

CONTRIBUTION and INDEMNITY

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This article addresses the liability of multiple defendants in tort and other liability contexts. It also addresses the rights to contribution and indemnity among the co-defendants.

I. Contribution.

North Carolina has over the years recognized a common law right to contribution, or equitable contribution, pursuant to which one person can obtain reimbursement for a portion of the judgment or liability against him. For example, where one insurer bears an expense for which another insurer also had a duty to incur the expense, the paying insurer is entitled to

contribution, recovering one-half of its payments. Ames v. Continental Casualty Co., 79 N.C. App. 530, 540 (1986) (where lower court ordered one insurer to pay another insurer money "as contribution" toward defense costs for action which they both had a duty to defend, order is affirmed; "equity dictates that the defense costs be shared equally among the two insurers"). And where one person pays a tax or debt which others should have paid also, he or she is entitled to contribution. Nebel v. Nebel, 223 N.C. 676 (1943) (recipient of gift who paid gift taxes was entitled to contribution from non-paying gift recipients, as she had discharged a common liability); Holcomb v. Holcomb, 70 N.C. App. 471, 473 (1984) (person paying judgment has common law contribution action against other debtor; "It was a settled principle of the common law that payment of the judgment debt by one or more of those jointly or severally liable on the judgment extinguished the judgment as to the other debtors."; "We are unconvinced that anything on the face of G.S. 1B-7, or in its history, indicates that the General Assembly intended to eliminate the plaintiff's right to seek equitable contribution.").

The extent to which common law contribution is still available is somewhat suspect in view of our statutory provisions regarding contribution. One case suggests that following the passage of the Uniform Right to Contribution Among Joint Tortfeasors Act (UJTA), there is no longer any common law

contribution. Holland v. Edgerton, 85 N.C. App. 567, 571, 355 S.E.2d 514 (1987) ("The right to contribution is statutory; therefore, it must be enforced according to the terms of the statute."). This statement, however, is probably limited to contribution between joint tort-feasors.

North Carolina has now enacted the Uniform Contribution Among Joint Tortfeasors Act. This act contains several specific statutory provisions regarding the right to contribution, including the recognition of the right. "[W]here two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them." G.S. § 1B-1(a). This is generally considered to be the prevailing law in North Carolina regarding the extent to which a party has a right to contribution, and the procedures available to him or her to enforce that right.

1. Requirement that parties be "Joint-Tortfeasor"

In order to obtain contribution, the party seeking contribution must show that he and the party from whom he is seeking contribution are joint tortfeasors. In general, this test has been defined as:

To be joint tort-feasors the parties must either act together in committing the wrong, or their acts, if independent of each other, must unite in causing a single injury. There must be a common intent to do that which results in injury, or their separate acts of negligence must concur in producing a single and indivisible injury.

. . .

Where two or more persons acting independently, without concert, plan or other agreement, inflict damage or cause an injury to another person, the persons inflicting the damage are not jointly liable therefor. In such case a joint action against them cannot be maintained. Especially is this true where the damage sued for was not the ordinary and natural result of the preceding negligence

Bost v. Metcalfe, 219 N.C. 607, 610, 611 (1941). See also Cox v. Robert C. Rhein Interest, Inc., 100 N.C. App. 584, 397 S.E.2d 358 (1990) (where plaintiffs treated defendants as joint tortfeasors and sought relief from flood damage caused by mud and silt runoff from all defendants' properties, and evidence at trial revealed only a single indivisible injury, the flooding of plaintiffs' property, and until appeal plaintiffs did not attempt to allocate their injury among defendants, defendants were joint tortfeasors); D'Alessandro v. Westall, 972 F. Supp. 965 (W.D.N.C. 1997) (city, sued for pursuit by police officers, had contribution claim against vehicle owner who left keys in car, which car was being pursued).

In many situations, it will be fairly clear whether the parties are joint tortfeasors. Thus, for example, when two motorists are negligent and collide, causing injury to a passenger or pedestrian, they are joint tortfeasors.

Also, both the person seeking contribution and the person from whom contribution is sought must have committed some "tort" toward the Plaintiff. For example, where a car buyer sues the vendor alleging false, misleading, and deceptive representations

regarding the vehicle, with an intent to deceive, the vendor's claim against the restoration company (who sold the car to the vendor) for indemnity and contribution fails, because there is not tort by the restorer toward the buyer. Bowman v. Alan Vester Ford Lincoln Mercury, 151 N.C. App. 603, 604 (2002). See also Holland v. Edgerton, 85 N.C. App. 567, 355 S.E.2d 514 (1987) (because plaintiffs do not have negligence claim against third-party defendant, funeral home and casket maker, defendant (memorial company) does not have contribution claim against third-party defendant; suit against memorial company arising from leakage of deceased's body fluids through the base of the mausoleum).

As a general matter, a general contractor usually does not have a contribution claim against a sub-contractor, because they are not tortfeasors toward the owner. As stated by one court:

Therefore, by clear language of the statute, plaintiff [general contractor] is not entitled to contribution for a claim [against him] sounding only in contract. Without a tort, there can be no tort-feasor; and without a tort-feasor, there can be no right to contribution under the UCATA. Thus, as a matter of law, plaintiff states no claim that could entitle it to any future right to contribution from defendant subcontractors and the trial court's dismissal was proper.

Kaleel Builders, Inc. v. Ashby, 161 N.C. App. 34, 43 (2003).

There are other situations where parties are not joint tortfeasors. If a motorist negligently injures a person, and the injured person seeks medical attention from a doctor, and the doctor negligently treats the patient, thereby worsening the

injuries, our courts have held that the negligent motorist and the doctor are not joint tortfeasors. Therefore, if a judgment is entered against the motorist, the motorist does not have a contribution claim against the doctor who negligently treated the claimant. Bost v. Metcalfe, 219 N.C. 607 (1941) (negligent motorist who causes accident and physician who negligently treats patient are not joint-tortfeasors and there is no right to contribution).

The test for whether parties are joint tort-feasors should be similar to the test used to determine whether a first tortfeasor's negligence is insulated by the negligence of a second tortfeasor, or whether they are one continuous tort. Many opinions are liberal in finding that a subsequent tort is foreseeable to the first tortfeasor. For example, where an automobile dealer fails to tighten the lugnuts on a wheel, and the tire comes off and the driver pulls off the roadway and exits the vehicle, and is struck by a second motorist, the dealer may be liable for those injuries. Hairston, 310 N.C. at 237, 311 S.E.2d at 566 (a short distance away from the dealership, left rear wheel came off and plaintiff brought the car to a stop on a bridge in the far right lane of travel; van stopped behind plaintiff's vehicle to assist and a car collided with the rear of the van propelling it into plaintiff, who was opening his trunk; "the jury could reasonably infer . . . that while the subsequent negligence of defendant Alexander Tank joined with Haygood's

original negligence in proximately causing the death of Hairston, it did not supersede the negligent acts of Haygood and thereby relieve Haygood of liability").

Another situation in which parties are probably not joint tortfeasors is if there is a gap in time between two accidents. Thus, for example, if the first tortfeasor causes an automobile accident, resulting in the presence of disabled vehicles on the roadway, and a second tortfeasor comes along 30 minutes later and strikes one of the disabled vehicles (or a person rendering assistance at the scene), then the first and second motorist are probably not joint tortfeasors. Although our courts have not expressly dealt with this issue in the context of contribution, they have held that in this situation, the second accident was not the proximate result of the first motorist's negligence. Williams v. Smith, 68 N.C. App. 71, 314 S.E.2d 279, cert. denied, 311 N.C. 769, 321 S.E.2d 158 (1984) (defendant Ling's negligence proximately caused an automobile accident, and twenty to forty-five minutes later, defendant Smith struck plaintiff police officer as he was directing traffic around the accident scene; summary judgment for Ling affirmed); Jackson v. Howell's Motor Freight, 126 N.C. App. 476 (1997) (where driver collided with utility pole, and truck driving through the accident scene caught a wire from the pole, and dragged pole into fireman's leg, driver was entitled to summary judgment as to third party claim by truck company because any subsequent act of negligence by the truck

driver was an intervening act which was not itself a consequence of the driver's original negligence, nor under his control, nor foreseeable by him in the exercise of reasonable prevision). By analogy, the two motorists should not be joint tortfeasors for the purpose of contribution.

Some cases which apply the contribution statutes are not clearly based on traditional joint tortfeasors. For example, where the insurer is held liable because of the negligence of the agent, there is authority that the insurer and the agent are joint-tortfeasors, entitled to contribution from each other. Jefferson Pilot Fin. Ins. Co. v. Marsh USA, Inc., 582 S.E.2d 701, 705 (2003) (where agent settled claim by insured for negligence and breach of contract, arising from insurer's denial of coverage for embezzlement by insured's employee, agent was entitled to contribution from insurer, as they are joint-tortfeasors, even though jury found insurer was not negligent; agent is entitled to 50-50 contribution from insurer for amount of settlement; insurer did not preserve for appellate review issue of indemnity).

The contribution claim may be barred if the plaintiff himself could not sue this person. For example, where a child is barred from suing his parent, a defendant cannot assert a contribution claim against that parent. Lee v. Mowett Sales Co., , 316 N.C. 489; 342 S.E.2d 882 (1986) (lawn mower's third-party contribution action against minor's father in minor's negligence action was properly dismissed because parent-child

immunity doctrine precluded liability for father in direct action by minor).

If, however, the two parties are "joint tortfeasors," then there is generally a right of contribution between them. There are two ways in which the right can arise. The first is if the first tortfeasor settles the claim against him. The second is if the first tortfeasor has a judgment entered against him. Each of these raise slightly different considerations.

2. Contribution by Settling Party

In the context of a settlement, the settling tortfeasor has a right of contribution only if he extinguishes the liability of the other tortfeasor. "A tort-feasor who enters into a settlement with a claimant is not entitled to recover contribution from another tort-feasor whose liability for the injury or wrongful death has not been extinguished nor in respect to any amount paid in a settlement which is in excess of what was reasonable." G.S. § 1B-1(d). See also N.C. Gen. Stat. § 1B-1(d) ("A tort-feasor who enters into a settlement with a claimant is not entitled to recover contribution from another tort-feasor whose liability for the injury or wrongful death has not been extinguished nor in respect to any amount paid in a settlement which is in excess of what was reasonable."). Practically speaking, this generally means that the first settling tortfeasor will obtain a release from the claimant, which includes a release of the second tortfeasor. This language is typical in many

releases. Such language would state that "claimant hereby releases tortfeasor and any and all other persons for personal injuries arising from the automobile accident occurring on. . ."

In such a situation (where the parties are joint tortfeasors and where the settling party obtains a release for the non-settling party), then the settling party has a right of contribution, which may be enforced by a civil action.

In order for the settling party to have a right to contribution, the settlement also must be reasonable. "A settlement is presumed to be fair and reasonable, and the burden of showing a lack of good faith is upon the party asserting it." Kirkpatrick & Associates, Inc. v. Wickes Corp., 53 N.C. App. 306, 311 (1981) (settlement by one driver for \$3,750 was presumptively reasonable, and second driver was only entitled to reduction from judgment of \$10,000, and he had no contribution claim). If it is reasonable, then it is entitled to a *pro rata* contribution. Jefferson Pilot Fin. Ins. Co. v. Marsh USA, Inc., 159 N.C. App. 43, 52 (2003) (jury finding settlement to be reasonable was required to enter judgment for one-half to settling party; award of less was reversed).

3. Contribution by Party with Judgment against it

The other situation in which contribution can arise is when there is a judgment entered against a tortfeasor. In this situation, the defendant is not required of course to prove that the verdict is fair and reasonable. The right does not arise

until the tortfeasor pays more than his share. Sterling v. Gil Soucy Trucking, Ltd., 146 N.C. App. 173, 182 (2001) (“[I]t is clear that a contribution action is separate from the initial liability action, and the right to seek contribution arises only when one joint tortfeasor has paid more than its share of the judgment. N.C.G.S. § 1B-1(b). Because defendants have not paid their share, have suffered no harm, the issue of contribution by third-party defendants (Jennifer and Clayton Lowman and West) is not ripe for resolution by this Court.”)

4. Procedures for and Timing of Asserting Claim

The contribution claim may be asserted in the original action. Smith v. Garrett, 32 N.C. App. 108, 112 (1977) (lower court erred in dismissing third party claim for contribution arising from MVA, where there was sufficient evidence of negligence; “Under G.S. 1A-1, Rule 14, the proper method to join an alleged tort-feasor is by third-party complaint, as was done here.”). It may also be brought by separate action. State Farm Mut. Auto. Ins. Co. v. Holland, 324 N.C. 466, 471, 380 S.E.2d 100 (1989) (“where one of the joint tortfeasors is not made a party to the original action, either by the plaintiff or the original defendant, the original defendant may nevertheless, by separate action, seek contribution from the other tortfeasor.”; G.S. § 1B-3(a) (“Whether or not judgment has been entered in an action against two or more tort-feasors for the same injury or wrongful death, contribution may be enforced by separate action.”).

The procedural rules in North Carolina for enforcement of a contribution claim are not entirely clear. It is not clear, for example, whether a defendant may defend a claim through a jury verdict, which is then entered against the defendant and another tortfeasor, and may then at the conclusion of that trial, ask the judge for an order allowing him contribution, where that defendant did not previously plead a claim for contribution. The way our contribution statutes are worded, they would seem to allow for a contribution claim to be made at the conclusion of a civil action, even without any previous pleading of a claim for contribution, as long as the jury verdict allows for contribution. G.S. § 1B-3(b) ("Where a judgment has been entered in an action against two or more tort-feasors for the same injury or wrongful death, contribution may be enforced in that action by judgment in favor of one against other judgment defendants by motion upon notice to all parties to the action."). The findings in a trial against both tortfeasors will generally be binding between them. G.S. § 1B-3(f) ("The judgment of the court in determining the liability of the several defendants to the claimant for the same injury or wrongful death shall be binding as among such defendants in determining their right to contribution.").

Our courts have also held that a settlement entered following a jury's verdict does not operate to extinguish the contribution claim. Medical Mut. Ins. Co. v. Mauldin, 137 N.C.

App. 690, 529 S.E.2d 697 (2000). Therefore, if a tortfeasor and its insurer want to avoid a contribution claim, they must consummate the settlement prior to the verdict.

Where there is a settlement, the contribution action must be brought within one year of the settlement. G.S. § 1B-3(d) ("If there is no judgment for the injury or wrongful death against the tort-feasor seeking contribution, his right of contribution is barred unless he has either . . . (1) Discharged by payment the common liability within the statute of limitations period applicable to claimant's right of action against him and has commenced his action for contribution within one year after payment, . . . (3) [joined the party as a third party defendant].").

Where a tortfeasor actually pays for the judgment, he has a right to contribution against another tortfeasor. He must commence this action within one year of the judgment. G.S. § 1B-2(c) ("If there is a judgment for the injury or wrongful death against the tort-feasor seeking contribution, any separate action by him to enforce contribution must be commenced within one year after the judgment has become final by lapse of time for appeal or after final judgment is entered in the trial court in conformity with the decisions of the appellate court."). Where there is a judgment against a joint tortfeasor, he can exercise his right to contribution in the first action, or he may institute an independent action to enforce a contribution right.

Further, the contribution claim is also subject to any applicable statutes of repose, such as the six-year statute of repose pertaining to improvements to real property. Monson v. Paramount Homes, Inc., 133 N.C. App. 235 (1999) (in suit against general contractor for defective construction of a house, defendant's third-party action against manufacturer and vendor of materials, alleging breach of contract, breach of express and implied warranties, and negligence, was barred by statute of repose).

5. Amount of Contribution

The right to contribution will essentially allow a tortfeasor who has incurred a judgment or a settlement to pursue other tortfeasors for a *pro rata* share of his or her liability. Thus, where there are two tortfeasors, the settling tortfeasor, or the tortfeasor against whom a judgment is entered, would be entitled to recover one-half, or 50% of his liability from another tortfeasor. The statute states, "In determining the pro rata shares of tort-feasors in the entire liability (1) Their relative degree of fault shall not be considered; (2) If equity requires, the collective liability of some as a group shall constitute a single share; and (3) Principles of equity applicable to contribution generally shall apply." G.S. § 1B-2.

Where a party is entitled to contribution, it is a *pro rata* sharing of liability. The jury does not apportion fault. If there are two tortfeasors, then they will each ultimately bear

one-half of the liability (assuming that they have sufficient assets to pay the judgment). If there are four tortfeasors, they would each ultimately bear one-fourth of the liability. A jury would not assign a percentage, such as 15%, to a given tortfeasor.

6. Protection to Settling Tortfeasor

It should also be noted that a release given to a tortfeasor operates so as to protect that tortfeasor from a contribution claim from another party. G.S. § 1B-4 ("When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death: . . . (2) It discharges the tort-feasor to whom it is given from all liability for contribution to any other tort-feasor.").

Therefore, the right to contribution discussed above is subject to this proviso. If the claimant has settled with one tortfeasor, and then obtains a judgment against a second tortfeasor, the second tortfeasor receives a credit or reduction or offset for the amount of the payment from the first tortfeasor to the claimant, Wheeler v. Denton, 9 N.C. App. 167, 175 S.E.2d 769 (1970) (defendant with \$10,000 judgment against him entitled to credit of \$3,750 paid by another tort-feasor), but the second tortfeasor does not have any right of contribution against the other tortfeasor.

The only requirement for this to take effect is that the settlement be in good faith. A settlement is presumed to be good faith. Nixon v. Liberty Mut. Ins. Co., 255 N.C. 106, 113 (1961) ("We assume that the settlement was reasonable."). The burden of showing that the settlement was entered in bad faith is upon the party asserting bad faith. Wheeler v. Denton, 9 N.C. App. 167, 175 S.E.2d 769 (1970) (burden of showing a lack of good faith is upon the party asserting it).

In one case involving the "good faith" issue, the plaintiff customer sued a pharmacy and a doctor, after the pharmacists were allegedly negligent in directing plaintiff to take four times the amount of daily medication prescribed for kidney problems. Following the plaintiff's evidence, and after the claims survived a DV motion, the doctor settled with plaintiff for \$10,000. The doctor had previously offered \$25,000. The court was made aware of the settlement and dismissed the cross-claims. The trial court concluded the doctor settled in good faith. A jury returned a verdict against pharmacist for \$2.5 million. The judge reduced this by the \$10,000 settlement by the doctor. The court held good faith was determined by examining the totality of the circumstances, and deciding whether the trial court acted arbitrarily and whether its decision was manifestly unreasonable. The appellate court noted the "lack of evidence no more substantive than mere intimation of wrongdoing on the part of plaintiff and the settling defendants," and that plaintiff's

counsel added that he believed the case against the doctor was a weak one, in light of the testimony that has developed, and he sought to avoid the taxing of costs to the plaintiff. The court held the trial court committed no error. Brooks v. Wal-Mart Stores, Inc., 139 N.C. App. 637 (2000). The court said that in determining "good faith," it must look to the "totality of the circumstances," and may consider any number of factors, such as a rough approximation of plaintiffs' total recovery and the settlor's proportionate liability, the amount paid in settlement, the allocation of settlement proceeds among plaintiffs, recognition that a settlor should pay less in settlement than he would if he were found liable after a trial, the financial conditions and insurance policy limits of settling defendants, as well as the existence of collusion, fraud, or tortious conduct aimed to injure the interests of nonsettling defendants.

The protection afforded by a release, however, does not protect a tortfeasor from an indemnity claim by another joint tortfeasor, where such a claim exists. G.S. § 1B-1(f) ("(f) This Article does not impair any right of indemnity under existing law.").

II. Indemnity.

North Carolina also recognizes a right to indemnity. This claim, when applicable, provides that a party who is held liable is entitled to complete reimbursement from another party. The

situations in which indemnity is not clear. Some cases can be interpreted as limiting the classes of cases allowing for indemnity, Kaleel Builders, Inc. v. Ashby, 161 N.C. App. 34, 38 (2003) ("In North Carolina, a party's rights to indemnity can rest on three bases: (1) an express contract; (2) a contract implied-in-fact; or (3) equitable concepts arising from the tort theory of indemnity, often referred to as a contract implied-in-law."), but the cases are not that easily catalogued.

1. Contractual Indemnity

North Carolina also recognizes a contractual indemnity claim. Where, therefore, one party contractually agrees to indemnify another party, our courts have traditionally upheld those provisions under common law principles. Kirkpatrick & Associates, Inc. v. Wickes Corp., 53 N.C. App. 306, 308, 280 S.E.2d 632, 634 (1981) (provision requiring defendant "to save and indemnify and keep harmless (plaintiff) against all liability, claims, judgments or demands for damages arising from accidents to persons or property, whether occasioned by (defendant), his agents or employees, provided said accidents occur in connection with (defendant's) work or are occasioned by (defendant), his agents or employees, in connection with other work" was valid and enforceable, regardless of whether loss was occasioned by defendant or by third person).

Our Legislature has, however, enacted a statute which invalidates many of these provisions. In particular, G.S. § 22B-

1 generally states that indemnity provisions in the construction context are invalid as against public policy. The complete statute reads as follows:

Any promise or agreement in, or in connection with, a contract or agreement relative to the design, planning, construction, alteration, repair or maintenance of a building, structure, highway, road, appurtenance or appliance, including moving, demolition and excavating connected therewith, purporting to indemnify or hold harmless the promisee, the promisee's independent contractors, agents, employees, or indemnitees against liability for damages arising out of bodily injury to persons or damage to property proximately caused by or resulting from the negligence, in whole or in part, of the promisee, its independent contractors, agents, employees, or indemnitees, is against public policy and is void and unenforceable. Nothing contained in this section shall prevent or prohibit a contract, promise or agreement whereby a promisor shall indemnify or hold harmless any promisee or the promisee's independent contractors, agents, employees or indemnitees against liability for damages resulting from the sole negligence of the promisor, its agents or employees.

Pursuant to this statute, most cases have held that indemnification provisions are invalid. See, e.g., Miller Brewing Co. v. Morgan Mechanical Contractors, Inc., 368 S.E.2d 438 (1988) (provision stating "Seller is to save harmless and indemnify Buyer from any and all judgments, costs, expenses, including attorneys' fees, and claims on account of damaged property or personal and bodily injuries (including death) which may be sustained by Seller, Buyer, Seller's or Buyer's employee [sic], or other persons arising out of or in any way connected with the work done or goods furnished under this P.O." was ineffective to require defendant to indemnify or hold plaintiff harmless).

Some cases have upheld the contractual provision where it does not indemnify a person for his own negligence.

Bridgestone/Firestone, Inc. v. Ogden Plant Maintenance Co. of North Carolina, 548 S.E.2d 807 (2001) (“In other words, a construction indemnity agreement may purport to indemnify a promisee from damages arising from negligence of the promisor, but any provision seeking to indemnify the promisee from its own negligence is void.”; provision stating that “[defendant] shall indemnify [plaintiff] and save it harmless from damage . . . from all claims and judgments for injury or death to persons or property damage (including costs of [litigation] and attorney's fees) made or obtained against [plaintiff] by third persons including [plaintiff's] and [defendant Ogden's] employees and agents, based on injuries to person or property, in any manner caused by, incident to, connected with, resulting or arising from the performance of this contract or the presence of [defendant Ogden's] employees, and/or agents on [plaintiff's] premises, *regardless of whether such claims are alleged to be caused by negligence, or otherwise, on the part of [plaintiff] or its employees*, excepting however, injury to or death of employees of [defendant Ogden], from any cause whatsoever” was not invalid; second contract's provision stating “[Defendant Budd] will further *indemnify and hold [plaintiff] harmless* from and against any and all liabilities, claims, demands, suits, losses, damages, costs, attorney's fees and expenses for bodily injury to, or

death of any person, or damage to or destruction of any property, caused by any negligent or intentional act or omission on the part of [defendant Budd], its officers, employees or former employees. Except [plaintiff] shall not be held harmless for any such liabilities, claims, demands, suits, losses, damages, costs, attorney's fees and expenses caused by any negligent or intentional act or omission on the part of [plaintiff], its officers, employees or agents" is valid).

One case has upheld a portion of an indemnity provision and struck another portion. International Paper Co. v. Corporex Constructors, Inc., 385 S.E.2d 553 (1989).

The only situation in which a contractual indemnification provision is enforceable is where the party seeking indemnity is not seeking indemnity for a claim arising from its own negligence. Therefore, a party may enforce a contractual indemnity provision where it was not negligent in causing the injury. Our cases have not clearly enunciated those circumstances under which a party would be liable other than for its own negligence, but this situation would have to arise out of some sort of vicarious liability, or out of some strict liability. (An interesting point to note is that those instances in which our Court will validate a contractual indemnity provision are probably very similar to those instances in which our courts will recognize a common law right to indemnity.)

Some cases refer to indemnity "implied-in-fact." This article treats such a theory as an implicit agreement to indemnify, thereby analogous to an express indemnification provision. The application of this theory is not clear.

In one case, an artist had a contract with a vendor to sell the artist's work. The artist was then approached by another vendor to sell the art, which constituted a breach of the agreement with the first vendor. The second vendor told the artist "that an attorney would be provided in the event [the artist] was sued by [the first vendor]." The court held that "the evidence was sufficient to establish the existence of an implied in fact contract," and held that the second vendor was obligated to indemnify the artist for his legal fees. McDonald v. Scarboro, 91 N.C. App. 13, 22 (1988).

In another case, a general contractor was sued (in arbitration), and he then sued his subcontractors for indemnity. The court held that there was no "implied in fact" indemnity claim, stating, "Read liberally, plaintiff's complaint alleges breach of contract and breach of warranty by a number of independent subcontractors. For this Court to read a right of indemnity implied-in-fact into such bald allegations would be to do so in every general and subcontractor agreement, thus infringing upon this state's long standing and coveted principle of freedom of contract." Kaleel Builders, Inc. v. Ashby, 161 N.C. App. 34, 41 (2003).

2. Common Law Indemnity

Our courts also recognize a common law right to indemnity. Some cases have broad-sweeping language as to when indemnity applies. For example, some cases say that indemnity "arises when one person has been compelled to pay a debt which ought to have been paid by another and for which the other was primarily liable." Lyon & Sons, Inc. v. N. C. State Board of Education, 238 N.C. 24, 32 (1953) ("Legal subrogation, . . . is a device adopted by equity to compel the ultimate discharge of an obligation by him who in good conscience ought to pay it."). And further:

Where two persons are join[t]ly liable in respect to a tort, one being liable because he is the active wrongdoer, the other by reason of constructive or technical fault imposed by law, the latter, if blameless as between himself and his cotortfeasor, will ordinarily be allowed to recover full indemnity over against the actual wrongdoer.

Hildreth v. United States Casualty Co., 265 N.C. 565 (1965).
(reversing ruling of trial court striking cross-action for indemnity of insurance company against its agent).

This has been further stated as follows:

The further general principle is announced, however, in many cases, that where one does the act which produces the injury, and the other does not join in the act, but is thereby exposed to liability and suffers damage, the latter may recover against the principal delinquent, and the law will inquire into the real delinquency, and place the ultimate liability upon him whose fault was the primary cause of the injury.

Johnson v. City of Asheville, 196 N.C. 550, 146 S.E. 229, 231 (1929) (reversing ruling of trial court which did not allow

jury's consideration of primary and secondary liability between Asheville and its contractor, in case for damages caused by blasting of contractor).

Some cases seem to broadly apply the doctrine where it is equitable, even where the parties are not tort-feasors. For example, in the case of Nationwide Mut. Ins. Co. v. Chantos, 293 N.C. 431, 442 (1977) the insurance company was held liable to a claimant under a policy of automobile liability insurance. The tortfeasor, however, did not have permission to use the vehicle, and therefore he was not an insured within the meaning of the insurance policy. The insurer was, however, required to provide the minimum statutory coverage for the tortfeasor because he was in lawful possession of the vehicle. Under these circumstances, the Court held that the insurer's duty to indemnify the tortfeasor arose solely by virtue of the statute, and held that the insurer was entitled to indemnity from the tortfeasor, to the extent that any payments made by the insurer. "A person who, in whole or in part, has discharged a duty which is owed by him, but, which as between himself and another, should have been discharged by the other, is entitled to indemnity from the other, unless the payor is barred by the wrongful nature of his act." "Nationwide's statutory liability was passive and secondary."

Our cases have also looked to other jurisdictions and to the Restatement of Restitution in determining whether there is a right of indemnity. Where a sub-contractor's liability arises

from the general contractor's plans and specifications, the sub-contractor may obtain indemnity against the general contractor. Where the sub was under the direct supervision and control of the general contractor, and was instructed by the GC to install damaged glass, the sub has an indemnity claim, as follows:

"in situations wherein one party controls or instructs another party and an accident results, the controlling party may be held actively negligent and the obeying party passively negligent. This obtains even though the obeying party actually committed the act which caused the injury." "[A]ction or movement, under some circumstances, could be passive negligence." [Illinois case] The Illinois court further stated that "[c]ategorizing negligence as active or passive, involves making a 'qualitative distinction between the negligence of two tortfeasors.

Hartrick Erectors, Inc. v. Maxson-Betts, Inc., 98 N.C. App. 120, 124 (1990) (citing Restatement of Restitution).

A. Active/Passive Negligence

Most cases addressing a common law indemnity claim focus on whether the party seeking indemnity is "passively negligent." This is therefore referred to as "active/passive negligence," or "primary and secondary liability." Our courts have described these doctrines as follows:

Our decisions adhere to the rule that where two parties are jointly liable in damages for negligence, one of them for the reason that he is "only passively negligent, but is exposed to liability through the positive acts and actual negligence of the other, the parties are not in equal fault as to each other, though both are equally liable to the injured person." * * * The further general principle is announced, however, in many cases, that where one does the act which produces the injury, and the other does not join in the act, but is thereby exposed to liability and suffers damage, the latter may recover against the principal delinquent,

and the law will inquire into the real delinquency, and place the ultimate liability upon him whose fault was the primary cause of the injury.

Wright's Clothing Store v. Ellis Stone & Co., 233 N.C. 126, 129, 63 S.E.2d 118, 121 (1951) (reversing ruling of trial court which held that indemnity claims were improper; where defendant (owner of property) hired contractor to excavate upon its property and erect a new department store building, resulting in the plaintiff's wall to settle, crack, and lean, thereby damaging plaintiff's property, defendant-owner was entitled to submit issue of indemnity against its contractor that did work which caused plaintiff's damage); Hunsucker v. High Point Bending & Chair Co., 237 N.C. 559, 563, 75 S.E.2d 768, 771 (1953) ("the primary liability for the damages rests upon the actively negligent tort-feasor because of the difference in the kinds of negligence of the two tort-feasors"; "When the passively negligent tort-feasor is forced to pay the damages to the injured third person, he discharges the obligation for which the actively negligent tort-feasor is primarily liable, and for this reason is entitled to indemnity from him."). "[T]he passively negligent tort-feasor who is compelled to pay damages to the injured party is entitled to indemnity from the actively negligent tort-feasor." Chantos, 293 N.C. at 431.

Where two parties are actively negligent, or where their negligence is equal, there is no right to indemnity. For example, where an accident victim sued the driver for traveling

at an excessive rate of speed and sued the car dealer for selling the car to the driver when he knew or should have known that the brakes were inadequate, the alleged negligence of the parties was active, and thus the driver was not entitled to indemnity from the dealer. Anderson v. Robinson, 2 N.C. App. 191 (1968)

Where the third party defendant is not liable to the plaintiff in tort, the parties are not joint tortfeasors, and there is no right to indemnity. For example, where the general contractor sued the architect for indemnity, the court held that "the parties do not fit the active-passive tort-feasor framework required to support an equitable right to indemnity implied-in-law as the [homeowners] have no claim in tort against either plaintiff [general contractor] or Mr. Duffy." Kaleel Builders, Inc. v. Ashby, 161 N.C. App. 34, 47 (2003). The general contractor does not have an indemnity claim against the architect with whom he is not in privity of contract, as the architect is not liable to the homeowner in tort. Kaleel.

The most classic example of a common law indemnity claim is where an employer is held vicariously liable for the acts of its employee. Under those circumstances, it is clear that the employer has an indemnity claim against the employee. Yates v. New South Pizza, Ltd., 330 N.C. 790, 796 (1992). Similarly, where a store owner is liable for the torts of an independent contractor security guard company, it is entitled to indemnity

from the company. Hendricks v. Leslie Fay, Inc., 273 N.C. 59 (1968).

i. Specific Cases

Beyond this employer/employee (or vicarious liability) context, it is very unclear as to when our courts will recognize a common law indemnity claim based on active and passive negligence. The following cases have recognized a common law right to indemnity:

- A bus was involved in an accident, and the bus company took the position that there was a manufacturing defect in the bus, and it asserted an indemnity claim against the bus manufacturer. One allegation against the bus company (i.e. the company operating the bus) was that it failed to maintain and inspect its vehicles. The North Carolina Supreme Court held that, under these circumstances, the bus company could be held liable for failing to inspect and maintain its busses, and the manufacturer of the bus could be actively negligent in producing the bus, under which circumstances the bus company would be entitled to indemnity against the bus manufacturer. If a bus departs a highway because of a pre-existing defect in the steering mechanism, and the bus company is liable to the passenger, and if a competent mechanic could and should have discovered by a proper inspection of the bus prior to its delivery to the bus company, then the company is entitled to recover indemnity from the company that sold and maintained the bus. "If this was the situation the two companies were not in equal fault." Mann v. Virginia Dare Transp. Co., 283 N.C. 734, 750 (1973).
- Where a municipality is liable to a person injured on the sidewalk, the municipality may have an indemnity action against the landowner. Bowman v. Greensboro, 190 N.C. 611, 614, 616 (1925) (recognizing indemnity "in cases of recovery against municipalities for obstructions to the highways caused by private persons. The fault of the latter is the creation of the nuisance, that of the former [the property owner or contractor] the failure to remove it in the exercise of its duty to care for the safe condition of the public streets; the first was a positive tort and the

efficient cause of the injury complained of, and the latter the negative tort of neglect to act upon notice express or implied."; tree limb fell onto pedestrian); Guthrie v. Durham, 168 N.C. 573, 575 (1915) (where municipality permits property owner to excavate along the sidewalk of its streets, and owner erects fence which gives way while a pedestrian is leaning thereon, the negligent act of the property owner would be antecedent, in point of time, to that of the city, in failing to exercise a proper degree of supervisory care, and liability of the city is secondary to that of the property owner who caused the excavation to be made; "in cases of recovery against municipalities for obstructions to highways caused by private persons. The fault of the latter is the creation of the nuisance, that of the former the failure to remove it in the exercise of its duty to care for the safe condition of the public streets; the first was a positive tort and the efficient cause of the injury complained of, the latter the negative tort of neglect after notice express or implied,"). Where the construction company digs a trench and fails to place lights there or to erect barriers around the trench to warn persons using the walk, "It was the author of the injury and the principal wrongdoer. As between it and the town, the latter has committed no wrong," and the town is entitled to indemnity. Commissioners of Lexington v. Aetna Indem. Co., 155 N.C. 219, 223 (1911) (town was under obligation to see that the negligence of its contractor was so guarded against as to prevent injury to pedestrians, and to take proper measures of precaution for that purpose).

- Where a worker was on a tank, and the tank exploded, and the worker sued the plant-owner for his injuries, and the plant settled and claimed that the injuries were solely the result of the negligence of the defendants (who agreed to maintain plant, and who handled security, including work permits), and claimed that the owner was not involved in the discussions regarding the job and was not present, it has stated a common law indemnity claim. Bridgestone/Firestone, Inc. v. Ogden Plant Maint. Co., 144 N.C. App. 503, 510 (2001).
- A plaintiff instituted a negligence action against owner of elevator, when the drive shaft of a construction elevator broke and caused the elevator to fall, alleging that the elevator was faulty. The owner instituted an action against the vendor of the elevator

alleging negligence and breach of implied warranty, seeking indemnification. The court held that a dismissal of the third party action (on procedural grounds) was error. This case implicitly recognizes the indemnity claim. Hager v. Brewer Equipment Co., 17 N.C. App. 489 (1973).

It is also not clear what constitutes "active" and "passive" negligence. Some cases indicate that these terms have their ordinary meaning. Brigman v. Fiske-Carter Const. Co., 192 N.C. 791, 136 S.E. 125, 128 (1926) (generally discussing active and passive negligence, and describing passive negligence as "the negligence of omission" and active negligence as "affirmative[] and active[] negligenc[ce]").

There are, however, cases which blur these terms. For example, a case in which a general contractor was sued for negligence after the house which he constructed was damaged in a fire. The allegation was that the chimney had been negligently constructed, and that this caused the fire to the residence. The builder attempted to rely on a release which had been given to the subcontractor by the claimant, in order to extinguish his liability. In order for this argument to prevail, the contractor had to show that his liability arose from his passive negligence and from the active negligence of the subcontractor, under common law cases. In this context, the Court of Appeals held that the general contractor's negligence was not passive, but was active, in that he was present on the construction site during construction, and he generally examined the chimney, but he failed to detect and/or correct the defects in the construction

of the chimney (consisting of excessive gaps in the mortar). Sullivan v. Smith, 56 N.C. App. 525, 531 (1982) ("The evidence did not establish conclusively that defendant Smith [contractor] was 'passively negligent but . . . exposed to liability through the active negligence of [sub-contractor].' Rather, it permitted a finding that defendant Smith was himself actively negligent in the exercise of, or failure to exercise, his duty of supervision of defendant Hooker."). This case seems peculiar in that the Court found "active" negligence in what was essentially the failure of the contractor to take certain measures.

3. Other Theories for Indemnity

It should also be noted that there are other doctrines which may enable a party to obtain indemnity, even though they are not traditionally labeled as "indemnification" claims. For example, a general contractor may be able to sue a subcontractor under a theory of breach of contract. Our North Carolina Supreme Court implicitly recognized such a claim in a case where the general contractor retained a subcontractor to install a roof on a warehouse. The roof later failed, and the owner sued the general contractor and the sub-contractor for the deficiencies. The North Carolina Supreme Court held that the owner did not have a claim against the sub-contractor, but implicitly held that the general contractor has a claim against the subcontractor for breach of contract, which would enable the general contractor to recover those damages to the general contractor, including its

liability, arising from the breach of contract of the subcontractor. The Court stated, "The dismissal of the plaintiff's action against Scott does not, of course, bar Dickerson's cross-action against Scott for damages for the alleged breach of the subcontract in the event that Dickerson is ultimately held liable to the plaintiff for damages for breach of the general contract." North Carolina State Ports Authority v. Lloyd A. Fry Roofing Co., 294 N.C. 73, 89 (1978).

In a related vein, a general contractor, or other party, may have a claim for breach of express or implied warranty, which could give rise to a claim essentially for indemnity. Our courts have not clearly used this theory to provide for indemnification, but there is generally some support for this theory. Simpson v. Hatteras Island Gallery Restaurant, Inc., 109 N.C. App. 314, 322, 427 S.E.2d 131, 136 (1993) (in food poisoning case, restaurant, found to not be negligent, is entitled to indemnity; "The retailer, however, has done nothing except act as a middleman and any liability it incurs for a customer's damages is merely derived from the supplier's original breach of warranty.").

It is well-established in the context of a retailer's liability that the retailer has an indemnity claim against the supplier. Davis v. Radford, 233 N.C. 283, 286, 63 S.E.2d 822, 825 (1951) (recognizing indemnity claim of retailer against manufacturer); Wilson v. E-Z Flo Chemical Co., 281 N.C. 506, 512, 189 S.E.2d 221, 225 (1972) ("Where the retailer purchases

personal property from the manufacturer or wholesaler for resale with implied or express warranty of fitness and the retailer resells to the consumer with the same warranty and the retailer has been compelled to pay for breach of warranty, he may recover his entire loss from the manufacturer.").

Unfortunately, North Carolina case law has not thoroughly addressed these avenues of recovering indemnification.

4. Damages Recoverable

The party entitled to indemnity is generally entitled to complete reimbursement for its liability.

It should be noted, however, that a finding of damages in the first action may not be binding in the subsequent indemnity action. In one case, a county was held liable for damages arising from a dog bite. The county then sued the dog owner for indemnity. The court held that the first jury's finding of damages was not binding in the second action for indemnity.

Heath v. Board of Comm'rs, 40 N.C. App. 233, 237 (1979)

(rejecting county's argument that owner is "automatically liable for the amount of damages awarded to the claimant in the first action against the County. In our opinion, the third-party defendant in this case was entitled to have a jury determine not only his liability, but also the amount thereof."; jury awarded \$5,000 in damages against county, second jury awarded county \$620.00).

Where, however, the indemnitor has an opportunity to participate in the trial, the judgment (and amount of damages) should be binding against him. Gadsden v. George H. Crafts & Co., 175 N.C. 358, 364-365 (1918) ("Where a person is responsible over to another, either by operation of law or by express contract for whatever may be justly recovered in a suit against each other, and he is duly notified of the pendency of the suit and requested to take upon himself the defense of it, and is given an opportunity to do so, the judgment therein, if obtained without fraud or collusion, will be conclusive in a subsequent suit against him for the indemnity, whether he appeared in the former suit or not.").

Where the party settles the claim, however, the settlement is binding as long as it is reasonable and in good faith. In such a case, the issues for the jury are whether the other party injured the claimant, whether the settlement was made in good faith, whether the settlement was fair and reasonable, and the "amount [the claiming party is] entitled to recover." As for the amount, if the jury finds these three issues in favor of the party seeking indemnity, then the judge is to enter judgment in the amount of the settlement. Nationwide Mut. Ins. Co. v. Chantos, 293 N.C. 431, 446-447 (1977).

5. Timing and Procedures for Claim

Under Rule 14 of the Rules of Civil Procedure, the indemnity claim may be brought in the original action. It may also be brought by separate action.

Regarding the statute of limitations for an indemnity claim, there appears to be a three year statute running from the date of payment. "The right to sue for indemnity for damages resulting from the negligence, misfeasance or malfeasance of another does not accrue until legal payment has been made." Hager v. Brewer Equipment Co., 17 N.C. App. 489, 491 (1973). See also Nationwide Mut. Ins. Co. v. Weeks--Allen Motor Co., 18 N.C. App. 689, 692 (1973) (finding that trial court erred in dismissing indemnity claim, because period runs from claim against defendant, pursuant to Hager). Where the indemnity claim is based on a breach of contract, however, (as opposed to a common law theory), it is less clear when the three years begins to run; there is some authority that it begins to run from the indemnitor's original breach (and not the indemnitee's payment).

Further, the indemnity claim, as with the contribution claim, is also subject to any applicable statutes of repose, such as the six-year statute of repose pertaining to improvements to real property.