111 S.E. 513 (1922); *cf.* Brady v. Brady, 161 N.C. 325, 326, 77 S.E. 235, 236 (1913). *See generally* MCINTOSH § 779. For purposes of *interstate* venue, it is generally held that any court that gets jurisdiction over a defendant's person has jurisdiction to enter a judgment commanding specific performance. J. EHRENZWEIG, CONFLICT OF LAWS, 210-11 (1962).

[39] 270 N.C. 201, 154 S.E.2d 320 (1967).

[40] *Id.* at 206, 154 S.E.2d at 324.

[41] Blume, *Place of Trial of Civil Cases*, 48 MICH. L. REV. 1, 12, 23 (1949).

culties inherent in closely supervising actions relating to land lying in another county.[42]

Thompson v. Horrell[43] applied the general rule that a motion for change of venue for the convenience of witnesses[44] is made only after issue is joined on the pleadings.[45] However, the reasons behind this rule seemed absent. The action was brought in Wake County for breach of a contract to build a house in Carteret County. Prior to answering, the defendant filed an affidavit stating that he had instituted an action in Carteret County to foreclose his laborer's lien on the same house.[46] Consequently, he desired removal to Carteret County so that the actions could be tried together. Having before him sufficient information upon which to base a decision, the trial judge granted the motion. But the Supreme Court reversed, finding that the trial court had acted prematurely by not waiting until the formal requirements for action had been met.

Real Party in Interest

In *Hardware Dealers Mutual Fire Insurance Co. v. Sheek*,[47] a partially subrogated insurer sued in its own name without making the insured a party to the action. When the defendant moved to dismiss the action on the ground that the insurer was not the real party in interest, any possible claim by the insured himself had been barred by the statute of limitations. The trial judge granted the defendant's motion and refused to allow an amendment to correct the mistake in ascertaining the real party in interest. He stated that it would amount to a substitution of parties and would introduce a new cause of action.

The Supreme Court affirmed, relying upon *Shambley v. Jobe-Blackley Plumbing & Heating Co.*,[48] where an insured brought an action against the wrongdoer for damages that had been paid in full by his insurer. The court had refused to allow the insurer to be made an additional party, for the reason that this would change the cause of action.

[42] Rose's Stores, Inc. v. Tarrytown Center, Inc., 270 N.C. 206, 154 S.E.2d 313 (1967).

[43] 272 N.C. 503, 158 S.E.2d 663 (1968).

[44] N.C. GEN. STAT. § 1-83(2) (1953) authorizes a change in venue to another county, not as a matter of right, but "[w]hen the convenience of witnesses and the ends of justice would be promoted by the change."

[45] *But see* MCINTOSH § 834.

[46] N.C. GEN. STAT. § 1-76(3) (1953) denominates such actions local. *See* Mitchell v. Jones, 272 N.C. 449, 158 S.E.2d 706 (1968).

[47] 272 N.C. 484, 158 S.E.2d 635 (1968).

[48] 264 N.C. 456, 142 S.E.2d 18 (1965).

Shambley has been criticized as representing "an unfortunate technical judicial policy not required by—and, indeed, virtually in defiance of—the controlling statutes."[49]

Both *Sheek* and *Shambley* illustrate that too often rules persist despite the lack of underlying justification. Familiar learning teaches that the rule against splitting a cause of action underlies the requirement that title to the entire claim remains in the insured when payment by the insurer does not cover the entire loss.[50] Similarly, amendment and relation back chiefly present the undesirable possibilities of prejudice and of undermining the statute of limitations. However, amendment should be aimed at facilitating the disposition of cases on their merits. In this context, these two decisions are difficult to commend.

In *Shambley*, the fact that the insurer was fully subrogated to the claim precluded any potential splitting of the claim, and it is unlikely such amendment permitting the insurer to adopt the complaint would have surprised the defendant. And in *Sheek*, though initially the cause of action was potentially split, the running of the statute of limitations precluded any such possibility. The reasonable view would appear to be that the insurer, who was the "only party having an enforceable claim"[51] against which the tortfeasor could be forced to defend, is the real party in interest. Such a position would avoid the harsh result of leaving the insurer remediless in statute-of-limitations cases.

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[49] Brandis, *Survey of North Carolina Case Law: Civil Procedure*, 44 N.C.L. REV. 897, 902 (1966). N.C. GEN. STAT. § 1-73 (1953) provides:

> [W]hen a complete determination of the controversy cannot be made without the presence of other parties, the court must cause them to be brought in.

N.C. GEN. STAT. § 1-163 (1953) provides:

> The judge or court may . . . amend any pleading, process or proceeding, by adding or striking out the name of any party. . . .

The prohibition in N.C. GEN. STAT. § 1-163 (1953) of an amendment substantially changing a claim or defense is confined to amendments conforming to the proof.

[50] Burgess v. Trevathan, 236 N.C. 157, 72 S.E.2d 231 (1952); Powell & Powell, Inc. v. Wake Water Co., 171 N.C. 290, 88 S.E. 426 (1916). *See generally* C. CLARK, CODE PLEADING § 24 (2d ed. 1947).

Two considerations may account for the reluctance of the insured party to sue in these situations. First, he may be subjected to counterclaim liability not covered by the insurance policy. Second, the most the insured can realize from a recovery against the tortfeasor would be the deductible amount not covered by the insurance less usually one-third, which the insurer keeps for the expense of prosecuting the action.

[51] Service Fire Ins. Co. v. Horton Motor Lines, Inc., 225 N.C. 588, 591, 35 S.E.2d 879, 881 (1945), *discussed in* Note, *Real Party in Interest—Partially Subrogated Insurer's Standing to Sue*, 38 N.C.L. REV. 99, 101 (1959). *See also* 3 J. MOORE, FEDERAL PRACTICE ¶ 17.02, at 1305 (2d ed. 1963).

Reference

The rule is well established that reference should not ordinarily be ordered when a "plea in bar"[52] properly interposed in the action would, if decided for the defendant, conclude the case.[53] The reason for this rule is clear: why go to the time and expense of reference before determining whether a completely dispositive defense exists? Consequently, application of the rule should not turn on technical inquiries as to whether a particular defense is a "plea in bar" in the classical pleading sense, but whether it can probably be disposed of by an inquiry extrinsic to that necessary to resolve the main claim whose complexity is thought to require consideration by a referee. In *Shute v. Fisher*,[54] the Supreme Court split over the problem. The suit was against the endorsers of a promissory note. The defendants pleaded: (1) fraud in procuring their endorsements, and (2) that the plaintiff was not the real party in interest. A majority of the Supreme Court did not consider these defenses to be the kind of "pleas in bar" whose interposition should prevent immediate reference. A dissenting justice thought otherwise, looking more clearly at the underlying rationale for the rule.

Res Judicata and Collateral Estoppel

In *Bowen v. Iowa National Mutual Insurance Co.*,[55] Bowen, the driver of one of the trucks involved in the accident, obtained a default judgment in Forsyth County against Shipp, the driver of the other truck involved. Subsequently, in an action brought in Cabarrus County by Shipp's employer, A & B Trucking Company, against Bowen and his employer, Hanes Knitting Company, the defendants got judgment on their counterclaims. These judgments were less than the Forsyth judgment and were satisfied by payment into Cabarrus County court by A & B's liability insurer, Iowa Mutual. The Supreme Court held that the payment by Iowa Mutual of the Cabarrus judgment extinguished Shipp's liability under the Forsyth judgment, particularly since Bowen had rejected a settlement of the default judgment and elected to pursue his action against A & B by way of counterclaim in the second action. Thus, the decision indicates that satisfaction of a judgment against the principal makes a

[52] *See* Murchison Nat'l Bank v. Evans, 191 N.C. 535, 132 S.E. 563 (1926) (enumerating the principal pleas of this character).
[53] McIntosh § 1394, 1407.
[54] 270 N.C. 247, 154 S.E.2d 75 (1967).
[55] 270 N.C. 486, 155 S.E.2d 238 (1967).

prior judgment against the agent stemming from the same occurrence unenforceable.

Current usage gives "res judicata" a broad meaning that covers all the various ways in which a judgment in one action will have a binding effect in another. This includes the effect of a former judgment as a bar to a later action proceeding on all or part of the claim that was the subject matter of the former. It also includes what is known as collateral estoppel: the effect of a former judgment in a later action based upon a different claim.[56] Two Supreme Court decisions in this area point out the elusive nature of these concepts.

The driver of one car, Kayler, sued Gallimore, the driver of the other car involved in the accident. It was stipulated that at the time of the collision Kayler was the agent of Stewart, the owner. In *Stewart v. Gallimore*,[57] the issues of Gallimore's negligence and Kayler's contributory negligence had been adjudicated adversely to Gallimore. Thus, in *Kayler v. Gallimore*,[58] Kayler argued that the only issue for the jury was that of damages. The Supreme Court disagreed:

> Clearly, had Gallimore prevailed in the suit brought against him by Stewart, such judgment would not estop Kayler, who was not a party to that case. Consequently, the judgment in favor of Stewart, in the former action does not estop Gallimore from relitigating the issues of negligence and contributory negligence when sued by Kayler.[59]

This position is in accord with the Restatement[60] and follows the general rule that there must be mutuality of estoppel, so that if both parties would not be bound by a judgment, neither would be.[61]

A similar question was presented in *Sumner v. Marion*.[62] Mrs. Sumner, driving her husband's car, was struck in the rear by an auto driven by Mrs. Marion. Mr. Sumner sued for damage to his car, and Mrs. Marion counterclaimed. The counterclaim failed. Subsequently, Mrs. Sumner instituted the present action for personal injuries, and Mrs. Marion again pressed her counterclaim. The trial court dismissed the

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[56] JAMES § 11.9.

[57] 265 N.C. 696, 144 S.E.2d 862 (1965). Kayler was initially joined as a co-defendant in the action, but subsequently the claim against him was nonsuited.

[58] 269 N.C. 405, 152 S.E.2d 518 (1967).

[59] *Id.* at 408, 152 S.E.2d at 522.

[60] RESTATEMENT OF JUDGMENTS § 93 (1942). *See generally* McINTOSH § 1734 (Supp. 1964).

[61] JAMES § 11.31. *See also Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 856-57 (1952).

[62] 272 N.C. 92, 157 S.E.2d 667 (1967).

counterclaim on grounds that it was barred by the former judgment. Relying directly upon *Kayler*, the Supreme Court reversed in a per curiam opinion.

However, it is questionable whether *Kayler* is proper authority for the holding in *Sumner*. *Kayler* involved an attempt by an agent to use affirmatively the prior judgment in favor of his principal.[63] The decision there reflects the general rule that collateral estoppel may be used as a shield, but not as a sword.[64] However, in *Sumner*, the plaintiff attempted to invoke collateral estoppel defensively; the Supreme Court's denial of that shield rested upon authority that is not in point.

In defense of the court, it may be said that *Sumner* did not present the usual case of collateral estoppel being used as a shield.[65] Assume that Mrs. Sumner sued first and defeated the counterclaim. In a subsequent suit by Mr. Sumner, the principal, the prior judgment on the counterclaim could be invoked, to avoid the anomalous result of the principal losing to the counterclaim, then exercising his right of indemnification against the agent—in effect holding the agent liable on a claim from which he had been earlier exonerated. *Technically*, this basic justification for allowing the principal to use the prior judgment as a shield was absent in *Sumner*. And if this potentially anomalous result, that is holding the agent indirectly liable, is the basis for abandoning the rule of mutuality, then the decision in *Sumner* is probably correct, though wrong for relying upon *Kayler*.

Nevertheless, a more basic policy underlying collateral estoppel is the desirability of avoiding blatantly inconsistent results on the same facts. And, in *Sumner*, should Mrs. Marion succeed on her resurrected counterclaim, as a *practical* effect, Mr. Sumner would eventually pay it, though in the prior action he avoided liability for it.

Saving Statute

In North Carolina, the plaintiff may take a voluntary nonsuit at any time before rendition of the verdict[66] and then reinstitute the same suit

[63] *See* McDougall v. Palo Alto Unified Sch. Dist., 212 Cal. App. 2d 422, 28 Cal. Rptr. 37 (1963); Nevarov v. Caldwell, 161 Cal. App. 2d 762, 327 P.2d 111 (1958).

[64] Bernhard v. Bank of America, 19 Cal. 2d 807, 122 P.2d 892 (1942); *accord*, Mackris v. Murray, 397 F.2d 74 (6th Cir. 1968); *cf.* JAMES § 10.14 at 474 n.21.

[65] *See* RESTATEMENT OF JUDGMENTS § 96 and Comment b (1942).

[66] This is the common law rule. See Slocum v. New York Life Ins. Co., 228 U.S. 364, 392-95 (1913); MCINTOSH § 1488(4); Louis, *The Sufficiency of the Complaint, Res Judicata and the Statute of Limitations—A Study Occasioned by Recent Changes in the North Carolina Code*, 45 N.C.L. REV. 659-60, 677-78

without prejudice within one year.[67] In *High v. Broadnax*,[68] more than two years after the decedent's death, but less than one year after nonsuit in Virginia federal court,[69] the administratrix reinstituted her suit for wrongful death in the North Carolina Superior Court. The Supreme Court held that the action was barred by the two year statute of limitations applicable to wrongful death actions, since the saving statute does not apply when the original suit is brought in another state.

Torts

Contribution

On January 1, 1968, the Uniform Contribution among Tort-Feasors Act became effective in North Carolina.[1] This statute is more comprehensive than the previous provision,[2] and should dispel the confusion that has permeated the North Carolina law of contribution.[3] It would be futile to detail all the problems under the old statute; however, a brief examination of the Uniform Act's treatment of several of them will point out the worth of the new statute.

The most serious problem was presented where the plaintiff initially collected against the insurer of one tortfeasor. By this act the paying insurer was effectively barred from any right of contribution: if the insurer tried to sue the other tortfeasor or the latter's insurer, the suit was barred because the insurer was not a *joint tortfeasor*;[4] if the insured brought the suit, the court held that the insurer was the real party in interest.[5] Although later cases provided some relief,[6] the Uniform Act's

(1967); *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 838 (1952). *But cf.* Walker v. Story, 256 N.C. 453, 124 S.E.2d 113 (1962).

[67] N.C. GEN. STAT. § 1-25 (1953). *See* Briley v. Roberson, 214 N.C. 295, 199 S.E. 73 (1938).

[68] 271 N.C. 313, 156 S.E.2d 282 (1967).

[69] Taking a voluntary nonsuit in federal court is within the discretion of the district judge, unless taken before answer or by stipulation of all the parties. FED. R. CIV. P. 41(a).

[1] N.C. GEN. STAT. § 1B-1 to -6 (Supp. 1967).

[2] N.C. GEN. STAT. § 1-240 (1953).

[3] *See generally* Thorpe, *Torts: Part Two, Survey of North Carolina Case Law*, 44 N.C.L. REV. 1047, 1051 (1966); Note, *Joint Tort-Feasors—Validity of Covenant Not to Sue*, 30 N.C.L. REV. 75 (1951); Note, *Torts—Insurers—Contribution*, 15 N.C.L. REV. 289 (1937).

[4] *See, e.g.*, Squires v. Sorahan, 252 N.C. 589, 114 S.E.2d 277 (1960).

[5] *See, e.g.*, Herring v. Jackson, 255 N.C. 537, 122 S.E.2d 366 (1961).

[6] *See, e.g.*, Nationwide Mut. Ins. Co. v. Bynum, 267 N.C. 289, 148 S.E.2d

refreshingly simple approach allows the insurer to succeed to its insured's right of contribution.[7]

The Uniform Contribution among Tort-Feasors Act also abolishes the distinction between a release and a covenant not to sue.[8] Previously, a plaintiff desirous of settling with one joint tortfeasor had to give the settling tortfeasor a covenant not to sue, rather than a release, to retain his rights against the other tortfeasor(s).[9] The Uniform Act provides that a release, a covenant not to sue, or a covenant not to enforce judgment given to one tortfeasor, discharges all liable parties only if its terms so provide.[10] Further, the effect of the settlement on the liability of the other parties is set forth:[11] their liability is reduced by the greater of the amount stipulated in the agreement or the consideration paid for it.[12]

Contributory Negligence

The Supreme Court has dealt significantly with the issue of contributory negligence in four cases. In *Miller v. Miller*,[13] a case of first impression, the defendant contended that the plaintiff was contributorily negligent in failing to fasten his seat belt. In a well documented opinion, Justice Sharp concluded for the court that failure to fasten a seat belt was not contributory negligence. Among the reasons for this decision were the following: (1) the desirability of seat belts is still debatable; (2) only through hindsight could it be determined that the seat belt would have prevented rather than caused the injury; (3) the failure to "buckle up" in no way contributed to the accident; (4) difficult proximate cause issues would be presented; and (5) the imposition of such a rule should come from the legislature. It was also held that plaintiff's failure to fasten his seat belt did not reduce defendant's liability under the avoidable consequences

114 (1966); Safeco Ins. Co. of America v. Nationwide Ins. Co., 264 N.C. 749, 142 S.E.2d 694 (1965); Pittman v. Snedeker, 264 N.C. 55, 140 S.E.2d 740 (1965).

[7] N.C. GEN. STAT. § 1B-1(d) (Supp. 1967).

[8] N.C. GEN. STAT. § 1B-4 (Supp. 1967).

[9] *See, e.g.*, Slade v. Sherrod, 175 N.C. 346, 95 S.E. 557 (1918); *Torts, Eleventh Annual Survey of North Carolina Case Law*, 42 N.C.L. REV. 721, 726 (1964). *But see* N.C. GEN. STAT. § 1-540.1 (1953), *commented on in* Baer, *Effects of Release Given Tortfeasor Causing Initial Injury in Later Action for Malpractice Against Treating Physician*, 40 N.C.L. REV. 88 (1961).

[10] N.C. GEN. STAT. § 1B-4 (Supp. 1967).

[11] This problem has not been before the court. See Note, *Joint Tort-Feasors—Contribution—Effects of Statute on Covenant Not to Sue*, 35 N.C.L. REV. 141 (1956).

[12] N.C. GEN. STAT. § 1B-4 (Supp. 1967).

[13] 273 N.C. 228, 160 S.E.2d 65 (1968).

rule: the duty to minimize damages arises only *after* the defendant's negligence. The court reasoned that there being no duty to use the seat belt, a failure to do so could not be a breach of duty to mitigate damages.

In North Carolina a plaintiff's contributory negligence will not bar his recovery where defendant's conduct is classified as willful or wanton.[14] But, presumably, where plaintiff's contributory fault is found willful or wanton, the defendant has a valid defense. An application of this rule is presented in *Pearce v. Barham*,[15] where plaintiff sued for injuries arising out of an automobile accident, was nonsuited, and appealed. The evidence tended to show that defendant's intestate was operating his vehicle on a wet road with slick tires at speeds up to ninety miles per hour. The Supreme Court, finding some confusion in the trial court's charge and the jury's response thereto, assumed that the jury found the driver's conduct willful and wanton. Defendant charged plaintiff with contributory negligence in that she failed to object to the manner in which the car was being operated, and jerked, pulled, and slapped at the driver in a "drunken rage." The lower court instructed the jury that plaintiff's contributory fault in any one of these particulars would bar her recovery. The court found error in that only plaintiff's interference with the driver could be characterized as willful or wanton, and thus prevent an award of damages. It was further noted that defendant failed to call plaintiff's conduct willful or wanton. Whether riding with an intoxicated driver at speed of ninety miles an hour without objection is mere ordinary negligence is debatable. At least, the decision should be carefully limited, as the court certainly cannot mean to imply that engaging the driver in a brawl is simple negligence.

At issue in *Hoots v. Beeson*[16] and *Welch v. Jenkins*[17] was the contributory negligence of a minor. In both cases a young cyclist was struck by an automobile. In *Hoots* an eleven year old boy was killed; in *Welch* a fourteen year old boy was injured. The jury found in both instances that the contributory negligence of the minor barred any recovery. On appeal both plaintiffs assigned as error instructions dealing with the minor's contributory negligence.

The court has formulated three rules or presumptions in dealing with a minor's negligence. Infants under seven years of age are conclusively

[14] Blevins v. France, 244 N.C. 334, 93 S.E.2d 549 (1956).
[15] 271 N.C. 285, 156 S.E.2d 290 (1967). This case is discussed herein at pp. 264-65 *supra*.
[16] 272 N.C. 644, 159 S.E.2d 16 (1968).
[17] 271 N.C. 138, 155 S.E.2d 763 (1967).

presumed to be incapable of negligence. Those over fourteen years of age are presumed to be capable of negligence, and unless the presumption is rebutted, the adult standard of care applies. Those infants between seven and fourteen are presumed incapable of negligence; if the presumption is rebutted the standard by which his conduct is to be gauged is that of a child of like age and experience.

The trial court in *Hoots* gave an instruction which had been previously approved by the Supreme Court in *Leach v. Varley*.[18] This instruction failed, however, to adequately state the presumption as to the negligence of a child between the ages of seven and fourteen, and also tended to equate the standard of care required to that required of an adult. The court, overruling *Leach*, found reversible error in both these points. The trial court must now carefully instruct the jury as to the significance of the presumption that a child between seven and fourteen is incapable of contributory negligence. Further, if the presumption is rebutted, the standard by which the child's conduct is to be measured is not that of an adult, but that of a child of like age, experience, and intelligence.

The plaintiff's contention in *Welch* was that he, as a fourteen year old, should not be held to the same standard of care as an adult. The court held that some definite age must be set at which a minor is presumed to possess the capacity of an adult to care for himself; otherwise the jury would have no standard to guide it. Thus, a fourteen year old, nothing to the contrary appearing, is held to the adult standard of care.

Last Clear Chance

The confusion surrounding the last clear chance doctrine was cleared to some extent by two decisions. In *Presnell v. Payne*,[19] plaintiff's intestate sat on the fender of a truck that was being used to push a station wagon in order to "jump start" it. When the automobile started and began to pull away, defendant applied the brakes of the truck causing the decedent to fall beneath the wheels of the still-moving vehicle. To defendant's answer alleging contributory negligence, plaintiff replied that defendant had the last clear chance to avoid the fatal accident. Although the lower court was held correct in refusing to submit the issue of last clear chance to the jury, the court departed from the rule that last clear

[18] 211 N.C. 207, 189 S.E. 636 (1937).
[19] 272 N.C. 11, 157 S.E.2d 601 (1967).

chance cannot apply when the plaintiff is found by the court to be contributorily negligent[20] as a matter of law. The court frankly admitted that efforts to explain the rule had proved futile, and simply stated:

> [T]he better reasoned view is that an issue of last clear chance may arise whether contributory negligence is determined by the Court as a matter of law, or found by the jury as an issue of fact.[21]

Prior to *Exum v. Boyles*,[22] the North Carolina court had held that the original negligent act of the defendant could not be relied upon to invoke the last clear chance doctrine.[23] Viewing the issue as one of proximate cause, the court felt that plaintiff's contributory negligence superseded defendant's negligence. Thus, for the doctrine to apply, the court required some further negligence on the part of the defendant to intervene between plaintiff's negligence and the injury. In *Exum* plaintiff's decedent was changing a tire along the side of a highway when he was struck by an automobile driven by the defendant. Both parties were negligent: defendant in failing to keep a proper lookout and in failing to move toward the center of the road; the decedent in failing to pull his car further onto the shoulder of the road and in working in such close proximity to the road. The plaintiff contended that the defendant had the last clear chance. The lower court refused to submit the issue to the jury. Finding that the jury should have determined whether defendant could have avoided the accident had he maintained a proper lookout, the court awarded the plaintiff a new trial. Obviously, no new and independent act of negligence on the part of the defendant intervened. The Supreme Court recognized this and admitted that the original negligence "of the defendant is sufficient to bring the doctrine of the last clear chance into play if the other elements of that doctrine are proved."[24] While it does not appear that the previous rule caused erroneous decisions, its demise is desirable "since it adds nothing but confusion to an already confusing subject."[25]

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[20] *See, e.g.*, Arvin v. McClintock, 253 N.C. 679, 118 S.E.2d 129 (1961). *See also Torts, Eleventh Annual Survey of North Carolina Case Law*, 42 N.C.L. REV. 721, 723 (1964).

[21] Presnell v. Payne, 272 N.C. 11, 14-15, 157 S.E.2d 601, 603 (1967).

[22] 272 N.C. 567, 158 S.E.2d 845 (1968).

[23] *See, e.g.*, Mathis v. Marlow, 261 N.C. 636, 135 S.E.2d 633 (1964).

[24] Exum v. Boyles, 272 N.C. 567, 576-77, 158 S.E.2d 845, 853 (1968).

[25] *Torts, Eleventh Annual Survey of North Carolina Case Law*, 42 N.C.L. REV. 721, 725 (1964).

Miscellaneous

Perhaps one of the most important decisions is *Corprew v. Geigy Chemical Corp.*[26] There the court limited the requirement of privity in warranty actions. The case has been noted elsewhere[27] and will not be discussed herein.

Also discussed in a previous casenote[28] is *Phelps v. Winston-Salem,*[29] where the court continues its strict and erroneous position on proof of causation in negligence actions.

Malpractice—Duty to Inform

Traditionally the North Carolina court has demonstrated a relatively stringent view of malpractice suits.[30] *Koury v. Fallo*[31] may signal a retreat from this attitude. There the plaintiff brought his nine month old daughter to the defendant for treatment of asthmatic bronchitis. The defendant prescribed a drug that caused the infant's deafness. The container in which the drug was packaged warned, "Not for Pediatric Use," and a pamphlet inside the container explained the risk in administering the drug to children. The defendant claimed that he was unaware of these warnings, although he knew that the drug could impair the aural nerves. On plaintiff's appeal from a nonsuit, the court held that the evidence could support a finding that the defendant had breached his duty to inform the parents in order that they might make an intelligent choice. In the words of the court:

> The plaintiff's evidence shows that the defendant did not so inform the parents of this little girl and thus give them the opportunity of an informed election between incurring the risk of prolonged bronchitis and possible pneumonia on the one hand and incurring the risk of total and permanent deafness of their child on the other.[32]

The court noted the absence of an emergency and the fact that no therapeutic reasons existed to justify the nondisclosure, since it was the parents', not the patient's, consent which was to be obtained.[33]

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[26] 271 N.C. 485, 157 S.E.2d 98 (1967).

[27] Note, *Products Liability—Is Privity Dead?*, 46 N.C.L. REV. 1010 (1968).

[28] Note, *Causal Relationship*, 46 N.C.L. REV. 1001 (1968).

[29] 272 N.C. 24, 157 S.E.2d 719 (1967).

[30] *See, e.g.*, Kennedy v. Parrott, 243 N.C. 355, 90 S.E.2d 754 (1956). See Byrd & Dobbs, *Torts, Survey of North Carolina Case Law*, 43 N.C.L. REV. 906, 912 (1965); Note, 34 N.C.L. REV. 581 (1956).

[31] 272 N.C. 366, 158 S.E.2d 548 (1968).

[32] *Id.* at 375, 158 S.E.2d at 555.

[33] The court also found that the evidence justified the conclusion that the dose prescribed by the defendant was excessive. This finding would not seem to limit

In *Starnes v. Taylor*,[34] plaintiff's esophagus was perforated during the course of an esophagoscopy. Plaintiff contended that the defendant-physician failed to warn him of any risks. The defendant claimed that he advised plaintiff that any surgery involves some risk. Unlike *Koury*, the court found that therapeutic reasons may have prevented the defendant from warning plaintiff of specific risks and that it did not appear that the plaintiff would have declined the operation even if warned of such risks. A nonsuit was affirmed.

Prenatal Injuries and Mental Distress

In *Stetson v. Easterling*,[35] a wrongful death action, the court held that a child, *who is born alive*, may recover for injuries sustained while *en ventre sa mere*. The court was forced to decide this question since the wrongful death action is available only where the decedent, had he lived, would have been entitled to an action for damages.[36] Previously, it had been held that the pecuniary loss rule, discussed *infra*, precluded recovery for the wrongful death of a child *en ventre sa mere*.[37] *Stetson* was a case of first impression, and in deciding as it did, the court joined the great majority of jurisdictions.[38]

It is the North Carolina (and probably the majority) rule that there can be no recovery for mental distress caused by negligent conduct, unless accompanied by a contemporaneous physical injury.[39] *Crews v. Provident Finance Co.*[40] presented to the court the opportunity to further define "physical injury." There defendant's bill collector, knowing plaintiff to have a heart condition, allegedly threatened her in vulgar language. As a result, the plaintiff suffered an attack of agina, became extremely nervous, and required bed rest. The Supreme Court reversed the nonsuit entered by the trial court, holding that the physical injury need not be visible and that plaintiff's injuries were sufficient to come within

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the decision as to the duty to disclose, however, since the drug, even in proper dosage, could impair the hearing of a child.

[34] 272 N.C. 386, 158 S.E.2d 339 (1968).

[35] 274 N.C. 152, 161 S.E.2d 531 (1968).

[36] Goldsmith v. Samet, 201 N.C. 574, 160 S.E. 835 (1931).

[37] Gay v. Thompson, 266 N.C. 394, 146 S.E.2d 425 (1966). The question of whether a viable child *en ventre sa mere*, who is born dead, is a person within the wrongful death act was not decided.

[38] W. PROSSER, LAW OF TORTS § 56 (3d ed. 1964).

[39] Slaughter v. Slaughter, 264 N.C. 732, 142 S.E.2d 683 (1965). See Note, *Damages—Mental Anguish—Action Arising out of Contract*, 28 N.C.L. REV. 318 (1950).

[40] 271 N.C. 684, 157 S.E.2d 381 (1967).

the rule. The decision is not surprising, for as early as 1906 the court held that the plaintiff could recover even though "the physical injury consists of a wrecked nervous system instead of lacerated limbs."[41]

Res Ipsa Loquitur

In *Greene v. Nichols*,[42] the North Carolina Supreme Court overruled previous conflicting and confusing decisions by holding that the doctrine of *res ipsa loquitur* may be applied to an unexplained single car accident. Prior to *Greene*, the court had consistently stated that *res ipsa* was unavailable where a car inexplicably left the road.[43] Plaintiffs in such a case could avoid nonsuit only by offering evidence tending to negate the possibility that a cause, other than the defendant's negligence, could be found responsible for the accident.[44] The court apparently feared that application of *res ipsa* to such cases could work an injustice to the defendant, who often had no better means to explain the accident than did the plaintiff. By requiring that the probability of other causes be discounted before allowing the case to go to the jury, the court was attempting to strike a fairer balance. While this approach is not indefensible, it led to decisions more inexplicable than the accidents which prompted them.[45]

The evidence presented by the plaintiff in *Greene* consisted primarily of a description of the respective conditions of the automobile, its passengers, and the tree with which it collided. The driver, ignoring a warning roadsign, had failed to negotiate a curve on a winding country road. The car struck a large tree killing both passengers instantly; the driver died shortly thereafter. From the condition of both the car and the tree it was obvious that the speed at impact had been great. Since the evidence failed to adequately discount the possibility of other causes,[46]

[41] Kimberly v. Howland, 143 N.C. 399, 404, 55 S.E. 778, 780 (1906).

[42] 274 N.C. 18, 161 S.E.2d 521 (1968).

[43] *See, e.g.*, Peoples Bank & Trust Co. v. Snowden, 267 N.C. 749, 148 S.E.2d 833 (1966); King v. Bonardi, 267 N.C. 221, 148 S.E.2d 32 (1966).

[44] *See, e.g.*, Lane v. Dorney, 250 N.C. 15, 108 S.E.2d 55 (1959), *rev'd on rehearing*, 252 N.C. 90, 113 S.E.2d 33 (1960), *noted in* 39 N.C.L. REV. 198 (1961). The standard allegations by which other possible causes were discounted were to the effect that the road was dry and in good condition; that there was little or no traffic; that the driver did not suffer from fits or seizures and was in good health; and that the car was in good mechanical condition.

[45] *Compare* Lane v. Dorney, *id.*, *with* Ivey v. Rollins, 250 N.C. 89, 108 S.E.2d 63 (1959). *See also* Byrd, *Torts: Part I, Survey of North Carolina Case Law*, 44 N.C.L. REV. 1039 (1966); Byrd & Dobbs, *Torts, Survey of North Carolina Case Law*, 43 N.C.L. REV. 906, 915 (1965).

[46] Plaintiff failed to offer evidence as to the condition of the car or as to the health of the driver.

the lower court entered a nonsuit. Although the decision was affirmed for other reasons,[47] the court seized this opportunity to declare that *res ipsa* could be applied to this type of case and an inference of negligence drawn therefrom. Prior decisions which had sustained nonsuits because of the absence of the required proof were declared to be "inconsistent with common experience."[48] Furthermore, "[t]he application of *res ipsa loquitur* to this factual situation is the general rule."[49]

Wrongful Death—Pecuniary Loss Rule

Although easing the burden of proving the defendant's negligence, the *Greene* decision continues the "pecuniary loss" rule, which has plagued plaintiffs seeking to recover for the wrongful deaths of their decedents.[50] The plaintiff's decedent in *Greene* was the fifteen year old wife of the driver, defendant's intestate. The nonsuit entered by the lower court was affirmed because the plaintiff "failed to show that his intestate had any earning capacity or that her untimely death resulted in a net pecuniary loss to her estate."[51] Chief Justice Parker, joined by Justice Higgins, dissented. Their disagreement went not to the pecuniary loss rule itself, but to its application to this case. The dissenters felt that the health and earning capacity of a young woman should be presumed.

A second and more severe application of the pecuniary loss rule is presented in *Stetson v. Easterling*.[52] There recovery was denied for the

[47] See notes 50-52 *infra* and accompanying text.

[48] Greene v. Nichols, 274 N.C. 18, 26, 161 S.E.2d 521, 526 (1968).

[49] *Id.* at 27, 161 S.E.2d at 527.

[50] The pecuniary loss rule has been stated as follows:

> The measure of damages in actions for wrongful death is the present worth of the net pecuniary value of the life of the deceased to be ascertained by deducting the probable cost of his own living and usual or ordinary expenses from his probable gross income which might be expected to be derived from his own exertions during his life expectancy. . . . In arriving at the net pecuniary value of the life of the deceased, the jury is at liberty to take into consideration the age, health and expectancy of life of the deceased, his earning capacity, his habits, his ability and skill, the business in which he was employed and the means he had for earning money, the end of it all being . . . to enable the jury fairly to arrive at the net income which the deceased might reasonably be expected to earn from his own exertions, had his death not ensued, and thus assess the pecuniary worth of the deceased to his family, had his life not been cut short by the wrongful act of the defendant.

Journigan v. Little River Ice Co., 233 N.C. 180, 184-85, 63 S.E.2d 183, 186 (1951). See Comment, *Wrongful Death Damages in North Carolina*, 44 N.C.L. REV. 402 (1966).

[51] Greene v. Nichols, 274 N.C. 18, 28, 161 S.E.2d 521, 528 (1968).

[52] 274 N.C. 152, 161 S.E.2d 531 (1968). See discussion of case at p. 280 *supra*.

death of a two month old infant, allegedly caused by the negligence of defendant-physicians. It is, of course, apparent that the pecuniary loss rule works most harshly where the decedent is extremely young or extremely old and therefore, in monetary terms, is a liability rather than an asset.