CLEAR AND CONVINCING EVIDENCE

Senate Bill 33 and the Higher Burden of Proof for

"Emergency Medical Conditions"

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I. INTRODUCTION

The Ratified version of Senate Bill 33 ("SB33") fundamentally changed the law of medical malpractice with respect to "emergency medical conditions." Technically, Section 6 of the bill effectuated this change by several amendments to N.C. Gen. Stat. § 90-21.12, the statutory definition of "standard of health care" in North Carolina. In order to fully appreciate the new burden of proof for "emergency medical conditions," it is necessary to the view the various ways in which § 90-21.12 was altered by SB33.

Prior to the enactment of SB33, N.C. Gen. Stat. § 90-21.12 read as follows:

> **§ 90-21.12. Standard of health care.**
> In any action for damages for personal injury or death arising out of the furnishing or the failure to furnish professional services in the performance of medical, dental, or other health care, the defendant shall not be liable for the payment of damages unless the trier of the facts is satisfied by the greater weight of the evidence that the care of such health care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act giving rise to the cause of action. (1975, 2nd Sess., c. 977, s. 4.)

The General Assembly made several changes to the above section with SB33. First, the bill divided this section into two subsections, (a) and (b). Subsection (a) expands the prior definition of medical standard of care by adding the phrase "under similar circumstances" to the familiar same or similar communities standard. Subsection (b) then sets out the heightened "clear and convincing evidence" burden of proof for any alleged violations of Subsection (a) involving "emergency medical conditions," as that term is defined under the Federal EMTALA statute.

After goes SB33 goes into effect on October 1, 2011, the new § 90-21-12 will read as follows:

> **§ 90-21.12. Standard of health care.**
> (a) Except as provided in subsection (b) of this section, in any medical malpractice action as defined in G.S. 90-21.11(2)(a), the defendant health care provider shall not be liable for the payment of damages unless the trier of fact finds by the greater weight of the evidence that the care of such health care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities **under the same or similar circumstances at the time of the alleged act** giving rise to the cause of action; or in the case of a medical malpractice action as defined in G.S. 90-21.11(2)(b), the defendant health care provider shall not be liable for the payment of damages unless the trier of fact finds by the greater weight of the evidence that the action or inaction of such health care provider was not in accordance with the standards of practice among

similar health care providers situated in the same or similar communities **under the same or similar circumstances at the time of the alleged act** giving rise to the cause of action.

(b) In any medical malpractice action arising out of the furnishing or the failure to furnish professional services in the treatment of an emergency medical condition, as the term "emergency medical condition" is defined in 42 U.S.C. 1395dd(e)(1), the claimant must prove a violation of the standards of practice set forth in subsection (a) of this section by clear and convincing evidence. Ratified Senate Bill 33, Session 2011 (emphasis added).

This manuscript will attempt to (1) predict the likely scope of "emergency medical condition"; (2) define the true weight of the "clear and convincing evidence" burden of proof; and (3) discuss some strategy considerations moving forward under this new law, all based upon my personal view of the issues.

II. DEFINITION OF "EMERGENCY MEDICAL CONDITION"

A. EMTALA definitions: 42 U.S.C. 1395dd(e)(1) and (e)(3)

The new § 90-21-12(b), as codified in Section 6 of SB33, expressly provides that the scope of the phrase "emergency medical condition" is to be determined by referencing the definitions contained in 42 U.S.C. 1395dd(e)(1), the federal Emergency Medical Treatment and Labor Act ("EMTALA") statute. Section 1395dd(e)(1) from the EMTALA statute reads:

TITLE 42 > CHAPTER 7 > SUBCHAPTER XVIII > Part E > § 1395dd
Examination and treatment for emergency medical conditions and women in labor

§ 1395dd(e) Definitions
In this section:

(1) The term "emergency medical condition" means—

(A) a medical condition manifesting itself by **acute symptoms** of **sufficient severity** (including **severe pain**) such that the absence of **immediate medical attention** could **reasonably be expected to result** in—

(i) placing the health of the individual (or, with respect to a pregnant woman, the health of the woman or her unborn child) in **serious jeopardy**,

(ii) **serious impairment** to **bodily functions**, or

(iii) **serious dysfunction** of any **bodily organ or part**; or

(B) with respect to a **pregnant woman who is having contractions**—

(i) that there is inadequate time to effect a **safe transfer** to another hospital before delivery, or

(ii) that transfer **may pose a threat** to the health or safety of the woman or the unborn child. (emphasis added)

Clearly, this complex, multi-part definition of "emergency medical condition" is troublesome. The "emergency medical condition" issue is likely to spawn a cottage industry of pre-trial litigation, bringing with it increased attorney costs, time and effort, as both sides of the case argue what these many terms mean, and how they should be applied to the plaintiff's alleged condition. In order to take command of the coming "emergency medical condition" fight, we must understand the various ways EMTALA terms are likely to be defined by North Carolina courts.

Generally speaking, EMTALA imposes a requirement on hospital emergency personnel to "screen" and "stabilize" patients who present with an emergency medical condition before transferring that patient out of the ED.[1] EMTALA litigation generally focuses on (1) whether a particular patient's presentation to the hospital, or even in the pre-hospital setting, actually triggers EMTALA's screening/stabilization requirements, and (2) whether an appropriate screening examination was performed for a known emergency medical condition. There is a dearth of EMTALA case law interpreting the meaning of the terms used in 42 U.S.C. § 1395dd(e)(1) to define "emergency medical condition." Thus, North Carolina courts will be forced to look outside the confines of 42 U.S.C. § 1395dd(e)(1) for guidance.

One place to start would be 42 U.S.C. § 1395dd(e)(3), which defines what it means to "stabilize" a patient for EMTALA purposes. An understanding how EMTALA defines a "stabilized" patient necessarily sheds light on how the same federal law determines whether a patient's medical condition is a true "emergency." The EMTALA definition of a stabilized patient focuses on the likelihood of "material deterioration" of the patient's current medical condition should appropriate treatment be lacking:

§ 1395dd(e) Definitions
In this section:

(3) The term "to stabilize" means, with respect to an emergency medical condition described in paragraph (1)(A), to provide such **medical treatment of the condition as may be necessary to assure, within reasonable medical probability, that no material deterioration of the condition is likely to result from or occur during the transfer** of the individual from a facility, or, with respect to an emergency medical condition described in paragraph (1)(B), to deliver (including the placenta).

The logical extension of this "stabilize" definition is that the patient's condition is likely to "materially deteriorate" without "immediate medical attention," then the condition is more likely to be considered an "emergency" under EMTALA and the amended § 90-21.12.

[1] EMTALA imposes three main obligations on hospitals: (1) it requires a hospital ER to provide a medical screening examination to determine whether an "emergency medical condition" exists, 42 U.S.C. § 1395dd(a); (2) it requires a hospital to provide treatment of an existing "emergency medical condition" until the condition is stabilized, § 1395dd(b)(1); and (3) it restricts transfers of persons who exhibit an "emergency medical condition" or are in active labor, § 1395dd(c).

B. Plain language dictionary definitions

The court will be forced to consider the plain meaning of the EMTALA terms when considering whether an "emergency medical condition" exists under the amended § 90-21.12.[2] There are many key terms in the EMTALA statute that bear defining to aid in this analysis:

EMTALA term	Definition
"Acute" symptoms	Of abrupt onset, in reference to a disease. Acute often also connotes an illness that is of short duration, rapidly progressive, and in need of urgent care. "Acute" is a measure of the time scale of a disease and is in contrast to "subacute" and "chronic." "Subacute" indicates longer duration or less rapid change. "Chronic" indicates indefinite duration or virtually no change. The time scale depends on the particular disease. For example, an acute myocardial infarction (heart attack) may last a week while an acute sore throat may only last a day or two. http://www.medterms.com/script/main/art.asp?articlekey=2133
Sufficient "severity" / "severe" pain	A clinical qualifier that describes a disease that is so severe that it dominates all other activities. http://medical-dictionary.thefreedictionary.com/severe 6(a): inflicting physical discomfort or hardship : harsh <severe winters> (b): inflicting pain or distress : grievous <a severe wound> 7: requiring great effort : arduous <a severe test> 8: of a great degree : serious <severe depression> http://www.merriam-webster.com/dictionary/severe
"Immediate" medical attention	Immediate: 1. occurring or accomplished without delay; instant 2. following or preceding without a lapse of time 3. having no object or space intervening; nearest or next 4. of or pertaining to the present time or moment 5. without intervening medium or agent; direct http://dictionary.reference.com/browse/immediate
Reasonably be "expected" to result	1. to look forward to; regard as likely to happen; anticipate the occurrence or the coming of 2. to look for with reason or justification 3. *Informal*. to suppose or surmise; guess http://dictionary.reference.com/browse/expect
"Serious"	Referring to the criticality of a patient/event outcome or action

[2] See, Section IV(C), *infra*, for a discussion of applicable canons of statutory construction.

	criterion (Segen's Medical Dictionary) http://medical-dictionary.thefreedictionary.com/Serious Being of such import as to cause anxiety, as of a physical condition. (The American Heritage® Medical Dictionary) http://medical.yourdictionary.com/serious
"Jeopardy"	1. hazard or risk of or exposure to loss, harm, death, or injury 2. peril or danger http://dictionary.reference.com/browse/jeopardy
"Impairment"	1. Any abnormality of, partial or complete loss of, or loss of the function of, a body part, organ, or system; 2. Weakening, damage, or deterioration, especially as a result of injury or disease. http://medical-dictionary.thefreedictionary.com/impairment
"Dysfunction"	disturbance, impairment, or abnormality of functioning of an organ (Dorland's Medical Dictionary) http://medical-dictionary.thefreedictionary.com/dysfunction

Although all of the above terms are likely to see expensive and time-consuming litigation with expert witnesses and summary judgment briefs, I believe that the phrase "immediate medical attention" will become the most important piece to the puzzle. In Section I(C) below, see how North Carolina has interpreted this phrase from another federal statute that employs identical language to EMTALA.

C. Instructive NC case law

In 2006, the North Carolina Supreme Court was faced with the issue of whether an individual's condition constituted an "emergency medical condition." In *Diaz v. Div. of Soc. Servs.*, 360 N.C. 384 (2006), the Court was interpreting 42 U.S.C. 1396b(v)(3), a federal Medicaid statute employing identical language from EMTALA to define "emergency medical condition." The Court explained, in relevant part, its "emergency medical condition" analysis thusly:

> [W]hen determining whether a condition is an emergency medical condition, the **key words are "emergency," "acute," "manifest," and "immediate**." Using the common definitions of those words, that court concluded: "[T]he statutory language unambiguously conveys the meaning that emergency medical conditions are **sudden, severe and short-lived physical injuries or illnesses that require immediate treatment to prevent further harm**." This analysis closely adheres to the clear and unambiguous language of subsection 1396b(v)(3). *Diaz v. Div. of Soc. Servs.*, 360 N.C. at 387-388 (internal citations omitted) (emphasis added).

The *Diaz* court went on to explain the logical importance of the term "immediate" in the instant analysis by distinguishing the facts *sub judice* with a Connecticut court case, saying:

> The word "immediate" is commonly defined as: "**occurring, acting, or accomplished without loss of time: made or done at once: INSTANT**." *Webster's Third New International Dictionary* 1129 (16th ed. 1971). Therefore, treatment is not for an emergency medical condition under subsection 1396b(v)(3) unless one of the statutorily enumerated results is reasonably expected if immediate treatment is withheld. We are cognizant the Supreme Court of Connecticut has decided a case factually similar to this one and has held contrary to our decision today. *See Szewczyk v. Dep't of Soc. Servs.*, 275 Conn. 464, 881 A.2d 259 (2005). However, in our opinion, the Connecticut decision applied a much broader interpretation of the word "immediate" than intended by Congress. **The divided *Szewczyk* court seemed to rest much of its decision upon evidence in the record indicating that the nonqualifying alien in the case would have rapidly died if not provided treatment**. *See id*. at 468, 881 A.2d at 262. In the case at bar, while there is no dispute Diaz received appropriate care in the standard medical course of treatment, **there is nothing in the record that indicated the prolonged chemotherapy treatments must have been "immediate" to prevent the statutorily enumerated results**. The record in the case *sub judice* and the record in *Szewczyk* differ as to whether immediate treatment was required to treat the respective conditions of the patients. *Diaz v. Div. of Soc. Servs.*, 360 N.C. at 388 (emphasis added).

This critical analysis from the *Diaz* helps make clear the critical significance of the word "immediate" when considering the "emergency medical condition" issue for non-labor and delivery plaintiffs. Based upon a combination of the "material deterioration" language in 42 U.S.C. § 1395dd(e)(3), the plain dictionary definition of the phrase "immediate medical attention," and the N.C. Sup. Ct's telling analysis in *Diaz*, a plaintiff's best hope at escaping the clear and convincing evidence burden of proof is to focus on this simple question:

> ***At the time of the alleged breach, was the plaintiff in such an acute condition that had immediate/instant medical attention been withheld, he or she could have experienced (i) serious jeopardy to his or her health; (ii) serious impairment to a bodily function; or (iii) serious dysfunction of a bodily organ or part?***
>
> ***i.e., Look at the time of the alleged breach and simply ask, "what was likely to happen to my plainiff's medical condition in the minutes, hours, days after the breach occurred?"***

If under this analysis the plaintiff's condition was not likely to "materially deteriorate" in the moments, minutes or arguably hours after the alleged breach occurred, then it is logical to conclude that the medical condition the defendant allegedly failed to treat/diagnose was not a true "emergency" under EMTALA.

For example, in a failure to diagnose infection case against a primary care doctor, if the primary care physician failed to order tests that would have revealed on Day 1 that the plaintiff had a strep infection, but it was not until Day 4 that plaintiff had to be rushed to the emergency department for strep bacteremia, then I would argue the alleged breach in this case did not involve the treatment of an emergency medical condition. Defense counsel may attempt to tie the plaintiff's eventual demise into the emergency room to the alleged breach and argue that the condition at hand was, in fact, an emergency condition that required immediate treatment.

However, a condition is NOT considered an "emergency" here unless "serious jeopardy to health, bodily impairment, or bodily dysfunction" is expected to occur if the plaintiff doesn't receive **instant** medical treatment at the time of the alleged breach. Here, under these facts, the Plaintiff was sick with an infection at the time of the breach but a strep infection is a progressive illness and a health care provider would expect it to take many hours or even days to eventually develop into bacteremia. Thus, no true "emergency" here at the time the primary care doctor failed to order the necessary diagnostic tests, and his negligence would only need to be proved by a preponderance of the evidence.

A contrary example would be that of a patient with respiratory distress who is intubated and on a ventilator during an EMS transport. If the alleged breach in this hypothetical was the failure to properly monitor the patient's airway during transport then this would surely be considered an "emergency medical condition" at the time of the alleged negligence. At the time of the breach the patient was intubated and receiving mechanical ventilation due to respiratory distress. If the plaintiff had not received immediate airway management during a transport like this, then it is very likely he or she could suffer oxygen deprivation in a matter of seconds leading to an anoxic brain injury. Thus, this would be considered a true "emergency" condition at the time of the alleged breach, and the EMS negligence must be proved by clear and convincing evidence.

III. CLEAR AND CONVINCING EVIDENCE – HOW HEAVY IS THIS BURDEN REALLY?

A. Burden *only* applies to evidence of breach

i. Clear and convincing standard expressly limited to only "violations of the standards of practice"

The plain and unambiguous language[3] of SB33 states that the clear and convincing burden of proof applies *only* when the plaintiff is trying to "prove **a violation of the standards of practice** set forth in subsection (a) of this section." Subsection (a) refers to the new § 90-21.12(a), which simply defines the "standards of practice" (i.e. standard of care) for all healthcare providers. *See* Page 4, *supra*. A "violation of the standards of practice" simply means a breach in the standard of care. *See*, *McAllister v. Khie Sem Ha*, 347 N.C. 638 (1998) (holding, in part, that where Plaintiffs' complaint alleged that defendant breached the appropriate standards of medical practice in the care he provided a valid medical malpractice action had been plead); *Alt v John Umstead Hospital*, 125 N.C. App. 193, 479 S.E.2d 800 (1997) (in affirming the award of the Industrial Commission, the Court of Appeals determined that the actions of the doctor and nurse were "not in keeping with the applicable psychiatric standards of practice."); *Gregory v. Kilbride*, 150 N.C. App. 601 (N.C. Ct. App. 2002) (duty of a psychiatric doctor was to "conform to a psychiatric standard of practice.")

The newly amended § 90-21.12(b) does **not** state that issues of causation and damages in an "emergency medical condition" malpractice case must be proved by clear and convincing evidence. In fact, it never even mentions the words causation, proximate, or damages. The new

[3] See, Section IV(C), *infra*, for a discussion of applicable canons of statutory construction.

statute should be construed strictly on this point, and plaintiffs will thus be required only to prove duty/breach by the clear and convincing standard.[4]

ii. Duty: the degree of proof vs. the degree of negligence

The "clear and convincing" burden of proof under SB33 applies *only* to the degree of proof required to establish a breach of duty in an emergency medical condition case; it does *not* refer to the degree of negligence that is actionable for the same type of case.

Do not be confused – and do not let your future judge become confused – by the fact that SB33 also contains a "gross negligence" provision in the bill. Under the $500,000 cap on non-economic damages, SB33 contains an exception to the cap if the breach committed by the healthcare provider amounted to gross negligence. This "gross negligence" standard refers to the degree of negligence required in order to state an actionable claim for an exception to the cap. In other words, to escape the $500,000 cap in a medical malpractice case, the plaintiff must prove that the defendant was grossly negligent.

However, under the plain language of the newly amended § 90-21.12(b), the degree of negligence is irrelevant. When it comes to the "clear and convincing" burden of proof, it does not matter how egregious or minor the alleged breach in an emergency medical condition case happens to be -- even the slightest departure from the standard of care is actionable as long as the evidence is both "clear" and "convincing" that a reasonable provider in the same position would not have made such a mistake. The plaintiff is *not* required to prove that the level of negligence was any more than ordinary medical negligence under the circumstances.

iii. Causation and Damages: plaintiff's burden is still preponderance of the evidence (i.e. "more likely than not")

Given that the "clear and convincing" burden of proof applies only to the issue of breach (See Section III(A)(i), *supra*), this means that the burden of proof for causation and damages still remains preponderance of the evidence. The plaintiff is *not* required to prove that the breach "clearly and convincingly" caused the plaintiff's injuries. Instead, for all emergency medical condition cases under the new bill, as long the evidence of the breach is both "clear" and "convincing," all the plaintiff is required to prove is that the same breach more likely than not caused the plaintiff's injuries. *See*, *Campbell v. Duke University Health System, Inc.*, 691 S.E.2d 31, 36 (N.C. App. 2010), *disc. review denied*, 364 N.C. 434, 702 S.E.2d 220 (2010) ("The evidence of causation in a medical negligence case 'must be probable, not merely a remote possibility.'"); *Day v. Brant*, 697 S.E.2d 345, 356 (N.C. App. 2010) ("[P]roof of proximate cause in a malpractice case requires more than a showing that a different treatment would have improved the patient's chances of recovery . . . The connection or causation between the negligence and death must be probable, not merely a remote possibility." (quoting *White v. Hunsinger*, 88 N.C. App. 382, 387, 363 S.E.2d 203, 206 (1988)).

B. What does "clear and convincing evidence" mean in North Carolina?

[4] See, Section IV(C), *infra*, for a discussion of applicable canons of statutory construction.

i. Case law defining "clear and convincing"

"The clear and convincing standard requires **evidence that "'should fully convince.'"** *Scarborough v. Dillard's, Inc.*, 363 N.C. 715, 721, 693 S.E.2d 640, 643 (2009) (quoting *In re Will of McCauley*, 356 N.C. 91, 101, 565 S.E.2d 88, 95 (2002) (emphasis added).

This burden is **more exacting than the "preponderance of the evidence"** standard generally applied in civil cases, **but less than the "beyond a reasonable doubt"** standard applied in criminal matters. *Id.* (quoting *Williams v. Blue Ridge Bldg. & Loan Ass'n*, 207 N.C. 362, 364, 177 S.E. 176, 177 (1934) (emphasis added). The "clear and convincing" standard has been described as the "**middle burden of proof.**" *Scarborough v. Dillard's, Inc.*, 363 N.C. 715, 731, 693 S.E.2d 640, 649-50 (2009) (Timmons-Goodson, J., dissenting) (quoting *Black's Law Dictionary* 209 (8th ed. 2004)) (emphasis added).

"In this jurisdiction there are three degrees of proof required of the party upon whom the *onus probandi* rests. First, in ordinary civil actions the burden is to satisfy the jury by the greater weight of the evidence; and, second, in certain cases of an equitable nature, such as where it is sought to reform a written instrument, or prove the terms of a lost will, or to impeach the probate of a married woman's deed, the burden is to establish the **contention by clear, strong, and cogent proof**; and, third, in criminal actions the burden is to show the guilt of the accused beyond a reasonable doubt. *Ellett v. Ellett*, 157 N.C. 161, 72 S.E. 861; *Montgomery v. Lewis*, 187 N.C. 577, 122 S.E. 374. The first phrase, "greater weight of the evidence," has been universally explained by "the preponderance of the evidence," *Butchers Supply Co. v. Conoly*, 204 N.C. 677, 169 S.E. 415; **the second phrase, "clear, strong, and cogent proof," by evidence which "should fully convince**," *Lumber Co. v. Leonard*, *supra*; and the third phrase, "beyond a reasonable doubt," by "to a moral certainty." *Williams v. Blue Ridge Bldg. & Loan Ass'n*, 207 N.C. 362, 364, 177 S.E. 176, 177 (1934).

The so-called "clear and convincing" burden of proof is applied in a number of different civil contexts in North Carolina. Some of the more common areas of law utilizing this standard of proof are: proving aggravating factors for punitive damages (§ 1D-15(b)); caveat proceedings to challenge the contents of a will (*In re Will of McCauley*, 356 N.C. 91, 101, 565 S.E.2d 88, 95 (2002)); and proceedings before the Judicial Standards Commission (Jud. Standards Comm'n R. 18, para. 3, 2010 N.C. R. Ct. (State) 443, 448).

At times, North Carolina case law describes this burden of persuasion as proof by "clear, cogent and convincing" evidence (*In re Inquiry Concerning a Judge*, 364 N.C. 114, 123 (2010), or proof by "clear, strong and cogent" evidence (*Lumber Co. v. Leonard*, 145 N.C. 339, 344, 59 S.E. 134, 135 (1907). However, "**there is no distinction between 'clear, cogent and convincing' and 'clear and convincing' evidence**." *In re Inquiry*, *supra* (citing *In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 252 (1984) ("It is well established that 'clear and convincing' and 'clear, cogent, and convincing' describe the same evidentiary standard.")) (emphasis added).

The issue of whether the plaintiff met his or her burden of proof by "clear and convincing" evidence is a question of fact for the jury to decide. As Justice Timmons-Goodson explained in her dissent in *Scarborough v. Dillard's, Inc.*, 363 N.C. 715, 731, 693 S.E.2d 640, 649-50 (2009) (Timmons-Goodson, J., dissenting):

> Determining whether a plaintiff has met the burden of persuasion by producing "clear and convincing" evidence is the exclusive province of the fact finder. *See,*

e.g., *In re Will of McCauley*, 356 N.C. 91, 102, 565 S.E.2d 88, 95 (2002) ("Whether the evidence on these questions is clear, strong, and convincing is for the jury to decide."); *Speas*, 188 N.C. at 530, 125 N.C. at 401. This principle is well established. As this Court admonished in *Lehew v. Hewett*, 130 N.C. 22, 22-23, 40 S.E. 769, 770, 40 S.E. 769, 770 (1902): "The evidence was sufficient to be submitted to the jury, with the instruction that it must be clear, strong and convincing to warrant a verdict for the plaintiff, but whether it was or was not 'strong, clear and convincing' was to be determined by the jury and not by the court; otherwise, the jury would be useless. The [j]udge has no more right, when the testimony[,] if believed[,] is sufficient to be submitted to the jury, to determine in the trial of civil actions what is strong, clear and convincing proof[,] tha[n] he has in the trial of a criminal action to express an opinion as to whether guilt has been shown beyond a reasonable doubt." *Id.* (quoting *Cobb v. Edwards*, 117 N.C. 244, 252, 23 S.E. 241, 244, 23 S.E. 241, 244 (1895) (alterations in original)); *see also Lefkowitz v. Silver*, 182 N.C. 339, 350, 109 S.E. 56, 61, 109 S.E. 56, 61 (1921) (noting that it is the role of the jurors to decide if evidence is strong, cogent and convincing, "just as they decide in ordinary civil cases whether the proof of plaintiff preponderates, or in criminal cases whether the State has established the crime beyond a reasonable doubt").

See, contra (*Scarborough v. Dillard's, Inc.*, 363 N.C. 715, 693 S.E.2d 640 (2009) (holding that upon a motion for directed verdict or JNOV, the trial court must review the jury's finding of punitive damages under § 1D-15 and determine whether the evidence of aggravating factors was clear and convincing pursuant to § 1D-50).

ii. Other sources courts may find instructive

a. N.C.P.I. Civil 101.11. "Clear, Strong and Convincing Evidence"

N.C.P.I. Civil 101.11
Clear, Strong and Convincing Evidence
Includes 2010 changes **[1]**

The law requires (*name party with burden of proof*) to prove each element of this issue by evidence which is clear, strong and convincing. Usually, the law only requires matters to be proved by the greater weight of the evidence. That is not the situation with this issue. Before (*name party with burden of proof*) is entitled to prevail, *he* must prove this issue by clear, strong and convincing evidence.

Clear, strong and convincing evidence is evidence which, in its character and weight, establishes what (*name party with burden of proof*) seeks to prove in a clear, strong and convincing fashion. You shall interpret and apply the words "clear," "strong" and "convincing" in accordance with their commonly understood and accepted meanings in everyday speech.[2]

FOOTNOTES

FOOTNOTE 1. This burden applies to the following types of cases (not intended to be exclusive): reformation of a written instrument for mistake or inadvertence; conversion of an absolute deed into a mortgage; attaching a parol or resulting or constructive trust to a legal estate; establishing a lost deed or will; proving an oral agreement which modifies a written contract; establishing a special or local custom; and proving certain matters before the Judicial Standards Commission or in judicial disbarment proceedings. Brandis and Broun on North Carolina Evidence §42 (6(fnth) ed. 2004).

Where this standard applies to less than all of the issues to be submitted it may be necessary to modify other instructions accordingly, see for example N.C.P.I. -- Civil 101.10 "Burden of Proof and Greater Weight of the Evidence."

FOOTNOTE 2. A further explanation may result in error. *McCorkle v. Beatty*, 225 N.C. 178, 33 S.E.2d 753 (1945).

b. N.C.P.I. Crim. 101.10. BURDEN OF PROOF AND REASONABLE DOUBT

Given that the "clear and convincing" standard is described as some degree of proof less exacting that the criminal "beyond a reasonable doubt" (*Scarborough,* 363 N.C. 715, 693 S.E.2d 640), it can be helpful to understand just how exacting the criminal burden of proof actually is. By equipping ourselves with this knowledge, we can prevent defense attorneys from making improper argument to the jury of the court as to what level of persuasion is actually required of the plaintiff under the clear and convincing standard.

N.C.P.I. Crim. 101.10
BURDEN OF PROOF AND REASONABLE DOUBT
Includes 2010 changes

A reasonable doubt is a doubt based on reason and common sense, arising out of some or all of the evidence that has been presented, or lack or insufficiency of the evidence, as the case may be. **Proof beyond a reasonable doubt is proof that fully satisfies or entirely convinces you of the defendant's guilt.[1] (emphasis added).**

[1]Reasonable doubt need be defined only if specially requested. *State v. Shaw*, 284 N.C. 366, 374 (1973).

Thus, the logical conclusion based on this jury instruction, is that it would be improper to tell they jury that in emergency medical cases the plaintiff must put on evidence of breach that "fully satisfies or entirely convinces" them that a violation in the standard of care has occurred. In reality, the plaintiff can meet the clear and convincing burden by evidence that does less than "fully satisfies or entirely convinces" the jury of a breach. In other words, a plaintiff can present evidence that leaves the jury with a lingering "doubt based on reason and common sense" and still meet the clear and convincing evidence standard.

c. Plain language dictionary definitions

Word	Definition
Clear	4*a* **:** capable of sharp discernment **:** keen 4*b* **:** free from doubt **:** sure http://www.merriam-webster.com/dictionary/clear 6. Plain or evident to the mind; unmistakable: 8. Discerning or perceiving easily; keen 9. Free from doubt or confusion; certain. 10. Free from qualification or limitation; absolute: (The American Heritage® Dictionary of the English Language, Fourth Edition): http://www.thefreedictionary.com/clear
Conviction	1: satisfying or assuring by argument or proof http://www.merriam-webster.com/dictionary/convincing?show=0&t=1314068990 1. persuading or assuring by argument or evidence 2. appearing worthy of belief; plausible http://dictionary.reference.com/browse/convincing

IV. STRATEGY AND TACTICS MOVING FORWARD WITH "CLEAR AND CONVINCING"

A. How we should explain C&C to a jury

The jury should "apply the words 'clear,' 'strong' and 'convincing' in accordance with their commonly understood and accepted meanings in everyday speech." N.C.P.I. Civil 101.11. Here, each of the two words used by the statute – "clear" and "convincing" – modify the term "evidence." Thus, in my opinion, according to the plain language of the "clear **and** convincing" standard, the jury should weigh the evidence according to a simple two-pronged test.

Under this two-pronged test, both of the following elements must be found by the jury in order for the plaintiff to meet his or her burden in an emergency medical condition case:

1) **The evidence of breach must be clear (i.e. from the evidence presented, it must be clear that some breach – no matter how large or small – occurred);**

AND

2) **The evidence of breach must be convincing (i.e. from the evidence presented, the jury must be convinced that a breach occurred).**

I believe it is improper to say that this standard requires the plaintiff to "clearly convince" the jury that a breach occurred. Such an interpretation conflates that two words of the standard, and ignores the conjunction "and" separating them.

Assuming the above is a permissible explanation of the clear and convincing burden, then I believe the best way to explain this to a jury is simply ask them to answer two, basic questions:

> *"Ladies and gentlemen of the jury, on the issue of breach you must ask yourself two questions: (1) is the evidence of breach here clear to you? And (2) are you convinced by the evidence that there was a breach? If so, then you must find for the plaintiff on that issue."*

B. How the court should instruct the jury on C&C cases

For the "clear, strong and convincing" pattern jury instruction, *See*, Section III(B)(ii)(a), *supra*.

When instructing the jury as to the meaning of "clear and convincing," the court is very limited in how much explanation it can offer to illustrate the level of persuasion that is required by the plaintiff. There is a danger that by over-explaining the difference between preponderance of the evidence and clear and convincing to the jury, the court runs the risk of overstating the actual degree of proof required. *See*, *e.g. McCorkle v. Beatty*, 225 N.C. 178, 181-182, 33 S.E.2d 753, 755 (1945) (holding that court gave an improper instruction on clear and convincing by stating to the jury, "Clear, strong and convincing evidence means evidence that is clearer, stronger, more cogent and convincing in its character and weight than that required in ordinary civil cases where the burden of proof is satisfied by the greater weight or preponderance of the evidence.")

"Although a stricter degree of proof may be required in those cases requiring clear and convincing evidence, the terms 'clear' and 'convincing' are 'not susceptible of separate, analytical comparison with greater weight of the evidence.'" *In re Hatley*, 291 N.C. 693, 699, 231 S.E.2d 633, 636 (1977) (quoting *McCorkle*, *supra*). Brandis and Broun explain the limitations placed on the court when instructing the jury on the clear and convincing standard, stating:

> Of course, the jury should be instructed as to the required degree of proof, and concededly the various phrases used require stronger evidence than 'greater weight' or 'preponderance.' Nevertheless, an explicit instruction to such an effect has been held to be error, though it seems acceptable to state the two standards without elaboration as to the relative strength of evidence they require. **The judge should not attempt to define 'clear,' 'cogent,' or 'strong.' The current pattern instructions reflect these rules. However, when 'clear and convincing' is constitutionally required, it seems that the jury must be informed that the proof required is greater than in ordinary civil cases**. 1-3 Brandis and Broun on North Carolina Evidence § 42 (internal citations omitted) (emphasis added).

C. Helpful canons of statutory construction

Given that SB33 presents new statutory language for the court to interpret, it may become necessary to cite various canons of statutory construction to convince the judge that your interpretation of the bill is more appropriate than your opponent's. The following canons of construction should be helpful to argue that the many statutory interpretation arguments presented in this manuscript are warranted:

- If "the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give the statute its **plain and definite meaning**, and are **without power to interpolate, or superimpose, provisions and limitations not contained therein**.'" *Boseman v. Jarrell*, 704 S.E.2d 494, 500 (2010) (quoting *In re D.L.H.*, 364 N.C. 214, 221, 694 S.E.2d 753, 757 (2010)) (emphasis added).

- When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, **and judicial construction of legislative intent is not required**. *Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 387 (2006) (citing *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990)).

- "[W]here more than one statute is implicated, the Court must construe the statutes *in pari materia* **and give effect, if possible, to all applicable provisions**." *Meza v. Div. of Soc. Servs. & Div. of Med. Assistance of the N.C. HHS*, 364 N.C. 61, 66 (2010) (emphasis added).

- "Although the General Assembly has the authority to modify common law torts, courts **strictly construe statutes in derogation of the common law**." *McKinney v. Deneen*, 231 N.C. 540, 542, 58 S.E.2d 107, 109 (1950) (citing *McCutchen v. McCutchen*, 360 N.C. 280, 285 (2006)) (emphasis added).

D. Ways to refute likely defense tactics – "Clear and Convincing" meets the *Reptile*

Undoubtedly, defense lawyers will attempt to talk to the jury about the legislative intent behind adopting the clear and convincing standard for all emergency medical condition cases. Whether this starts during jury selection, or ends up in closing argument, defense counsel will not be able to resist the urge to tell the jury that the North Carolina General Assembly recognized that emergency room doctors, EMT's, Ob-GYN physicians, and other like providers deal with "split-second decisions, often with no prior relationship to the patient," and often in the moments where "life and death hang in the balance." We are guaranteed to hear the following argument: *"Ladies and gentlemen, this case is exactly like those types of cases your state Legislature envisioned when they amended this statute."*

I believe that such an argument – assuming it is even permissible – is a public policy argument that directly opens the door to rebuttal by plaintiff's counsel using the *Reptile* approach. If defense counsel wants to argue that the General Assembly intended to protect the emergency medical provider in a case like yours, then you should be completely free to argue

what effect the jury's verdict in this case will have on the level of patient safety that is delivered in their community. In other words, the more defense counsel is allowed to argue how SB33 was meant to shield the provider in your case from liability by raising the burden of proof, then you should be allowed to argue how much more dangerous the jury's emergency medical community will be for future patients in the plaintiff's position if they decide the provider is not liable here.

The key is to watch out and listen for these arguments by defense counsel during all phases of the trial, from motions in *limine*, to jury selection, to direct/cross, and, of course, during summation.

V. CONCLUSION

Hopefully this manuscript has correctly predicted the number and scope of the changes we will face moving forward with "emergency medical condition" cases in North Carolina. If so, then perhaps the "clear and convincing" standard is not as bad as it first seemed. After all, the truth of the matter is that only clear and convincing emergency medicine cases actually had a chance of winning in front of North Carolina juries even before the passage of SB33. Perhaps the language of SB33 can now embolden us to stand up in front of future juries and argue (or even declare with just a hint of righteous indignation on behalf of our clients) that the defense is right about one point – this case never would have made through our doors, and onto the courthouse steps if it were not such a clear and convincing case of medical negligence.

Please feel free to call or email me at any time with questions, concerns or comments. I will be glad to discuss. Thank you.

Article 1B.

Medical Malpractice Actions.

§ 90-21.11. Definitions.

As used in this Article, the term "health care provider" means without limitation any person who pursuant to the provisions of Chapter 90 of the General Statutes is licensed, or is otherwise registered or certified to engage in the practice of or otherwise performs duties associated with any of the following: medicine, surgery, dentistry, pharmacy, optometry, midwifery, osteopathy, podiatry, chiropractic, radiology, nursing, physiotherapy, pathology, anesthesiology, anesthesia, laboratory analysis, rendering assistance to a physician, dental hygiene, psychiatry, psychology; or a hospital or a nursing home; or any other person who is legally responsible for the negligence of such person, hospital or nursing home; or any other person acting at the direction or under the supervision of any of the foregoing persons, hospital, or nursing home.

As used in this Article, the term "medical malpractice action" means a civil action for damages for personal injury or death arising out of the furnishing or failure to furnish professional services in the performance of medical, dental, or other health care by a health care provider. (1975, 2nd Sess., c. 977, s. 4; 1987, c. 859, s. 1; 1995, c. 509, s. 135.2(o).)

§ 90-21.12. Standard of health care.

In any action for damages for personal injury or death arising out of the furnishing or the failure to furnish professional services in the performance of medical, dental, or other health care, the defendant shall not be liable for the payment of damages unless the trier of the facts is satisfied by the greater weight of the evidence that the care of such health care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act giving rise to the cause of action. (1975, 2nd Sess., c. 977, s. 4.)

HECTOR DIAZ, Petitioner v. DIVISION OF SOCIAL SERVICES and DIVISION OF MEDICAL ASSISTANCE, NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, Respondent

No. 523PA04

SUPREME COURT OF NORTH CAROLINA

360 N.C. 384; 628 S.E.2d 1; 2006 N.C. LEXIS 31

November 14, 2005, Heard in the Supreme Court
April 7, 2006, Filed

PRIOR HISTORY: *Diaz v. Div. of Soc. Servs., 166 N.C. App. 209, 600 S.E.2d 877, 2004 N.C. App. LEXIS 1636 (2004)*

DISPOSITION: [***1] REVERSED AND REMANDED.

CORE TERMS: emergency, medical condition, alien's, coverage, patient, acute, organ transplant, plain meaning, chemotherapy, symptoms, federal government, leukemia, discretionary review, nonqualifying, severe, color of law, medical service, medical assistance, lawfully admitted, reimbursement, stabilization, lymphocytic, permanently, immigration, statutorily, enumerated, residing, qualify, sudden, sore throat

HEADNOTES

Public Assistance--Medicaid--illegal alien--emergency medical treatment

Medicaid coverage was properly denied for chemotherapy for an illegal alien with acute lymphocytic leukemia after his condition stabilized and no longer constituted an emergency (although there was testimony that he would have regressed into an emergency condition without the treatments). There is an emergency treatment provision in the federal Medicaid statutes, but petitioner did not meet the statutory definition for an emergency medical condition when he received the treatments in question.

COUNSEL: Ott Cone & Redpath, P.A., by Melanie M. Hamilton, Thomas E. Cone, and Wendell H. Ott, for petitioner-appellee/appellant.

Roy Cooper, Attorney General, by Richard J. Votta, Assistant Attorney General, for respondent-appellant/appellee.

JUDGES: BRADY, Justice. Justice TIMMONS-GOODSON did not participate in the consideration or decision of this case.

OPINION BY: BRADY

OPINION

[*384] [**2] On discretionary review pursuant to *N.C.G.S. § 7A-31* of a unanimous decision of the Court of Appeals, *166 N.C. App. 209, 600 S.E.2d 877 (2004)*, affirming a judgment and order entered on 23 May 2003 by Judge James W. Webb in Superior Court, Guilford County. On 3 March 2005, the Supreme Court allowed petitioner's conditional petition for discretionary review as to an additional issue. Heard in the Supreme Court 14 November 2005.

[*385] BRADY, Justice.

This case requires determination of the scope of coverage and reimbursement for a nonqualifying alien's medical treatment under federal and North Carolina Medicaid law. Because we hold the relevant treatment provided to petitioner did not qualify as treatment for an emergency medical condition, we reverse the decision [***2] of the Court of Appeals.

FACTUAL BACKGROUND

Petitioner Hector Diaz, a native of Guatemala, is "an alien who is not lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law." *42 U.S.C. § 1396b(v)(1) (2000)*. In October of 2000, Diaz began experiencing sore throat, nausea, vomiting, bleeding gums, and increasing lethargy, which were later diagnosed as symptoms of acute lymphocytic leukemia (ALL). [1] Doctors at Moses Cone Memorial Hospital in Greensboro, North Carolina treated petitioner beginning on or about 21 October 2000. Chemotherapy treatments commenced shortly thereafter and continued intermittently until July of 2002.

1 This disease is also referred to as "acute lymphoblastic leukemia" in medical literature and in portions of the record.

At some time during his treatment, petitioner authorized the medical service provider to seek Medicaid coverage on his behalf. In the applications for Medicaid coverage relevant to [***3] this appeal, respondent Division of Medical Assistance (DMA) approved payment for emergency medical services from 21-22 October 2000 and 9-11 February 2002. DMA denied all other coverage dates relevant to this appeal as nonemergency services, and this denial was affirmed on administrative appeal by a final decision of the Chief Hearing Officer of the North Carolina Department of Health and Human Services. Consequently, none of petitioner's chemotherapy treatments at issue were reimbursed by Medicaid.

Petitioner appealed the final agency decision to the Guilford County Superior Court, which reversed respondent's decisions, finding the treatment was provided for an emergency medical condition and that "payment by Medicaid is not limited to emergency services; rather, Medicaid shall pay for all care and services as are medically necessary for the treatment of an emergency medical condition." Respondent then appealed to the North Carolina Court of Appeals, which unanimously affirmed the decision of the trial court. This [*386] Court allowed respondent's petition for discretionary review and petitioner's conditional petition for discretionary review, and we now reverse the decision of the Court [***4] of Appeals.

ANALYSIS

STANDARD OF REVIEW

In cases appealed from administrative tribunals, we review questions of law *de novo* and questions of fact under the whole record test. *See* [**3] *N.C. Dep't of Env't & Natural Res. v. Carroll, 358 N.C. 649, 659, 599 S.E.2d 888, 894-95 (2004)*.

CONSTRUCTION OF *42 U.S.C. § 1396b(v)*

Medicaid is a joint program between participating states and the federal government. North Carolina chose to participate and therefore must abide by federal statutory law governing Medicaid reimbursement by the federal government. *See 42 U.S.C. § 1396a (2000)*. If a state does not follow federal Medicaid statutes in providing coverage for a patient, that state risks losing Medicaid reimbursement from the federal government for that payment. The relevant statute in this case provides the federal government will not make payment to a state for "medical assistance furnished to an alien who is not lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law." *Id. § 1396b(v)(1)*. There is one exception to this broad rule, and that is [***5] for treatment of an emer-

gency medical condition, not related to an organ transplant procedure, of an alien who would qualify but for his or her immigration status. *Id. § 1396b(v)(2)* (2000). *Subsection (v)(3)* defines an "emergency medical condition" as:

> a medical condition (including emergency labor and delivery) manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in--
>
> (A) placing the patient's health in serious jeopardy,
>
> (B) serious impairment to bodily functions, or
>
> (C) serious dysfunction of any bodily organ or part.

Id. § 1396b(v)(3) (2000). The relevant federal and North Carolina administrative codes are in accord with this definition. *See 42 C.F.R. § 440.255(b)(1)* & *(c)(1) (2005)*; *10A NCAC 21B .0302(c)* (June 2004). We must now interpret this statute and determine whether petitioner's treatments were for an emergency medical condition.

[*387] When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning [***6] of the statute, and judicial construction of legislative intent is not required. *See Burgess v. Your House of Raleigh, Inc., 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990)*. However, when the language of a statute is ambiguous, this Court will determine the purpose of the statute and the intent of the legislature in its enactment. *See Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs of Town of Nags Head, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980)* ("The best indicia of that intent are the language of the statute or ordinance, the spirit of the act and what the act seeks to accomplish."). We find the statute in question to be clear and unambiguous; therefore, we will give effect to its plain meaning.

In the leading case on this issue, *Greenery Rehabilitation Group, Inc. v. Hammon*, the United States Court of Appeals for the Second Circuit held that continuous and regimented care provided for nonqualified aliens who "suffered sudden and serious head injuries that necessitated immediate treatment and ultimately left the patients with long-term debilitating conditions" was not covered under the Medicaid program. *150 F.3d 226, 228 (2d Cir. 1998)*. [***7] One of these patients, Izeta Ugljanin, was "[b]edridden and quadriplegic," requiring a feeding tube and extensive nursing care. *See id.* Another, Leon Casimir, was unable to walk and required continual monitoring and medication. He was unable to bathe, dress, eat, or use the toilet without assistance. *See id. at 228-29*. A third patient, Yik Kan, was legally blind. *See id. at 229*. The United States District Court for the Northern District of New York found Ugljanin and Casimir's treatments were for emergency medical conditions, but that Yik Kan's treatment was not. *See id. at 231*. In reversing the District Court as to the treatments for Ugljanin and Casimir, the Second Circuit wrote: "The patients' sudden and severe head injuries undoubtedly satisfied the plain meaning of *§ 1396b(v)(3)*. However, after the patients were stabilized and the risk of further direct harm from their injuries was essentially eliminated, the medical emergencies ended." *Id. at 232*.

[**4] In arriving at this "stabilization" construction of *subsection 1396b(v)(3)*, the Second Circuit noted when determining whether a condition is an emergency medical [***8] condition, the key words are "emergency," "acute," "manifest," and "immediate." *See id*. Using the common definitions of those words, that court concluded: "[T]he statutory language unambiguously conveys the meaning that emergency medical conditions are sudden, severe and short-lived physical [*388] injuries or illnesses that require immediate treatment to prevent further harm." *Id.* This analysis closely adheres to the clear and unambiguous language of *subsection 1396b(v)(3)*. Accordingly, we find the *Greenery* decision persuasive.

Petitioner contends that once a patient presents with an emergency medical condition, any and all treatment necessary for the cure of the underlying cause of the emergency medical condition must be covered, even when the condition is no longer an emergency. We disagree. Petitioner's contention, in our view, is contrary to the plain meaning of the statute. Under *subsection 1396b(v)(3)*, in order for a nonqualifying alien to be entitled to Medicaid coverage, his or her condition must require *immediate* intervention to prevent the occurrence of any of the three statutorily enumerated results. *See 42 U.S.C. § 1396b(v)(3)*. The [***9] word "immediate" is commonly defined as: "occurring, acting, or accomplished without loss of time: made or done at once: INSTANT." *Webster's Third New International Dictionary*

1129 (16th ed. 1971). Therefore, treatment is not for an emergency medical condition under *subsection 1396b(v)(3)* unless one of the statutorily enumerated results is reasonably expected if immediate treatment is withheld.

We are cognizant the Supreme Court of Connecticut has decided a case factually similar to this one and has held contrary to our decision today. *See Szewczyk v. Dep't of Soc. Servs., 275 Conn. 464, 881 A.2d 259 (2005)*. However, in our opinion, the Connecticut decision applied a much broader interpretation of the word "immediate" than intended by Congress. The divided *Szewczyk* court seemed to rest much of its decision upon evidence in the record indicating that the nonqualifying alien in the case would have rapidly died if not provided treatment. *See id. at 468, 881 A.2d at 262*. In the case at bar, while there is no dispute Diaz received appropriate care in the standard medical course of treatment, there is nothing in the record that indicated the [***10] prolonged chemotherapy treatments must have been "immediate" to prevent the statutorily enumerated results. The record in the case *sub judice* and the record in *Szewczyk* differ as to whether immediate treatment was required to treat the respective conditions of the patients.

Additionally, while the *Szewczyk* court purported to follow the Second Circuit's decision in *Greenery* for the sake of uniformity between federal and state law in Connecticut, it added to the holding in *Greenery*: "Beyond the analysis of *Greenery* . . . we also note that the plain language of *§ 1936b(v)* indicates that the statute encompasses [*389] payment for care beyond that which is immediately necessary to stabilize a patient." *Id. at 482-83, 881 A.2d at 271*. The reasoning behind this statement is the requirement that the treatment for an emergency medical condition not be "related to an organ transplant procedure." *42 U.S.C. § 1396b(v)(2)(C)*. Because Congress chose to not provide coverage for emergency medical services related to organ transplant procedures, the *Szewczyk* court reasoned that Congress intended for treatment under the statute to encompass [***11] more than stabilization because organ transplants are "undoubtedly . . . time-consuming and entail relatively lengthy hospitalizations." *Id. at 483, 881 A.2d at 271*. Presuming Congress would not enact superfluous legislation, the *Szewczyk* court assumed it was unnecessary to exempt coverage for organ transplant procedures if only short-term stabilization is required. *Id. at 483-84, 881 A.2d at 271-72*.

However, the construction of the statute by the Second Circuit in *Greenery* and this Court in the case *sub judice* does not render *subsection (v)(2)(C)* a superfluity. Congress simply provided that even if the only appropriate treatment for an emergency medical condition was an organ transplant, it had made a policy decision that the federal government would not reimburse state Medicaid [**5] payments for such a procedure. We are not persuaded the restriction found in *subsection (v)(2)(C)* changes the plain meaning of the word "immediate" found in *(v)(3)*. Therefore, we follow the federal appellate court's interpretation of *42 U.S.C. § 1396b* in *Greenery* and decline to follow the divided fellow state appellate court's interpretation [***12] in *Szewczyk*.

By giving effect to the plain meaning of the statute, we acknowledge "'[t]he role of the Court is not to sit as a super legislature and second-guess the balance struck by the elected officials.'" *State v. Bryant, 359 N.C. 554, 565, 614 S.E.2d 479, 486 (2005)* (quoting *Henry v. Edmisten, 315 N.C. 474, 491, 340 S.E.2d 720, 731 (1986)*); *see also State v. Revis, 193 N.C. 192, 195, 136 S.E. 346, 347 (1927)* ("The Legislature alone may determine the policy of the State . . . ."). Therefore we defer to the broad public policy statement of Congress found in *subsection 1396b(v)*: "[N]o payment may be made to a State under this section for medical assistance furnished to an alien who is not lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law." *42 U.S.C. § 1396b(v)(1)*. The narrow exception to this broad statement appears in *subsection (v)(2)*, which provides for treatment of emergency [*390] medical conditions if the alien would qualify but for his immigration status and the "care and services are not related to an organ transplant procedure." This exception [***13] is consistent with the public policy clearly articulated by Congress in *8 U.S.C. § 1601(6)*: "It is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits." The Second Circuit's analysis in *Greenery* follows the plain meaning of *42 U.S.C. § 1396b*, and our holding is consistent with both the statute and *Greenery*.

Therefore, we hold an emergency medical condition is one which manifests itself by acute symptoms at the time of treatment and requires immediate treatment to stabilize the condition, such that the absence of this treatment would reasonably be expected to cause any of the three results listed in *42 U.S.C. § 1396b(v)(3)(A), (B),* or *(C)*. The State is not required to make payment for services provided to treat a nonqualifying alien's condition, unless it meets the definition of an emergency medical condition.

APPLICATION OF *SECTION 1396b(v)*

Acute lymphocytic leukemia (ALL) is an acute leukemia "characterized by replacement of normal bone marrow by blast cells of a clone arising from malignant transformation of a hematopoietic [***14] stem cell." *The Merck Manual of Diagnosis and Therapy* 946 (Mark H. Beers, M.D. & Robert Berkow, M.D., eds., 17th ed. 1999). The presenting symptoms of ALL are "fatigue, fever, malaise, weight loss," and other nonspecific symptoms. *See id.* at 947. When peti-

tioner sought emergency treatment on or about 21 October 2000, he presented with severe symptoms, namely sore throat, nausea and vomiting, bleeding gums, and lethargy. At the time of his initial treatment in the emergency room, there is no dispute petitioner presented with an emergency medical condition. However, soon after his admission to the facility, petitioner's condition dramatically improved. During petitioner's chemotherapy treatments, his condition was stable and, therefore, he was no longer entitled to Medicaid coverage. As testified to by a medical doctor under contract to review cases for the Medicaid program, if petitioner had not received chemotherapy treatments, he would have eventually regressed into a state of an emergency medical condition. However, as also testified to by that same physician, at the time the chemotherapy treatments at issue were provided to petitioner, he did not meet the requirement of [***15] having an emergency medical condition. Thus, it was error for the trial court to reverse the final agency decision denying coverage for [*391] the dates denied. Accordingly, we reverse the decision of the Court of Appeals and remand the case to that court with instructions to remand to the trial court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Justice TIMMONS-GOODSON did not participate in the consideration or decision of this case.

Positive
As of: Aug 23, 2011

BERNARD SCARBOROUGH v. DILLARD'S, INC., formerly Dillard Department Stores, Inc., a North Carolina Corporation

No. 112A08

SUPREME COURT OF NORTH CAROLINA

363 N.C. 715*; *693 S.E.2d 640*; *2009 N.C. LEXIS 1287*; *30 I.E.R. Cas. (BNA) 212

October 15, 2008, Heard in the Supreme Court
December 11, 2009, Filed

SUBSEQUENT HISTORY: US Supreme Court certiorari denied by *Scarborough v. Dillard's, Inc., 2011 U.S. LEXIS 3769 (U.S., May 16, 2011)*

PRIOR HISTORY: *Scarborough v. Dillard's Inc., 188 N.C. App. 430, 655 S.E.2d 875, 2008 N.C. App. LEXIS 226 (2008)*

DISPOSITION: [***1] REVERSED.

CORE TERMS: punitive damages, shoe, burden of persuasion, judgment notwithstanding, convincing evidence, convincing, aggravating factor, burden of production, embezzlement, pair, directed verdict, malice, reckless, manager's, willful, wanton, malicious prosecution, interview, earrings, compensatory damages, citation omitted, burden of proof, customer, claimant, matter of law, evidence presented, wanton disregard, reasonable doubt, register, store manager

COUNSEL: David Q. Burgess for plaintiff-appellee.

Poyner & Spruill LLP, by David W. Long, Douglas Martin, and John W. O'Hale, for defendant-appellant.

JUDGES: PARKER, Chief Justice. Justice TIMMONS-GOODSON dissenting. Justice HUDSON joins in this dissenting opinion.

OPINION BY: PARKER

OPINION

[**641] [*716] Appeal pursuant to *N.C.G.S. § 7A-30(2)* from the decision of a divided panel of the Court of Appeals, *188 N.C. App. 430, 655 S.E.2d 875 (2008)*, reversing entry of judgment notwithstanding the verdict in defendant's favor as to punitive damages on 8 January 2007 by Judge Hugh B. Campbell, Jr. in District Court, Mecklenburg County. Heard in the Supreme Court 15 October 2008.

[*717] PARKER, Chief Justice.

The issue before the Court on this appeal is whether the trial court erred in granting defendant judgment notwithstanding the verdict as to punitive damages. For the reasons stated herein, we conclude that the trial court did not err, and the decision of the Court of Appeals is reversed.

This case arises out of an action for malicious prosecution instituted by plaintiff Bernard Scarborough as the result of his having been indicted, tried, and acquitted of embezzlement from his employer, defendant Dillard's, Inc. At the outset, we note that [***2] the sufficiency of the evidence to support the underlying tort of malicious prosecution is not before the Court in that defendant did not cross appeal the trial court's denial of its motion for judgment notwithstanding the verdict (JNOV) as to the jury's determination of liability for malicious prosecution.

The evidence presented at trial tended to show that on 27 October 1997, plaintiff worked in the ladies' shoe department at Dillard's, where he had been employed part-time for approximately two years. Around 8:00 p.m., plaintiff waited on two women for approximately thirty-five to forty minutes, showing them about twenty pairs of shoes. When one of the women decided to purchase two pairs of shoes, plaintiff took the shoes to the register, scanned the shoes, and placed them in a bag. Before plaintiff completed this transaction, the other woman came to the register and asked him about trying on a pair of shoes. Plaintiff voided the first transaction so he could check the price of the shoes for that customer and to prevent his employee number from remaining in the register when he went into the stockroom to look for the shoes. Plaintiff was unable to find shoes in the width the woman [***3] needed but agreed to stretch the shoes for her. The two women stated that they would return for the third pair. The women then left Dillard's with two pairs of shoes for which no payment had been made.

The women later returned and asked plaintiff if he could hold the third pair of shoes until the next day. Plaintiff agreed, and the woman who wanted the shoes wrote her name, Betty Jordan, on a piece of paper which plaintiff attached to the shoe box. Plaintiff also wrote his employee number on the piece of paper so he could receive credit for the sale.

After the women left, two other shoe department employees, Lynette Withers and Selma Brown, who had watched the transaction, [*718] commented to plaintiff that he had had a big sale and asked if they could look at the journal tape to see what the amount was. Plaintiff agreed. Upon looking at the tape Withers and Brown confirmed that the women had taken the first two pairs of shoes without paying for them. Ms. Brown told [**642] plaintiff that the sales transaction was missing. Plaintiff then called Steven Gainsboro, the manager on duty that night, to tell him what had happened. Mr. Gainsboro told plaintiff he would discuss the incident the next day with [***4] David Hicklin, the shoe department manager.

When plaintiff arrived at Dillard's the next evening, he met with Mr. Hicklin, Kevin McCluskey, the store manager, and Sergeant Cullen Wright, a Dillard's loss prevention employee, who also worked full time as an officer for the Charlotte-Mecklenburg Police Department (CMPD). During the two-hour interview, plaintiff explained that he had made a mistake, took responsibility for the incident, and offered to pay Dillard's for the shoes. Plaintiff also offered to submit to a polygraph exam. Mr. McCluskey accused plaintiff of knowing the two women and threatened to have him prosecuted for embezzlement and ruin his full-time job at First Union National Bank if he did not provide the names of the women. Plaintiff told Mr. McCluskey that he did not know the women and could not provide their names. Sergeant Wright also participated in questioning plaintiff about the incident and took a written statement from him. At the end of the interview, Mr. McCluskey terminated plaintiff for embezzlement.

After plaintiff's termination, Sergeant Ken Schul, another Dillard's security guard who was employed full time as an officer for the CMPD, took statements from [***5] four Dillard's employees, Ms. Withers, Ms. Brown, Mr. Gainsboro, and Mr. Hicklin, about plaintiff's failed transaction. On 12 November 1997, Sergeant Schul met with Assistant District Attorney (ADA) Nathaniel Proctor to present a case against plaintiff. Upon review of the information presented, Mr. Proctor authorized the prosecution of plaintiff for embezzlement. Mr. Proctor did not ask for additional information or investigation. Thereafter, Sergeant Schul obtained a warrant for plaintiff's arrest.

Approximately two weeks after his termination from Dillard's, plaintiff was arrested in the atrium of One First Union Center in Charlotte while on his way to his office. Uniformed police officers, one of whom was Sergeant Wright, handcuffed plaintiff and escorted him outside to a police car. Upon his release from jail, plaintiff returned to First Union to find that his employment was suspended [*719] without pay because of his arrest for embezzlement and that he would be eligible to return to work only if the charges against him were cleared.

Plaintiff was subsequently indicted by the grand jury for embezzlement. Plaintiff was tried for embezzlement in Superior Court, Mecklenburg County. On 27 May [***6] 1998, a jury found plaintiff not guilty.

On 4 April 2001, plaintiff initiated this action for malicious prosecution. Following a trial in January 2005, the jury returned a verdict in plaintiff's favor, awarding him $ 30,000 in compensatory damages and $ 77,000 in punitive damages for malicious prosecution. On 24 February 2005, the trial court granted Dillard's motion for JNOV as to punitive damages and entered an order setting aside that award. Plaintiff appealed to the Court of Appeals, which remanded the case because, contrary to *N.C.G.S. § 1D-50*, the trial court's 24 February 2005 order contained no reasons why the trial court set aside the jury verdict as to punitive damages. *Scarborough v. Dillard's, Inc., 179 N.C. App. 127, 130, 632 S.E.2d 800, 803 (2006)*. Upon remand, the trial court filed an order on 8 January 2007 setting out the basis for its judgment notwithstanding the verdict as to punitive damages. Plaintiff appealed from that order on 9 January 2007.

The Court of Appeals reversed the trial court's entry of judgment notwithstanding the verdict as to punitive damages. The Court of Appeals' majority reviewed the issue under the "more than a scintilla of evidence" standard. [***7] *Scarborough v. Dillard's Inc., 188 N.C. App. 430, 431, 655 S.E.2d 875, 876 (2008)*. The dissenting judge would have affirmed the trial court as plaintiff failed to present "clear and convincing evidence" of any statutory aggravating factor required for punitive damages. *Id. at 438, 655 S.E.2d at 881* (Hunter, Robert C., J., dissenting).

Defendant appealed to this Court based on the dissenting opinion in the Court of Appeals. Defendant contends that the Court of [**643] Appeals applied an incorrect standard of review and that the evidence was insufficient to support a jury's finding of an aggravating factor. We agree.

This Court has stated that "[t]he test for determining the sufficiency of the evidence when ruling on a motion for judgment notwithstanding the verdict is the same as that applied when ruling on a motion for directed verdict." *Northern Nat'l Life Ins. Co. v. Lacy J. Miller Mach. Co., 311 N.C. 62, 69, 316 S.E.2d 256, 261 (1984)* (citing [*720] *Summey v. Cauthen, 283 N.C. 640, 648, 197 S.E.2d 549, 554 (1973))*. A motion for judgment notwithstanding the verdict "is essentially a renewal of an earlier motion for directed verdict." *Bryant v. Nationwide Mut. Fire Ins. Co., 313 N.C. 362, 368-69, 329 S.E.2d 333, 337 (1985)* [***8] (citation omitted). A motion for directed verdict "tests the legal sufficiency of the evidence to take the case to the jury and support a verdict" for the nonmovant. *Manganello v. Permastone, Inc., 291 N.C. 666, 670, 231 S.E.2d 678, 680 (1977)* (citing, *inter alia, Investment Properties of Asheville, Inc. v. Allen, 281 N.C. 174, 188 S.E.2d 441 (1972))*.

"The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the nonmoving party, is sufficient as a matter of law to be submitted to the jury." *Davis v. Dennis Lilly Co., 330 N.C. 314, 322, 411 S.E.2d 133, 138 (1991)* (citation omitted). A directed verdict and judgment notwithstanding the verdict are therefore "not properly allowed 'unless it appears, as a matter of law, that a recovery cannot be had by the plaintiff upon any view of the facts which the evidence reasonably tends to establish.'" *Manganello, 291 N.C. at 670, 231 S.E.2d at 680* (quoting *Graham v. North Carolina Butane Gas Co., 231 N.C. 680, 683, 58 S.E.2d 757, 760 (1950))*.

We must first determine the application of these principles to an award of punitive damages. Our General Assembly has set parameters for the recovery of punitive [***9] damages through the enactment of Chapter 1D of the North Carolina General Statutes. To recover punitive damages a claimant must prove

> that the defendant is liable for compensatory damages and that one of the following aggravating factors was present and was related to the injury for which compensatory damages were awarded:
>
> (1) Fraud.
>
> (2) Malice.
>
> (3) Willful or wanton conduct.

N.C.G.S. § 1D-15(a) (2007). The statute further provides that a claimant "must prove the existence of an aggravating factor by clear and convincing evidence." *N.C.G.S. § 1D-15(b)* (2007). When punitive damages are sought against a corporation, the claimant must further show that "the officers, directors, or managers of the corporation [*721] participated in or condoned the conduct constituting the aggravating factor giving rise to punitive damages." *N.C.G.S. § 1D-15(c)* (2007).

The clear and convincing standard requires evidence that "'should fully convince.'" *In re Will of McCauley, 356 N.C. 91, 101, 565 S.E.2d 88, 95 (2002)* (quoting *Williams v. Blue Ridge Bldg. & Loan Ass'n, 207 N.C. 362, 364, 177 S.E. 176, 177 (1934))*. This burden is more exacting than the "preponderance of the evidence" standard generally applied in civil [***10] cases, but less than the "beyond a reasonable doubt" standard applied in criminal matters. *Williams, 207 N.C. at 363-64, 177 S.E. at 177*.

Plaintiff argues that whether the evidence is clear and convincing is for the jury to decide; and if there is more than a scintilla of evidence from which the jury could infer the existence of the aggravating factor, the determination should be left to the jury. The plain language of the statute, however, does not support this contention in the context of punitive damages.

The statute provides that a trial court in "upholding or disturbing" an award of punitive damages must "address with specificity the evidence, or lack thereof, as it bears on the liability for or the amount of punitive damages, *in light of the requirements of this Chapter." N.C.G.S. § 1D-50* (2007) (emphasis added). This language, coupled with that in *N.C.G.S. § 1D-15(b)* requiring proof by "clear and convincing evidence," manifests [**644] that the General Assembly intended that the quantum of evidence be more than would be sufficient to uphold liability for the underlying tort and that the trial court have a role in ascertaining whether the evidence presented was sufficient to support a [***11] jury's finding of the factor under the standard established by the legislature. *See, e.g., Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202, 216 (1986)* (stating that for purposes of a directed verdict "the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case" and that where "clear and convincing" evidence is required, the inquiry is "whether the evidence presented is such that a jury applying that evidentiary standard could reasonably find for either the plaintiff or the defendant").

In light of these principles, we hold that in reviewing a trial court's ruling on a motion for judgment notwithstanding the verdict on punitive damages, our appellate courts must determine whether the nonmovant produced clear and convincing evidence from which a jury could reasonably find one or more of the statutory aggravating [*722] factors required by *N.C.G.S. § 1D-15(a)* and that that aggravating factor was related to the injury for which compensatory damages were awarded. Reviewing the trial court's ruling under the "more than a scintilla of evidence" standard does not give proper deference [***12] to the statutory mandate that the aggravating factor be proved by clear and convincing evidence. Evidence that is only more than a scintilla cannot as a matter of law satisfy the nonmoving party's threshold statutory burden of clear and convincing evidence.

Having determined the applicable standard of review, we must now determine whether plaintiff presented clear and convincing evidence from which a jury applying that standard could reasonably find that the officers, directors, or managers of defendant Dillard's participated in or condoned conduct that was (i) malicious or willful or wanton and (ii) was related to the injury for which compensatory damages were awarded.

We initially note that although the dissenting opinion relies on plaintiff's failure to assign error to the trial court's findings of fact, defendant does not raise this issue in its new brief to this Court. Normally, when an appellant fails to assign error to findings of fact by the trial court, the findings are binding on the appellate court, *Koufman v. Koufman, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991)* (citing, *inter alia, Schloss v. Jamison, 258 N.C. 271, 275, 128 S.E.2d 590, 593 (1962))*, and the only question is [***13] whether the trial court's findings support the conclusions of law, *Quick v. Quick, 305 N.C. 446, 451, 290 S.E.2d 653, 657 (1982)*, which are reviewable de novo. *Humphries v. City of Jacksonville, 300 N.C. 186, 187, 265 S.E.2d 189, 190 (1980)* (citing, *inter alia, Food Lion Stores, Inc. v. City of Salisbury, 300 N.C. 21, 265 S.E.2d 123 (1980))*. However, this Court, in reviewing trial court rulings on motions for directed verdict and judgment notwithstanding the verdict, has held that the trial court should not make findings of fact, and if the trial court finds facts, they are not binding on the appellate court. *Kelly v. Int'l Harvester Co., 278 N.C. 153, 158-59, 179 S.E.2d 396, 398-99 (1971)*. Moreover, the language of the statute does not require findings of fact, but rather that the trial court "shall state in a written opinion its reasons for upholding or disturbing the finding or award. In doing so, the court shall address with specificity the evidence, or lack thereof, as it bears on the liability for or the amount of punitive damages." *N.C.G.S. § 1D-50*. That the trial court utilizes findings to address with specificity the evidence bearing on liability for punitive damages is not [***14] improper; the "findings," however, merely provide a convenient format with which all trial [*723] judges are familiar to set out the evidence forming the basis of the judge's opinion. The trial judge does not determine the truth or falsity of the evidence or weigh the evidence, but simply recites the evidence, or lack thereof, forming the basis of the judge's opinion. As such, these findings are not binding on the appellate court even if unchallenged by the appellant. These findings do, however, provide valuable assistance to the appellate court in de-

termining whether as a matter of law the evidence, when considered in the light most favorable to the nonmoving party, is sufficient to be [**645] considered by the jury as clear and convincing on the issue of punitive damages.

We next consider defendant's contentions that plaintiff failed to present sufficient evidence of willful or wanton conduct or of malice on the part of defendant to support the jury's award of punitive damages. The General Assembly has defined "willful or wanton conduct" as "the conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely [***15] to result in injury, damage, or other harm. 'Willful or wanton conduct' means more than gross negligence." *N.C.G.S. § 1D-5(7)* (2007).

Plaintiff relies on two cases in support of his contention that defendant's "superficial and cursory investigation" of the alleged embezzlement evidences "a 'reckless and wanton disregard of [his] rights'": *Jones v. Gwynne, 312 N.C. 393, 408-09, 323 S.E.2d 9, 18 (1984), receded from by Hawkins v. Hawkins, 331 N.C. 743, 417 S.E.2d 447 (1992)*, and *Williams v. Boylan-Pearce, Inc., 69 N.C. App. 315, 319, 317 S.E.2d 17, 20 (1984), aff'd per curiam, 313 N.C. 321, 327 S.E.2d 870 (1985)*. Plaintiff's reliance on these cases is misplaced as each of them is distinguishable on its facts from the present case.

In *Jones* this Court determined that the evidence was sufficient for submission to the jury on the issue of punitive damages based on the fact that the investigation conducted by defendant Gwynne, the regional security officer for McDonald's Corporation, "was conducted 'in a manner which showed the reckless and wanton disregard of the plaintiff's rights.'" *Jones, 312 N.C. at 405, 323 S.E.2d at 16*. One witness testified that she saw the plaintiff Ray Jones, McDonald's [***16] store manager, ring numerous consecutive "no sales" and put the money in the register, yet time cards showed that this particular witness had worked less than half the days she allegedly saw the plaintiff ring the "no sales." *Id. at 406, 312 S.E.2d at 17*. Although Gwynne had reviewed the daily store records, the register journal tapes, the managers' schedules, the crew schedules, and the employee time [*724] cards for the period in question, he failed to make any notations as to when the witness worked and at trial did not know where the time cards could be located. *Id.* Moreover, no evidence was adduced at trial that the McDonald's restaurant showed a shortage of money for any day or that any McDonald's money was ever missing from that store. *Id.* Gwynne never performed an audit of the McDonald's nor did he order that an audit of the store's records be performed. *Id. at 406-07, 323 S.E.2d at 17*. After Gwynne discussed the case with two of his superiors, he talked with two detectives, telling them that he thought they had enough evidence to charge the plaintiff with embezzlement. *Id. at 408, 323 S.E.2d at 18*. Gwynne also suggested that one of the detectives discuss the case with an assistant [***17] district attorney. *Id.* The ADA advised the detective that although it sounded like a good case, if the detective "'could get more information as to the actual conversion of the money . . . it certainly would be better.'" *Id.* At the time of the events in question, Gwynne was an employee of McDonald's Corporation and was not a sworn law enforcement officer, although he had previously been an SBI agent and a Chief Deputy Sheriff. *Id. at 406, 323 S.E.2d at 16*. By contrast, in the instant case the undisputed evidence is that the investigation was handled by Sergeants Wright and Schul acting in their capacity as CMPD officers. ADA Proctor did not ask for any additional investigation or information when presented with the case. Most importantly, the evidence was undisputed that plaintiff voided the sales transaction and permitted the two customers to leave the store with two pairs of shoes for which no payment had been received.

In *Williams* the plaintiff, a part-time employee during the Christmas season, was working in the jewelry department at the defendant department store. *69 N.C. App. at 316, 317 S.E.2d at 18*. The sales people were permitted to model the jewelry to encourage customers [***18] to purchase it. *Id.* One evening at closing, after rushing to get the 14 karat gold jewelry into the safe and to leave before the lights were turned off, the plaintiff walked out of the store without removing a pair of earrings she had been wearing during the day. *Id.* She was seized by J.M. Lynch, an [**646] off-duty police officer hired to provide store security, and was taken back into the store. *Id.* She was ushered into a small room and questioned by three employees about an alleged theft of earrings. *Id. at 316-17, 317 S.E.2d at 18*. The plaintiff offered to return the earrings she had been wearing during the day, but Lynch continued to look for other earrings by examining the contents of the plaintiff's purse without her consent. *Id. at 317, 317 S.E.2d at 18*. Lynch later testified that he did not stop the plaintiff [*725] because she was wearing the store earrings out of the store, but because he thought she had taken other earrings earlier when he saw her bend down and do something under the counter. *Id.* When Lynch's search of the plaintiff's purse revealed only the plaintiff's own earrings, Karen Beasley, head of the defendant's security force, subjected the plaintiff to a body search. *Id. at 317, 317 S.E.2d at 19*. [***19] The plaintiff's requests to call her father were refused until after the search failed to reveal any evidence of stolen property. *Id.*

Lynch had the plaintiff transported to the magistrate's office, where he attempted to have her charged with felonious larceny. *Id.* The magistrate would only issue a warrant for misdemeanor larceny of two pairs of earrings. *Id.* The plaintiff was found not guilty of these charges in District Court. *Id.* On this evidence the Court of Appeals concluded

that the jury could find that the plaintiff "was treated rudely and oppressively." *Id. at 320, 317 S.E.2d at 20*. The Court of Appeals also concluded that the evidence of Lynch's failure to take an inventory to determine if jewelry was missing, his failure to check the plaintiff's sales book to determine if she had made any sales, and his failure to check with anyone regarding the plaintiff's personnel record or her character constituted evidence from which the jury could find reckless and wanton disregard of the plaintiff's rights. *Id. at 320, 317 S.E.2d at 20-21*.

Again, in the instant case the evidence is undisputed that plaintiff failed to ring the sale and permitted the customers to leave the store with two [***20] pairs of shoes for which payment had not been tendered. The evidence is undisputed that Sergeant Schul presented the results of the investigation to an ADA before obtaining a warrant from the magistrate.

Nevertheless, plaintiff argues that as in *Jones* and *Williams,* defendant acted willfully and wantonly in reckless disregard of his rights in its investigation of the incident by failing to inquire into his character and employment records, as well as failing to obtain statements from all possible witnesses, including Betty Jordan, one of the two women who received the shoes. Plaintiff further argues defendant did not divulge exculpatory evidence to the police.

We find these arguments unpersuasive in light of the investigation conducted by Sergeants Wright and Schul before the case was submitted to ADA Proctor. Plaintiff was interviewed by Sergeant Wright, Mr. Hicklin, and Mr. McCluskey the day after the incident and before he was fired. Sergeant Wright took a written statement from [*726] plaintiff during this meeting. The officers took statements from plaintiff's coworkers, Ms. Brown and Ms. Withers, as well as from his supervisors Mr. Gainsboro and Mr. McCluskey. Ms. Withers's statement expressed [***21] her belief that plaintiff had given the shoes to the women on purpose, even though Gainsboro thought plaintiff had made a mistake. However, Mr. Gainsboro's statement does not reflect that he thought plaintiff had made a mistake. The relevance of this allegedly exculpatory evidence involving Mr. Gainsboro's opinion about whether plaintiff made a mistake or acted intentionally is problematic at best. In *Jones* the undiscovered or undisclosed exculpatory evidence was presented by the plaintiff at trial and demonstrated that had the investigator discovered this evidence, the defendant would have known that no money was missing from McDonald's. In this case Mr. Gainsboro's initial opinion that plaintiff made a mistake has no bearing on the existence of missing property or goods. Further, though the record does not disclose why Mr. Gainsboro's statement fails to mention his initial opinion or impression, Mr. Gainsboro would have been entitled to change his opinion. Moreover, that Mr. Gainsboro initially thought plaintiff made a mistake was disclosed through Ms. Withers's statement. Certainly this omission does not [**647] rise to the level of clear and convincing evidence of willful or wanton reckless [***22] disregard of plaintiff's rights in conducting the investigation. Although defendant's investigation may not have been perfect and could perhaps have included statements from additional witnesses, unlike in *Jones* and *Williams,* plaintiff has not adduced any evidence that this additional investigation that plaintiff thinks could have been conducted would have changed the officers' decision to present the case to the ADA. We simply do not know what any additional investigation would have revealed. Speculation is not probative evidence of willful or wanton conduct.

Plaintiff next contends that defendant acted with a conscious and intentional disregard of his rights in procuring his prosecution knowing that it would cause him to lose his full-time job at First Union Bank despite evidence showing that he simply made a mistake in forgetting to charge the women for the shoes. Plaintiff testified that during the meeting the day after the incident occurred, Mr. McCluskey repeatedly accused him of knowing the two women and threatened to "mess up" his job at First Union if he did not tell Dillard's who the women were. Plaintiff testified that he told Mr. McCluskey that he did not know the women [***23] and that he would take a polygraph test to clear his name. At the time of the meeting, Dillard's was in possession of the piece of paper with the name [*727] "Betty Jordan" on it, which had been placed by plaintiff on the box of shoes that he had put on hold for one of the women who was supposed to return the next day to purchase the shoes.

While plaintiff's characterization of Mr. McCluskey's statements reveals that Mr. McCluskey may have been somewhat intemperate in his interview with plaintiff, interviews such as this one are always stressful. The pertinent question is whether, under the circumstances, Mr. McCluskey's statements to plaintiff that he was suspected of embezzlement and that if he were charged with embezzlement, it would adversely affect plaintiff's position at First Union Bank constitutes evidence of reckless disregard for plaintiff's rights, or whether Mr. McCluskey simply confronted plaintiff with the truth. That being charged with embezzlement would affect a person's job with a bank is indisputable. The underlying premise of plaintiff's argument is that Mr. McCluskey acted inappropriately by not merely accepting plaintiff's explanation that he made a mistake by forgetting [***24] to re-ring the sale. Department store managers have an obligation to protect the safety and security of people and property within the store. Common sense dictates that a store manager cannot be precluded from taking investigative measures necessary to fulfill this obligation when con-

fronted with the information Mr. McCluskey had in this instance. Refusing to accept an employee's explanation and telling an employee the consequences of the situation do not equate with reckless disregard of an employee's rights.

Plaintiff next argues that he presented sufficient evidence of malice on the part of defendant in procuring his felony prosecution to support the jury's award of punitive damages. In the context of punitive damages, "[m]alice" is defined as "a sense of personal ill will toward the claimant that activated or incited the defendant to perform the act or undertake the conduct that resulted in harm to the claimant." *N.C.G.S. § 1D-5(5)* (2007).

Plaintiff argues that malice can be evidenced by his previous reprimand by Mr. McCluskey for referring a customer to another shoe store. Plaintiff testified that at the beginning of his meeting with management the day after the incident, Mr. McCluskey [***25] repeatedly said, "I cannot believe you're [Scarborough] in my office again." Plaintiff also argues that the prosecution was due to Mr. McCluskey's belief that plaintiff was so inept that the women were able to dupe him out of the shoes rather than any honest belief that Mr. McCluskey had intentionally given away the shoes. These arguments are too speculative and fall well short of constituting clear and convincing evidence from [*728] which a jury could conclude that Mr. McCluskey acted with malice under *N.C.G.S. § 1D-15(a)*.

In conclusion, we hold that the proper standard of review of a trial court's ruling on a motion for judgment notwithstanding the verdict as to punitive damages is whether the nonmovant produced clear and convincing evidence [**648] of one of the statutory aggravating factors for punitive damages.

Inasmuch as we have determined that the evidence in this case is not sufficient to support a jury's finding of a statutory aggravating factor by clear and convincing evidence, we do not reach the issues of whether the factor "was related to the injury" or whether one of defendant's "officers, directors, or managers . . . participated in or condoned the conduct constituting the aggravating [***26] factor giving rise to punitive damages." *N.C.G.S. § 1D-15(c)*.

For the forgoing reasons, the decision of the Court of Appeals is reversed.

REVERSED.

DISSENT BY: TIMMONS-GOODSON

DISSENT

Justice TIMMONS-GOODSON dissenting.

The majority conflates the burden of persuasion--the exclusive province of the jury--with the burden of production. In so doing, the majority improperly weighs the evidence and substitutes its own judgment for the jury's. I therefore respectfully dissent. Because plaintiff presented sufficient evidence to support the jury's award of punitive damages, the trial court erred in granting defendant's motion for judgment notwithstanding the verdict.

I. N.C.G.S. § 1D-15

Subsections 1D-15(a) and (b) state that:

> (a) Punitive damages may be awarded only if the claimant proves that the defendant is liable for compensatory damages and that one of the following aggravating factors was present and was related to the injury for which compensatory damages were awarded:
>
> (1) Fraud.
>
> (2) Malice.
>
> (3) Willful or wanton conduct.
>
> [*729] (b) The claimant must prove the existence of an aggravating factor by clear and convincing evidence.

N.C.G.S. §§ 1D-15 (a),(b) (2007).

To determine the General Assembly's intent in requiring "clear [***27] and convincing" evidence of punitive damages under *N.C.G.S. § 1D-15* and whether by establishing such burden of proof, the General Assembly intended to alter the trial court's review of the evidence upon a motion for judgment notwithstanding the verdict, I believe it instructive to closely examine two basic concepts of law: the burden of proof and judgment notwithstanding the verdict.

II. Burden of Proof

The burden of proof in any case includes both the burden of production and the burden of persuasion. *Black's Law Dictionary* 209 (8th ed. 2004) [hereinafter *Black's*]; *see also N.C.G.S. § 8C-1, Rule 301* (2007) (distinguishing between the burden of production and the burden of persuasion); *Hunt v. Eure, 189 N.C. 482, 486, 127 S.E. 593, 594 (1925)*; *Speas v. Merchs. Bank & Tr. Co., 188 N.C. 524, 526, 125 S.E. 398, 399 (1924)*; 1 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence §* 30 (6th ed. 2004) [hereinafter Broun]. The burden of production, also known in North Carolina as the "duty of going forward," *Speas, 188 N.C. at 529, 125 S.E. at 401*, is "[a] party's duty to introduce enough evidence on an issue to have the issue decided by the fact-finder, rather than decided against the [***28] party in a peremptory ruling" such as a directed verdict or a judgment notwithstanding the verdict, *Black's* 209. *See also Speas, 188 N.C. at 526, 125 S.E. at 399* (contrasting the "burden or duty of going forward and producing evidence" with the party's burden of persuasion); Broun § 30 (same). The burden of persuasion, meanwhile, is the "party's duty to convince the fact-finder to view the facts in a way that favors that party." *Black's* 209; *see also* Broun § 33. The burden of persuasion is commonly known in North Carolina as the "burden of the issue." *Speas, 188 N.C. at 529, 125 S.E. at 401*; *see also State Board of Education v. Makely, 139 N.C. 31, 34-35, 51 S.E. 784, 786, 51 S.E. 784, 786 (1905)*; Broun §§ 30, 33. The burden of persuasion is also often "loosely termed [the] burden of proof." *Black's* 209 (emphasis omitted); *see also* Broun § 33.

The burden of production and the burden of persuasion are distinct concepts. *See, e.g., Speas, 188 N.C. at 529, 125 S.E. at 401* ("The burden of the issue and the duty of going forward with evidence are two very different things."); *Makely, 139 N.C. at 57-58, 139* [*730] *N.C. at 35-36, 51 S.E. at* [**649] *786* (distinguishing the burden of production from the burden of proof); [***29] *Black's* 209 (same). Significantly, the trial court may review the evidence to ensure that the burden of production is met, while the burden of persuasion rests with the trier of fact:

> "The important practical distinction between these two senses of 'burden of proof,' is this: 'The risk of non[]persuasion operates when the case[s] . . . come into the hands of the jury [] while the duty of producing evidence implies a liability to a ruling [of] the judge disposing of the issue without leaving the question open to the jury's deliberation[].'"

Hunt, 189 N.C. at 488, 127 S.E. at 596 (quoting 5 John Henry Wigmore, *Evidence* § 2487 (2d ed. 1923) (alterations in original)); *see also Campbell v. Everhart, 139 N.C. 503, 516, 52 S.E. 201, 206, 52 S.E. 201, 206 (1905)* ("The legal sufficiency of proof and the moral weight of legally sufficient proof are very distinct in the conception of the law. The first lies within the province of the court, the last within that of the jury."); *Black's* 209 (defining the burden of production as the "party's duty to introduce enough evidence on an issue to have the issue decided by the fact-finder" rather than by the trial judge, while the burden of persuasion is [***30] the "party's duty to convince the fact-finder"); Broun §§ 32, 33, 39.

A. Varying Levels of the Burden of Persuasion

The burden of persuasion is "heavier or lighter depending upon the kind of case and the particular issue involved." Broun § 33; *see also Speas, 188 N.C. at 528-29, 125 S.E. at 400-01* (describing the differing levels of the burden of persuasion); *Black's* 209 (identifying varying burdens of persuasion). In civil cases, the burden of persuasion is usually the "greater weight" or "preponderance" of the evidence, *Black's* 209, but other civil cases require a greater burden of persuasion, that of "clear and convincing evidence," *see Speas, 188 N.C. at 528-29, 125 S.E. at 401*, also called the "middle burden of proof," *Black's* 209. *See also* Broun § 42. In criminal cases, the burden of persuasion is almost always "beyond a reasonable doubt." *Speas, 188 N.C. at 528, 125 S.E. at 400*; *Black's* 209. In each case, the jury must determine whether the party with the burden of persuasion has met that burden with evidence that preponderates, clearly con-

vinces, or establishes the matters at issue beyond a reasonable doubt. These various burdens of persuasion relate to the credibility of the [***31] evidence offered rather than the quantity of the evidence. *See In re Will of* [*731] *Lomax, 225 N.C. 592, 595, 35 S.E.2d 876, 878 (1945)* (noting that the probative value of testimony offered "is a matter only for the jury").

B. The "Clear and Convincing" Burden of Persuasion

The majority asserts that, *as a matter of law,* plaintiff failed to present "clear and convincing" evidence in support of his claim for punitive damages. In so concluding, the majority conflates the burden of production with the burden of persuasion. Determining whether a plaintiff has met the burden of persuasion by producing "clear and convincing" evidence is the exclusive province of the fact finder. *See, e.g., In re Will of McCauley, 356 N.C. 91, 102, 565 S.E.2d 88, 95 (2002)* ("Whether the evidence on these questions is clear, strong, and convincing is for the jury to decide."); *Speas, 188 N.C. at 530, 125 N.C. at 401*. This principle is well established. As this Court admonished in *Lehew v. Hewett, 130 N.C. 22, 22-23, 40 S.E. 769, 770, 40 S.E. 769, 770 (1902)*:

> The evidence was sufficient to be submitted to the jury, with the instruction that it must be clear, strong and convincing to warrant a verdict for the plaintiff, [***32] but whether it was or was not "strong, clear and convincing" was to be determined by the jury and not by the court; otherwise, the jury would be useless.
>
> "The [j]udge has no more right, when the testimony[,] if believed[,] is sufficient to be submitted to the jury, to determine in the trial of civil actions what is strong, clear and convincing proof[,] tha[n] he has in the trial of a criminal action to express an opinion as to whether guilt has been shown beyond a reasonable doubt."

Id. (quoting *Cobb v. Edwards, 117 N.C. 244, 252, 23 S.E. 241, 244, 23 S.E. 241, 244 (1895)* (alterations in original)); *see also Lefkowitz v. Silver, 182 N.C. 339, 350,* [**650] *109 S.E. 56, 61, 109 S.E. 56, 61 (1921)* (noting that it is the role of the jurors to decide if evidence is strong, cogent and convincing, "just as they decide in ordinary civil cases whether the proof of plaintiff preponderates, or in criminal cases whether the State has established the crime beyond a reasonable doubt").

Section 1D-15 of the North Carolina General Statutes, like so many statutes, sets forth both the burden of production and the burden of persuasion. To be awarded punitive damages, the plaintiff must meet his burden of production [***33] by producing evidence [*732] of (1) fraud, (2) malice, or (3) willful or wanton conduct. *N.C.G.S. § 1D-15(a)*. The plaintiff's burden of persuasion is to produce "clear and convincing" evidence of one of these aggravating factors. *Id. § 1D-15(b)*. The "clear and convincing" burden of persuasion required by *N.C.G.S. § 1D-15(b)* is neither novel nor unique in our statutory scheme and case law. Our statutes require varying burdens of persuasion--from preponderance of the evidence, to clear and convincing, to beyond a reasonable doubt. *See, e.g., N.C.G.S. §§ 7B-805* (2007) (requiring clear and convincing evidence); *7B-2409* (2007) (requiring proof beyond a reasonable doubt); *42-30* (2007) (requiring preponderance of the evidence). The majority concludes that because the burden of persuasion set forth in *N.C.G.S. § 1D-15* is "clear and convincing," the trial court must, upon a motion for directed verdict or judgment notwithstanding the verdict, review and determine whether the evidence is clear and convincing. Yet as explained above, the burden of persuasion lies within the province of the jury. *See Martin v. Underhill, 265 N.C. 669, 675, 144 S.E.2d 872, 876 (1965)* (stating that when the required burden [***34] of persuasion is clear, cogent, and convincing evidence, "whether the evidence has that convincing quality is a question for the jury upon proper instructions from the court" but "the rule as to the sufficiency of the proof to withstand a motion for judgment of nonsuit [is] the same as in other cases" (citations omitted)). I do not believe, and the majority offers no compelling argument otherwise, that the General Assembly intended to overturn this settled principle of law by merely requiring a heightened burden of persuasion in order to recover punitive damages under *N.C.G.S. § 1D-15*.

III. Judgment Notwithstanding the Verdict

"A motion for judgment notwithstanding the verdict . . is essentially a renewal of an earlier motion for a directed verdict." *Taylor v. Walker, 320 N.C. 729, 733, 360 S.E.2d 796, 799 (1987)* (citation omitted). It requires the trial court to assess whether the burden of production has been met by evidence that is "legally sufficient to take the case to the jury." *Id.* (citations omitted). It is well established that "[t]he [***35] party moving for judgment notwithstanding the

verdict, like the party seeking a directed verdict, bears a heavy burden under North Carolina law." *Id.* "In ruling on the motion, the trial court must consider the evidence in the light most favorable to the non-moving party, giving him the benefit of all reasonable inferences to be drawn therefrom and resolving all conflicts in the evidence in his favor." *320 N.C. at 733-34, 360 S.E.2d at 799* (citing, *inter alia, Smith v. Price,* [*733] *315 N.C. 523, 340 S.E.2d 408 (1986)).* Judgment notwithstanding the verdict may not be granted "unless it appears *as a matter of law* that a recovery simply cannot be had by plaintiff upon *any view of the facts* which the evidence reasonably tends to establish." *Id.* (emphases added) (citing *Manganello v. Permastone, Inc., 291 N.C. 666, 231 S.E.2d 678 (1977)).*

Contrary to the majority's assertions, the trial court does not alter its review of the plaintiff's *burden of production* upon a motion for judgment notwithstanding the verdict merely because the *burden of persuasion* is higher or lower in each case. As long as the plaintiff has met his burden of production and the facts in evidence establish a prima facie case, [***36] the case belongs with the jury. *See, e.g., Millers Mut. Ins. Ass'n v. Atkinson Motors Inc., 240 N.C. 183, 187, 81 S.E.2d 416, 420 (1954)*; *Campbell, 139 N.C. at 405, 139 N.C. at 516-17, 52 S.E. at 206* (noting that "the province of the jury should not be invaded in any case" and that when reasonable minds "might reach different conclusions, the evidence must be submitted to the jury" (citations omitted)). The trial court then instructs [**651] the jury on, *inter alia*, the plaintiff's burden of persuasion, and it is "for the jury to say, upon the facts and the circumstances shown by [the] plaintiff's evidence" whether the plaintiff has established his claim. *Millers Mut. Ins., 240 N.C. at 187, 81 S.E.2d at 419-20*.

Here, the trial court instructed the jury regarding plaintiff's "clear and convincing" burden of persuasion on his claim for punitive damages. "This Court presumes that jurors follow the trial court's instructions." *State v. Cummings, 352 N.C. 600, 623, 536 S.E.2d 36, 53 (2000), cert. denied, 532 U.S. 997, 121 S. Ct. 1660, 149 L. Ed. 2d 641 (2001).* The jury applied the clear and convincing burden of persuasion to plaintiff's evidence and found that punitive damages were warranted. The jury in its discretion, therefore, [***37] awarded plaintiff punitive damages. *See Watson v. Dixon, 352 N.C. 343, 348, 532 S.E.2d 175, 178 (2000).* This Court will not set aside the jury's determination unless only a single inference, unfavorable to the plaintiff, is possible from the evidence:

> Taking the case away from the jury, while a duty sometimes unavoidable, is always a delicate task, involving much more than a strong feeling that the plaintiff ought not to recover. The power of the court is *limited to the ascertainment whether there is any evidence at all which has probative value in any or all of the facts and circumstances offered in the guise of proof.* It is not a matter of passing upon the weight of evidence when it has [*734] weight. *That power is denied us.* It is a matter of dropping the proffered proof into evenly poised balances to see whether it weighs against nothing.

Wall v. Bain, 222 N.C. 375, 378, 23 S.E.2d 330, 332-33 (1942) (emphases added) (citations omitted).

IV. Evidence Presented

In the present case, I conclude that plaintiff met his burden of production. Taken in the light most favorable to the nonmovant, the evidence shows that plaintiff, a forty-one year old African-American man, was terminated from his employment [***38] as a part-time shoe salesman at Dillard's after mistakenly allowing two African-American women to leave the store with two pairs of shoes for which they did not pay. When plaintiff realized his mistake, his "hands start[ed] shaking" and he uttered an expletive. Plaintiff immediately reported his mistake to the manager on duty, Steven Gainesboro. Gainesboro took no action to recover the shoes, but merely checked the register tape. Gainesboro believed that plaintiff's actions were inadvertent rather than intentional. Gainesboro told plaintiff he would speak to his supervisor, shoe department manager David Hicklin, the following day. Although other Dillard's shoe department employees later observed the two women carrying the bag with the shoes, no steps were taken to approach or apprehend the women.

The next day, plaintiff telephoned Hicklin three times to explain what had happened. When plaintiff finally reached him, Hicklin told plaintiff he didn't "know what [plaintiff was] talking about" but that they would talk when plaintiff came to work that evening. When plaintiff arrived at Dillard's that evening, Hicklin summoned him to the manager's office, where he waited outside for approximately [***39] fifteen minutes. Once plaintiff was allowed to enter the office, he was interviewed by Hicklin, store manager Kevin McCluskey, and Officer Cullen Wright of the Mecklenburg Police Department. McCluskey immediately told plaintiff, "I cannot believe you're in my office again." McCluskey had

formally reprimanded plaintiff the previous week for referring a customer to another store when Dillard's did not carry the type of shoe the customer desired to purchase.

The "drain[ing]" interview lasted at least two hours, during which the three men repeatedly accused plaintiff of being acquainted with the women and intentionally allowing them to leave with the shoes. McCluskey threatened to charge plaintiff with embezzlement and [*735] "mess up" his job at First Union if he did not reveal the names of the two women. Plaintiff repeatedly explained that he had made a mistake, took responsibility for the incident, and offered to pay for the shoes and to submit to a polygraph examination. At the end of the interview, McCluskey terminated plaintiff's employment at Dillard's [**652] and banned him from entering any Dillard's store. Plaintiff was "very upset" and "very surprised" by the interview. Dillard's referred the [***40] matter to Officer Wright and Officer Ken Schul, another Mecklenburg Police Department officer who also worked at Dillard's, for prosecution. Officer Wright later arrested plaintiff at his place of employment with First Union on charges of embezzlement. First Union subsequently suspended plaintiff without pay because of his arrest for embezzlement.

V. Punitive Damages Based on Malicious Prosecution

In establishing his malicious prosecution claim, plaintiff here was required to prove that defendant (1) initiated the earlier proceeding, (2) with malice and (3) without probable cause, and (4) that the earlier proceeding terminated in his favor. *Jones v. Gwynne, 312 N.C. 393, 397, 323 S.E.2d 9, 11 (1984)* (quoting *Stanback v. Stanback, 297 N.C. 181, 202, 254 S.E.2d 611, 625 (1979))*. The jury found defendant liable for malicious prosecution of plaintiff and--as the majority acknowledges--the validity of that verdict stands. Thus it is uncontroverted that at least the greater weight of the evidence showed that defendant acted with malice.

The majority appears to concede that plaintiff presented evidence of the aggravating factor of malice, but concludes that the evidence falls short of the "clear [***41] and convincing" standard required by *N.C.G.S. § 1D-15*. Again, however, whether evidence is clear and convincing is a matter for the trier of fact. The majority's efforts to rationalize and explain the actions of various persons and events illuminate the difficulty of reviewing a cold record and attempting to assess whether evidence is clear and convincing. For example, the majority characterizes McCluskey's threat to plaintiff to "mess up" his job at First Union if he did not reveal the names of the women who took the shoes--even though McCluskey possessed the name of one of the women, whom he did not bother to investigate--as "somewhat intemperate" and "simply confronting plaintiff with the truth." This is indeed one possible inference from the evidence presented. An equally plausible view of the evidence presented is that McCluskey had no intention of conducting a genuine investigation of the incident, that instead, he personally disliked plaintiff and believed him to [*736] be an incompetent employee, and that he therefore seized upon plaintiff's mistake in order to terminate his employment with Dillard's and advance his termination at First Union. Such a view is imminently reasonable [***42] given the evidence of the preexisting ill will McCluskey demonstrated towards plaintiff, plaintiff's lack of involvement in the theft, the interrogation-style interview McCluskey conducted, McCluskey's threat to "mess up" plaintiff's job at First Union, and the fact that no one at Dillard's appeared to be at all interested in locating the two women or recovering the merchandise. The jury may have also drawn conclusions from the fact that none of plaintiff's supervisors at Dillard's--Gainesboro, Hicklin, or McCluskey--testified at trial.

In *Jones* this Court held that the Court of Appeals erred in concluding that the plaintiff's evidence was insufficient to justify submission of the issue of punitive damages to the jury based on malicious prosecution when there was evidence from which a reasonable juror could conclude that defendant's investigation of the plaintiff was conducted with reckless and wanton disregard of the plaintiff's rights. *312 N.C. at 408-09, 323 S.E.2d at 18*. In that case the evidence tended to show that the defendant conducted only "a superficial and cursory investigation" of the plaintiff employee before soliciting his prosecution for alleged embezzlement. *Id; see* [***43] *also Williams v. Boylan-Pearce, Inc., 69 N.C. App. 315, 319-20, 317 S.E.2d 17, 20-21 (1984)* (holding the trial court erred in failing to submit the issue of punitive damages to the jury when there was evidence from which the jury could find that the defendant maliciously prosecuted the plaintiff in a manner evincing a "reckless and wanton disregard of her rights"), *aff'd per curiam, 313 N.C. 321, 327 S.E.2d 870 (1985)*. The majority contends *Jones* and *Williams* are factually distinguishable and therefore, inapplicable. Cases may always be distinguished on their facts, however. Whether cases may be *meaningfully* distinguished is the pertinent question. That the majority dedicates nearly half of its opinion to discussing the facts of [**653] the instant case and attempting to distinguish them from the facts of *Jones* and *Williams* speaks volumes.

VI. Conclusion

Taken in the light most favorable to plaintiff, I conclude that plaintiff met his burden of production by presenting evidence from which a reasonable juror could conclude that defendant acted with malice and with reckless and wanton disregard for plaintiff's rights. Given the various possible interpretations of the evidence, judgment notwithstanding [***44] the verdict was improper. *Taylor, 320 N.C. at 733-34,* [*737] *360 S.E.2d at 799*. It was the jury's role to sift through the evidence, evaluate the demeanor and credibility of the witnesses, and determine whether plaintiff met his burden of persuasion by producing clear and convincing evidence in support of his claim for punitive damages. The jury did so and found in favor of plaintiff. The majority's decision usurps the jury's role and imposes its own view of the evidence, contrary to well-established case law. I respectfully dissent.

Justice HUDSON joins in this dissenting opinion.

Analysis
As of: Aug 23, 2011

ELIZA WILLIAMS AND L. W. WILLIAMS v. BLUE RIDGE BUILDING AND LOAN ASSOCIATION, A CORPORATION, AND A. W. BURNS, JR., LIQUIDATING AGENT FOR THE CENTRAL BANK AND TRUST COMPANY.

[NO NUMBER IN ORIGINAL]

SUPREME COURT OF NORTH CAROLINA

207 N.C. 362*; *177 S.E. 176*; *1934 N.C. LEXIS 469

November 21, 1934, Filed

PRIOR HISTORY: [***1] APPEAL by the plaintiffs from Pless, J., at June Term, 1934, of BUNCOMBE. New trial.

This was a civil action, instituted by the plaintiffs to restrain a sale under a certain recorded deed of trust, signed, and purporting to be duly acknowledged before a notary public, by the plaintiffs, to the Central Bank and Trust Company, as trustee, to secure an indebtedness to the Blue Ridge Building and Loan Association.

It is alleged in the complaint that, while the feme plaintiff signed the deed of trust, she never appeared before the notary public whose name is affixed to the certificate, and never, separately and apart from her husband, assented thereto. This allegation is denied in the answer. The case was submitted to the jury upon the following issue:

"1. Did the notary public, Fenton H. Harris, take the private examination of Eliza Williams touching her voluntary execution of the deed of trust dated 11 December, 1929, securing the sum of $ 7,000, recorded in Deed of Trust Book 305, page 292?" Upon the issue being answered in the affirmative, judgment was entered for the defendants, and the plaintiffs appealed, assigning errors.

DISPOSITION: New trial.

CORE TERMS: convincing proof, degrees of proof, greater weight, cogent, criminal actions, criminal cases, judicial officer, reasonable doubt, preponderance, universally, convincing, convince, solemn, satisfying

HEADNOTES

Evidence B a --

A charge that the burden of convincing the jury by "clear, strong, and convincing proof" means evidence convincing the jury to a "moral certainty" *is held* for error. The degrees of proof required in civil and criminal actions, and definitions of same, are discussed by *Mr. Justice Schenck.*

COUNSEL: Harry A. Gorson for appellants.

[***2] R. M. Wells and Martin & Martin for appellees.

JUDGES: SCHENCK, J.

OPINION BY: SCHENCK

OPINION

[**177] [*363] SCHENCK, J. The appellants assign as error the following from the charge: "You enter the jury box with the presumption that the private examination was legally taken, and if that presumption is to be rebutted it must be done by the plaintiff, the burden being upon her, Eliza Williams, to satisfy this jury by clear, strong, and convincing proof that the private examination was not legally taken. The phrase 'clear, strong, and convincing proof' means more than merely satisfying you, or satisfying you by the greater weight of the evidence; it means she must fully satisfy you, that is, satisfy you to a moral certainty that the certificate signed by the notary public, Fenton Harris, is not correct, that her private examination was not taken."

We are constrained to hold that when his Honor, in explaining the meaning of the words "clear, strong, and convincing proof," told the jury that the plaintiffs "must . . . satisfy you to a moral certainty," he required of the plaintiffs an intensity of proof not warranted or justified by the decisions of this Court, even in cases where it is [***3] sought to set aside a solemn act of a judicial officer. If the quoted words had been omitted, the charge would have been in accord with *Lumber Co. v. Leonard, 145 N.C. 339, 59 S.E. 134*, where it is said: "The court should instruct the jury with the greatest care in cases of this character, and explain to them that the solemn act of a judicial officer is not to be lightly set aside, and certainly not upon a mere preponderance of [*364] evidence, but only upon very clear, strong, and cogent proof, which should fully convince the minds of the jury." But when the phrase "satisfy you to a moral certainty" was chosen his Honor adopted the language that this Court has universally used in criminal cases to define the clause "satisfy you beyond a reasonable doubt."

In this jurisdiction there are three degrees of proof required of the party upon whom the *onus probandi* rests. First, in ordinary civil actions the burden is to satisfy the jury by the greater weight of the evidence; and, second, in certain cases of an equitable nature, such as where it is sought to reform a written instrument, or prove the terms of a lost will, or to impeach the probate of a married woman's [***4] deed, the burden is to establish the contention by clear, strong, and cogent proof; and, third, in criminal actions the burden is to show the guilt of the accused beyond a reasonable doubt. *Ellett v. Ellett, 157 N.C. 161, 72 S.E. 861*; *Montgomery v. Lewis, 187 N.C. 577, 122 S.E. 374*. The first phrase, "greater weight of the evidence," has been universally explained by "the preponderance of the evidence," *Butchers Supply Co. v. Conoly, 204 N.C. 677, 169 S.E. 415*; the second phrase, "clear, strong, and cogent proof," by evidence which "should fully convince," *Lumber Co. v. Leonard, supra;* and the third phrase, "beyond a reasonable doubt," by "to a moral certainty," *S. v. Schoolfield, 184 N.C. 721, 114 S.E. 466*.

When his Honor placed upon the plaintiffs the burden of establishing their contention [**178] "to a moral certainty" he took this case out of that line of cases requiring the second degree of proof, and placed it in the category of criminal cases requiring the third degree of proof. In this we think there was error, and therefore award a New trial.

N.C.P.I. Civil 101.11
Clear, Strong and Convincing Evidence
Includes 2010 changes **[1]**

The law requires (*name party with burden of proof*) to prove each element of this issue by evidence which is clear, strong and convincing. Usually, the law only requires matters to be proved by the greater weight of the evidence. That is not the situation with this issue. Before (*name party with burden of proof*) is entitled to prevail, *he* must prove this issue by clear, strong and convincing evidence.

Clear, strong and convincing evidence is evidence which, in its character and weight, establishes what (*name party with burden of proof*) seeks to prove in a clear, strong and convincing fashion. You shall interpret and apply the words "clear," "strong" and "convincing" in accordance with their commonly understood and accepted meanings in everyday speech.[2]

FOOTNOTES

FOOTNOTE 1. This burden applies to the following types of cases (not intended to be exclusive): reformation of a written instrument for mistake or inadvertence; conversion of an absolute deed into a mortgage; attaching a parol or resulting or constructive trust to a legal estate; establishing a lost deed or will; proving an oral agreement which modifies a written contract; establishing a special or local custom; and proving certain matters before the Judicial Standards Commission or in judicial disbarment proceedings. Brandis and Broun on North Carolina Evidence §42 (6(fnth) ed. 2004).

Where this standard applies to less than all of the issues to be submitted it may be necessary to modify other instructions accordingly, see for example N.C.P.I. -- Civil 101.10 "Burden of Proof and Greater Weight of the Evidence."

FOOTNOTE 2. A further explanation may result in error. *McCorkle v. Beatty*, 225 N.C. 178, 33 S.E.2d 753 (1945).