UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 69 | Number 5 Article 4

6-1-1991

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In the mid-1970s the North Carolina General Assembly began to address the problem of rising medical liability insurance premiums.[1] In an attempt to remedy the problem, the general assembly amended the statute of repose applicable to professional malpractice,[2] making it less favorable to plaintiffs. Rather than allowing an outer limit of ten years, as originally permitted, the legislature reduced the length of the statute of repose to four years in certain instances.[3] Although the general assembly retained the ten-year statute of repose in cases involving foreign objects left in a patient's body, the four-year repose period applies in all other instances.[4] The shortened repose period effectively reduces the amount of time in which an injured patient may file suit, even in cases in which the injury is not discovered until after the four-year limit.[5]

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1. N.C. PROFESSIONAL LIAB. INS. STUDY COMM'N, REPORT TO THE GENERAL ASSEMBLY OF 1976, at 11 (1976). North Carolina was one of many states that enacted legislation dealing with the malpractice insurance crisis. *See generally* Comment, *An Analysis of State Legislative Responses to the Medical Malpractice Crisis*, 1975 DUKE L. J. 1417 (discussing legislatures' attempts to decrease the liability of health-care providers by altering the substantive and procedural rules of malpractice actions).

2. Act of May 12, 1976, ch. 977, § 2, 1976 N. C. Sess. Laws 3, 3-7 (codified as amended at N.C. GEN. STAT. § 1-15(c) (1983 & Supp. 1990)). *See* Black v. Littlejohn, 312 N.C. 626, 632-33, 325 S.E.2d 469, 473-74 (1985) (describing the malpractice insurance crisis and its impact on the amendment of the statute).

3. N.C. GEN. STAT. § 1-15(c) (1983 & Supp. 1990). The full language of the section reads as follows:

> Except where otherwise provided by statute, a cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action: Provided that whenever there is bodily injury to the person, economic or monetary loss, or a defect in or damage to property which originates under circumstances making the injury, loss, defect or damage not readily apparent to the claimant at the time of its origin, and the injury, loss, defect or damage is discovered or should reasonably be discovered by the claimant two or more years after the occurrence of the last act of the defendant giving rise to the cause of action, suit must be commenced within one year from the date discovery is made: Provided nothing herein shall be construed to reduce the statute of limitation in any such case below three years. Provided further, that in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action: Provided further, that where damages are sought by reason of a foreign object, which has no therapeutic or diagnostic purpose or effect, having been left in the body, a person seeking damages for malpractice may commence an action therefor within one year after discovery thereof as hereinabove provided, but in no event may the action be commenced more than 10 years from the last act of the defendant giving rise to the cause of action.

Id.

4. *Id.*

5. Section 1-15(c) of the North Carolina General Statutes contains both the statute of limitations and the statute of repose. *See* N.C. GEN. STAT. § 1-15(c) (1983 & Supp. 1990), quoted in full *supra* note 3. A statute of limitations is a legislative act declaring that no suit shall be maintained on a cause of action unless the suit is brought within a specified period of time after the right of action accrued. BLACK'S LAW DICTIONARY 835 (5th ed. 1979). A statute of repose is an outer time limit for the bringing of actions imposed by the legislature on the theory that defendants may suffer great hardship from an extended statute of limitations. W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 30 (5th ed. 1984) [hereinafter PROSSER AND KEETON ON THE LAW OF TORTS].

Since the legislature enacted this amendment, the North Carolina Court of Appeals has applied the "continued course of treatment" doctrine to ameliorate the effects of this stricter statute.[6] This doctrine tolls the running of the statute so long as the patient remains under the physician's continuous treatment for the injuries that gave rise to the cause of action.[7] Until recently North Carolina courts have applied this doctrine only to the statute of limitations found in section 1-15(c) of the North Carolina General Statutes.[8] In *Stallings v. Gunter*,[9] however, the North Carolina Court of Appeals employed the "continued course of treatment" doctrine in construing the statute of repose for medical malpractice.[10]

This Note examines the application of the "continued course of treatment" doctrine to section 1-15(c). It reviews relevant case law on the doctrine and analyzes the legislative policy underlying section 1-15(c). In particular, the Note examines the application of the new doctrine announced in *Stallings* to the statute of repose contained in section 1-15(c). The Note concludes that policy concerns and shaky precedent make this doctrinal expansion of the professional malpractice statute of repose unwarranted. It further concludes that the North Carolina Court of Appeals usurped the authority of the general assembly by creating an alternate accrual rule that both defeats the legislative goals underlying the statute and ignores the statute's substantive purpose.

In *Stallings* the plaintiff was a dental patient of the defendant throughout the period in which she wore braces.[11] After plaintiff's orthodontist removed her braces, the defendant discovered that plaintiff's X-rays showed "significant resorption or dissolving of the roots" of her teeth.[12] As a result of this condition, plaintiff required treatment from a dental specialist.[13] She continued to visit the defendant on several occasions following defendant's discovery of her condition.[14] About two and a half years later, she filed suit against the orthodontist, alleging medical malpractice, and later amended her complaint to include the defendant.[15]

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6. Stallings v. Gunter, 99 N.C. App. 710, 715, 394 S.E.2d 212, 216, *disc. rev. denied*, 327 N.C. 638, 399 S.E.2d 125 (1990). For a more complete discussion of the "continued course of treatment" doctrine, see *infra* notes 42-46 and accompanying text.

7. Mathis v. May, 86 N.C. App. 436, 440, 358 S.E.2d 94, 97, *disc. rev. denied*, 320 N.C. 794, 361 S.E.2d 78 (1987); Ballenger v. Crowell, 38 N.C. App. 50, 58, 247 S.E.2d 287, 293 (1978); *see infra* notes 41-46 and accompanying text.

8. *See* Callahan v. Rogers 89 N.C. App. 250, 255, 365 S.E.2d 717, 719 (1988); *Mathis*, 86 N.C. App. at 440, 358 S.E.2d at 97; Johnson v. Podger, 43 N.C. App. 20, 26, 257 S.E.2d 684, 689, *disc. rev. denied*, 298 N.C. 806, 261 S.E.2d 920 (1979).

9. 99 N.C. App. 710, 394 S.E.2d 212, *disc. rev. denied*, 327 N.C. 638, 399 S.E.2d 125 (1990).

10. *Id.* at 715, 394 S.E.2d at 216.

11. *Id.* at 711, 394 S.E.2d at 213-14.

12. *Id.* at 711, 394 S.E.2d at 213.

13. *Id.* at 711, 394 S.E.2d at 214.

14. *Id.*

15. *Id.* The plaintiff first visited the defendant, a general dental practitioner, in March 1976. She consulted an orthodontist in 1981, who subsequently applied braces to her teeth. The defendant provided dental treatment for the plaintiff on November 12, 1982; October 3, 1983; May 7, 1984; and July 17, 1984. In January 1985, the defendant's hygienist X-rayed plaintiff's teeth. The defendant took more X-rays on February 6, 1985, after which the defendant informed the plaintiff of the damage to her teeth. The plaintiff received additional treatment from the defendant on April 10, 1985;

The trial court found that the plaintiff was barred by the statute of repose because more than four years had passed since the last act of the defendant giving rise to her cause of action. The plaintiff appealed and the North Carolina Court of Appeals affirmed the trial court's judgment. After finding that section 1-15(c) was applicable,[16] the court noted that courts had applied the "continued course of treatment" doctrine to delay the running of the statute of limitations for medical malpractice.[17] Because both the statute of repose and the statute of limitations contained in section 1-15(c) begin to run at "the last act of the defendant giving rise to the cause of action,"[18] the court held, "it is correct to use the 'continuing course of treatment' doctrine to determine the start date for running of the statute of repose."[19] The court further ruled that "the action accrues at the conclusion of the physician's treatment of the patient, so long as the patient has remained under the continuous treatment of the physician for the injuries which gave rise to the cause of action,"[20] but stated that the plaintiff was not entitled to its benefits if she "knew or should have known of . . . her injuries."[21] The court found that the plaintiff knew of her injuries more than four years prior to filing suit, and affirmed the trial court's ruling that the statute of repose barred her action.[22]

The accrual date applicable to professional malpractice actions has undergone several changes in the past twenty years. Prior to 1971, a cause of action for professional malpractice accrued "from the wrongful act or omission complained of, without regard to the time when the harmful consequences were discovered."[23] Then, in 1971, the North Carolina General Assembly revised the professional malpractice statute of limitations, enacting section 1-15(b) of the North Carolina General Statutes.[24] Section 1-15(b) provided that the statute of limitations for non-apparent injuries began to run upon discovery of the in-

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March 19, 1986; July 17, 1986; and November 12, 1986. She filed suit against her orthodontist on December 30, 1987, but later reached a settlement with him. Plaintiff amended her complaint to add defendant on March 10, 1989. *Id.* at 712-13, 394 S.E.2d at 214-15.

16. *Id.* at 713, 394 S.E.2d at 215.

17. *Id.* at 714, 394 S.E.2d at 215.

18. N.C. GEN. STAT. § 1-15(c) (1983 & Supp. 1990). The statute of repose in § 1-15(c) provides that "in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action." *Id.* The statute of limitations also accrues at "the last act of the defendant giving rise to the cause of action." *Id.*

19. *Stallings*, 99 N.C. App. at 715, 394 S.E.2d at 216.

20. *Id.* at 714, 394 S.E.2d at 215.

21. *Id.* at 715, 394 S.E.2d at 216.

22. *Id.* at 715-16, 394 S.E.2d at 216.

23. Shearin v. Lloyd, 246 N.C. 363, 368, 98 S.E.2d 508, 512 (1957). For an account of the development of § 1-15, see Black v. Littlejohn, 312 N.C. 626, 630-32, 325 S.E.2d 469, 473-74 (1985); Johnson v. Podger, 43 N.C. App. 20, 22-24, 257 S.E.2d 684, 687-88, *disc. rev. denied*, 298 N.C. 806, 261 S.E.2d 684 (1979).

24. Act of July 21, 1971, ch. 1157, § 1, 1971 N.C. Sess. Laws 1706 (codified at N.C. GEN. STAT. § 1-15(b) (1971)), *repealed by* Act of May 28, 1979, ch. 654, § 3, 1979 N.C. Sess. Laws 687, 687-90. The former statute read as follows:

> Except where otherwise provided by statute, a cause of action, other than one for wrongful death, having as an essential element bodily injury to the person or a defect in or damage to property which originated under circumstances making the injury, defect or damage not readily apparent to the claimant at the time of its origin, is deemed to have accrued at the time the injury was discovered by the claimant, or ought reasonably to have been discov-

jury.[25] In addition, the revision imposed a ten-year statute of repose.[26] A statute of repose is an outer time limit for the bringing of actions imposed by the legislature on the theory that defendants may suffer great hardship from an extended limitations period.[27] A repose statute generally supplements or overrides the discovery rule.[28] It is a time limitation that "acts as a condition precedent to the action itself," whereas an ordinary statute of limitations is "clearly procedural, affecting only the remedy directly and not the right to recover."[29]

In 1976, the general assembly modified the statutes of limitations and repose in reaction to the perceived malpractice insurance crisis, making the date of accrual "the time of the occurrence of the last act of the defendant giving rise to the cause of action."[30] The legislature eliminated the statute of limitations for professional malpractice from subsection (b) of section 1-15 and added subsection (c) to deal specifically with malpractice.[31] Subsection (c) provides that the discovery rule applies in cases of nonapparent injuries to toll the running of the statute if "the injury, loss, defect or damage is discovered or should reasonably be discovered by the claimant two or more years after the occurrence of the last act of the defendant giving rise to the cause of action."[32] In addition, the amended statute shortens the statute of repose from ten to four years in most cases, but retains the ten-year limit for cases in which the injury results from a foreign object left inside the plaintiff's body.[33]

Nearly a decade later, in *Black v. Littlejohn*,[34] the North Carolina Supreme Court examined the reasoning underlying section 1-15(c). The *Black* court looked first to the historical developments preceding the section's enactment.[35] The court noted that former section 1-15(b), which established the discovery rule, "was enacted in 1971 to mitigate the sometimes harsh results of G.S. 1-52. . . . The net effect of 1-15(b) was to overrule prior case law that had held that a cause of action for medical malpractice 'accrues from the date of the wrongful

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ered by him, whichever event first occurs: provided that in such cases the period shall not exceed 10 years from the last act of the defendant giving rise to the claim for relief.

Id.; *see generally* Note, *Limitation of Actions—The Discovery Rule Codified in North Carolina*, 7 WAKE FOREST L. REV. 688 (1971) (analyzing the 1971 amendments to N.C. GEN. STAT. § 1-15(b) (1971)).

25. N.C. GEN. STAT. § 1-15(b) (1971), *repealed by* Act of May 28, 1979, ch. 654, § 3, 1979 N.C. Sess. Laws. 687, 687-90.

26. *Id.*

27. PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 5, § 30.

28. *Id.*

29. Boudreau v. Baughman, 322 N.C. 331, 340, 368 S.E.2d 849, 857 (1988).

30. Act of May 12, 1976, ch. 977, § 2, 1976 N.C. Sess. Laws 3, 3-7 (codified as amended at N.C. GEN. STAT. § 1-15(c) (1983 & Supp. 1990)). Section 1-15(c) is identical in the statutory compilations of 1976 and 1983. For the full text of § 1-15(c), see *supra* note 3.

31. Act of May 12, 1976, ch. 977, § 2, 1976 N.C. Sess. Laws 3, 3-7 (codified as amended at N.C. GEN. STAT. § 1-15(c) (1983 & Supp. 1990)).

32. *Id.*

33. *Id.*

34. 312 N.C. 626, 325 S.E.2d 469 (1985). *See generally* Note, Black v. Littlejohn: *A New Discovery Formula for Non-apparent Injuries Under the Professional Malpractice Statute of Limitations*, 64 N.C.L. REV. 1438 (1986) (discussing the conflicting policies that underlie statutes of limitations and examining the *Black* court's opinion in light of these policies).

35. *Black*, 312 N.C. at 630-31, 325 S.E.2d at 469, 473-74.

act or omission.' "[36] The court in *Black* stated that the enactment of section 1-15(c), in contrast, was in reaction to increased malpractice claims and the consequent rise in the cost of medical malpractice insurance.[37]

In examining the impact of section 1-15(c), the *Black* court noted the effectiveness of the discovery provision in "avoiding the obvious injustice and harshness of the 'occurrence' of the last act accrual period contained in the three-year period of limitation."[38] The supreme court characterized the discovery provision in section 1-15(c) as "strik[ing] a delicate balance" between the competing goals of preventing plaintiffs from successfully bringing stale claims and preserving a cause of action for those who do not delay in filing suit.[39] In addition, the court described the statute of repose as "the most significant recommendation" made by the North Carolina Professional Liability Insurance Study Commission, which prior to the 1976 amendments had outlined several proposals to remedy the malpractice insurance crisis.[40] The court also referred to the statute of repose as "an unyielding and absolute barrier" that is "consistent with the purpose and spirit of the medical malpractice act, that is, to decrease the number and severity of medical malpractice claims in an effort to decrease the cost of medical malpractice insurance."[41] The court stressed the importance of the four-year outer limit in remedying the malpractice insurance problem.

Like the discovery rule found in section 1-15(c), the "continued course of treatment" doctrine is an exception to the common law rule that a statute of limitations begins to run at the time of the injury.[42] The doctrine arose out of the concept of a "continuous tort," which derives from the notion that a continuing doctor-patient relationship resulting in an ongoing injury to the patient will cause the statute of limitation to be tolled until the relationship involving the injury ends.[43] This concept works to mitigate the harsh consequences that flow

36. *Id.* at 630-31, 325 S.E.2d at 473.

37. *Id.* at 631, 325 S.E.2d at 474.

38. *Id.* at 634-35, 325 S.E.2d at 476.

39. *Id.* at 635, 325 S.E.2d at 476.

40. *Id.* at 631, 325 S.E.2d at 474.

41. *Id.* at 633, 325 S.E.2d at 475.

42. Comment, *The Continuous Treatment Doctrine: A Toll on the Statute of Limitations for Medical Malpractice in New York*, 49 ALB. L. REV. 65, 71-72 (1984).

A few states have incorporated the "continued course of treatment" doctrine into their malpractice statutes of limitation. *See* MICH. COMP. LAWS ANN. § 600.5838 (West 1990) (MICH. STAT. ANN. § 27A.5838 (Callaghan 1986 & Supp. 1990)); N.Y. CIV. PRAC. L. & R. § 214a (McKinney 1990 & Supp. 1991); TEX. CIV. PRAC. & REM. CODE ANN. § 16.003 (Vernon 1986 & Supp. 1991). A number of states have adopted the doctrine judicially. *See, e.g.*, Johnson v. Winthrop Laboratories Div. of Sterling Drugs, 291 Minn. 145, 149-50, 190 N.W.2d 77, 80 (1971); Farley v. Goode, 219 Va. 969, 976-77, 252 S.E.2d 594, 599 (1979); Samuelson v. Freeman 75 Wash. 2d 894, 900, 454 P.2d 406, 410 (1969) (en banc).

43. Septimus, *The Concept of Continuous Tort as Applied to Medical Malpractice: Sleeping Beauty for Plaintiff, Slumbering Beast for Defendant*, 22 TORT & INS. L.J. 71, 76 (1987). Early American case law applied the doctrine to actions involving trespass and nuisance. Actions could be maintained for the continuing effects of a nuisance, although the events that first caused the nuisance had ceased. Courts later allowed the continuous injury theory to support causes of action for cumulative damages, such as occupational disease, brought after the expiration of the statutory time limit. *Id.* at 75.

from the common-law rule in cases involving latent injuries by extending the length of time in which an injured patient may file suit.

The "continued course of treatment" doctrine, as it is commonly articulated, provides that if a doctor's treatment is continuous and the patient's condition is the type that imposes upon the doctor a duty to provide continuing treatment, the statute of limitations does not begin to run until the treatment has terminated unless the patient discovers the doctor's negligence before the treatment ends, in which case the statute begins to run upon discovery.[44] Although the North Carolina Court of Appeals and some other courts construe the rule as delaying the accrual of the cause of action, in truth the doctrine acts to toll the statute of limitations. The New York Court of Appeals drew this distinction:

> Although the cases speak of the doctrine in terms of when the action "accrues," that term in this context is not strictly accurate. . . . [T]here is a certain illogic in stating that no action is ripe—i.e., it does not "accrue"—until after treatment ends. Continuous treatment has nothing to do with the initial act of negligence. . . . Continuous treatment serves simply as a toll—the action may be brought at any time, but the patient will not be compelled to initiate judicial proceedings so long as the physician continues to treat the injury.[45]

The basic elements of the rule are (1) a continuing relationship between the plaintiff and her doctor and (2) that the doctor treated the patient following the negligent act.[46]

The North Carolina Court of Appeals application of the "continued course of treatment" theory has been marked by confusion and inconsistency. There are many variations on the rule, and the court of appeals has applied them selectively in different cases.[47] The North Carolina Supreme Court has never applied the doctrine. The supreme court, however, acknowledged the "continued course of treatment" doctrine in *Shearin v. Lloyd*.[48] In *Shearin*, the defendant surgeon closed an incision before removing a sponge he had introduced into the plain-

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44. 1 D. LOUISELL & H. WILLIAMS, MEDICAL MALPRACTICE § 13.08 (1990).

45. McDermott v. Torre, 56 N.Y.2d 399, 407, 437 N.E.2d 1108, 1111-12, 452 N.Y.S.2d 351, 354-55 (1982); *see also* Comment, *supra* note 42, at 65 ("The continuous treatment doctrine tolls the statute of limitations during the period of time in which the victim of medical malpractice remains under the treatment of the negligent physician for the injury which gave rise to the cause of action.").

It would be anomalous if plaintiffs had no rights to file suit until the termination of treatment despite their ability to prove that they had been treated negligently earlier. *See* Comment, *Malpractice Statute of Limitations in New York: Conflict and Confusion*, 1 HOFSTRA L. REV. 276, 283 (1973).

46. Comment, *supra* note 42, at 72.

47. 1 D. LOUISELL & H. WILLIAMS, *supra* note 44, § 13.08. Courts have implemented various versions of the rule, including equating it with the termination of the physician-patient relationship; holding that continuous treatment is interrupted by the referral by the negligent physician to another doctor; holding that the rule applies if the continued treatment involves injuries or illnesses other than the one during which the negligent act occurred; holding that the rule applies where the plaintiff continues to take injurious medication after his last visit to the prescribing physician; holding that discovery by the plaintiff before treatment interrupts the continuity, starting the running of the limitations period; and holding that a phone call to the physician or an appointment canceled by the physician qualifies as the last treatment under the rule, despite the fact that physician never actually treated plaintiff on that occasion. *Id.*

48. 246 N.C. 363, 98 S.E.2d 508 (1957).

tiff's body.[49] In determining whether the action had commenced within the three-year statute of limitations, the court examined both the discovery rule and the "continued course of treatment" doctrine. The court rejected the discovery rule,[50] but did not explicitly reject the "continued course of treatment" doctrine.

Citing an Oregon Supreme Court case, the *Shearin* court noted that "where the alleged negligence related to a continuing course of treatment, . . . the cause of action did not accrue until the treatment terminated."[51] In addition, the court discussed the California rule, which provides that "the statute of limitations does not commence to run during the continuance of the relationship of physician and patient unless and until the patient discovers or by the exercise of due care should have discovered the facts upon which his cause of action is based."[52] The court declined to apply either of these rules, however, finding that even if the plaintiff's cause of action accrued at the termination of his treatment or his relationship with the defendant, the claim still was barred because more than three years had passed since both events had occurred.[53] The court concluded: "When confronted with [a meritorious cause of action that has been barred by the statute of limitations], the urge is strong to write into the statute exceptions that do not appear therein. In such cases, we must bear in mind Lord Campbell's caution: 'Hard cases must not make bad law.' "[54] In addition, the court made clear it would not meddle with the statute of limitations, stating, "[T]his is a matter within the province of the General Assembly."[55] Although the supreme court did not explicitly reject the "continued course of treatment" doctrine, *Shearin* was hardly a hearty endorsement of it.

Despite the supreme court's reluctance to apply the "continued course of treatment" doctrine, an unusual set of circumstances led the North Carolina Court of Appeals to adopt it in *Ballenger v. Crowell*.[56] In *Ballenger* the plaintiff had become addicted to narcotics prescribed by the defendant physician as pain

49. *Id.* at 366, 98 S.E.2d at 510. The plaintiff first saw the defendant on July 20, 1951 when the defendant admitted him to the hospital and removed his appendix. He saw the defendant weekly for a short period and then only after six months had passed, he complained to the defendant about pain in the area of his surgery. At a 12-month checkup, he again commented on the pain in that area. He next saw the defendant on November 15, 1952, at which time the defendant acknowledged that something was wrong. X-rays taken on November 17, 1952 revealed the presence of the sponge. Two days later, the defendant operated on plaintiff to remove the sponge. The infection persisted, and the plaintiff, after seeing the defendant several more times and undergoing another operation, terminated the relationship in the fall of 1953 when the defendant informed him that another operation would be necessary. The plaintiff filed suit on November 14, 1955. *Id.* at 364-66.

50. *Id.* at 368, 98 S.E.2d at 512. The court held that the cause of action accrued from the date of the wrongful act, "without regard to the time when the harmful consequences were discovered." *Id.*

51. *Id.* at 369, 98 S.E.2d at 513 (citing Hotelling v. Walther, 169 Or. 559, 130 P.2d 944 (1942)).

52. *Id.* at 369-70, 98 S.E.2d at 513 (citing Huysman v. Kirsch, 6 Cal. 2d 302, 57 P.2d 908 (1936) (en banc)).

53. *Id.* at 370, 98 S.E.2d at 514.

54. *Id.* at 371, 98 S.E.2d at 514.

55. *Id.* at 370, 98 S.E.2d at 514. The court acknowledged the injustice that the statute sometimes caused, noting that "[t]hey operate inexorably without reference to the merits of plaintiff's cause of action." *Id.* The court stated, however, that "it is not for us to justify the limitation period prescribed for actions such as this." *Id.*

56. 38 N.C. App. 50, 247 S.E.2d 287 (1978).

relievers.[57] After a twelve-year addiction, the plaintiff visited another doctor who informed him that the narcotics he had been taking were not necessary to relieve his pain. At that point the plaintiff entered a treatment center and withdrew from the medication.[58] Two years later, the plaintiff filed suit against the defendant for malpractice.[59]

The court of appeals found section 1-15(c) inapplicable because the case was pending at the time the general assembly enacted the section.[60] In addition, former section 1-15(b) did not apply because it covered only latent injury cases.[61] The court found that plaintiff's injury was not latent, but instead involved "a course of continued negligent treatment."[62] Thus, the court decided that "the determination of th[e] case will be controlled by case law."[63]

The *Ballenger* court discussed *Shearin v. Lloyd*, noting that although the supreme court specifically had rejected the discovery rule,[64] the case did not preclude the application of the "continued course of treatment" doctrine.[65] Then the court of appeals itself adopted the "continued course of treatment" rule, holding that plaintiff's cause of action "accrued at the earlier of (1) the termination of defendant's treatment of the plaintiff or (2) the time at which the plaintiff knew or should have known of his injury."[66]

The next year, in *Johnson v. Podger*,[67] the court of appeals applied a different version of the "continued course of treatment" rule. In *Johnson*, plaintiff underwent an abdominal hysterectomy performed by defendant surgeon.[68] After the surgery the plaintiff began to suffer vaginal discharge, fever, and abdominal pains.[69] During follow-up examinations the defendant assured her that this reaction to the surgery was routine and that she had healed completely.[70] Several months later, another doctor diagnosed the plaintiff's ailment as a staph

57. *Id.* at 51, 247 S.E.2d at 289.

58. *Id.* at 52, 247 S.E.2d at 290.

59. *Id.* at 51, 247 S.E.2d at 289. The defendant diagnosed the plaintiff as having a debilitative neurological disorder called "Marie-Charcot-Tooth disease" in 1960. At that time, the defendant treated the plaintiff with pain-killing addictive drugs. The plaintiff became addicted in 1962 and thereafter began to ingest large quantities of the drugs daily. The plaintiff continued in the defendant's care until 1974, when he entered a treatment center and withdrew from the drugs. The plaintiff instituted suit in 1976. *Id.* at 51-53, 247 S.E.2d at 289-90.

60. *Id.* at 56-57, 247 S.E.2d at 292. Former § 1-15(b) provided that "injury, defect or damage not readily apparent to the claimant at the time of its origin, is deemed to have accrued at the time the injury was discovered by the claimant, or ought reasonably to have been discovered by him." N.C. GEN. STAT. § 1-15(b) (1971), *repealed by* Act of May 28, 1979, ch. 654, § 3, 1979 N.C. Sess. Laws. 687, 687-90.

61. *Ballenger*, 38 N.C. at 51, 247 S.E.2d at 289.

62. *Id.* at 57, 247 S.E.2d at 292.

63. *Id.*

64. *Id.* at 57, 247 S.E.2d at 293.

65. *Id.* at 57, 247 S.E.2d at 294.

66. *Id.* at 60, 247 S.E.2d at 294 (citing Hundley v. St. Francis Hosp., 161 Cal. App. 2d 800, 327 P.2d 131 (1958); Ehlen v. Burrows, 51 Cal. App. 2d 141, 124 P.2d 82 (1942); Waldman v. Rohrbaugh, 241 Md. 137, 215 A.2d 356 (1966); Jones v. Sugar, 18 Md. App. 99, 305 A.2d 219 (1973); McFarland v. Connally, 252 S.W.2d 486 (Tex. Civ. App. 1952)).

67. 43 N.C. App. 20, 257 S.E.2d 686, *disc. rev. denied*, 298 N.C. 806, 261 S.E.2d 920 (1979).

68. *Id.* at 20, 257 S.E.2d at 686.

69. *Id.*

70. *Id.* at 21, 257 S.E.2d at 686.

infection, which required her to undergo another operation and weekly injections for several years.[71] She sued the defendant for malpractice.[72]

Johnson represented the first application of the doctrine to a case in which section 1-15 applied. In deciding whether the statute of limitations barred plaintiff's action, the court of appeals held that

> [w]here a harmful substance, though not necessarily foreign, is left in the body of a patient through negligence, an action based on failure to discover or remove such harmful substance should not run until the *later* in time of (1) termination of treatment or (2) the time the patient himself finally discovers and removes the substance.[73]

The court went on to find that the plaintiff's action accrued when she discovered her injury.[74] The court's holding in *Johnson* represented a significant liberalization of the "continued course of treatment" rule, though the court limited its application to instances involving harmful substances left in a patient's body. In *Ballenger* the court had held that the *earlier* in time of termination of treatment or discovery should determine the time of accrual; in contrast, the *Johnson* court ruled that the statute began to run on the *later* of the two dates. The *Johnson* court not only liberalized the "continued course of treatment" doctrine, but it also created a potentially gaping exception to the statute of limitations contained in section 1-15(c).

In *Mathis v. May*,[75] the court of appeals adopted a restrictive view of the rule's application. In *Mathis* the defendant administered a zeromammogram of the plaintiff's breast after she had discovered a lump.[76] The defendant informed the plaintiff that the procedure had revealed no mass in her breast and did not suggest further treatment.[77] More than three years later the plaintiff visited another doctor because of the persistence of the mass.[78] The doctor performed another zeromammogram, which revealed an area of malignancy.[79] The plaintiff subsequently underwent a mastectomy.[80] One year later she filed suit against

71. *Id.* at 21-22, 257 S.E.2d at 686-88. On March 30, 1970, the defendant performed surgery on the plaintiff, removing her cervix and uterus. He saw her for follow-up examinations on April 13 and 20, 1970. After another doctor performed unrelated surgery, he recommended that the plaintiff return to the defendant for another examination because of continuing vaginal discharge. The other doctor again insisted that the plaintiff return to defendant in May 1970 because of the plaintiff's pain, fever, and discharge. The defendant prescribed some medicine to heal an infection and pronounced her healthy in June 1970. After the plaintiff complained about continuing pain, the defendant refused to see her again. After continuing problems, other physicians operated on plaintiff in December 1970. She received weekly anti-staphylococcal injections, which continued until February 28, 1973. The plaintiff filed suit on September 10, 1973. *Id.*

72. *Id.* at 22, 257 S.E.2d at 687.

73. *Id.* at 26, 257 S.E.2d at 689.

74. *Id.* In doing so, the court stated, "We are aware of the opinion of this Court in *Ballenger v. Crowell*. . . . We have, nevertheless, taken the facts of this case and applied the law in accord with what we believe the Legislature has expressly provided." *Id.*

75. 86 N.C. App. 436, 358 S.E.2d 94, *disc. rev. denied*, 320 N.C. 794, 361 S.E.2d 78 (1987).

76. *Id.* at 436, 358 S.E.2d at 95.

77. *Id.* at 437, 358 S.E.2d at 95.

78. *Id.*

79. *Id.*

80. *Id.*

the defendant for malpractice.[81]

The *Mathis* court refused to apply the "continued course of treatment" doctrine, stating that North Carolina had "never applied the doctrine where there ha[d] been a continued course of *non*-treatment."[82] The court's definition of the rule was again a more liberal formulation than that applied in *Ballenger*. The court stated that when the doctrine applies, "the statute [of limitations] does not ordinarily begin to run until the injurious treatment is terminated." The court did not provide for an alternative discovery rule as the *Ballenger* and *Johnson* courts did. Accordingly, the court's decision in *Mathis* created another version of the "continued course of treatment" exception to section 1-15 by providing for accrual upon termination of treatment, regardless of when the patient discovers the physician's negligence.[83]

Although in prior cases the North Carolina Court of Appeals applied the doctrine solely in cases involving the statute of limitations, the *Stallings* court broadened the rule's application by applying it to the statute of repose contained in section 1-15(c).[84] Yet the court simultaneously returned to a more restrictive formulation of the doctrine, once again using the *Ballenger* rule, which states that a claim accrues upon the earlier of discovery or termination of treatment.[85] The court erred in relying on *Ballenger*, however, because that decision resulted from an unusual set of facts stemming from the absence of a statutorily mandated date of accrual.[86] In *Ballenger* the court applied the common-law accrual rules set forth in *Shearin*,[87] the supreme court decision that rejected the discovery rule, but left open the question of whether courts could apply the "continued course of treatment" doctrine in North Carolina.[88] The *Ballenger* court applied the "continued course of treatment" rule to prevent the plaintiff, whose injury was not readily apparent, from being subject to the harsh common-law rule that

81. *Id.* The plaintiff first saw the defendant on May 7, 1981, for diagnosis and treatment of a lump in her breast. On May 15, 1981, the defendant assured the plaintiff that she was healthy. The plaintiff saw another physician on October 3, 1984, because the lump persisted, and was subsequently informed that it might possibly be malignant. The plaintiff filed suit on September 13, 1985. *Id.*

82. *Id.* at 440, 358 S.E.2d at 97 (emphasis added).

83. *Id.* The court applied the same rule in Callahan v. Rogers, 89 N.C. App. 250, 365 S.E.2d 717 (1988). In *Callahan* the plaintiff underwent hip surgery during which the defendant inserted a partial prosthesis. *Id.* at 250-51, 365 S.E.2d at 717-18. After the surgery the plaintiff continued to see the defendant for several months, and during those visits complained of continuing pain in the hip. *Id.* at 251, 365 S.E.2d at 718. The plaintiff later visited another orthopedic surgeon who operated on her, removed the prosthesis inserted by the defendant, and replaced it with a completely different kind. *Id.* Approximately three years later, the plaintiff filed suit against the defendant for malpractice. *Id.*

The *Callahan* court applied the "continued course of treatment" doctrine. The court stated that "[w]here the injurious consequences arise from a continuing course of negligent treatment . . . the statute does not ordinarily begin to run until the injurious treatment is terminated." *Id.* at 253-54, 365 S.E.2d at 719. As in *Mathis*, the court did not provide an alternative test.

84. *Stallings*, 99 N.C. App. at 715, 394 S.E.2d at 216. For a discussion of the difference between statutes of limitations and statutes of repose, see *supra* note 5.

85. Ballenger v. Crowell, 38 N.C. App. 50, 57, 247 S.E.2d 287, 293-94 (1978).

86. *Id.* at 57, 247 S.E.2d at 28 .

87. *Id.*; *see* Shearin v. Lloyd, 246 N.C. 363, 370, 98 S.E.2d 508, 512 (1957), discussed *supra* notes 48-55 and accompanying text.

88. *Ballenger*, 38 N.C. App. at 57, 247 S.E.2d at 292-93.

"the cause of action accrues from the date of the wrongful act or omission."[89] *Ballenger*'s precedential value should extend only to similar cases in which the common-law rule applies; it should not control those that section 1-15(c) governs. To do otherwise disrupts the general assembly's goal of "balanc[ing] the needs of the malpractice victims and those of health care providers and insurers."[90]

In applying the "continued course of treatment" doctrine to toll the statutes of limitations and repose in section 1-15(c), the *Stallings* court created the potential for untoward results. The statute of repose operates only in cases involving nonapparent injuries. This is because when the injury is apparent, the statute of limitations bars a cause of action three years after "the last act of the defendant giving rise to the cause of action."[91] If the statute did not include a repose period, section 1-15(c) would extend indefinitely the period of time in which patients with latent injuries could file suit; it is conceivable that some patients may not discover their injuries until many years after they occur. As a means of decreasing exorbitant malpractice insurance rates, the legislature enacted the statute of repose to prevent such extended time periods in which a physician may be vulnerable to suit.[92] The statute of repose accrues at the defendant's last negligent act, regardless of whether the injured party has discovered his or her injury, "granting the defendant an immunity to actions for malpractice after the applicable period of time has lapsed."[93]

The application of the "continued course of treatment" doctrine to determine the date of accrual in an action involving nonapparent injuries has the effect of rendering the statute of repose useless. For example, if an injured patient continues to receive treatment from the physician who caused the injury, the doctrine as applied by the North Carolina Court of Appeals provides that the cause of action accrues when the treatment ends or when the patient knew of his injury.[94] Thus, if a patient who has not discovered an injury undergoes continuous treatment for his symptoms over fifteen years, at which point the treatment ends, the statute of limitations will begin running fifteen years after the injury. The patient then will have three years in which to file suit. The application of the doctrine to the statute of repose means that, like the statute of limitations, the statute of repose will begin to run fifteen years after the injury, and will bar the action in four years. In this event, the statute of repose is rendered useless, because the statute of limitations already will have barred the action three years after the action accrued. This result is contrary to the reasoning underlying the enactment of a statute of repose: to extinguish the right of action after a fixed number of years, regardless of whether a patient has discovered his or her injury or terminated treatment.[95]

89. *Shearin*, 246 N.C. at 369, 98 S.E.2d at 513.
90. Black v. Littlejohn, 312 N.C. 626, 637, 325 S.E.2d 469, 477 (1985).
91. N.C. GEN. STAT. § 1-15(c) (1983 & Supp. 1990).
92. *Black*, 312 N.C. at 631, 325 S.E.2d at 473-74.
93. *Id.*
94. *Stallings*, 99 N.C. App. at 714-15, 394 S.E.2d at 215-16.
95. *See Black*, 312 N.C. at 633, 325 S.E.2d at 475.

The potential for problematic results created by *Stallings* is compounded by the confusing variety of formulations of the "continued course of treatment" rule applied by the North Carolina Court of Appeals. Each of these formulations has a different effect upon the dates the statutes of limitations and repose begin to run. None of the possible applications of the rule have outcomes consistent with section 1-15(c) when the statute is applied as written. The court of appeals' initial formulation of the "continued course of treatment" doctrine in *Ballenger*, which provides that the cause of action accrues upon the earlier of discovery or termination of treatment,[96] narrows the time period in which a patient may bring a cause of action in cases involving nonapparent injuries. The statute of limitations set forth in section 1-15(c) provides that in cases involving latent injuries discovered two or more years after the last act of negligence, a patient may file suit within one year of discovery.[97] The *Ballenger* rule cuts short the period of limitations in cases involving nonapparent injuries in which the treatment ends before a patient discovers her injuries by mandating that the action must accrue when treatment terminates, but does not affect the accrual date in cases in which the injury is apparent. Presumably, a patient would discover such injuries at essentially the same time the negligent act occurred. Thus, the statute would have no practical impact on the date the cause of action would accrue in this type of case.

The application of the *Ballenger* rule to determine when the claim accrues lengthens the outer time limit of the statute of repose in which patients with nonapparent injuries may bring a cause of action. Rather than accruing at the "last act" constituting a physician's negligence, the cause of action will accrue at the earlier of termination of the physician's treatment or discovery by the patient of his injury. Both of these events will occur after the doctor's last negligent act; treatment for injuries arising as a result of a physician's negligence cannot be terminated before the negligent act occurs, and, similarly, discovery of an injury necessarily takes place after the negligent act occurs.

If the statute is applied as written, the statute of repose in cases involving latent injuries allows a patient four years from a physician's last negligent act to bring an action.[98] If a patient fails to discover the injury and file suit within the four-year period, the cause of action will cease to exist. Yet the application of the continued course of treatment doctrine as formulated in *Ballenger*[99] may extend the amount of time that a patient may file suit far beyond four years. For example, if a patient who is negligently injured by a surgeon during an operation continues to receive treatment for the injury for fifteen years and does not discover the injury for seventeen years, the statute of repose would begin to run fifteen years after the last negligent act because termination of treatment occurred prior to discovery of the injury. Thus, rather than having only four years after the last act leading to the cause of action to file suit, the patient may bring

96. Ballenger v. Crowell, 38 N.C. App. 50, 60, 247 S.E.2d 287, 294 (1978).

97. N.C. GEN. STAT. § 1-15(c) (1983 & Supp. 1990).

98. *Id.*

99. *See supra* notes 64-66 and accompanying text.

an action against the surgeon many years after the negligent act takes place. This result defeats the general assembly's goal of reducing the cost of malpractice insurance because it creates the potential for increased numbers of malpractice suits.[100] In addition, it prevents the statute of repose from performing its function as "an unyielding and absolute barrier" after which a patient's right of action is extinguished.[101]

Although the *Stallings* court applied the *Ballenger* rule, it is possible that a court could rely on different precedent in the future and apply another version of the "continued course of treatment" doctrine. For example, the court could develop the rule applied in *Johnson v. Podger*, which provides that a cause of action accrues at the *later* of discovery or termination of treatment.[102] Thus, it allows patients whose injuries are apparent to delay filing suit until treatment ends despite their knowledge of the injuries. In addition, it disregards the constraints of the discovery rule contained in the statute of limitations in section 1-15(c) in cases in which treatment terminates after discovery of a nonapparent injury. It is unlikely that a patient who has discovered an injury resulting from a physician's negligence would remain in his care. Treatment probably would terminate at the same time as discovery. In theory, however, it is possible that a patient could remain in the physician's care long after discovery, defeating the statute of limitations imposed by section 1-15(c).

The date the statute of repose begins to run in cases governed by section 1-15(c) is altered dramatically by the application of the accrual rules set forth in *Johnson*. Returning to the example used to illustrate the *Ballenger* rule, if a patient with a latent injury continues being treated by a physician for fifteen years after the negligent act and discovers the injury seventeen years after the act, the statute of repose will begin to run when the patient discovers the injury, seventeen years after the negligent act. Although the *Ballenger* rule would affect only cases involving latent injuries, the application of *Johnson* to the statute of repose also would affect instances in which injuries are readily apparent because termination of treatment may occur after a patient becomes aware of the injury. Since *Johnson* provides that an action accrues upon the *later* of discovery or termination of treatment, a patient who continues receiving treatment from the negligent doctor may delay the running of the statute of repose indefinitely. As with the *Ballenger* rule, this result defeats the legislative goals that motivated the general assembly to enact the statute of repose.

The formulation of the "continued course of treatment" doctrine found in *Mathis* would have a similar effect. The *Mathis* court held that the application of the doctrine to the statute of limitations would cause it to begin to run when a patient's treatment by a negligent physician ended. This approach, like those articulated in *Ballenger* and *Johnson*, also contravenes both the statute of limitations and the statute of repose found in section 1-15(c), which specifically pro-

100. Black v. Littlejohn, 312 N.C. 626, 633, 325 S.E.2d 469, 475 (1985).

101. *Id.*

102. 43 N.C. App. 20, 26, 257 S.E.2d 684, 689, *disc. rev. denied*, 298 N.C. 806, 261 S.E.2d 920 (1979). *See supra* notes 67-74 and accompanying text.

vides that in cases involving readily apparent injuries, a patient's action accrues at the termination of treatment rather than at the physician's "last act."[103] When a patient continues to receive treatment from a doctor for an extended period of time, the three-year statute of limitations and the four-year statute of repose would be ineffective. The same result would occur when an injury is not readily apparent. Rather than being tolled until one year after discovery, a patient's action would not accrue until termination of treatment by the physician. With respect to the application of the doctrine to the professional malpractice statute of repose, any one of these formulations may be applied since the court of appeals has given no indication of a preference for any version of the rule.

In addition to defeating the legislative goals underlying section 1-15(c), the *Stalling* court's analysis was flawed because it authorized the tolling of a substantive right.[104] The North Carolina Court of Appeals previously has held that a substantive limitation may not be tolled.[105] Failure to file suit within a substantive limitation on the right of action "generally results not only in a loss of the right to enforce the action, but in a loss of the substantive right of action itself."[106] In *Boudreau v. Baughman*[107] the North Carolina Supreme Court described the nature of a statute of repose, stating that "[i]f the action is not brought within the specified period, the plaintiff 'literally has no cause of action.' "[108] In addition, the court has characterized a statute of repose as a condition precedent to the cause of action.[109] The statute of limitations is a procedural bar that affects only the remedy,[110] and thus may be tolled. A statute of repose, however, is a substantive rule affecting plaintiff's right to recover,[111] and consequently cannot be tolled.[112] It is impossible to toll or delay a right that no longer exists. After the expiration of the statute of repose, a plain-

103. N.C. GEN. STAT. § 1-15(c) (1983 & Supp. 1990).

104. Nevertheless, a few courts have applied the "continued course of treatment" doctrine to statutes of repose, using the same flawed analysis found in *Stallings*. *See* Comstock v. Collier, 737 P.2d 845, 848 (Colo. 1987) ("[I]n the case of a continuous course of treatment for a particular condition, we conclude that the three-year statute of repose does not begin running until the final act constituting the treatment."); Smith v. Dewey, 214 Neb. 605, 605, 335 N.W.2d 530, 530 (1983) ("[T]he ten year statute of repose . . . begins to run when the physician's treatment, which the patient claims to have constituted malpractice, ceases . . . .").

105. *See* Joyner v. Lucas, 42 N.C. App. 541, 546, 257 S.E.2d 105, 109 (holding that the time limitation in N.C. GEN. STAT. § 49-14 (1990 & Supp. 1990) for bringing an action to establish paternity is not a substantive limitation and thus may be tolled), *disc. rev. denied*, 298 N.C. 297, 259 S.E.2d 300 (1979).

106. *Id.* at 545, 257 S.E.2d at 108. *See* 51 AM. JUR. 2D *Limitations of Actions* § 51 (1970); *see also* Atlantic Coast Line R.R. Co. v. Burnette, 239 U.S. 199, 200 (1915) ("[W]hen a law that is relied on as a source of an obligation in tort sets a limit to the existence of what it creates, other jurisdictions naturally have been disinclined to press the obligation farther.").

107. 322 N.C. 331, 368 S.E.2d 849 (1988).

108. *Id.* at 340-41, 368 S.E.2d at 857 (quoting Rosenberg v. Town of North Bergen, 61 N.J. 190, 199, 293 A.2d 662, 667 (1972)).

109. Bolick v. American Barmag Corp., 306 N.C. 364, 369, 293 S.E.2d 415, 419 (1982).

110. *Boudreau*, 322 N.C. at 340, 368 S.E.2d at 857.

111. *Id.*

112. *Stallings*, 99 N.C. App. at 716, 394 S.E.2d at 216; *see* RESTATEMENT (SECOND) OF TORTS § 899 comment g (1979) ("[Statutes of repose] set a designated event for the statutory period to start running and then provide that at the expiration of the period any cause of action is barred regardless of the usual reasons for 'tolling' the statute.").

tiff's right of action disappears. Thus, the *Stallings* court, in applying the "continued course of treatment" doctrine to the statute of repose, ignored its substantive nature.

The application of the "continued course of treatment" doctrine contravenes the well-established rule that when the legislature has not provided for exceptions in the positive terms of a statute, courts will presume that it intended to make none.[113] In construing a statute, courts "have no authority to create, and will not create, exceptions to the provisions of a statute not made by the act itself."[114] The North Carolina Supreme Court has acknowledged that "the General Assembly is the policy-making agency of our government, and when it elects to legislate in respect to the subject matter of any common law rule, the statute supplants the common law rule and becomes the public policy of the State in respect to that particular matter."[115] The express language of section 1-15(c) does not include the "continued course of treatment" doctrine. Thus, the North Carolina Court of Appeals, in applying the rule to cases in which section 1-15(c) applies, went beyond its authority and encroached upon that of the legislature.

The application of the "continued course of treatment" doctrine to the professional malpractice statute of repose defeats the policies underlying section 1-15(c) by clearing the way for increased numbers of malpractice suits and consequently higher costs for malpractice insurance. In addition, the *Stallings* court, in applying the doctrine to toll the running of the statute of repose, ignored the statute's substantive nature. North Carolina courts should reject the "continued course of treatment" doctrine in all medical malpractice cases except those to which section 1-15(c) does not apply. Section 1-15(c) clearly sets forth the time when a professional malpractice cause of action accrues and triggers the running of the statute of repose. The appellate courts should restrict themselves to applying the legislature's statute and avoid creating their own.

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113. Upchurch v. Hudson Funeral Home, 263 N.C. 560, 565, 140 S.E.2d 17, 21 (1965).

114. *Id.*; *see also* Matter of Wharton, 305 N.C. 565, 574, 290 S.E.2d 688, 693 (1982) ("While matters implied by language of statutes must be given effect to the same extent as matters specifically expressed . . . the court may not, under the guise of judicial interpretation, interpolate provisions which are lacking."); State v. Fountain, 282 N.C. 58, 64, 191 S.E.2d 674, 679 (1972) ("[T]his Court is without power to interpolate or superimpose provisions not contained in a clear and unambiguous statute . . . ."); State v. Davis, 267 N.C. 126, 128, 147 S.E.2d 570, 572 (1966) ("[T]he Court has no power to amend an Act of the General Assembly."); Barnhardt v. Yellow Cab Co., 266 N.C. 419, 427, 146 S.E.2d 479, 485 (1966) ("[T]his Court may not legislate under the guise of construing a statute liberally."); State v. Cobb, 262 N.C. 262, 266, 136 S.E.2d 674, 677 (1964) ("If the law is to be changed, it is the firm conviction of this Court that our system requires it to be changed by the legislative branch of the government and not by the judiciary."); Fisher v. Taylor Motor Co., 249 N.C. 617, 621, 107 S.E.2d 94, 98 (1959) ("This Court interprets and does not make the law.").

115. Bolick v. American Barmag Corp., 306 N.C. 364, 370, 293 S.E.2d 415, 420 (1982) (citing McMichael v. Proctor, 243 N.C. 479, 483, 91 S.E.2d 231, 234 (1956)).