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A New Bright Line Rule for General Construction Contractors - Brady v. Fulghum

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NOTES


**INTRODUCTION**

Article 1 of Chapter 87 of the General Statutes of North Carolina, governing general construction contractors,\(^1\) clearly contemplates that a general contractor be licensed at the time the contract to construct is made and during the entire period of construction.\(^2\) Specifically, North Carolina General Statute § 87-10 requires an examination of all applicants seeking to be licensed as general contractors.\(^3\) Under G.S. § 87-10, an applicant must not only pass the examination administered by the State Licensing Board for General Contractors,\(^4\) but must also certify his good

1. A general contractor is defined in N.C. Gen. Stat. § 87-1 (Supp. 1983) as "any person or firm or corporation who for a fixed price, commission, fee or wage, undertakes to bid upon or to construct or who undertakes to superintend or manage . . . the construction of any building, highway, public utilities, grading or any improvement or structure where the cost of the undertaking is . . . $30,000 or more, shall be deemed to be a 'general contractor' engaged in the business of general contracting in the State of North Carolina." Vogel v. Supply Co., 277 N.C. 119, 177 S.E. 2d 273 (1970) (a sub-contractor is not required to be licensed under the statute); Duke Univ. v. Am. Arbitration Ass'n., 64 N.C. App. 75, 306 S.E.2d 584 (1983) (G.S § 87-1 does not apply to any construction contract for $30,000 or more, a general contractor is determined by the degree of control over the construction project); Phillips v. Parton, 59 N.C. App. 179, 296 S.E.2d 317 (1982); Helms v. Dawkins, 32 N.C. App. 453, 232 S.E.2d 710 (1977); Hickory Furniture Mart v. Burns, 31 N.C. App. 626, 230 S.E.2d 609 (1976).


3. N.C. Gen. Stat. § 87-10 (Supp. 1983). "Anyone seeking to be licensed as a general contractor in this State shall file an application for an examination . . . . The Board shall conduct an examination, either oral or written, of all applicants for license to ascertain the ability . . . and . . . qualifications of the applicant . . . ."

4. N.C. Gen. Stat. § 87-2 (1981) creates the State Licensing Board for General Contractors that is composed of seven members which include five general contractors and two public members appointed by the Governor.
character and qualifications as to competency, ability and integrity. Further, G.S. § 87-13 makes non-compliance with the statutory requirements under Article 1, Chapter 87 a misdemeanor punishable by either fine, imprisonment or both. Article 1, Chapter 87 of the General Statutes prohibits a general contractor from undertaking to construct a building, structure or improvement costing $30,000 or more. The purpose of Article

5. N.C. Gen. Stat. § 87-10 requires that "[b]efore being entitled to an examination an applicant must show to the satisfaction of the Board from the application and proofs furnished that the applicant is possessed of good character and is otherwise qualified as to competency, ability and integrity . . . ."

6. N.C. Gen. Stat. § 87-13 (1981). "Any person, firm or corporation not being duly authorized who shall contract for or bid upon the construction of any of the projects or works enumerated in G.S. § 87-1, without having first complied with the provisions hereof . . . shall be deemed guilty of a misdemeanor . . . [punishable] by a fine of not less than . . . $500.00 or imprisonment of three months, or both . . . ." This statute must be strictly construed due to the criminal penalties imposed. Its scope may not be expanded beyond the meaning of the statutory language so as to include offenses not clearly described. Walker Grading and Hauling v. S.R.F. Mgmt. Corp., 311 N.C. 170, 178, 316 S.E.2d 298, 303 (1984); Duke Univ. v. Am. Arbitration Assoc., 64 N.C. App. 75, 306 S.E.2d 584 (1983); Sager v. W.M.C., Inc., 64 N.C. App. 546, 307 S.E.2d 585 (1983).

7. Undertaking is defined as, "[a]n engagement by one of the parties to a contract to the other, as distinguished from the mutual engagement of the parties to each other." Fulton v. Rice, 12 N.C. App. 669, 672, 184 S.E.2d 421, 423 (1971) (quoting Black's Law Dictionary 1696 (4th ed. 1968)). "The undertaking is the promise or engagement." Id. at 672, 184 S.E.2d at 423.

8. "A building is defined as 'a[n edifice . . . a structure;' and a structure is defined as '[t]hat which is built or constructed; an edifice or building of any kind.' Black's Law Dictionary 244, 1592 (4th ed. 1968); . . . So when the words building and structure are strictly construed, in context with the remainder of G.S. § 87-1, they do not embrace parts or segments of a building or structure." Vogel v. Supply Co., 277 N.C. at 132, 177 S.E.2d at 281. "The term 'improvement' does not have a definite and fixed meaning . . . . As used here it connotes the performance of construction work and presupposes the prior existence of some structure to be improved. As used with reference to land, the word improvement presupposes the prior existence of the land itself." Id. "A general contractor is one who undertakes to build an entire building." Hickory Furniture Mart, Inc. v. Burns, 31 N.C. App. at 631, 230 S.E.2d at 612 (1976); See also Duke Univ., 64 N.C. App. at 78, 306 S.E.2d at 586.

9. The cost of the undertaking is the cost of the promise or engagement. Therefore, the cost of the undertaking is the contract price and not the total cost. The contract price determines whether the statutory limit has been violated and thus whether the contractor must be licensed. Fulton v. Rice, 12 N.C. App. at 672, 184 S.E.2d at 423. The statutory language "$30,000 or more" includes a contract price of $30,000. Revis Sand and Stone, Inc. v. King, 49 N.C. App. 168, 170, 270 S.E.2d 580, 581 (1980).
Chapter 87 is to protect the public from incompetent builders.\textsuperscript{10} As a result, when an unlicensed general contractor, in disregard of the statutory requirements, contracts with an owner to erect a building or improvement costing more than the statutory minimum, the unlicensed contractor may not recover if the owner breaches the contract.\textsuperscript{11} This prohibition is true even though the statutes do not specifically forbid such suits.\textsuperscript{12}

While the statutes are unambiguous in their language and clearly mandate examination and licensing, the North Carolina Court of Appeals in its interpretations of the statutes created an exception based on the doctrine of substantial compliance.\textsuperscript{13} In \textit{Brady v. Fulghum},\textsuperscript{14} the North Carolina Supreme Court rejected the doctrine of substantial compliance and ended its application in this State.\textsuperscript{15} In rejecting the doctrine, the court alluded to past difficulty in the doctrine's application, which resulted in skewed results and uncertainty of the rights of parties, all of which have promoted litigation.\textsuperscript{16}

This note will analyze the background of cases leading up to the doctrine's rejection and the effect of those cases, as controlling precedent, in light of the \textit{Brady} decision. Further, this note will examine the court's opinion to demonstrate that while the court specifically rejected the doctrine it left open the door for recovery by unlicensed general contractors in specific factual circumstances.

**THE CASE**

In February 1980, Coite P. Brady, d/b/a Brady Building Company, entered into negotiations with Edwin and Patricia Fulghum. These negotiations culminated in a written contract for construc-

\begin{itemize}
\item[11.] \textit{Midyette}, 274 N.C. at 270, 162 S.E.2d at 510-11.
\item[12.] \textit{Id.} \textit{See also} 53 C.J.S. LICENSES § 59 (1948); Annot., 82 A.L.R.2d 1429 (1962); 6A A. CORBIN, CORBIN ON CONTRACTS §§ 1510-13 (1962).
\item[13.] "Compliance with the essential requirements, whether of a contract or of a statute." \textit{BLACK'S LAW DICTIONARY} 1280 (5th ed. 1979). A doctrine of judicial creation which with respect to the licensing of general construction contractors, allows contractors who have not fully complied with the licensing requirements to recover on their construction contracts if they demonstrate substantial compliance with the licensing requirements.
\item[14.] 309 N.C. 580, 308 S.E.2d 327 (1983).
\item[15.] \textit{Id.} at 583, 308 S.E.2d at 331.
\item[16.] \textit{Id.} at 583, 308 S.E.2d at 330.
\end{itemize}
tion of the Fulghum's house. The total contract price was approximately $106,850. Brady began construction some time around March 13, 1980.17 Neither during negotiation of the contract, at the time the contract was signed nor when Brady began construction of the Fulghum's home, was he licensed as a general contractor as required by North Carolina law.18 Brady was awarded his builders license on October 22, 1980, after passing the exam. At that time, Brady had completed two-thirds of the work on the Fulghum's home. The Fulghums paid Brady the sum of $104,000 and refused to pay any more.19

Brady sued the Fulghums for $2,850, the amount due under the original contract, and an additional $28,926.41 for "additions and changes" that the Fulghums requested during construction.20 In their answer, the defendants alleged that Brady could not recover further under the contract because he was not a licensed contractor within the meaning of G.S. § 87-1.21 The trial court entered summary judgment for the defendants and Brady appealed.22

The sole issue on appeal was whether the trial judge properly granted summary judgment for the defendants based upon Brady's non-compliance with Article 1, Chapter 87.23 In holding that summary judgment was properly entered for the defendants, the court of appeals concluded that Brady was not entitled to the benefit of the doctrine of substantial compliance.24 Brady argued that he had substantially complied with the statutory licensing requirements when he obtained his license during the course of construction.25 The court held that Brady had not substantially complied with the licensing requirements because he was not licensed during the majority of the construction project.26 Therefore, Brady was not enti-

17. Id. at 581, 308 S.E.2d at 329.
19. 309 N.C. at 581, 308 S.E.2d at 329.
20. Id.
22. 309 N.C. at 581, 308 S.E.2d at 329.
23. 62 N.C. App. at 100, 302 S.E.2d at 5.
24. Id. at 102, 302 S.E.2d at 6.
25. Id. Defendant relied on an earlier court of appeals case, Holland v. Walden, 11 N.C. App. 281, 181 S.E.2d 197, cert. denied, 279 N.C. 349, 182 S.E.2d 581 (1971). The court of appeals found defendant's reliance on Holland to be misplaced because in Holland the contractor was licensed for 88 percent of construction time. In the present case, Brady did not obtain his license until two-thirds of construction was completed.
26. Id.
tled to recover on the basic contract or for any additional expenditures or "extras." 27

The North Carolina Supreme Court agreed with the result reached by the court of appeals but rejected the basis for the court's decision—the doctrine of substantial compliance. 28 The court held that Brady had illegally entered into the contract to construct the Fulghum's home. 29 Furthermore, his subsequent procurement of a license did not make legal a contract that was illegal in its inception. 30 For these reasons, the contract was held to be unenforceable by Brady.

**BACKGROUND**

The question of whether an unlicensed general contractor may enforce or recover on his contract is determined primarily by statute. It is well settled that statutes that expressly provide that a contract of an unlicensed person cannot be enforced unless that person establishes that he was duly licensed, will not allow an unlicensed person to enforce his contract or recover for services rendered thereunder. 31 Where the licensing statutes make no express provision relating to the validity or enforceability of such contracts, the courts have looked to the purpose and intent of the statutes for guidance. A determinative factor is whether the statutes were enacted as a police power measure for the protection of the public health or welfare against fraud and incompetence, or merely as a revenue measure. 32 If the statutes are an exercise of police power, it is much more likely that in addition to the express statutory penalties, the non-conforming party will be penalized by the courts by denying him the enforcement of his bargain. 33 Most state licensing statutes which govern general contractors do not expressly provide for such forfeitures. Instead, they fix penalties of minor character and vest the courts with discretion in applying the penalties. 34 Therefore, in most states, the added penalty of non-

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27. *Id.*
29. *Id.* at 586, 308 S.E.2d at 332.
30. *Id.*
32. *Id.*
33. 6A A. Corbin, *Corbin on Contracts* § 1512 (1962).
34. *Id.* See supra note 6, for N.C. Statute fixing penalties for non-compliance.
enforceability of a bargain is a judicial creation.\textsuperscript{35}

Article 1, Chapter 87 of the General Statutes does not expressly forbid suits by unlicensed general contractors on their contracts to construct.\textsuperscript{36} The statutes in North Carolina were enacted as a police power measure.\textsuperscript{37} In \textit{Bryan Builders Supply v. Midyette}, the North Carolina Supreme Court declared the purpose of Article 1, Chapter 87 to be for the protection of the public from incompetent builders.\textsuperscript{38} \textit{Midyette} involved an action by a contractor against the owners for a balance allegedly due under a contract to construct the owners' home. The owners counter-claimed for damages and alleged that the contractor was not a licensed contractor as required by Article 1, Chapter 87. The contractor admitted that at the time he entered into the contract he was not licensed. The trial court entered judgment for the owners and the builder appealed.\textsuperscript{39} The supreme court found no error in the trial below but determined that the contract of an unlicensed contractor should not be held void.\textsuperscript{40} Such contracts are not without legal significance because they are enforceable by the property owner in an action for damages for breach of contract.\textsuperscript{41}

Denial of recovery to an unlicensed contractor rests upon his conduct that violates the licensing statutes and not the nature of the transaction.\textsuperscript{42} However, the property owner's conduct is not violative of the statutes. Furthermore, the property owner is among the class of persons protected by the statutes, and denying relief to the owner would defeat the licensing statutes' purpose thereby penalizing the person intended to have the statutes' protection.\textsuperscript{43}

The court in \textit{Midyette} also denied recovery based on theories of \textit{quantum meruit} and unjust enrichment.\textsuperscript{44} Again the court's reasoning was based on the legislative purpose of protection of the public from incompetent builders. "To deny an unlicensed contrac-

\textsuperscript{35} Id.
\textsuperscript{36} 274 N.C. at 270, 162 S.E.2d at 511.
\textsuperscript{37} Ar-Con Construction Co. v. Anderson, 5 N.C. App. 12, 19, 168 S.E.2d 18, 23 (1969); 309 N.C. at 584-85, 308 S.E.2d at 331.
\textsuperscript{38} 274 N.C. at 270, 162 S.E.2d at 510-11.
\textsuperscript{39} Id. at 269, 162 S.E.2d at 510.
\textsuperscript{40} Id. at 270, 162 S.E.2d at 511. "A void contract is no contract at all; it binds no one and is a mere nullity."
\textsuperscript{41} Id.
\textsuperscript{42} Id. at 271, 162 S.E.2d at 511.
\textsuperscript{43} Id.
\textsuperscript{44} Id. at 273, 162 S.E.2d at 512.
tor the right to recover damages for breach of contract, which it was unlawful for him to make, but to allow him to recover the value of work and services furnished under that contract would defeat the legislative purpose. . . .”

Following Midyette, in Ar-Con Construction Company v. Anderson, the North Carolina Court of Appeals denied recovery to a corporate contractor suing for money owed for materials and labor furnished in the construction of defendant's home. The contractor did not hold a general contractor’s license at the time of contract nor at any time during the construction period. The evidence showed that he did hold a license approximately one year prior to the time of the contract with the defendants, but the license had expired and had not been renewed. The plaintiff contended that it substantially complied with the statutory requirements because at one time it held a valid license as required in G.S. § 87-10.

The plaintiff relied on Latipac Inc. v. Superior Court of Marin County, a California case that allowed the contractor to maintain its suit to recover the balance due on a contract with the owner. However, the court of appeals distinguished Latipac in one very important respect. The contractor in Latipac was licensed at the time of the contract and his license remained in full effect fifteen months thereafter. Because Ar-Con did not have a valid license at the time of contract, it had not substantially complied with the licensing statutes.

The plaintiff's second argument in support of substantial compliance revolved around the requirement under G.S. § 87-10 that a

45. Id. at 273, 162 S.E.2d at 513. In dicta the court recognized a qualification of rule noted in Culbertson v. Cizek, 225 Cal. App. 2d 451, 37 Cal. Rptr. 548 (1964). That case held that an unlicensed person could offset, as a defense against damages due the owner, any sums which the owner owed to him. The supreme court in Midyette noted that this relaxation in the rule would allow the unlicensed contractor to assert his counter-demands defensively in an effort to reduce in whole or in part the claims against him for damages. 274 N.C. at 273, 162 S.E.2d at 513. “[A] general contractor can enforce his contract defensively, as a set-off to the claims asserted against him, though the set-off cannot exceed his adversary's claims.” Hickory Furniture Mart, Inc., 31 N.C. App. at 633, 230 S.E.2d at 613.

47. Id. at 15, 168 S.E.2d at 20.
48. Id. at 17, 168 S.E.2d at 21.
49. 64 Cal. 2d 278, 49 Cal. Rptr. 676, 411 P.2d 564 (1966).
50. 5 N.C. App. at 18, 168 S.E.2d at 22.
51. Id. at 19, 168 S.E.2d at 22.
renewal fee be paid every year. The plaintiff argued that the statuto-
ry renewal fee was merely for revenue purposes. Therefore, even though it had neglected to pay the renewal fee, it should still be considered as having substantially complied with the statutes.\textsuperscript{52}\ The court of appeals quickly rejected that argument, finding a clear legislative intent that the annual renewal fees were an important requirement in order to accomplish the protective public purpose of the statutes.\textsuperscript{53}\n
Finally, the plaintiff alleged waiver, claiming that the defendants had knowledge at the time of contract that the contractor was not licensed. The court of appeals countered this argument, holding that nothing in the statute allows a third party to waive the statutory requirements. Further, the statutes do not grant immunity to a contractor just because he advises his customers of his unlicensed status.\textsuperscript{54}\n
\textit{Holland v. Walden}\textsuperscript{55} was another action by a contractor against the owner to recover a balance due on the construction contract. The court of appeals found the contractor to be a general contractor within the definition of G.S. \textsection{87-1}\textsuperscript{56} and subject to the licensing requirements of G.S. \textsection{87-10}.\textsuperscript{57} Therefore, "[u]nless [the contractor] substantially complied with those [statutory] provisions, [the contractor] may not recover against the defendants whether on [the] contract or upon quantum meruit."\textsuperscript{58} Based on the factual situation presented in this case, the court of appeals held that the contractor had substantially complied with the licensing requirements and therefore was able to maintain an action on the contract.\textsuperscript{59} The court distinguished both \textit{Midyette} and \textit{Ar-Con Construction} because in those cases the contractors were neither licensed at the time of contract nor at any time during the subsequent construction period.\textsuperscript{60}\n
The court of appeals in \textit{Holland v. Walden} found substantial compliance even though the contractor was not licensed at the

\begin{itemize}
  \item \textsuperscript{52} \textit{Id.} at 19, 168 S.E.2d at 22-23.
  \item \textsuperscript{53} \textit{Id.} at 19-20, 168 S.E.2d at 23.
  \item \textsuperscript{54} \textit{Id.} at 20, 168 S.E.2d at 23.
  \item \textsuperscript{56} \textit{See supra} note 1.
  \item \textsuperscript{57} \textit{See supra} notes \textsuperscript{3 and 5}. 11 N.C. App. at 284, 181 S.E.2d at 199.
  \item \textsuperscript{58} 11 N.C. App. at 284, 181 S.E.2d at 199.
  \item \textsuperscript{59} \textit{Id.}
  \item \textsuperscript{60} \textit{Id.} at 284-85, 181 S.E.2d at 200.
\end{itemize}
time of contract or when she commenced construction of the building. Dispositive on the issue of substantial compliance was that for 88 percent of the construction time the contractor held a valid license. Further, the court found that allowing the contractor to maintain her action upon the contract did not conflict with the purpose of the licensing statutes. Quite the contrary. The court held that it would defeat the purpose of the statutes if under these circumstances a contractor was denied a right of action.

Barrett, Robert and Woods, Inc. v. Armi, was the last case decided by the court of appeals which interpreted the doctrine of substantial compliance prior to the Brady decision. In this case a general contractor filed suit alleging breach of contract and failure of the owner to pay. The defendant owners filed a motion for summary judgment on the ground that the plaintiff was not licensed as a general contractor during a majority of the construction period. The motion for summary judgment was denied. Following a non-jury trial, judgment was entered for the plaintiff and the defendants appealed.

The issue presented to the court of appeals was: What constitutes "substantial compliance" under the licensing statutes so that a contractor may maintain an action on the contract? In answering the question, the court rejected the contractor's argument that possession of a valid license at time of contract is sufficient. The time of contract is of great significance since that is the time the owner must decide whether the contractor is competent. However, it is not enough to rise to the level of substantial compliance.

In justifying the application of the doctrine of substantial compliance, the court concluded that the protective policy of the statutes was realized when a contractor had substantially complied with the licensing requirements. That conclusion was reached by the court's reliance on the following facts. The plaintiff was duly

61. Id. at 285, 181 S.E.2d at 200.
62. Id.
64. 59 N.C. App. at 135-36, 296 S.E.2d at 12.
65. Id. at 136, 296 S.E.2d at 12.
66. Id. at 139, 296 S.E.2d at 14.
67. Id.
68. Id.
69. Id. at 140, 296 S.E.2d at 14. See also Holland v. Walden, cited supra note 55.
licensed as a general contractor at the time of the contract. The plaintiff's license lapsed because of inadvertence, not incompetence or disciplinary action. The plaintiff's license was renewed immediately. The plaintiff's financial condition and composition remained unchanged during the period it was not licensed. Although the plaintiff was *not* licensed for 90 percent of the construction period, the above factors were sufficient to persuade the court that the protective purpose of the licensing statutes was satisfied. Therefore, the plaintiff was not be barred from recovery under its contract.

**ANALYSIS**

The court of appeals analyzed *Brady v. Fulghum* in terms of whether the contractor had substantially complied with the licensing requirements. A majority of the panel concluded that because the contractor was not licensed during 66 percent of the construction period and because the contractor was not licensed at the time of contract, he had not substantially complied with the licensing requirements.

The supreme court rejected the doctrine of substantial compliance, reiterated the purpose of the licensing statutes as previously stated in *Midyette* and expounded upon it. The express language of G.S. § 87-10 clearly indicates that it is intended to insure competence within the construction industry. The court interpreted the examination requirement as an attempt to fulfill the legislative goal guaranteeing "skill, training and ability to accomplish such construction in a safe and workmanlike fashion."

"In tandem, these requirements 'protect members of the general public without regard to the impact upon individual contractors.'"

The court also restated the general rules with respect to enforceability of contracts entered into by unlicensed general con-
These types of contracts are unenforceable by the contractor because they are entered into in violation of public protection statutes. The unenforceability of such contracts stems directly from their beginning in the contractor's illegal act. It is not the nature of the transaction, but rather the conduct of the contractor which renders these contracts unenforceable by the unlicensed general contractor.

The argument in favor of abolishment of the doctrine of substantial compliance is clearly one of public policy. Denial of recovery and unenforceability to unlicensed general contractors is supported by several worthy considerations, all of which were relied on by the supreme court in Brady. The Legislature, by enacting such statutes, exercised its police power. It is a power invoked to protect the public from fraud, incompetence and irresponsibility. Denying recovery and making these contracts unenforceable by the unlicensed contractor has the effect of encouraging obedience to the statutes, thereby providing the public with optimum protection.

Had the supreme court's opinion stopped here, the doctrine of substantial compliance with respect to general contractors, as defined in G.S. § 87-1, would have truly been abolished in this state. However, while rejecting the doctrine and acknowledging the harsh consequences that might result, the court also recognized a minority rule. From the case of Ar-Con Construction Company v. Anderson, the case of Latipac Inc. v. Superior Court of Marin County and its progeny still survive in North Carolina. The North Carolina Supreme Court in Brady agreed with the California court in Latipac, that the existence of a license at the time the contract is signed is determinative:

The key moment of time when the existence of the license becomes determinative is the time when the other party to the agreement must decide whether the contractor possesses the req-

79. 309 N.C. at 583, 308 S.E.2d at 330.
80. Id. See also F.N. Thompson, Inc. v. Anchor Invest. Co., 239 F.2d 470 (4th Cir. 1956); Olsen v. Reece, 114 Utah 411, 416, 200 P.2d 733, 736 (1948).
81. 309 N.C. at 584, 308 S.E.2d at 330.
82. Midyette, 274 N.C. at 271, 162 S.E.2d at 511.
83. 309 N.C. at 584-85, 308 S.E.2d at 331. See also 6A A. CORBIN, CORBIN ON CONTRACTS § 1512 (1962); Enlow and Son, Inc. v. Higerson, 201 Va. 780, 787, 113 S.E.2d 855, 860 (1960).
84. 309 N.C. at 585, 308 S.E.2d at 331.
85. See supra note 33 and accompanying text.
86. See supra note 36 and accompanying text.
uisite responsibility and competence and whether he should, in the first instance, enter into the relationship . . . . We agree that the existence of a license at the time the contract is signed is determinative and attach "great weight to the significant moment of the entrance of the parties into the relationship." 87

The result of the court's opinion is two basic rules. First, a contract "illegally entered into by an unlicensed general construction contractor is unenforceable by the contractor." 88 Subsequent procurement of a license will not validate the contract. 89 This means that when an unlicensed general construction contractor enters into a contract of construction there can be no substantial compliance with the licensing statutes. 90 The non-existence of a license at the time the contract is signed is determinative. In this circumstance, the doctrine of substantial compliance with respect to general construction contractors has been abolished in this state. The contract of an unlicensed construction contractor is not, however void. 91 The individuals for whom the protective statutes were passed do not act illegally by becoming parties to such a con-

87. 309 N.C. at 586, 308 S.E.2d at 331.
88. Id. (emphasis supplied).
89. Id. This is in line with the general rule that "[w]here the bargain is illegal and a change of facts removes the cause of the illegality the contract does not thereby become enforceable except . . . where either party did not know or have reason to know of the illegality. However, where a change in fact occurs which removes the cause of the illegality the parties may subsequently ratify the agreement." J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS § 22-14 (2d ed. 1977). 6A A. CORBIN, CORBIN ON CONTRACTS § 1532 (1962); RESTATEMENT OF CONTRACTS § 609 (1932).
90. 309 N.C. at 586, 308 S.E.2d at 331.
91. Id. However the general rule is that an illegal bargain is void. RESTATEMENT OF CONTRACTS §§ 598, 607 (1932). A bargain (contract) is illegal if either its formation or performance is criminal, tortious or otherwise opposed to public policy. RESTATEMENT OF CONTRACTS § 512 (1932). To form a valid bilateral contract there must be consideration on both sides. If A promises to do something illegal and B promises to do something legal, there can be no action for breach on either side. There is no mutuality of obligation. A may not sue because his illegal promise does not constitute consideration for B's promise and B may not sue, even though he promises to do something lawful. RESTATEMENT OF CONTRACTS § 607 comment a (1977); cf. 6A A. CORBIN, CORBIN ON CONTRACTS § 1523 (1962). Despite the general rule, there are cases where a party may sue upon an illegal executory bilateral contract. One exception is where a particular statute is directed against one of the parties and designed to protect the other party. This exception would include the public protective licensing statutes. 6A A. CORBIN, CORBIN ON CONTRACTS § 1540 (1962); J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS § 22-14 (2d ed. 1977).
These parties may enforce the contract against the unlicensed contractor. 93

Second, "if a licensed contractor's license expires, for whatever reason, during construction, he may recover for only the work performed while he was duly licensed." 94 This second rule incorporates, by implication, the first rule. The contractor must of course be licensed at the time the contract was signed. This second rule applies when the license expires during construction. If the contractor renews his license during construction, he may only recover for work performed while he was licensed, or in other words, before expiration and after renewal. 95

What is the effect of Brady on the cases leading up to this decision? Clearly, Midyette remains good law following the Brady decision. Midyette was not decided on the basis of the doctrine of substantial compliance. It set the standard for evaluating the purpose of the licensing statutes and the legislative intent behind them. 96 The court in Midyette held that the contracts of unlicensed general construction contractors should not be termed "void." These contracts have legal effect because the innocent party may maintain an action for damages for breach of the contract. 97

Recovery on the basis of quantum meruit was denied by the supreme court in Midyette. 98 Under Brady, the result is the same. If a contractor is unlicensed at the time the contract is signed, he may not recover on the contract or for the value of the work and services furnished under the contract. 99 The contract is illegal as to the contractor and he may not recover on any theory. However, if the contractor is licensed at the time of contract and his license subsequently expires, he may recover for the work performed while licensed. 100 His recovery is based on the contract, legally entered into, for the time period it remained legal.

Ar-Con Construction Company v. Anderson 101 was decided by

92. 309 N.C. at 586, 308 S.E.2d at 331-32.
93. Id at 586, 308 S.E.2d at 332.
94. Id. (emphasis supplied).
95. Id.
96. 274 N.C. at 270-71, 162 S.E.2d at 510-11.
97. Id. at 270, 162 S.E.2d at 511.
98. Id. at 273, 162 S.E.2d at 512
99. 309 N.C. at 586, 308 S.E.2d at 331.
100. Id. at 586, 308 S.E.2d at 332.
the court of appeals on the basis of the doctrine of substantial compliance. The contractor was found to have failed to substantially comply with the licensing requirements.\textsuperscript{102} However, \textit{Ar-Con} is still significant for its reliance on \textit{Latipac}, a case relied on by the supreme court in \textit{Brady}. The court of appeals in \textit{Ar-Con} relied on \textit{Latipac}'s primary requirement of a license at the time the contract is signed to hold that because the contractor did not have a license at the time the contract was signed he had not substantially complied with the licensing requirements.\textsuperscript{103} The same result would be reached under \textit{Brady} but for a different reason. Under \textit{Brady} the contractor would be denied recovery because when an unlicensed general construction contractor enters into a construction contract there can be no substantial compliance with the licensing statutes. \textit{Ar-Con} provides an example of a circumstance in which the doctrine of substantial compliance has truly been abolished. Further, \textit{Ar-Con} provides sound discussion of the purpose of Article 1, Chapter 87 as a police power measure and not a revenue measure.\textsuperscript{104}

If the facts as presented in \textit{Holland v. Walden}\textsuperscript{105} were decided under the new \textit{Brady} rules, the contractor would not be allowed recovery under any theory. It should be remembered that in \textit{Holland} the contractor was not licensed at the time the contract was signed.\textsuperscript{106} The court of appeals, however, found substantial compliance from the fact that the contractor was licensed during 88 percent of the construction period.\textsuperscript{107} Under the \textit{Brady} rules, the contractor would be denied recovery. Her contract would be illegal and unforceable by her.\textsuperscript{108} Accordingly, it could not be validated by her subsequent procurement of a license.\textsuperscript{109} For all intents and purposes, \textit{Holland v. Walden} has no precedential value in light of \textit{Brady} and by implication has been overruled.

In \textit{Barrett, Robert and Woods, Inc. v. Armi},\textsuperscript{110} the court of

\textsuperscript{102} Id. at 19, 168 S.E.2d at 22, 23.
\textsuperscript{103} Id.
\textsuperscript{104} Id. at 19-20, 168 S.E.2d at 22-23.
\textsuperscript{106} Id. at 282, 181 S.E.2d at 198.
\textsuperscript{107} Id. at 285, 181 S.E.2d at 200.
\textsuperscript{108} 309 N.C. at 586, 308 S.E.2d at 331.
\textsuperscript{109} Id.
appeals also held that the contractor should not be barred from recovery on the contract.\textsuperscript{111} In \textit{Armi}, the contractor was licensed at the time the contract was signed. Through inadvertence his license lapsed but was not renewed until after the work required under the contract had been completed. Furthermore, his financial condition and composition remained unchanged during construction.\textsuperscript{112} These factors were important to the court of appeals in determining that substantial compliance existed, even in light of the fact that the contractor was \textit{not} licensed for 90 percent of the construction period.\textsuperscript{113} Under the \textit{Brady} rules only one of the four factors considered by the court of appeals would have any significance. That factor being that the contractor was licensed at the time the contract was signed.\textsuperscript{114} Under \textit{Brady} this requirement must be met in order for there to be any recovery on the contract.\textsuperscript{115}

The contractor in \textit{Armi} would be subject to the second rule of \textit{Brady}. Because the contractor maintained a valid license at the time of contract, he would be allowed to maintain his action based on the contract. However, he would only be able to recover the work performed while he was duly licensed.\textsuperscript{116} Under the second rule of \textit{Brady} the contractor in \textit{Armi} would be limited to a ten percent recovery.\textsuperscript{117}

\begin{itemize}
\item \textsuperscript{111} Id. at 140, 296 S.E.2d at 14.
\item \textsuperscript{112} Id. It is significant to note that the expiration of the license was inadvertent and as soon as the error was discovered the contractor moved to renew his license.
\item \textsuperscript{113} Id.
\item \textsuperscript{114} 309 N.C. at 586, 308 S.E.2d at 331. As stated in \textit{Brady} the reason for lapse or expiration is of no consequence. The court never mentions other factors such as financial condition or composition. Although, these have been held to be significant in that they go toward the purposes of the statutes, to protect from fraud and incompetence. Renewal of course is important but only to the extent that renewal occurs during construction period. Renewal after construction is completed will not aid the contractor in his quest for recovery. \textit{Id.} at 586, 308 S.E.2d at 332.
\item \textsuperscript{115} 309 N.C. at 586, 308 S.E.2d at 332.
\item \textsuperscript{116} \textit{Id.}
\item \textsuperscript{117} 59 N.C. App. at 140, 296 S.E.2d at 14. This is of course must be qualified. The facts in \textit{Armi} indicate that the defendant owners had paid nothing on the contract. The suit was to recover all amounts due on the contract. Of course the amount of recovery excluding all other claims and defenses, would not necessarily be ten percent recovery. Under \textit{Brady} the contractor could only recover for work performed while he was licensed. As determined by the court of appeals he was licensed only during ten percent of the construction period. Presumably, he would be allowed to recover the value of the services rendered and materials fur-
\end{itemize}
Both *Armi* and *Holland v. Walden* illustrate excellent examples of the potential for harsh results that can occur with non-compliance under the Brady rules. However, the supreme court in *Brady* appears to have washed its hands of the matter stating, "[i]f, by virtue of these rules, harsh results fall upon unlicensed contractors who violate our statutes, the contractors themselves bear both the responsibility and the blame."118

How will the *Brady* rules be applied by the courts in future disputes between general contractors and property owners? This question is answered in part by the supreme court's decision in *Sample v. Morgan*.119 In *Sample* a licensed general contractor sued to recover the balance due on a contract to construct a residential dwelling for the defendants. At all relevant times the general contractor was duly licensed. However, his license was limited to $125,000 on any single construction project. The original estimated cost of the project was approximately $116,000. The total cost of the dwelling was approximately $140,000. The defendants had paid the sum of $120,331.82 and had refused to pay any more.120

The supreme court held that to allow a general contractor to recover amounts in excess of the statutory limit of his license would invalidate the legislative purpose of Article 1, Chapter 87—to protect the public from incompetent builders.121 However, the court rejected the defendants' argument that based upon the *Brady* decision the contractor's claim is barred by Article 1, Chapter 87. As the court in *Sample* explained, its decision in *Brady* adopted a "bright line" rule that requires strict compliance with the licensing provisions of Article 1, Chapter 87.122 *Brady*’s application is limited to the issue of "unlicensed contractors who enter into construction contracts for which a license is required."123 Until the contractor in *Sample* exceeded the allowable limit of his license ($125,000), he was not acting in violation of G.S. § 87-10. However, once he exceeded the statutory limit he violated the pro-

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118. 309 N.C. at 586, 308 S.E.2d at 332.
120. *Id.* at 719, 319 S.E.2d at 608-09.
121. *Id.* at 722, 319 S.E.2d at 611.
122. *Id.*
123. *Id.*
visions of G.S. 87-10.\textsuperscript{124}

\textit{Sample v. Morgan} is consistent with the \textit{Brady} rules. Sample maintained a valid license at the time of contract and during the construction period. As to the statutory limit of his license, his contract is enforceable by him. As to the excess amount the contractor will be denied recovery on the contract or on any theory of unjust enrichment. The contractor may maintain an action for the amount of work or materials furnished up to the limit of his license, but no more.\textsuperscript{125}

As \textit{Brady} makes clear, a contract entered into by an unlicensed general contractor is unenforceable by him against the property owners.\textsuperscript{126} The contract is not however void or useless. The purpose of Article 1, Chapter 87 is to protect the \textit{public} from incompetent builders.\textsuperscript{127} "The licensing statutes have no application to the rights and liabilities of contractors and sub-contractors \textit{inter se} where the public is not involved."\textsuperscript{128} Sub-contractors are not required to be licensed under Article 1, Chapter 87 and they are not among the class of persons the Legislature intended to protect by the enactment of G.S. §§ 87-1 to -14.\textsuperscript{129}

Additionally, the unlicensed general contractor may utilize his otherwise unenforceable contract defensively, as set-off to any claims asserted against him by the owners in a suit for damages.\textsuperscript{130} However, the court of appeals has held that the amount of set-off cannot exceed the amount of the claims against the contractor.\textsuperscript{131}

\textbf{CONCLUSION}

Public welfare licensing statutes, like G.S. §§ 87-1 to -14 are for protection against fraud and incompetence. In many situations however, problems arise when the statute breaker is neither fraudulent or incompetent. In these problem areas, solutions have been created by the courts. In the past the solution to the problem of unlicensed general contractors has been the doctrine of substantial compliance.

\textsuperscript{124} \textit{Id.}
\textsuperscript{125} \textit{Id.} at 722-23, 319 S.E.2d at 611.
\textsuperscript{126} 309 N.C. at 586, 308 S.E.2d at 332.
\textsuperscript{127} 274 N.C. at 270, 162 S.E.2d at 510-11.
\textsuperscript{128} \textit{Vogel}, 279 N.C. at 133, 177 S.E.2d at 282.
\textsuperscript{129} \textit{Id.}
\textsuperscript{130} \textit{Midyette}, 274 N.C. at 273, 162 S.E.2d at 513.
\textsuperscript{131} Hickory Furniture Mart, Inc., 31 N.C. App. at 633, 230 S.E.2d at 613.
In situations where a qualified and competent contractor performed excellent services and quality workmanship, the non-compliance appears harmless and denial of recovery does not appear to further the licensing statutes' purpose or intent. The real defrauder appears to be the owner who is attempting to enrich himself at the contractor's expense. In these situations the courts have relied on the doctrine to avoid application of the licensing requirements strict mandates in an effort to prevent disproportionate hardship that would flow from their application. Now that solution is no longer available. Under the new *Brady* rules, certain requirements must be met. If they are, recovery is allowed; if not it is denied.

The doctrine of substantial compliance with respect to the statutory licensing requirements of general construction contractors was clearly a doctrine of judicial creation. As such, it can be judicially denied or rejected all together. The North Carolina Supreme Court's rejection stems from an unambiguous public protective statute, founded on a legislative intent to protect the public from incompetence by attempting to guarantee skill, training and responsibility. In mandating these mechanically applicable rules, the court has attempted to reduce the confusion of the doctrine's application in the past. However, *Brady* creates potential for harsh result that may cause disproportionate hardship. Strict compliance with the statutory licensing requirements accords with sound policy except when it operates with disproportionate severity. In cases that would result in disproportionate severity by strictly applying the licensing requirements, the courts should be permitted to consider the merits of the particular case and to avoid unreasonable penalties and forfeitures. Under the *Brady* rules the courts will be unable to do so.

*Kimberly Ann Kelly*

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132. Accordingly, we adopt the rule that a contract illegally entered into by an unlicensed general construction contractor is unenforceable by the contractor. It cannot be validated by the contractor's subsequent procurement of a license . . . . Further, if a licensed contractor's license expires, for whatever reason, during construction, he may recover for only the work performed while he was duly licensed.

309 N.C. at 586, 308 S.E.2d at 331-32.