

# SELECT ANSWERS

to the

# FEBRUARY 2008 NORTH CAROLINA BAR EXAMINATION

\$30.00

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## Essay Questions and Selected Answers

### February 2008 North Carolina Bar Examination

This publication contains the essay questions from the February 2008 North Carolina Bar Examination and one or two selected answers for each question.

These answers received good scores and were written by applicants who passed the examination. The handwritten answers were typed as submitted, being edited as little as possible, and without correcting errors in spelling, grammar or punctuation.

These published answers are representative of the general quality of answers that merited the particular score on that question. They are intended to provide the applicant with examples of the various quality of answers and the standards employed by the graders in scoring the examination.

Since the scoring of the essay examination is based upon the relative scale rather than an absolute scale, the average answer on one question may have been better or worse than the average on another question.

<u>Question Number</u>	<u>Subject</u>
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Peter President is President of GA Games, Inc. (“GA Games”), a North Carolina business corporation. He is also a member of the five-person board of directors of GA Games and is one of three shareholders holding 1/3 of the shares of GA Games common stock. GA Games makes sports video games.

Peter President enters into a personal loan agreement with Second Bank for a construction loan to build a new luxury house on Topsail Island. As a condition of granting the construction loan, Second Bank requires a corporate guarantee from GA Games.

Peter President signs the guarantee by GA Games as “President of GA Games, Inc.” Second Bank Vice President asks Peter President whether he has authority as President of GA Games to guarantee the loan. Peter President assures him that although the board and shareholders of GA Games have not met in over five years and have not addressed this issue in the past, he is President of GA Games and can sign for GA Games.

**QUESTION:**

Can Second Bank enforce the guarantee against GA Games if Peter President were to default on his personal loan?

### Answer A to Question 1

No, Second Bank cannot enforce the guarantee agreement against GA Games if Peter were to default on his personal loan.

A corporate officer is an AGENT of the corporation, and must have either express, implied, or apparent authority in order to bind the corporation.

Under North Carolina corporate and agency law, an officer of a corporation is an agent of the corporation. The duties of an agent are loyalty and obedience. The authority of the agent is derived from the principal in the form of express, implied, or apparent authority. Express authority is, for example, when a Board of Directors votes to give an officer the authority to enter into a specific contract, or to make a binding commitment on behalf of the organization. The Board of Directors are the fiduciaries of the corporation, and represent the corporation as the principal. The Board represents the shareholders, who are the owners of the corporation. Therefore, express authority would have to come from a vote of the majority of a quorum of the Board. Implied authority generally is derived from one's position in the corporation. It is possible for a CEO or CFO or President to have implied authority under the proper circumstances. It is even possible for a manager to have implied authority to place orders on behalf of the corporation, if it is an established part of his position. Apparent authority is the impression given to a third party by the principal, the effect of which is to "hold out" the agent as having the authority to bind the corporation. It is the impression given to the third party by the principal. In the case of a corporation, it would be the impression given by the Board of Directors to a third party as to the extent and nature of the authority of a corporate officer.

Here, Peter President has neither express, implied, nor apparent authority to bind the corporation to guarantee his personal loans. Here, the Board consists of 5 members. As a close corporation, generally a majority of the Board would have to approve an action in order for an officer to be able to claim express authority. The Board has not met in over 5 years. Clearly, they have no idea that Peter is trying to bind the two other shareholders to a big loan for a personal luxury house. Even as President or Director, Peter would not have implied authority here. He is not entering into a contract on behalf of the COMPANY, but for his own personal benefit. The bank must realize that he is not acting in his role of corporate officer for a corporate matter. And finally, Peter, does not have apparent authority. The Board has in no way indicated to the Bank that Peter has the authority to hold the company liable for a large personal loan. In fact, Peter has told the bank officer that the Board has not met in over five years -- the Bank is on notice that the company is not authorizing Peter to sign a guarantee as the agent of the corporation.

Therefore, Second Bank cannot enforce the guarantee agreement against GA Gaes if Peter were to default on his personal loan.

A corporate officer or Board member may not act outside the bounds of the authority granted to him by the Articles of Incorporation. By doing so, his actions are ultra vires.

Under North Carolina corporate law, an officer must act on behalf of the corporation within the authority granted to him by the Articles of Incorporation, or else his actions will be held to be ultra vires. Any ultra vires activity entered into by the officer will be held valid, however, the officer will be held liable for the consequences.

Here, by taking out a large personal loan against the assets of the corporation, Peter would be acting ultra vires. It is highly unlikely that the Articles of GA Games specifically authorize the officers or directors to borrow large amounts of money for personal use and put the corporation at financial risk. If Peter were to obtain this loan, he would be held personally liable to the Bank.

Therefore, Second Bank would not be able to guarantee GA Games if Peter were to default on his loan. Only Peter would be liable.

A corporate director has a fiduciary duty of loyalty to the corporation.

Under North Carolina corporate law, a director has a clear duty of loyalty to the corporation. The role of the Board of Directors is to protect the financial interests of the owners, who are the shareholders. This duty includes a duty to act in the best interest of the corporation, to not compete with the corporate business, to not usurp corporate opportunities, and to not enter into transactions where there is a personal conflict of interest. The test for the duty of loyalty is that the transaction is fair to the corporation. The interested director must disclose the transaction, and a majority of disinterested directors or disinterested shareholders must approve.

Here, Peter would be absolutely violating his duty of loyalty to the other two shareholders of GA Games. This loan is against the interest of the corporation, and Peter's personal desire for an expensive vacation home conflicts with the interests of the shareholders and the corporation. He would have to disclose his desire for this loan, and a majority of the Board, or the other two shareholders, would have to approve the transaction, which is, of course, highly unlikely.

Therefore, Second Bank cannot enforce the guarantee against GA Games if Peter were to default, because as a director, he would be violating his duty of loyalty.

## Answer B to Question 1

No, Second Bank cannot enforce the guarantee against GA Games (“GA”) if Peter President (“Peter”) were to default on his personal loan, since Peter had neither apparent authority or actual authority on behalf of GA to enter into the guarantee.

The law in North Carolina provides that an individual operating in a representative capacity of a corporation must be acting with authority in order to take action on behalf of the corporation or to legally bind the corporate entity under any agreements. Authority may be apparent or actual. Apparent authority is provided in circumstances in which the corporate representative appears to have the requisite authority to conduct the business at hand. Apparent authority may be provided through the representative’s association or relation to the corporate entity, including the representative’s title. Furthermore, apparent authority is judged subjectively based on the third party’s perception, and the third party must not have any knowledge to the contrary.

Second, actual authority is provided when the corporate representative is explicitly provided with each authority. Actual authority is typically provided in the corporation organizational documents, which include the Articles of Incorporation and the by-laws. Additionally, actual authority may be granted with a requisite vote during a duly-called meeting with a requisite quorum. In the alternative, the corporation’s board of directors may also draft a resolution granting such authority in lieu of a meeting (of course, a requisite vote would be necessary as with an actual meeting.)

In the situation presented, Peter did not have apparent authority to bind the corporation under the guarantee with Second Bank. It may initially appear that he did, in fact, have such authority due to Peter’s relationship with the corporation. He is the

President, a Board Member, and a significant shareholder. However, Second Bank's V. President should reasonably concluded that Peter did not have authority, particularly considering the quality of his business (he is a sophisticated party who probably deals with business entities and commercial lending regularly). The facts state that the loan was for a personal loan intended for the construction of a luxury residential development. Thus, the loan most likely would in no way further the million of the business or be related to the business/purpose of the corporation since GA is in the business of sports video games, which is clearly not related to real estate development finally, the personal nature of the loan was clearly an indication that the loan was not fir the benefit of GA but, rather, for the personal gain of Peter.

Secondly, Peter did not have actual authority to bind GA under the guarantee. The facts do not indicate whether Peter's authority was provided expressly in GA's corporate documents. However, it is safe to assume that he did not have such authority since, when questioned by the Bank's VP, he did not produce such documentation. Additionally, Peter stated that the board and share holders had not met in over five years and had not addressed the issue. Thus, the facts indicate that Peter was not granted such authority in a duly called meeting with requisite vote with a requisite quorum, nor had Peter been granted such authority by the shareholders or board of directors under a resolution, consent or certificate in lieu of a meeting.

Defendant Jones was indicted by the Grand Jury of Wake County for larceny of a necklace alleged to be worth \$1,200.00. The bill of indictment contained no allegations of aggravating factors under the Structured Sentencing Law. In Jones' confession he admitted stealing the necklace from a display case at a jewelry store, but said it was worth only \$900.00. The defendant admitted he had a gun in his back pocket.

The State provided discovery to the defendant 6 months before trial. In the discovery was a report from the police officer which said a jewelry store clerk saw the defendant take the necklace and when the defendant walked out the door the clerk saw a small handgun sticking out of the back pocket of defendant's blue jeans. Three weeks before trial the prosecutor sent an email to the defense lawyer saying that the state was going to seek an aggravated range sentence and was relying on the aggravating factor that the defendant was armed with or used a deadly weapon at the time of the crime. The defense counsel moved to prohibit the State from seeking an aggravated range sentence in the event of a conviction of felonious larceny.

#### QUESTIONS:

1. Should the trial judge grant the defendant's motion?
2. Who should decide whether there is an aggravating factor: the judge or the jury?

## Answer A to Question 2

The trial judge should grant defendant's motion. In North Carolina Armed Robbery is defined as a taking of another's possession by the use or threat of use of force or violence and a dangerous instrument or weapon is used to carry out that threat. In North Carolina the test is not whether the victim was in actual fear, it's whether the instrument used could actually pose a real threat. Hence using a toy pistol is not armed robbery in North Carolina.

In this case, the defendant possessed an actual hand gun in his back pocket, however at no time during the larceny did the defendant actually threaten or use violence to obtain the necklace. The store clerk did not even know the defendant had the gun until defendant was out the door. By then, the act of grand larceny was already completed.

The other issue is the value of the necklace. \$1,000 is the bright line for felonious larceny. If defendant can prove it is only \$900 it would not be a felony.

Also, the prosecution should have alleged the use of a deadly weapon at the time of the indictment. The indictment was only for larceny. 3 weeks before a trial is not sufficient time to defense attorney to prepare. The facts state that the Prosecution provided discovery 6 months before trial. It was at that time that the Prosecution should have made the defense aware of its intent to seek an aggravated range sentence.

2. The jury should decide the aggravating factor. If a sentence is enhanced to go beyond the standard range, a jury must believe beyond a reasonable doubt that the aggravating factor has been proven by the Prosecution. This is the standard set in the U.S. Supreme Court case of Appendi.

## Answer B to Question 2

1: The trial judge should grant the defenses motion to prohibit the State from seeking an aggravated range sentence in the event of a conviction of felonious larceny.

A defendant who commits larceny, or the intentional picking up and carrying away of the property of another with the intent to deprive them of that property, may be charged with aggravated larceny when certain facts are present, such as the use of a deadly weapon or assault or battery.

Here the defendant had admitted to stealing the necklace, but disputes its value. He also admits to having a gun in his possession. There is also evidence from the clerk that indicates that he saw the gun as the defendant was leaving.

There is no evidence offered that the defendant used the gun during the commission of the alleged larceny. Both he and the clerk acknowledge that it was in his back pocket and the clerk only saw it as he exited the store.

It is not enough to be in possession of a deadly weapon to be charged with an aggravated factor. One must use the weapon during the commission of the crime.

Additionally there are notice issues present in this case that would militate toward not allowing the charge. Nowhere in the bill of indictment nor in the discovery provided to the defense six months prior to the trial was there any indication that the defendant would be charged with an aggravated factor. In the absence of the appearance of new evidence, the prosecution had an obligation to notify the defense of the charges in a timely fashion. The judge will likely find that three weeks notice prior to trial is insufficient as it will prejudice the defendant with regard to the preparation of his defense.

Additionally, the court could find that an email is insufficient notice to the defense of the prosecutions intent to charge the defendant with an aggravated factor. The prosecutions should have to amend its bill of indictment. For these reasons, the trial judge should grant the defendants motion to prohibit the state from seeking an aggravated range sentence.

Question2: The jury should decide if there is an aggravating factor. The presence of an aggravating factor is a question of fact and questions of fact are to be decided by the jury. In this instance, the judge should give the jury instructions with respect to the conditions to be met for an aggravating factor to be present and the jury then decides if, in fact, the standard for an aggravating factor has been met.

Judges decide questions of law.

Thus the jury should decide whether there is an aggravating factor present.

Henry and Wanda were married in 1991. In 1994, Henry began a sexual affair with Goldie. The affair continued for two years, until Wanda discovered Henry and Goldie in the poolhouse one afternoon. Wanda always told Henry that she could never forgive him. Wanda and Henry never separated, however, and had two children, born in 1997 and 1998.

In January 2007, Henry told Wanda that he wanted a divorce. For the children's sake, Wanda asked Henry not to move out until the end of the school year in June. Henry agreed. In April 2007, Wanda was feeling sad and got a little drunk. One thing lead to another, and by the end of the evening Wanda had engaged in oral sex with a neighbor named Jack, which Henry discovered.

At the time Henry and Wanda separated in June 2007, Henry was earning \$250,000 per year. Wanda had not been employed since 1991, when she was a part-time cashier at Food Lion.

**QUESTION:**

Is Wanda entitled to alimony from Henry?

### Answer A to Question 3

No, Wanda is not entitled to alimony from Henry.

The issue is whether Wanda is a dependant spouse and whether she committed illicit sexual behavior.

Under NC law, a spouse may receive alimony if there is determined to be a dependant and supporting spouse. If the supporting spouse can address the shortfall between the dependant's spouse's expenses and income. Also, a determination of alimony must be equitable considering the factors. If a dependent spouse commits illicit sexual behavior with a third party during the marriage, then he or she will be barred from receiving alimony. If a supporting spouse commits illicit sexual behavior with a third party during the marriage then, the court may still grant alimony to the dependant spouse. However, if a spouse commits illicit sexual behavior, and the other spouse condones or forgives the cheating spouse, then slate has been wiped clean, and the illicit sexual behavior before the condonation is irrelevant. Additionally, if both parties commit illicit sexual behavior, then it is in the court's discretion whether to grant the dependant spouse alimony.

Here, Henry earns \$250,000 per year, and Wanda has not worked or had income since 1991. Additionally, when she did work, it was as a part-time cashier at Food Lion. Therefore, the facts suggest that Wanda is a dependant spouse and Henry is a supporting spouse. Henry had an affair with Goldie for two years. Wanda discovered the affair. Wanda said she would never forgive him. However, the couple did not separate and had two kids. It appears that the couple resumed their marital relationship after Wanda learned of the affair. Therefore, Wanda effectively or implied forgave Henry for his affair

with Goldie and condonation occurred. Ten years later, Henry told Wanda he wanted a divorce, however, she asked him not to move out of the house. Before they two of them separated, Wanda had oral sex with a neighbor while she and Henry were still married. Therefore, committing illicit sexual behavior. Wanda's illicit sexual behavior will bar her from receiving alimony from Henry, although she is a dependant spouse. Since, Wanda forgave Henry for his affair and the facts do not indicate he resumed or had a later affair, the court will not consider his previous affair. Therefore, Wanda will not be able to receive alimony from Henry, although she is a dependant spouse.

Arguably, Wanda Henry forgave Wanda for her illicit sexual behavior. He found out about the affiar in April and did not move out until June. However, Henry told Wanda he wanted a divorce in January, however, she asked him to stay in the house until the end of the kids' school year, which ended in June. Nonetheless, they did not separate until June. Henry's continued to stay until June may be considered to be condonation. However, it is doubtful since the couple had already decided not to separate until June. Also, it could be considered that the marriage ended in January when Henry told her he wanted a divorce. Therefore, Wanda's affiar may not matter in her petition for alimony. However, this is doubtful as well since the coupled seemed to continue to hold itself out as a married couple and did not separate until June.

### Answer B to Question 3

No Wanda is not entitled to alimony from Henry.

An award of alimony may be appropriate only when one spouse is dependant and the other is the supporting spouse , and where an award is equitable considering all relevant factors. A disparity in income alone will not warrant an award of alimony. Other relevant factors include parties' contributions to the family, earning capacity, as well as any marital misconduct before separation by either or both parties.

In North Carolina, if the supporting spouse alone commits acts of illicit sexual behavior (i.e., marital misconduct), which includes adultery, before separation, the court must award alimony to the dependent spouse. However, if the dependent spouse alone commits acts of illicit sexual behavior before separation, the court may nit award alimony yo the dependent spouse. Further, if both parties commit acts of illicit sexual behavior before separation, the court may use its discretion in awarding or denying alimony considering all relevant factors. The trial judge must make findings of fact to support any award or denial of alimony.

Here, the facts state that Henry had a sexual affair in 1994 that lasted for two years. However, Wanda and Henry never separated and had two children later in the marriage.

Under North Carolina law, the trial judge may consider whether any acts of marital misconduct, or illicit sexual behavior have been condoned (or forgiven). Marital forgiveness may be shown by cohabitation or the resuming of marital relations or both. Here, the fact that two children were born later in the marriage and that the parties never

separated, is proof of condonation, despite Wanda's utterance that "she could never forgive him."

The facts also state that Henry told Wanda he wanted a divorce in January 2007, but the couple did not officially separate until June of 2007. During that time, Wanda engaged in acts of illicit sexual behavior. The issue here is whether the trial judge will consider the date of separation on January or June. Generally, mere expressions of the intent to separate will not be enough if the parties remain in cohabitation. The court may consider the fact that Wanda wanted to remain in the same household for the sake of the children, until the end of the school year. However, under previous North Carolina case law, it is doubtful the court will consider January as the date of separation. (separate bedrooms have not been enough).

If the trial judge considers June as the date of separation then Wanda's acts of illicit sexual behavior in April of 2007 will bar her from an alimony award. As stated above, the court may use its discretion when both parties have committed acts of illicit sexual behavior before separation, but here, Henry's past acts were condoned, as evidenced by the couple remaining in cohabitation for over 10 years after his affair and the birth of two children.

Of course all of this depends on whether Wanda can prove she is the dependent spouse in the first place. Based on the few facts we have (that she has not been employed since 1991 and has little earning capacity since she was a part-time cashier at Food Lion up to 1991), it can be assumed Wanda would qualify for dependent status. However, based on the above discussion, it is doubtful she will be awarded alimony because of her acts of illicit sexual behavior before separation.

A-1 Construction Company, Inc. (hereinafter referred to as “A-1”), a Pitt County business, borrowed \$200,000 from Home Town Bank in Greenville, North Carolina, (hereinafter referred to as “Bank”). To secure the repayment of the obligation to Bank, A-1 executed a promissory note, security agreement and financing statement granting Bank a security interest in certain valuable earth-moving equipment owned by A-1. Bank paid the loan proceeds to A-1 after duly perfecting its security interest by the proper filing of the financing statement.

Several months later, A-1 was unable to make payment under the terms of Bank’s obligation, and Bank declared the obligation in default and lawfully repossessed the collateral. Subsequently, without giving notice of the sale to A-1, Bank sold the collateral. Bank used the sale proceeds to pay off senior liens on the earth moving equipment in the stipulated amount of \$120,000.00 and then applied the remaining funds to the costs of sale and its obligation. Bank then brought an action against A-1 to recover a substantial deficiency remaining on the obligation. Its Complaint set forth the facts above stated and incorporated by attachment and reference all of the loan documentation referred to above.

A-1 filed an Answer, which included the following affirmative defenses:

- 1) That Bank’s failure to give notice of the sale of the collateral constituted a complete bar to the recovery of any deficiency, entitling Defendant to judgment as a matter of law. (Defense No. 1)
- 2) That the price received at the sale was so grossly inadequate as to make the sale commercially unreasonable as a matter of law. (Defense No. 2)

3) That the sales proceeds were improperly applied and that the amount due under Bank's obligation, even if otherwise enforceable, should be adjusted to the extent of such misapplication. (Defense No. 3)

A-1 moved for judgment on the pleadings based solely upon the three affirmative defenses. Bank moved for judgment on the pleadings as to Defense No. 2.

**QUESTIONS:**

- 1) How should the Court rule upon A-1's motion as to Defense No. 1?
- 2) How should the Court rule upon the cross-motions as to Defense No. 2?
- 3) How should the Court rule upon A-1's motion as to Defense No. 3?

#### Answer A to Question 4

1. The judge should deny A-1's motion as to Defense No. 1. Although failing to give proper notice makes a sale commercially unreasonable, and the proceeds of a commercially unreasonable sale are presumed to satisfy the entire debt, this is a rebuttable presumption. Under UCC Article 9, which governs the attachment, perfection and enforcement of security interests in goods (such as earth-moving equipment), once a debtor has defaulted, a secured creditor has the right to repossess the collateral. Once it has repossessed the collateral, the secured creditor can either keep the collateral in full satisfaction of the debt (a strict foreclosure) or it can sell the collateral in a commercially reasonable manner to a third party and go after the debtor to get a deficiency judgement on any of the remaining debt. Here, Bank chose the latter option, so the Bank was required to do a commercially reasonable sale. The Bank should have given notice to the debtor, anyone else liable on the debt, as well as any other secured parties with a recorded security interest in the debt. This notice must include what is being foreclosed and, if it is a public sale, the date and time for the public sale, and, if it is a private sale, the date and time by which the sale will have taken place. Ten days' notice is presumed to be adequate notice for a foreclosure sale of non-consumer goods.

It does not appear that the Bank gave the proper notice to the debtor. This notice must be given unless the collateral is the type that can easily be sold in recognized market (such as publicly traded securities). There is no recognized market for earth-moving equipment. Thus, due to the failure to give proper notice, the sale is presumed to be commercially un-reasonable. If a sale is commercially unreasonable, the presumption is that the sale price will satisfy the entire amount of the debt. If Bank cannot rebut this

presumption, this means that there is no deficiency and, thus, it cannot go after Debtor for a deficiency judgement.

However, the presumption that the sale was unreasonable is a rebuttable one, which the Bank must rebut by clear and convincing evidence. Bank may not be able to do this, but there is not enough information in the facts regarding the manner of the sale for the judge to determine whether or not the Bank has successfully rebutted this presumption. Bank is entitled to show evidence that the sale was commercially reasonable. For instance, if Bank sold the equipment at a public auction in which there were many bidders and participants, the Bank could probably rebut this presumption. Thus, the judge should deny this motion.

2. The judge should probably not grant the cross-motion by Bank. As discussed above, the sale is presumed to be commercially unreasonable, not because of the sale price, but because of failure to give proper notice. If that presumption is rebutted, A-1 could show that the sale price was so grossly inadequate as to make the sale price unreasonable, but this is generally a matter of fact, not law. Also, A-1 would have the burden of proof.

There is no evidence indicating that the price was grossly inadequate, and this is generally very difficult to show under Article 9, as it is assumed that foreclosure sales will often result in prices that are lower than might be expected due to the risk that buyers are taking regarding whether or not there may still be liens on the equipment that are not being foreclosed (see question However, A-1 is entitled to appropriate discovery regarding the matter so the judge should not grant the crossmotion.

3. The Court should grant this motion, as the Bank improperly applied the sale proceeds. When a second- or third-lien holder forecloses on collateral, they only can foreclose and

extinguish their lien and the liens which are junior to them; they cannot extinguish any liens which are senior to theirs. Any liens senior to the foreclosing lienholder are not extinguished by the foreclosure and will remain on the collateral. The senior liens which were senior to the Bank's liens remained on the collateral. Thus, Bank should not have used the proceeds to pay off the senior liens; their liens are not extinguished and they are still entitled to foreclose on the collateral. Rather, it should have used the proceeds to cover the costs of the foreclosure and its own debt. Any remaining proceeds would go to the debtor (or junior lienholders, if there are any, and they give the appropriate notice). Debtor is correct, the application of the proceeds should be re-adjusted to satisfy the foreclosure costs first, the Bank's debt second, junior lienholders (if any) third, with the remaining going to the Debtor.

#### Answer B to Question 4

(1) The Court should deny A-1's motion for judgment on the pleadings as to Defense 1 because, though A-1 was entitled to notice of the foreclosure sale, lack of notice creates the presumption that the creditor is not entitled to a deficiency judgment but is not a complete bar.

Under North Carolina Rules of Civil Procedure, judgment on the pleadings is appropriate after the close of the pleadings when there is no issue genuine issue of material fact and the moving party is entitled to judgment as a matter of law. All facts should be considered in the light most favorable to the non-moving party.

Attachment, which requires the execution of a promissory note and security agreement which reasonably identifies the collateral, makes a security interest enforceable against a debtor. If there is attachment, a creditor may repossess the collateral upon default of the debtor. The creditor may then sell the collateral to satisfy the debt but may do so only after giving debtor at least 10 days notice of the sale. The penalty for failing to notify the debtor of the sale is that the amount received at the sale is presumed sufficient to satisfy the debt and unless the presumption is rebutted, the creditor is not entitled to a deficiency judgment.

Here, the facts indicate that A-1 executed a promissory note and security agreement which described the collateral as "earth-moving equipment owned by A-1." It is likely that this reasonably identifies which property of A-1 serves as collateral. A-1 defaulted on its loan and Home Town Bank lawfully repossessed the earth-moving equipment. Home Town Bank then proceeded to sale the equipment at a foreclosure sale to satisfy the debt owed by A-1.

A-1 was not given notice of the sale. This creates a presumption that the amount received at the sale was sufficient to satisfy the debt. Thus, it is up to Home Town Bank to produce evidence that this amount was not sufficient. Home Town Bank has alleged that after paying of the senior creditors there was a substantial deficiency. It is unclear whether there would have been a deficiency if Home Town Bank had not paid off the senior creditor. Therefore, there are material facts in dispute and defendant is not entitled to judgment as a matter of law based upon this defense.

(2) The Court should deny both motions for judgment on the pleadings as to Defense 2 because there are not sufficient facts alleged in the pleadings to make a determination of whether the sale was commercially reasonable.

Under North Carolina Rules of Civil Procedure, judgment on the pleadings is appropriate after the close of the pleadings when there is no issue genuine issue of material fact and the moving party is entitled to judgment as a matter of law. All facts should be considered in the light most favorable to the non-moving party.

A creditor may sell collateral through a private sale or a public sale. The sale must be commercially reasonable for the creditor to be able to receive a deficiency judgment for any outstanding balancing not satisfied by the sale. If the sale is made at public sale, the sale price is considered commercially reasonable. When the sale is a private sale, defendant has the opportunity to defeat a claim for a deficiency judgment by showing that the sale price was grossly inadequate and therefore the sale was not commercially reasonable. Additionally, while the creditor may purchase the collateral itself at a public sale, it may not do so at a private sale.

Here, it is unclear whether there was a public or private sale. Because it is unclear, the price should not be considered commercially unreasonable. It is not known how much the equipment was worth nor how much it sold for. More facts should be developed to determine if the sale was public or private, and if it was private, whether the sale price was commercially reasonable or not. Additionally, it is not clear who the buyer was and it may have been the bank considering that the bank paid of the senior lienholders after the sale. If this was the case and it was a private sale, the sale would not be commercially reasonable and the bank would not be entitled to a deficiency judgment. Because more facts are needed to determine if the sale was commercially reasonable, neither party is entitled to judgment on the pleadings.

(3) The Court should grant A-1's motion for judgment on the pleadings as to Defense 3 because Bank did not have any obligation to pay off senior creditors and therefore cannot recover any deficiency caused by doing so.

Under North Carolina Rules of Civil Procedure, judgment on the pleadings is appropriate after the close of the pleadings when there is no issue genuine issue of material fact and the moving party is entitled to judgment as a matter of law. All facts should be considered in the light most favorable to the non-moving party.

When collateral is sold in satisfaction of a debt, all senior liens remain on the collateral. Accordingly, the senior lien holders have no right to recovery from the foreclosure sale of the collateral but can later foreclose upon the collateral in the new owner's hand. Therefore, the purchaser of the collateral should not pay more than the fair market value of the collateral minus the amount secured by the collateral to the senior lienholders. Junior lienholders do have right to recover from the foreclosure sale in order

of their priority. If the money runs out before they are paid, they may seek a deficiency judgment. Junior lienholders are necessary parties to the foreclosure sale.

Here, bank had no obligation to share the proceeds from the sale with the senior lienholders or to pay off their liens. Accordingly, the bank's doing so cannot be charged against the debtor. Any deficiency should be measured based on the difference between the total amount bank received from the foreclosure sale and the total amount owed by A-

Additionally, if Bank bought the collateral itself at the foreclosure sale there may be problems as discussed above (if it was a private sale). However, even if it was a public sale and bank's purchase of the collateral was proper, Bank should not have paid more than the fair market value minus the amount owed to the senior creditors, so bank itself would be responsible for any deficiency that arose as a result of its bad purchase decision.

Early in 1997 Dirk Developer was interested in purchasing a parcel of property in Person County, North Carolina, which was owned by Larry Landfill. Dirk intended to use the property to erect a new restaurant building. Dirk asked Larry if the lot was "stable" and Larry stated it was, but he would have his engineer verify it.

Ed Engineer prepared a report at Larry's request, which was dated February 10, 1997, stating he had tested the tract at issue and found no problems. Engineer's report was provided to Dirk. Despite the statements in the report, both Engineer and Larry knew that the property and a contiguous tract (also owned by Larry) had been used as a landfill for many years. Neither tract was stable or suitable for a restaurant building. In fact, there was garbage buried about 10 feet below the surface of the contiguous tract. Dirk was not provided with any information about the landfill or the contiguous tract.

In reliance on the representations of Larry and Engineer, Dirk purchased the property and erected the restaurant building. Early in 1998, the building began to settle and Dirk's engineer tested the property. Dirk's engineer discovered the property was not stable and was not suitable for a restaurant building in particular because it had been used as a landfill and because the contiguous tract still had garbage buried ten feet below the surface.

Dirk filed a lawsuit in Superior Court, Person County against both Larry and Engineer for negligent misrepresentation in January 2000. The lawsuit was set for trial in April 2002. However, in March 2002, Dirk took a voluntary dismissal without prejudice.

In May 2002, Dirk re-filed his lawsuit against Larry and Engineer in the same court. However, the new complaint asserted causes of action based upon both negligent misrepresentation and fraud. Both claims arose out of the purchase of Larry's property for use as a restaurant.

Larry and Engineer immediately moved to dismiss the re-filed lawsuits in the 2002 action, based on the statute of limitations.

**QUESTIONS:**

1. Should the Court grant the motion to dismiss the negligent misrepresentation claim?
2. Should the Court grant the motion to dismiss the fraud claim?

## Answer A to Question 5

1. The court should deny the motion to dismiss the claim for negligent misrepresentation. Under North Carolina law, a claim for negligent misrepresentation generally must be brought within three years after the party asserting the claim is damaged by the alleged misrepresentation. Here, Dirk's cause of action accrued in early 1998, when he had the property tested and discovered that it was not suitable for a restaurant building because it had been used as a landfill. Dirk timely filed his original claim against Larry and Engineer for negligent misrepresentation in January 2000 in Person County Superior Court.

Under North Carolina law, a party can take a voluntary dismissal, without prejudice, and re-file the same claim within one year, even after the original statute of limitations has run. Dirk took a voluntary dismissal without prejudice on the negligent misrepresentation claim in March 2002. Because he re-filed it in May 2002, it is still timely, since it was filed within one year of the dismissal, and the parties and court are the same.

2. Yes, the court should grant the motion to dismiss the fraud claim.

As stated above, the statute of limitations in torts actions in North Carolina is three years. The three years starts to accrue at the time of the recognition or discovery of the fraudulent action or act by the defendant. Generally, a re-filing within the 1 year applicable period after a dismissal would relate the initial action back to the first filing date. Once an action is dismissed, the same cause of action may be brought against the defendant and it will relate to the original filing date. However, once there is a statute of

limitations issue, any new claim not included in the original complaint will not relate back as it was not included as a claim initially.

Here, the plaintiff initially set out negligent misrepresentation as its torts claim in the complaint. When Dirk refiled after dismissing, the negligent misrepresentation claim, identical to its initial complaint, related back so there was no issue as to a statute of limitations. However, the fraud claim was an entirely new allegation and must be stated with particularity and specificity in the complaint. It would not be equitable or fair for a plaintiff to allege a claim in a complaint and 5 years after the date of fraud, include fraud as part of its complaint and expect it to relate back.

Therefore, the fraud claim is out of statute pursuant to North Carolina law and the motion to dismiss should be granted.

### Answer B to Question 5

1) No, the motion to dismiss the negligent misrepresentation claim should not be granted.

In North Carolina the statute of limitations for a negligence misrepresentation claim is 3 years from when the claimant becomes aware of the misrepresentation, of which the claimant relied. The earliest possible point that any party could point to as the point for the tolling of the statute of limitations was February 10, 1997. Even taking this date, Dick filed suit in January of 2000, within the appropriate period. In North Carolina the Rules of Civil Procedure allow for a 1time voluntary dismissal as long as the case is re-filed within 1 year of the voluntary dismissal. Here, Dirk refiled his negligent misrepresentation claim in May of 2002, only 2 months after the voluntary dismissal and therefore within the period provided for under the rules. Dirk's misrepresentation claim is thus properly filed and the motion to dismiss this claim should not be granted.

2) Yes, the motion to dismiss the fraud claim should be granted.

Negligent misrepresentation is a claim arising out of negligence requiring the showing of a duty on the part of the defendant, a breach of that duty, causation, and damages. However, under North Carolina law fraud is an intentional tort requiring the plaintiff to demonstrate that the plaintiff had scienter. While it is clear that the two claims arose out of the same transaction or occurrence, fraud requires the demonstration of an additional element. North Carolina's heightened notice pleading requirements, of sufficient notice of pleading, would likely not have been satisfied under the original claim as pled because a fraud complaint would require the pleading of facts that at the time of the misrepresentation, Larry and the Engineer both knew of the misrepresentation and

made it with the intent that Dirk rely upon it. While refiled claims are not required to have exactly the same causes of action when they are refiled, the inclusion of fraud, which is an intentional tort rather than one arising out of negligence, is of the type that is likely to be excluded by a court given the 3 year statute of limitations that attaches to fraud claims. Failure to have some restriction, would allow claimants to voluntarily dismiss claims and then add additional claims to which plaintiffs have no notice of, as a way of circumventing statute of limitation requirements. The fraud claim would be outside of the statute of limitations when included in the May 2002 suit, as the discovery of the deficiency in the property occurred in early 1998.

James and Mary Jones, husband and wife, owned a farm in Orange County, North Carolina, known as BerryHill. They purchased BerryHill shortly after they were married. As part of their estate plan, James and Mary, in 1995, executed and delivered to their daughter, Pattie Jones, a deed conveying to Pattie fee simple title to BerryHill. The deed recited that it was given for consideration of “natural love and affection of Grantors for Grantee”. Pattie did not record the deed at the time it was delivered to her. James and Mary continued to live on the farm, along with Pattie who was provided room and board by her parents at no cost to her.

In late 2001, James discovered Pattie had not recorded the deed and instructed her to immediately record the deed to BerryHill which she did. In early 2006, the IRS filed in the N.C. Secretary of State’s office and the Orange County Clerk of Court’s office, a federal tax lien against James (but not Mary), and PCA Bank obtained and docketed, in the Orange County Clerk of Court’s office, a judgment against James (but not Mary).

**QUESTIONS:**

1. Who owns BerryHill in 2006, Pattie Jones, James Jones or Mary Jones?
2. Do either the IRS’s or PCA Bank’s respective liens attach against BerryHill?

### Answer A to Question 6

The recording of Pattie's deed to Berry Hill was void and thus, James and Mary still own the home as tenants by entirety.

First, it needs to be noted that the property here was originally and still owned as a tenancy by the entirety. In NC, the courts presume that when a married couple buys property, that unless, there is specific language in the deed showing an intent otherwise, that the property is owned as a tenancy by the entirety with rights of survivorship.

Here, the facts clearly indicate that the property was purchased after they were married, and without other facts suggesting otherwise, a tenancy by the entirety was created here.

As a result, any conveyance of property with a tenancy by the entirety must be a joint conveyance. The same is true for mortgages, and as will be explained later, for judgment liens as well. Thus, the issue here is whether there was a valid conveyance to Pattie. A valid conveyance occurs when a property is conveyed in writing (the deed here) and is lawfully executed and delivered. Lawfully executed means all formalities were followed (i.e. if it was in writing, signed, description of the property was accurate and the owner's name is on the deed). Delivery occurs when the grantor relinquishes actual possession of the deed if only for a brief moment.

Here, the facts indicated that both James and Mary as tenants by the entirety executed with all formalities, and delivered the deed to Pattie, who took possession of the deed at that time. However, a problem occurred when the deed was not recorded until 6+ years after the conveyance because by all accounts this deed was a gift deed given without consideration.

A special rule applies for gift deeds. Under NC law, if a deed given as a gift is not recorded within two (2) years of the conveyance, the deed is void and cannot be recorded thereafter and be given effect. If this is the result it will be as if the conveyance was never made, and the property remains in the hands of the original grantors.

Here the deed from James and Mary was properly executed and delivered to Pattie with all the formalities required in 1995. The facts suggest that this was a gift deed as the deed noted that in lieu of consideration the grant was made in return for their love they had for Pattie. This clearly was a gift deed as no consideration was given. Thus, Pattie needed to record her deed within two years of 1995. The facts state she didn't record until 2001, 6 years later. As a result of this error, the conveyance was void and the recording 2001 had no effect, and thus, the property remains in the hands of James and Mary as owners of Berryhill as tenants by the entirety.

2) The lien from the IRS property attaches to Berryhill, but the PCA Bank ("bank") lien does not.

Normally, as noted previously, when there is a tenancy by the entirety, neither party individually may execute a mortgage or convey the property. Additionally, a third party (unsecured) may not attach a judgment lien against only one of the members of the tenancy by entirety. However, a property executed and filed tax lien will attach to the property, even if it is only one of the spouses names. Proper execution requires that the tax lien be filed in the county clerk's office where the property is located. Also, notably, a judgment lien in both parties name is properly attached to the property when it is docketed in the clerk's office of the county where the property is located.

Here, first the IRS lien against James. The IRS properly filed the tax lien in the Orange County Clerk's office and with the Secretary of State. Thus, despite it only being a lien against James, it properly attached to the property at Berryhill as an exception to the rule for tenancys by the entirety.

The PCA Bank judgment did not attach despite PCA following the proper docketing procedure. As noted in the facts, the judgment was only against James, not Mary, thus, PCA could not attach its lien to Berryhill, as it was held by James and Mary as a tenancy by the entirety, which as explained earlier, is what NC presumes the deed to be held under. PCA properly docketed the lien in Orange County but because it was only against James, it could not attach.

As a result, the IRS lien did attach to Berryhill but the PCA Bank lien did not. So James and Mary own the property as tenant's by the entirety, subject to the IRS lien.

## Answer B to Question 6

Land purchased and owned jointly in NC by a married couple is presumed a tenancy by entirety with the right of survivorship. This means that when one of the couple dies, the whole interest belongs to the other surviving spouse. Another implication of owning land as tenants by the entirety is that one spouse cannot convey away or burden the property without the other's permission. Here, both James and Mary together conveyed Berryhill to their daughter by deed, so the land can pass. When a deed is chosen as the mechanism of transferring title to land, it must be executed properly and delivered. No evidence here suggests problems with either. We are told that it was "executed and delivered" so we can assume those processes were valid. A deed is valid upon delivery. Actually possession and control must be surrendered. There is no suggestion here that James and Mary had access to the deed or that they could revoke it, so it was effective upon delivery to Pattie. It did not need the recodation as between grantee and grantors. Recordation just serves as notice to subsequent Bonified Purchasers. Mary Jones owns Berry Hill in 2006.

2. For a lien to attach to a property, it must be the property of the one against whom the lien is asserted. A person may only burden property that he or she has to burden. So long as property is validly conveyed without fraudulent intent (i.e. to defraud one's creditors) and the person does not hold that interest anymore, he or she cannot cause it to be burdened by lien or judgment.

If the time frame (the less time between conveyance and obligation that would attach to the property and burden it the more likely the conveyance was fraudulent) infers fraudulent conveyance, the conveyance may be held invalid, allowing creditors to reach

the property. However, the property must still be owned such that it can be burdened by acts of the debtor. Here, even if the conveyance is held to be an attempt to defraud creditors, it is still not subject to the federal tax lien or judgment lien. This is because the land was held as tenancy by the entirety. Therefore, for a tax lien to attach to a property, it must be assessed against both owners (James and Mary). Here, the lien cannot be assessed against Berryhill because, if deemed the property if James and Mary, both persons must have burdened it and/or given consent to be burdened. The same holds true for the judgment lien. Some other property would have to be burdened that is James' interest only for which it is James' interest and Mary consents to the attachment.

Prior to the execution of her will, Virginia owned a twenty acre tract of land which adjoined the lands of Myrtle Raleigh, Violet Swaim, and Paul Holder. She also owned a five acre tract of real property which did not adjoin the lands of Myrtle, Violet and Paul, but which did adjoin the twenty acre tract on the north side. Virginia had never married and had no children. Her only living relatives were her great-niece and great-nephew, Montez and Mike, respectively. Myrtle had been Virginia's dear friend and neighbor for 40 years. When Virginia died, she left a properly executed will which read as follows:

*First, I direct my executor hereinafter named to give my body a suitable burial and to pay all my funeral expenses. Second, I give and devise to Myrtle Raleigh all my real property joining the lands of Myrtle Raleigh, Violet Swaim, and Paul Holder, containing twenty acres, more or less. Third, I give and bequeath to Myrtle Raleigh all my personal property of whatsoever nature. Fourth, I constitute and appoint Mark Minister as my executor and hereby revoke all prior wills made by me.*

Montez and Mike have now stepped forward and have asserted a claim to the five acre tract of real property owned by Virginia at the time of her death.

**QUESTION:**

Should Montez and Mike inherit the five acre tract?

### Answer A to Question 7

No, Montez and Mike should not inherit the five acre tract.

Under North Carolina law of succession, any property that a decedent does not dispose of in his or her will should pass by intestate succession. In this case, Virginia apparently disposed of all her property except for the 5 acre tract, the question is whether Virginia intended to include the 5 acre lot in her devise to Myrtle. The Court should try to determine the intent of the testator based on the document.

In this case, Virginia devised to Myrtle “all my real property joining the land of Myrtle Raleigh, Violet Swaim and Paul Holder containing twenty acres, in more or less.” It could be construed that the 5 acres was included in this devise because Virginia did not specify exactly twenty acres; she said “more or less”. In addition, it could be construed that Virginia perceived the 20 acre lot and the 5 acre lot to be one contentions tract. In that event the 5 acre lot would also join with the other three tracts. Also, unless there is evidence to the contrary, there is evidence to the contrary, there is a presumption that a testator’s will is intended to device/bequeath her entire estate. On the face of the document, there is nothing to indicate that Virginia intended to devise the property to Montez and Mike.

There is also evidence that Virginia would intend the 5 acre tract to go to Myrtle. Myrtle is said to be Virginia’s “dear friend and neighbor for 40 years.” It would seem that Virginia would want her dear friend to have her property rather than two somewhat distant relatives. Also, Virginia left her personal property to Myrtle as well. This would seem to indicate that Virginia would like Myrtle to have all of her property. But that raises the issue of why Virginia didn’t just say, “I leave all of my property to Myrtle.”

Montez and Mike would have a good argument in that regard. And under NC intestate succession laws they could take because they are within the 5 steps of consanguinity.

However, based on the instrument before the court, Montez and Mike should not inherit the 5 acre tract.

### Answer B to Question 7

Montez and Mike will not inherit the 5 acre tract.

At the time of Virginia's death she owned 2 adjoining pieces of real property; a 20 acre parcel which adjoined the lands of Myrtle Raleigh, Violet Swain, and Paul Holder; and a 5 acre parcel which adjoined the 20 acres on the other side. As an unmarried person with no children, there were no restrictions on whom she could devise her property too, nor could anyone assert any statutory rights to it apart from intestacy rights to property not properly disposed of in the will. The disposition made by Virginia of "all my real property joining the lands of.... containing 20 acres, more or less, " is ambiguous because it is unclear whether she meant all her real property or just the 20 acre parcel.

If Virginia meant only the 20 acre parcel, the 5 acre parcel will have been left out of the will and as there is no residuary clause stating who inherits everything not specifically enumerated, the residuary would pass to Virginia's heirs via the intestacy statutes. Montez and Mike are Virginia's only heirs, they are within 5 degrees of relation to her, and as they are at an equal level of relation to her, would inherit any property in her residuary estate as equal tenants in common.

Montez and Mike will claim this is the proper interpretation of Virginia's will because her statement "20 acres, more or less must refer only to the 20 acre tract, 5 additional acres being more than is commonly referred to as "more or less."

However, the court will probably disagree with them on this as the law highly disfavors intestacy and will make every effort to construe her will in a manner that will avoid it. The court will disregard Virginia's misstatement of the acreage, particularly in

light of the fact that she added, “more or less”. The interpretation of the will that avoids intestacy is that Virginia truly meant to leave “all” her real property to Myrtle. The fact that the 5 acre tract adjoins the 20 acre tract which adjoins the other 3 named parties’ tracts can be said to fit Virginia’s description of all her property that joins all the others’ lands by virtue of their total continuous nature.

This interpretations avoids any intestacy and Myrtle will inherit both the 20 acre and the 5 acre tracts.

Marty Match's home burned late in the evening on October 5, 2004. Marty told the firemen that the blaze was caused by grease catching on fire in the kitchen. Based solely on what defendant told the firefighters the day of the fire, the County Fire Lieutenant's report of the fire listed a pan of grease as the source of the fire.

The fire was subsequently investigated by the State's arson and fire expert Agent Fred Fireman. At the conclusion of that investigation, Marty Match was accused of arson in connection with the fire in his home.

At trial Fred Fireman was called as a witness for the prosecution. The defense agreed that Agent Fireman was an expert in the field of fire chemistry and behavior, fire cause and origin, and arson and fire investigation. Agent Fireman testified to 40 years of experience with firefighting, that he had received training by State and National agencies in the field of fire investigation, and that he had taught courses in fire investigation at the United States Bureau of Alcohol, Tobacco and Firearms. He had not gone to college and had never had a college level chemistry course.

It was Fireman's opinion that the fire was intentionally set by someone pouring a large quantity of an ignitable liquid in the living room and setting it on fire. Over objection from defense counsel, Fireman also testified that in his opinion, it was physically impossible for the fire in defendant's home to have been caused by grease. His testimony was based on an experiment he ran attempting to ignite vegetable oil commonly sold in grocery stores. After several failed attempts at igniting the hot oil, he finally did so using a plumber's torch. He then poured the ignited oil onto the floor

where the fire went out, leaving grease patterns on the floor. No traces of grease were found on defendant's living room carpet .

The defendant was convicted and on appeal, he contended that the trial court erred by allowing Fireman to testify about the impossibility that grease could have caused the fire. Defendant argues that Agent Fireman's expert opinion was merely speculation. Defendant asserted that the jury could be trusted to form its own common sense conclusions about cooking fires and no assistance from an expert was necessary or permissible.

### **QUESTIONS**

1. Did the Trial Court commit error in allowing the State's expert to testify that the fire could not have been caused by a grease fire?
2. If the defense counsel had not stipulated that Fireman was an expert, what factors should the trial judge have considered in making a determination about the admissibility of the expert testimony?
3. If the defense counsel had not stipulated that Fireman was an expert, would it have been error for the court to allow one who did not have a college or graduate degree to testify as an expert?

## Answer A to Question 8

1. Since Fred's qualifications in the appropriate field of expertise were stipulated, the question is whether or not Fred's experiment was a sufficiently reliable method of proof to support his opinion that the fire was not caused by grease. In this regard, North Carolina applies a less stringent test of reliability than the Daubert test preferred by the federal courts. In North Carolina, the trial court may consider all relevant indices in determining whether or not an expert method of proof is reliable. Among such indices are the following: 1) The use of established techniques; 2) the expert's professional background; 3) the use of visual aids to clarify the method of proof; and 4) independent research by the expert. Although the facts presented by the question do not speak to all of these specific indices, the qualifications of the expert are relevant and extensive. Thus the court was probably correct in admitting Fred's opinion that the fire was caused by grease.

2. The judge would have considered any education, training and experience of the expert and whether the basis of his opinion was relevant and reliable and based on the information other experts in the field would reasonably rely upon.

North Carolina has rejected the federal gatekeeping Daubert standards as North Carolina found such standards too limiting. Instead, courts in North Carolina favor the admissibility of expert testimony and consider the following in admission of such testimony: education, training, experience, reliability and relevance of opinion and whether the methods used were those likely to be used of similar experts. Finally, a party must tender an expert witness in NC prior to testifying.

Here, the judge would have considered the 40 years of experience of the expert, his training by State and National agencies in the field of fire investigation, and his teaching

with the USATF. As discussed below in (3), his lack of college/graduate education will not likely hinder his qualifications.

Further, the judge would consider the relevance of the opinion being offered and whether such would be helpful to the jury. Here, his combined experience and investigation in the case was relevant in determining just how the fire started.

3. If defense had not stipulated, is it error to allow one without a college/graduate degree to testify as an expert?

No. Here, it would not have been error to allow Fireman to testify as an expert if defense had not stipulated.

As stated above in question 8(2), education is only one factor that a judge may consider in determining whether a witness is an expert in a given field. For instance if the expert witness was being asked to testify as to a medical condition such an expert would have to be a doctor and would thus, have to have a medical degree. However, here, although one does not have to hold a degree in the field of arson or fire behavior/investigation, the lack thereof is compensated by 40 years of experience.

Here, it would not be error to allow an expert without a college degree to testify.

### Answer B to Question 8

1. No, the trial court did not commit error in allowing the state's expert to testify that the fire could not have been caused by a grease fire.

Before an expert is allowed to testify, he/she must be tendered as an expert before the court. If the opposing party does not concede the party is an expert, the judge serves as a gatekeeper in deciding whether the expert is qualified to testify. At issue in this question is not the qualification of the expert (since the defendant stipulated he was an expert) to testify but rather the content of his testimony. In Federal Court, the Daubert case requires that an expert only formulate their testimony based on a certain level of reliable research. Therefore, an expert must base their opinion on scientifically accepted methods of research; i.e. ones that experts in the field recognize as reliable. North Carolina has not adopted the Daubert reliability standard. Rather, in North Carolina, an expert's opinion testimony may be based on a broader range of research and theories, such as novel scientific theories that have not yet been adopted by the scientific community. The expert must be able to testify that his opinion is based on substantial certainty. If the opinion of the expert will aid the trier of fact in formulating an opinion regarding the ultimate issue, it is allowed. Further, an expert may testify to his/her opinion on an ultimate issue in the case so long as he/she is not drawing a conclusion as to the mental state/capacity of the defendant.

Here, Fred Fireman's testimony was based on an experiment he ran attempting to ignite vegetable oil commonly sold in grocery stores. The trial court did not err in failing to require the expert to testify based solely on evidence of scientifically accepted principles because North Carolina has a broader/more relaxed standard for reliability than

federal court. Since a lay person may not have the full understanding of when a grease fire may arise and from what causes, the Fireman's testimony would aid the trier of fact in formulating an opinion regarding the defendant's alleged arson. Accordingly, the trial court did not err in letting him testify.

2. North Carolina does not follow the Daubert analysis when determining the admissibility of expert testimony. Instead, NC considers whether the testimony is relevant, whether it meets various indices of reliability, and whether it is helpful to the trier of fact in making its ultimate findings of the issue before the court.

Here, the court would have considered the expert's 40 years of experience, the fact he had training from state and national agencies in the field of fire investigation, and the fact that he taught courses in fire investigation at the US bureau of Alcohol, Tobacco and Fire Arms as sufficient indices that he was an expert in the field. Further the court would have deemed those experiences and knowledge to be of use to the jury. The court in NC would not have required that the science involved be accepted practice in the field.

3. Even if the defense counsel had not stipulated that Fireman was an expert, it would not have been error for the court to allow someone to qualify as an expert who possessed neither college nor graduate school credentials. If the question were one of medical malpractice, then it would have been germane for the expert to have exceptional and advanced academic qualifications. However, a person can be an expert in any number of subjects and their expertise can be established through credentials other than academia. Given Fireman's advanced experience with the department and extensive training, the lack of formal education would not undermine his professional expertise. On the other hand, a full background should be provided to the jury so that the members of

the jury could make their own assessment as to the validity of the Fireman's credentials and the weight they would afford his testimony.

Manufacturer, Inc. assembles tobacco curing barns at its plant in Rocky Mount. It manufactures many of the components it assembles, including a small spring latch, two of which are required to secure each of the Manufacturer barn's 126 curing racks. The latches insure that the racks hold the tobacco.

In June 2004, Metalworks, a Wilmington-based supplier, proposed to Manufacturer that it take over manufacturing the latches. Manufacturer expressed interest and gave Metalworks a latch and a copy of the engineering drawings to examine. Based on its examination, Metalworks made 100 sample latches which it delivered to Manufacturer for consideration on July 18, 2004. Manufacturer found that the latches performed satisfactorily under normal field conditions. After being quoted a price that was below Manufacturer's cost of manufacturing the latches in-house, Manufacturer decided to outsource all its latch production to Metalworks. Accordingly, Manufacturer placed an initial order with Seller on August 12, 2004, for 500,000 latches "as per the samples you gave us," which order Seller accepted. As soon as Metalworks delivered the latches, "per your order", in mid-October, Manufacturer stopped producing its own latches.

Over four months later, in late February 2005, after selling over 1,000 tobacco barns with MetalWorks latches, Manufacturer began getting complaints from farmers that tobacco was falling from the curing racks. Within a few days, Manufacturer notified Metalworks of the complaints, suspended its use of the Metalworks latches, and resumed making its own latches. Manufacturer also began incurring shipping and labor costs to replace the latches in the field. An investigation soon determined that there was a subtle

design difference between the sample latches tested in July and the production latches delivered in mid-October, as a result of which the production latches could not withstand tobacco loads within the weight range at which the sample latches had performed successfully.

In early March, Manufacturer returned the 240,000 Metalworks latches remaining and demanded that Metalworks refund the partial payment it had made on the October delivery. In response, Metalworks, which had no other customer for the latches, demanded payment in full for the order.

**QUESTION:**

What, if any, remedies might Manufacturer have against Metalworks?

### Answer A to Question 9

Manufacturer has a claim of breach of contract claim against Metalworks. As the metal latches would be considered "goods", the claim would be governed by UCC Article 2. Given the facts, it appears that Metalworks made both express and implied warranties to Manufacturer regarding the latches. When a seller makes an express representation regarding goods to be sold, and the buyer relies on the at representation, the buyer has a claim for breach of express warranty if those representations turn out to be false. When MetalWorks sent the 100 sample latches to Manufacturer, it was making an express warranty regarding the latches it was to sell (i.e., it was representing that the latches they were offering would be the same as the samples they had sent as samples). It is also clear that Manufacturer relied on the samples, as it ordered 500,000 latches "as per the samples you gave us". Further, Metalworks knew of the purpose for which Manufacturer needed the latches and so they also likely were making an implied warranty of fitness for an express purpose. When it turned out the latches sold differed from what was sent earlier as samples, this gave rise to a breach of contract claim. As a remedy, Manufacturer could have rejected the goods had it noticed the defect when they were tendered because, under the UCC, a buyer is entitled to reject anything that is not a perfect tender. However, Manufacturer did not notice the defect until after it had accepted them. When a buyer accepts goods, it may still later revoke that acceptance if (1) there were excusable grounds for failing to notice the defect earlier, (2) the defect substantially impairs the value of the goods and (3) the buyer gives timely notice of revocation. Here, there were excusable grounds for failing to notice the defect--we are told that the design difference was very "subtle", so it is likely they would not have noticed the difference upon initial

inspection. Further, the defect was not uncoverable until the latches were being used, at which point it became evident that they were impaired as they could not withstand tobacco loads. As Manufacturer made a timely investigation into the complaints of its customers, it appears that there were indeed excusable grounds for ignorance.

Whether or not there was substantial impairment may be more difficult to show, as we are told the design difference was very "subtle". However, the effect of that design difference meant that the latches failed to perform correctly in withstanding tobacco loads; hence, since they were unable to perform the functions for which they were intended, the design difference was arguably substantial.

Finally, regarding whether or not the notice of revocation came timely enough, the facts tell us that Manufacturer did not revoke until almost 6 months later (delivery in October and notice of defects in March). However, as discussed above, the notice of the defects came as timely as possible following the delivery; given the circumstances, it is understandable that it took Manufacturer 6 months to give notice of the defects. When an acceptance has been effectively revoked, the buyer must keep the goods and await seller's instructions regarding the return of the goods. As we are told Manufacturer wishes to return the 240,000 remaining latches, this is what it should do. With regard to the latches it will not be returning (the 260,000 already incorporated into the machines and sold), Manufacturer has a breach of contract claim against MetaIWorks. Under the UCC remedies, when the seller breaches and the buyer keeps the goods, the Manufacturer is entitled to the difference between the value of the goods as perfect minus the goods as delivered.

With regards to goods that the buyer does not keep when the seller breaches, the buyer is entitled to the cost of replacement. Thus, with regard to the latches Manufacturer will be returning, Manufacturer is entitled to the cost of replacing the latches (which will most likely be the cost to them of producing the latches themselves).

Furthermore, Manufacturer is entitled to consequential damages of the breach if such damages were foreseeable. Thus, Metalworks may also be liable for the shipping and labor costs that Manufacturer has incurred in replacing the latches in the field, as long as these costs were foreseeable when the parties entered into the contract. These were likely foreseeable as Metalworks was aware of the purpose for which these latches were to be used and Manufacturer's business. Thus, that some customers would want their tobacco machines replaced when the latches failed to perform adequately is foreseeable.

## Answer B to Question 9

Possible damages could include expectancy damages or benefit of the bargain damages, incidental damages, damages to obtain a cover contract, and possibly consequential damages.

Article 2 governs the sale of goods. A contract may be formed under 2 by way of shipment of goods or by agreeing to ship the goods. In a non-installment sales contract, the rule of perfect tender rule applies. A merchant must deliver the goods as requested at the perfect time, the perfect place and in the requested condition. Where the perfect tender rule is not observed, the seller has breached the contract. In a breach, the buyer may either accept the goods, reject the goods or accept a commercial unit and reject the balance. Once goods have been accepted, they may not be rejected. A buyer may revoke its acceptance only where, after a reasonable opportunity to inspect accepted goods a latent defect is discovered and the latent defect substantially impairs the contract. In this instance, a buyer must give notice to the seller within a reasonable time of discovery and hold the goods for the seller's pick up. An express warranty is any affirmation regarding the product that becomes a basis of the bargain and a reason for the purchase. In a breach of contract under article 2, possible damages could include expectancy damages or benefit of the bargain damages, incidental damages, damages to obtain a cover contract, and possibly consequential damages. Expectancy damages are those damages that normally flow from a breach of a contract. Incidental damages are damages that occur as a result of the breach by having to store unwanted goods, etc. Cover damages occur where the nonbreaching party has to go out into the market and find replacement goods for the breached contract. Consequential damages are damages that are reasonably within the

contemplation of the breaching party at the time the contract was entered into.

Consequential damages must be foreseeable.

The facts indicate that under an express warranty, MetalWorks represented laches as durable, however, after purchasing the laches and installing them on curing barns, the laches gave way. This was not discovered until after Manufacturer had already installed over 1000 of the 500,000 laches received. Manufacturer started to receive complaints from its customers. This defect is a latent defect and this latent defect substantially impairs the contract. Therefore, Manufacturer is able to revoke its acceptance of the laches and may seek damages. Manufacturer may receive a refund of the payment made for the 240,000 returned laches and may also seek expectancy damages or benefit of the bargain damages. Expectancy damages do not have to be foreseeable but must be definite and not speculative. The damage amounts to what Manufacturer would have received had the contract been fully performed. Manufacturer may also seek incidental damages. Incidental damages are those damages that are incurred as a result of breach in having to store unwanted goods. Manufacturer may also obtain damages incurred in obtaining a cover contract. Where manufacturer has to go out into the market place and find substitute goods to replace the defective goods, manufacturer may obtain the cost of cover. Finally, where manufacturer is able to show that special damages as a result of the breach that were contemplated by Metalworks at the time the contract was entered into, manufacturer may obtain consequential damages for costs incurred in having to take back faulty curing barns and contracts breached as a result of defective goods. Loss of other contracts and having to take back faulty goods are damages that are reasonably foreseeable.

On July 24, 2003, Bill Major and Mike Sargent were traveling at a high rate of speed in Sargent's car in Surry County. At an intersection, they collided with a car which was stopped to make a left turn. Sargent and the operator of the other car were killed and Major was thrown from the car. Major suffered a head injury. A witness, who had seen Major and Sargent in a roadside tavern several miles south of the intersection, testified that Major was driving as they left the tavern.

Major was charged with several violations, including death by vehicle under G.S. 20-141.4. Attorney Al Lawyer was retained by Major. Major told Lawyer that he could not remember who was driving at the time of the accident.

As trial approached, Lawyer met often with Major. He explained the applicable law and the possible outcomes. He went over the questions he would ask and Major's answers so that Major's testimony would be given in the most effective manner, including that he had never driven Sargent's car before the day of the accident. Lawyer told Major that without some evidence that Sargent was driving, there was considerable risk that Major would be convicted.

On the eve of trial, Major told Lawyer that he intended to testify that Sargent had been driving the car. When Lawyer pressed him about his sudden recall, Major admitted that he in fact had been driving Sargent's car at the time of the accident. However, because of Lawyer's advice about applicable law and the testimony of the roadside tavern witness, he realized that without his denial that he had been driving there was a considerable risk that he would be convicted and imprisoned. Thus, rather than say he had no recollection, he intended to testify that Sargent was driving.

Despite Lawyer 's advice that Major should tell the truth if he testified, Major insisted that he would testify that Sargent was driving, since Lawyer had made it clear to him that without his denial of driving, he could go to jail.

At trial, Major insisted upon taking the stand, contrary to Lawyer 's advice. As to the facts of the accident, Lawyer simply asked him "Is there anything you want to say about the charges against you?" Major then testified that Sargent had been driving.

**QUESTIONS:**

1. Was there anything improper about the manner in which Lawyer represented Major before the trial?
2. Was there anything improper about the manner in which Lawyer represented Major at the trial?

## Answer A to Question 10

1. No, there was nothing improper about the manner in which Lawyer represented Major before the trial.

Before the trial, Lawyer acted as a competent and ethical lawyer. Lawyer met with Major often, explaining the law and the possible outcomes, as he should under the North Carolina Rules of Professional Conduct. He also went over questions he would ask Major and Major's testimony, to ensure that Major's testimony would be given in the most "effective manner." There is nothing improper about this. A lawyer can "rehearse" testimony for such purposes, to ensure that the client/witness gives clear and effective answers. Under the North Carolina Rules of Professional Conduct, of course, a lawyer cannot tell the witness to lie, or suggest that he lie, or "plant" information that is not his client/witness's. But Lawyer did not do that here, under the facts as given. He did go over Major's testimony that Major had never driven Sargent's care before the day of the accident, but there is no indication that that testimony is untrue.

Furthermore, it was proper - indeed, good practice - for Lawyer to tell Major that without some evidence that Sargent was driving, there was considerable risk that Major would be convicted. A lawyer should tell his client his estimation of the merits of the case, both fact and law.

The most significant pre-trial issue, of course, is whether Lawyer should have told Major that he would not put him on the stand after Major told Lawyer that he would lie and testify that that Sargent was driving. Lawyer certainly did the proper thing in attempting, after Major told him he would lie, to convince Major to tell the truth if he testified. Lawyer had no affirmative duty to disclose to anyone that Major told him that

he was driving; to the contrary, he had a duty to Major not to disclose that confidential client communication. After Major insisted that he would testify falsely, however, whether Lawyer then had a duty to tell Major that he would not put him on the stand is the same as asking whether Lawyer should have put him on the stand, see below.

2. Yes, Lawyer acted improperly by allowing Major to testify falsely.

A firm rule of the North Carolina Rules of Professional Conduct is that a lawyer should not put evidence before a tribunal which the lawyer knows to be false. Moreover, where a lawyer has put on such evidence, he or she has a duty to the tribunal to disclose the false evidence - by convincing the client to correct the record or, if the client refuses to do so, correcting it himself or herself. Afterwards, he or she may also have a duty to cease representation, if further representation would result in any violations of the Rules of Professional Responsibility, or the client persists in offering more false testimony.

This rule is generally quite clear. Its implications are problematic, however, when the client is a criminal defendant testifying in his own behalf. Such a client has a constitutional right to testify in his own behalf. In some jurisdictions, although it is still improper for a lawyer to offer false testimony by actively questioning his client and eliciting false responses, the lawyer can ask his client a general question - such as, "is there anything you want to say?" - and let the client give a narrative response. In some states, this preserves the criminal defendant's right to testify in his behalf and the lawyer's obligation not to offer false evidence. The theory is that the lawyer is not offering false evidence, but rather allowing the defendant to say whatever he wants, true or untrue.

North Carolina, however, does not generally allow this sort of narrative testimony. A lawyer in this state should not offer false testimony or evidence in any form. Consequently, Lawyer should not have asked Major the stated question. When Major told Lawyer on the eve of trial that he intended to lie, and then insisted that he would testify falsely despite Lawyer's protestations, Lawyer should have refused to put Major on the stand.

### Answer B to Question 10

Most states, including North Carolina have adopted the ABA model Rules of Professional Conduct (RPC), with a few notable variations. The rules are in place to ensure the safety for the public and to maintain the decorum of the legal profession.

1) Yes, as soon as Lawyer ("L") learned of Major's ("M") intent to perjure himself, he had to withdraw from representing M.

An attorney has many duties owed to his client. Most notably here, are the attorney's duties of confidentiality, diligence and competence. Under most circumstances, the attorney may not divulge confidential information about his/her client learned into the scope of representing the client. Here, when L learned that M planned to perjure himself, that is a confidential communication that that an attorney normally may not divulge to a third party without express or implied consent. However, there is a notable exception to this rule that states an attorney may divulge otherwise confidential information to prevent a future crime. Here, L would have had a couple of choices before trial. Under the circumstances, he may have withdrawn from his representation of M. However, if that would fail to stop the impending act of perjury, L may disclose the M's plan to the trial judge without violating any ethical rules. At that point, L would have to listen to what the judge tells him, if the judge demands he withdraw, then he must, if the judge forbids him to withdraw, then he must abide. Either way he is off the hook at this point.

An attorney must not knowingly aid in a violation of an ethical rule.

An attorney's role as counselor requires the attorney to counsel the client and assess the case for them at their request. An Attorney may counsel a client of the legal

ramifications of certain acts, however, an attorney may never counsel or aid a client in committing a crime or covering one up. here, L probably did not violate this duty.

because although without L, M would not have come up with the plan to perjure himself, it was a result of L's permissible counseling by explaining the applicable law and possible outcome of him testifying that M stood a good chance to be convicted unless there was evidence that Sargent was the driver of the car. Therefore, L did not counsel M to commit a crime.

Overall, L must have attempted to withdraw in his representation of M, and if that wouldn't stop the perjury, he may have revealed his knowledge to the trial judge.

2) Yes, L committed a violation of the rules by not telling the trial judge about the perjured testimony.

As mentioned previously. When L learned that M planned on taking the stand in his own defense and offering perjured testimony, he should have done a number of things before it came to the point it did. First, she should have told M of the consequences of perjuring testimony and that L would not be able to help him perjure himself or else L himself would be subject to sanctions. If that did not dissuade M from planning to commit perjury. He should threaten to withdraw and then actually withdraw if that doesn't work. Ordinarily, in a noncriminal case, L would have been able to not call M as a witness. However, in a criminal case, it is the accused constitutional right to take the stand in his/her own defense, so that remedy would not work for L here. the final measure that L could have taken is to tell the judge of M's plans to commit perjury. After that, if the judge still does not allow L to withdraw, the final thing L can do in this situation is to allow the witness to perjure, however, he should not aid in the perjury, so his questions

leading up to the perjured testimony must allow the witness to narrate the testimony (so L does not directly aid in the perjury). L actually does this in the facts. However, under the circumstances, L did not take any of the other measures that he had a duty to undertake before it came to the point that L should be sanctioned for his actions in this case.

Rowan County Ordinance 3255 prohibits “the burning of crosses with the intent to intimidate.” Bob White is a Rowan County citizen. On November 1, 2004, White led a Ku Klux Klan rally on his property in Rowan County. The rally was held in an open field, but there were approximately ten (10) homes in the immediate area, half of which were occupied by African American families. The rally was voluntarily attended by 35 people. At the conclusion of the rally, the crowd circled around a 25-foot tall cross, which White set on fire. White and those attending the rally knew that African American families lived nearby and that they would likely see the burning cross.

The County Sheriff’s Department received a complaint call from one of the African American neighbors. The neighbor informed the dispatcher that she was “terrified” when she saw the burning cross. The Sheriff arrived to investigate while the cross was still burning, entered the property without a warrant and arrested White for violating Ordinance 3255. At trial, White asserted that the charges against him should be dismissed on constitutional grounds.

**QUESTION:**

Will White prevail?

## Answer A to Question 11

No, White will not prevail on his assertion that the charges claiming violating Rowan County Ordinance 3255 be dismissed on constitutional grounds

The 1<sup>st</sup> amendment is applied to the states via the due process clause of the 14<sup>th</sup> Amendment. Statutes restricting one's freedom of speech in public or limited public spaces are valid if they are subject matter and viewpoint neutral, limited in time, place or manner if for an important government purpose and leave alternative channels. The restriction does not need to be the least restrictive. For non-public places, the restrictions must be reasonable and viewpoint neutral. The Supreme Court has held that while cross burning may be an acceptable form of symbolic free speech, it can be banned if "made with an intent to intimidate or threaten."

Here, the Rowan County Ordinance specifically prohibits "the burning of crosses with the intent to intimidate." This restriction of free speech falls within the Supreme Courts approved limitation as this form of symbolic speech. Moreover, although White was burning the cross on his own private property, the facts indicate that White and then attending the rally knew that African-American families lived in houses adjacent to White's property and that they would likely see the cross. Seeing as this was a Ku Klux Klan rally, and that the group had knowledge that African-American families would see the burning cross, it is very likely that White and his followers intended to use the burning cross to intimidate. Moreover, this is further supported by the fact that the cross was 25-feet high- clearly to ensure that the cross could be seen for quite a distance.

Therefore, the court should not dismiss the charges against White on constitutional grounds.

## Answer B to Question 11

No, White will not prevail either from a 4th Amendment or 1st Amendment challenge.

The First Amendment of the United States Constitution protects the freedom of speech. Speech is not only verbal statements made by individuals, but it can also be certain types of conduct. In order to regulate conduct speech, the type of conduct must be regulated to serve an important governmental, legitimate interest. Further any law or ordinance must not be overly broad or vague. The regulation should leave ample channels open for other avenues as well. The speech should also be viewpoint and content neutral. If it is not content or viewpoint neutral, it moves from intermediate to strict scrutiny. However, this type of strict scrutiny can be proven by the government as fulfilling a legitimate governmental interest. Viewpoint neutral means that the regulation does not prohibit or restrict a particular viewpoint while allowing another to go. Content neutral means that the speech does not particular a certain kind of speech.

First, it is important to establish that in any suit, the party has standing; there must be cases and controversy; and there must be an injury. Here this law directly affects Bob White because he is attempting to burn a cross and the ordinance prevented him from doing so. The ordinance led directly to his arrest. Thus, he has been immediately injured and would have standing to challenge the constitutionality. The first amendment free speech rights are (largely) fundamental rights and therefore with exceptions such as commercial speech, obscenity, government employee speech, etc., most other types of speech are protected under strict or intermediate scrutiny. With this level of scrutiny, it is for the government to prove that the type of speech being regulated serves an important

governmental interest. For example, banning the burning of draft cards has been upheld by the Supreme Court because draft cards serve an important, legitimate, governmental interest in protecting identification. However, burning American flags was upheld in Texas v. Johnson, because the government could not articulate a legitimate, governmental interest in restricting this rarely used form of conduct speech. Though White will likely argue that burning a cross is similar to burning a flag, the Supreme Court has held otherwise. In a notable opinion by Justice Thomas, he stated that cross burning involves a different type of speech restriction given its history. The history of cross burning as a form of intimidation and fear rises almost to the level of "fighting words" which the government upheld restrictions upon in 1942. The history and nature of cross burning and the sheer intimidation and terror that it raises means that ordinances that prohibit this particular type of "conduct" speech or "fighting" words will be upheld. The statute is narrowly tailored to a particular form of intimidation (the burning of crosses). This particular type of speech is thus prohibited. That one neighbor was "terrified" when she saw the cross burning demonstrates the fear that such an act creates and goes to the evidence that Justice Thomas was discussing. While the cross burning was on private property, the intent was to scare the neighbors who Mr. White knew were African-American families. See also Brandenburg v. Ohio.

White will also not prevail on being arrested without warrant. Generally, when effecting an arrest upon someone you must have a duly executed warrant, probable cause, and a neutral magistrate. When these things do not exist, an arrest can be determined to be a violation of Fourth Amendment and unreasonable "search and seizure." There are exceptions though to being arrested without a warrant. These exceptions include a Terry

Stop (an arrest of a person based on a "reasonable articulation of facts" while searching them for contraband), arresting someone while in "hot pursuit" (you are chasing a suspect), situations involving consent to arrest, lawful arrest subject to a search, and the automobile exception (officer has reason to believe that an automobile is being used for contraband). Another one of those exceptions though is also "plain view." Here, Ordinance 3255 prohibits the "burning of crosses with the intent to intimidate." Upon arriving at the scene to investigate due to numerous calls, the Sheriff in plain view saw the cross burning. Given that the neighbors had called to complain and one said she was "terrified", the Sheriff saw a crime that was immediately apparent before his eyes. This gave him the right to arrest White.

Two lawyers from different law firms, Pete and Arthur, served as co-counsel in a case in which out-of-town depositions were scheduled in Asheville, North Carolina. Pete, a reputable senior litigator who was also a duly licensed private pilot, insisted that Arthur accompany him to the depositions in Pete's twin-engine airplane, a Beechcraft Baron. Arthur reluctantly agreed to ride to the deposition in Pete's airplane.

On the deposition date, the lawyers departed their home airport at 8:00 a.m. and arrived at the Asheville airport at 10:30 a.m., just in time for the depositions. Pete, who had flown the airplane, then conducted a 10 hour deposition of two hostile witnesses while Arthur took notes. Thereafter, Pete insisted upon returning that night, over the objection of Arthur.

Upon taking off from the Asheville airport, the Beechcraft Baron stalled and crashed into a mountainside, severely injuring both Pete and Arthur. After investigating, the National Transportation Safety Board (NTSB) determined, among other things, that no stall warning horn was on the airplane at the time of the accident and this was a proximate cause of the accident. Arthur sued both Pete and Beechcraft, the airplane manufacturer on theories of negligence and strict liability. Uncontradicted discovery disclosed that all Beechcraft Baron aircraft were manufactured and delivered with stall warning horns in place. The trial court denied Pete's motion to dismiss for failure to state a claim against him; and it denied Beechcraft's motion for summary judgment as to all claims.

**QUESTIONS:**

1. Was the trial court correct in denying Pete's motion?
2. Was the trial court correct in denying Beechcraft's motion?

## Answer A to Question 12

1. The trial court correctly denied Pete's motion as to negligence, but not as to the strict liability claim.

(The wording is not clear, but it appears Arthur brought a strict liability claim against Pete.) The only basis for imposing strict liability on Pete is by considering flying to be an ultrahazardous activity. The owner or driver of a vehicle is not strictly liable to passengers. Strict liability can be imposed for damages that result from ultrahazardous activities, regardless of fault. In North Carolina, however, the only recognized ultrahazardous activity is blasting. Moreover, the majority of states no longer consider flying to be ultrahazardous like it used to be. Therefore, the court should have granted Pete's motion to dismiss the strict liability claim against him.

Based on the pleadings however, Arthur has clearly stated a valid claim for negligence against Pete. A motion to dismiss for failure to state a claim cannot be granted unless the plaintiff can prove no set of facts that would entitle him to relief. (But see the recent US Supreme Court Twombly decision that might alter this standard. Even if the Twombly standard is used, Arthur has stated a valid claim.) The elements of a negligence claim are duty, breach, causation, and damages. First, Pete as owner and operator of the aircraft, had a duty to Arthur as his passenger. Second, the pleadings indicated that Pete may have breached this duty in one of two ways. He was probably tired after the long day, but proceeded to fly over objection. This very likely could have been one of the causes of the crash -- the missing horn is only listed as one of the causes. The other possible breach is that Pete failed to have a stall warning horn on his airplane. Given that Beechcraft installs them on all planes, it is probably reasonable to require them. As stated

here, at least the lack of horn, and possibly Pete's tiredness caused the crash. Finally, Arthur suffered injuries. So all elements could be met and there is a valid claim.

Pete could argue that Arthur was contributorily negligent by agreeing to fly with Pete. But since Pete was an experienced pilot, that cannot be said based on the pleadings alone. Also there was no breach of a duty to Pete this way. Or Pete could say that Arthur assumed the risk. Without knowing more of the facts regarding Pete's condition and Arthur's knowledge of it, such a determination cannot be made on the pleadings. Thus, Pete's motion as to the negligence claim was properly denied.

2. The trial court erred in denying Beechcraft's summary judgment motion.

North Carolina does not have a strict liability action based on products liability. As this is clearly the basis of Arthur's strict liability claim against Beechcraft, summary judgment should have been granted on this claim.

As for the negligence claim against Beechcraft, there is no evidence of negligence on its part. The only alleged defect that could have come from the manufacturer is the lack of the stall warning horn. The uncontradicted testimony, however, demonstrates that Beechcraft produced and delivered the plane with the horn in place. Arthur cannot survive summary judgment without some contradicting evidence on this point. As there is no other indication of negligence on Beechcraft's part, its motion should have been granted as to the negligence claim too. (A warranty action under the products liability statute would lead to the same result because delivering the product without the claimed defect is a defense to a warranty action.)

## Answer B to Question 12

1. Yes, the court was correct in denying Pete's motion.

Under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, a court can dismiss a claim for failure to state a claim where: 1) the complaint states not cognizable cause of action; 2) the complaint affirmatively pleads something barring relief; or 3) the complaint states a cause of action in the abstract but fails to state sufficient facts supporting each element of the claim. This last basis is particularly important in North Carolina, which, although it has notice pleading, requires the plaintiff to state sufficient facts supporting each element of the claim in a way that the Federal Rules of Civil Procedure do not. In analyzing a Rule 12(b)(6) motion, the court looks only to the complaint, accepting as true its allegations.

Here, Arthur sued Pete for negligence and strict liability. There is no basis for strict liability here. Strict liability applies when trespassing animals or wild animals do damage, and where the defendant performs an abnormally and necessarily dangerous activity unusual for the area. Although most states apply strict liability in the products liability context, North Carolina does not. And even if North Carolina did apply strict liability in products cases, Pete is not a retailer, wholesaler, or manufacturer or a product - he was merely the user of the airplane.

However, Arthur has sufficiently stated a claim against Pete for negligence. Negligence requires that the plaintiff show four things: 1) duty; 2) breach; 3) causation; and 4) injury. Each person owes everyone else a duty of reasonable care in the circumstances. A party breaches that duty when he does not use such care. Causation requires that the defendant have been the "but for" and proximate cause of the plaintiffs

injuries, the latter encompassing everything that is "reasonably foreseeable" from the defendant's breach.

Here, Pete owed to Arthur a duty of reasonable care in flying and maintaining his airplane. Arthur has probably stated a claim that Pete breached this duty by flying when he was tired: he flew after a two-hour morning flight and a long ten-hour session of depositions of two hostile witnesses. The facts do not say whether this was the case, however, but surely Arthur's complaint sufficiently alleges that Pete was too tired to fly. The harder question with this claim is causation. The facts say only that, "among other things," there was no stall warning horn on the plane. It is unclear if Pete's probable tiredness had anything to do with the crash. If it did, then Arthur has established "but for" and proximate causation, and clearly his damages stem from that breach.

In any event, Arthur's better negligence claim is that Pete did not maintain his aircraft by ensuring that it had a stall warning horn. Arthur's complaint surely alleges that Pete breached his duty to him by not maintaining the horn; it surely alleges what the NTSB concluded, that the lack of a stall warning horn was a proximate cause; it also surely alleges "but for" causation, which appears to exist, and Arthur's damages were certainly caused by the crash. Consequently, Arthur has stated a claim against Pete for negligence.

Pete's eventual defenses might revolve around assumption of risk or contributory negligence. In North Carolina, however, a party assumes a risk only pursuant to a contract; he cannot impliedly assume the risk in situation like the one presented here. Hence that defense would fail. North Carolina follows the traditional common law contributory negligence rule, meaning that any contributory negligence is a complete bar

to recovery. However, while Arthur may have been contributorily negligent in allowing Pete to fly while tired or in getting in plane while Pete was tired, there is no evidence that he was contributorily negligent for not maintaining the stall warning horn. Hence that defense would fail. In any event, these defenses would be more appropriate for a Rule 12(c) motion for judgment on the pleadings, not a Rule 12(b)(6) motion, which looks only to the plaintiff's complaint. Pete cannot establish an assumption of risk of contributory negligence defense based solely on Arthur's complaint.

2) No, the court was not correct in denying Beechcraft's motion.

Under North Carolina Rule of Civil Procedure 56, the court should grant summary judgment to a party when there is no genuine issue of material fact such that that party is entitled to judgment as a matter of law. The court should construe all facts in the light most favorable to the nonmoving party; however, when the moving party has submitted evidence that goes uncontradicted by the other party, the court can consider that evidence as true. For example, where one party in North Carolina submits sworn affidavits and the other submits no evidence, the former often prevails.

Here, as noted above, Arthur's strict liability claim against Beechcraft fails because North Carolina does not recognize strict liability in products cases. Hence the court erred in denying Beechcraft's motion as to that claim.

As to the negligence claim, the court also erred in denying that motion. In North Carolina, it is usually difficult to hold a manufacturer liable under principles of negligence, for various reasons. One of the most common reasons is presented by the facts here - that the product was safe when it left the manufacturer's possession. Here,

Beechcraft has submitted uncontested evidence that all Beechcraft Baron aircraft, the type of aircraft at issue, were manufactured and delivered with stall warning horns in place; presumably it has also submitted the uncontested evidence from the NTSB that Pete's airplane had not stall warning horn in place. To survive summary judgment, Arthur would have needed to have submitted some evidence that the stall warning horn was not in place at the time of delivery, or that it was in place but was not working properly. Arthur has failed to overcome Beechcraft's evidence, and this case is proper for summary judgment on the negligence claim.