IN THE COURT OF APPEALS OF TENNESSEE

CGR INVESTMENTS, INC.,	)	C/A NO. 03A01-9609-CV-00289
	)	
Plaintiff-Appellant,	)	
	)	
	)	
	)	APPEAL AS OF RIGHT FROM THE
v.	)	KNOX COUNTY CIRCUIT COURT
	)	
	)	
	)	
HACKNEY PETROLEUM, INC.,	)	
	)	HONORABLE WHEELER A. ROSENBALM,
Defendant-Appellee.	)	JUDGE

For Appellant

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For Appellee

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O P I N I O N

AFFIRMED IN PART
REVERSED IN PART
REMANDED

Susano, J.

This appeal is controlled by North Carolina substantive law. Our focus is on an admitted misrepresentation made during the course of negotiations to settle a lease dispute. One issue is whether the misrepresentation is such as to warrant voiding the settlement agreement subsequently executed by the parties to this litigation. Following a bench trial, the trial judge held that the settlement agreement was valid and enforceable. He had earlier determined that the acknowledged misrepresentation did not constitute an unfair or deceptive trade practice under the applicable North Carolina statutory scheme.[1] The plaintiff CGR Investments, Inc. (CGR) appealed, arguing that the trial court's judgment is wrong in both respects. We affirm in part, and reverse in part.

CGR sued Hackney Petroleum, Inc. (Hackney) to set aside a settlement agreement executed by the parties on June 17, 1993. CGR claims that it is entitled to void the agreement because of a misrepresentation made by Hackney's counsel to CGR's counsel during settlement negotiations. The parties were then attempting to settle disputes between them regarding their lease agreement and environmental issues impacting the leased premises. CGR, the landlord, now attempts to void the settlement agreement so it can pursue damage claims stated in its complaint based upon an alleged breach of the lease and alleged violations of North Carolina General Statutes (N.C.G.S.) § 75-1-1, et seq., North Carolina's statutes proscribing unfair and deceptive trade practices.

[1]*See* North Carolina General Statutes (N.C.G.S.) § 75-1-1, *et seq*., pertinent parts of which are set forth in an appendix to this opinion.

I.

Issues

The trial court's judgment and the issues raised in CGR's brief present the following questions for our review:

> 1. Does the false representation of Hackney's counsel to CGR's counsel--that the leased premises were not subject to an Order of Consent with the North Carolina Environmental Management Commission--constitute sufficient justification to invalidate the parties' settlement agreement of June 17, 1993?
>
> 2. Did the trial court err when it found that Hackney was not guilty of violating North Carolina's statutory scheme prohibiting unfair and deceptive trade practices?

While these issues are stated somewhat differently from those advanced in the appellant CGR's brief, we believe they are the real issues before us. After reciting the facts, we will address them in reverse order.

II.

Facts

On June 13, 1990, Gary Reffit and his then-wife leased their real property in Warne, North Carolina, to Hackney for a term of five years. On May 26, 1993, Reffit and his new wife conveyed the leased property, including the lease, to CGR,[2] a company incorporated earlier in the year by Reffit. At the time of the lease to Hackney, the property was improved with a small

[2]The parties agree that CGR is the proper party in interest as to the lease with Hackney.

grocery store and gas station, which had been operated by Reffit since 1985. The site had four underground storage tanks, all of which were owned by Hackney. They contained three grades of gasoline and one of diesel fuel. When Reffit operated the store/gas station prior to the Hackney lease, Hackney was his fuel supplier.

When Hackney's business at the site did not go well, it notified Reffit in March, 1992, that it intended to terminate the lease. Hackney continued to operate the store until June, 1992. A dispute arose between the parties as to whether, under the terms of the lease, Hackney's purported termination was valid.[3] Under an express reservation of rights, Hackney continued to pay rent through December, 1992.

In the meantime, unbeknownst to Reffit, Hackney entered into a Special Order of Consent (Order) with the North Carolina Environmental Management Commission on November 18, 1992.[4] The Order pertains to several locations owned by Hackney in North Carolina, including the site involved in this case. The Order provides that Hackney had not met its obligation "to install stage I vapor control systems on each stationary storage tank."

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[3]The dispute involves the timing of Hackney's attempted termination of the lease. The lease provides that Hackney could terminate it "at the end of the 24th month of the Initial Term", provided Hackney gave at least six months' notice. CGR interprets this provision to mean that the lease could only be terminated at 24 months, and that Hackney therefore was required to give six months' notice of its intention to terminate at least by the end of the 18th month of the term. CGR maintains that since Hackney did not give notice until March, 1992, some 21 months into the lease term, its window of opportunity to exercise the right of termination had passed. Hackney, on the other hand, interprets the clause to mean that it could terminate the lease at any time after the initial 24 months had passed, and that its notice of termination was therefore effective.

[4]CGR learned of the Special Order of Consent in October, 1993, some four months after the execution of the settlement agreement.

Among other things, the Order requires Hackney to do one of the following with respect to each underground fuel tank on the site: remove the tank; replace it with a new tank; or upgrade the tank to meet 1998 Underground Storage Tank standards and install "stage I vapor control systems" on each. The work was to be completed no later than January 1, 1994.

CGR and Hackney began negotiations to terminate the lease and resolve various environmental issues directly related to the leased premises. In response to CGR's Requests for Admissions, Hackney admitted the following:

> During negotiations to settle the dispute over the validity of Hackney's notice of termination of the [lease], representatives of Hackney were asked by a representative of CGR's predecessors if the gasoline storage tanks which were located on the leased premises were subject to any Special Order by Consent with the Environmental Management Commission of North Carolina.
>
> Representatives of Hackney told representatives of CGR's predecessors that the leased premises were not subject to any Special Order by Consent of the Environmental Management Commission of North Carolina.

The trial court found, and Hackney admits, that the statement by Hackney's counsel that no Order of Consent existed was a misrepresentation. As discussed below, the critical issues on this appeal are whether the misrepresentation was material in nature and whether it was relied upon by CGR.

On June 17, 1993, at a time when neither CGR nor Reffit were aware of the Special Order of Consent, CGR and Hackney

entered into a settlement agreement which, by its language, purports to

> compromise and settle the controversy between the parties concerning the termination of [the parties'] Lease [of June 3, 1990] and to settle and define the respective rights and obligations of the parties with respect to potential, present and future environmental issues related to both the four underground petroleum storage tanks... located on the Leased Premises and the operation of a retail gasoline facility on the Leased Premises....

The settlement agreement provides that the lease is terminated, and also establishes procedures for environmental testing, improvements, and cleanup of the subject premises. It requires Hackney, at its sole expense, to have both soil and tank tightness tests performed, and to install stage I vapor recovery equipment on the tanks. The agreement states that

> [i]t is the parties' intent that the above environmental work shall place the four [tanks] on the premises in compliance with all *current* rules, regulations, requirements, and standards of [the Department of Environmental Management] and the Environmental Protection Agency ...

(emphasis added). The settlement agreement further provides that Hackney is not required to bring the tanks into compliance with any other rules of the Department of Environmental Management or the Environmental Protection Agency, including the 1998 standards. The settlement agreement also requires Hackney to bear the cost of environmental cleanup in the event the testing reveals a "reportable situation." It obligates Hackney to pay CGR $9,575; plus an additional $20,000 if no "'reportable

situation'... is discovered". In the event such a "reportable situation" is discovered, the agreement requires Hackney to pay CGR (in addition to the $9,575) only the difference between $20,000 and the "costs of clean-up, remediation, and, if required, tank removal and re-installation." If these costs exceeded $20,000, Hackney had no obligation to CGR beyond the payment of $9,575.

Under the agreement, Hackney also promises to convey title to certain personal property, including the four underground storage tanks, giving "no warranties to [CGR] whatsoever, except for its warranty of title..." However, the agreement also provides that

> [Hackney] hereby represents and certifies that, to the best of [its] knowledge, said four [underground storage tanks] and [Hackney] are currently, as of the date of this Agreement, in compliance with the regulations of [the Department of Environmental Management] and EPA and any other state and/or federal laws and regulations.

Following the execution of the settlement agreement, CGR reopened the service station on the premises. Hackney enlisted two companies to perform the agreed-upon environmental tests, which revealed soil contamination and a leak in the diesel fuel tank. Reffit disputed the results of these tests and commissioned additional testing, which he contends indicated that all four tanks, including the diesel tank, were free of leaks. Reffit apparently does not dispute that the soil was found to be contaminated.

In December, 1993, Hackney attempted to have the tanks removed, but Reffit refused to allow their extraction. Hackney did remove the tanks the following February, after CGR had arranged to acquire new tanks.[5] The tank removal caused an interruption in the station's retail gas sales for eight days, until CGR could install new tanks at a cost of $41,000. Following removal of the tanks, Hackney informed CGR that it would no longer sell it gasoline and diesel fuel. In April, 1994, Hackney's parent company, The H.T. Hackney Company, which had previously supplied CGR with groceries, notified CGR that it would no longer sell it goods.

Since Hackney's costs to clean up the contaminated site and remove the tanks exceeded $20,000, it refused to pay CGR any monies in excess of the $9,575 provided for in the settlement agreement.

CGR's causes of action as set forth in its complaint are twofold. First, it contends that Hackney violated the North Carolina Act, § 75-1.1, *et seq*., by its misrepresentation regarding the existence of the Special Order of Consent; by removing the tanks in such a manner as to interrupt and interfere with CGR's business; by refusing to sell gasoline to CGR; and by the refusal of Hackney's parent company to sell it goods. Secondly, CGR claims that Hackney's misrepresentation was material to the subject matter of the parties' negotiations, and that this misrepresentation vitiates the agreement. CGR argues

[5]The removal of the tanks caused some damage to the concrete at the service station, for which CGR also sought compensation in its complaint. Hackney consented to judgment on this claim in the amount of $5,190, and that issue is not before us on this appeal.

that the settlement agreement, once "voided", is no longer an impediment to its efforts in this litigation to sue for breach of the parties' lease.

At the conclusion of the plaintiff's proof-in-chief, the trial court granted Hackney's motion, pursuant to Rule 41.02(2), Tenn.R.Civ.P., for an involuntary dismissal of CGR's unfair and deceptive trade practices claim, holding that Hackney's activities did not fall within the scope of the statutes; that Hackney's refusal to do business with CGR was justified; and that CGR had not demonstrated any quantifiable loss resulting from Hackney's actions. After a full hearing on the merits regarding the validity of the settlement agreement, the trial court concluded that the subject representation, while false, was unintentional, not material, and that there was no proof that CGR relied on it in agreeing to the terms of the settlement agreement.

III.

Unfair or Deceptive Trade Practices Claim

A Rule 41.02(2), Tenn.R.Civ.P. motion made at the conclusion of the plaintiff's proof-in-chief in a bench trial should be granted if the trial court determines that the facts, as found by it, do not make out the plaintiff's case by a preponderance of the evidence. ***Atkins v. Kirkpatrick***, 823 S.W.2d 547, 552 (Tenn. App. 1991). We review the trial court's dismissal of CGR's unfair trade practices claim under the standard of Rule 13(d), T.R.A.P. The findings of fact of the trial court in granting a motion for involuntary dismissal under

Rule 41.02(2), Tenn.R.Civ.P., are therefore accompanied by a presumption of correctness and unless the preponderance of the evidence is otherwise, those findings must be affirmed. Rule 13(d), T.R.A.P. ***Atkins,*** 823 S.W.2d at 552. Questions of law come to us free of any such presumption. ***Adams v. Dean Roofing Co., Inc.***, 715 S.W.2d 341, 343 (Tenn.App. 1986).

In general terms, the North Carolina Act declares unlawful "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." N.C.G.S. § 75-1.1(b). The Act provides that treble damages shall be awarded for any violation. N.C.G.S. § 75-16.

CGR's claim under the Act is based primarily upon the misrepresentation made by Hackney's counsel that there was no Order of Consent covering the subject equipment or property. The trial court found that Hackney's misrepresentation was not such as to fall within the ambit of the statute.

Decisions of North Carolina courts indicate that the North Carolina Act applies only to unfair or deceptive practices that take place within the context of trade or commerce. ***Johnson v. Phoenix Mut. Life Ins. Co.***, 300 N.C. 247, 266 S.E.2d 610, 620 (1980), *overruled on other grounds by* ***Myers & Chapman v. Evans***, 323 N.C. 559, 374 S.E.2d 392 (1988). It has also been held that

> language limiting the statute to acts or practices in the conduct of "trade or commerce" confined its scope to matters "involved in the bargain, sale, barter, exchange or traffic" of goods or services or

> to "activities surrounding the 'sale'" of goods or services or to "practices affecting sales" and not to "practices unrelated to the sale" of such goods or services.

CF Industries v. Transcontinental Gas Pipe Line, 448 F.Supp. 475, 484 (W.D.N.C. 1978)(citing ***State ex rel. Edmisten v. J.C. Penney Co.***, 292 N.C. 311, 233 S.E.2d 895 (1977)).

"§ 75-1.1 does not cover every dispute between two parties." ***Hageman v. Twin City Chrysler-Plymouth***, 681 F.Supp. 303, 306-07 (M.D.N.C. 1988). In addition, "although [the] statutory definition of commerce is expansive, the Act is not intended to apply to all wrongs in a business setting." ***HAJMM Co. v. House of Raeford Farms***, 328 N.C. 578, 403 S.E.2d 483, 492 (1991). For example, the North Carolina Act has been held inapplicable to debt collection practices. *See* ***Edmisten***, 292 N.C. 311, 233 S.E.2d 895, 899-901 (1977).

CGR has cited no authority, nor have we found any, to support its contention that a misrepresentation made in the context of the settlement of a lease or similar dispute falls within the purview of the statute. We hold that the trial judge was correct in ruling that the misrepresentation was not sufficiently related to trade or commerce to constitute an unfair or deceptive trade practice under N.C.G.S. § 75-1.1, *et seq.*

As set forth in its complaint, the other aspects of CGR's claim under the North Carolina Act pertain to the circumstances of Hackney's removal of the underground fuel

storage tanks, and the subsequent refusal of Hackney and its parent company to do business with CGR. However, CGR does not argue these points in its brief. The Tennessee Rules of Appellate Procedure provide, in pertinent part, that the appellant's brief shall contain, among other things,

> [a]n argument...setting forth the contentions of the appellant with respect to the issues presented, and the reasons therefor, including the reasons why the contentions require appellate relief, with citations to the authorities and appropriate references to the record...relied on.

Rule 27(a)(7), T.R.A.P. The failure of CGR to address these points in its brief and include appropriate references to the record constitute a waiver of these positions. ***Dixie Sav. Stores, Inc. v. Turner***, 767 S.W.2d 408, 411 (Tenn. App. 1988).

In view of the trial court's correct determination that Hackney's misrepresentation during settlement negotiations falls outside the scope of the North Carolina Act, we conclude that the court's dismissal of CGR's claim under the Act was proper.

IV.

Validity of the Settlement Agreement

Our review of the trial court's decision that Hackney's misrepresentation was not such as to allow CGR to avoid the settlement agreement is likewise governed by the standard in Rule 13(d), T.R.A.P. Thus, our review is *de novo* upon the record, with a presumption of correctness of the trial court's findings

of fact, unless the preponderance of the evidence is otherwise. *Id.*

The North Carolina Supreme Court has held that

> false representations as to material facts which constitute an inducement to the contract and upon which the party had a right to rely, will give equity jurisdiction [to rescind the contract].

Hinsdale v. W.I. Phillips Co., 199 N.C. 563, 155 S.E. 238, 243 (1930). Furthermore,

> where either the suppression of the truth, or the suggestion of what is false, can be proved, in a fact material to the contract, the party injured may have relief against the contract.

Isler v. Brown, 196 N.C. 685, 146 S.E. 803, 804 (1929). Thus, the party seeking to avoid the contract must show at least three things: that a misrepresentation was made; that the misrepresentation was material; and that the party relied upon the misrepresentation in entering into the contract. ***Id.; Hinsdale***, 155 S.E. at 243.

The concealment of a material fact which is known to the seller but not the buyer may constitute a misrepresentation. ***Ramsey v. Keever's Used Cars***, 92 N.C.App. 187, 374 S.E.2d 135, 137 (1988). It is also well-established that the concealment of a material fact, where there is a duty to speak, is equivalent to

a fraudulent misrepresentation. ***Griffin v. Wheeler-Leonard & Co.***, 290 N.C. 185, 225 S.E.2d 557, 565 (1976).

There is no question but that the statement by Hackney's counsel that Hackney had not entered into an Order of Consent with respect to the site or its equipment was a misrepresentation. Hackney has admitted that the statement was made and that it was false. Thus, the initial question for our determination is whether that misrepresentation was a material one.

The term "material" has been defined as follows:

> [a] false representation is material if the fact untruly asserted, or wrongfully suppressed if it had been known to the party, influenced his judgment or decision in entering into the contract.

Homelite v. Trywilk Realty Co., 272 F.2d 688, 691 (4th Cir. 1959) (citing ***White Sewing Machine Co. v. Bullock***, 161 N.C. 1, 76 S.E. 634 (1912)); or, stated another way, "[a] false representation is material when it deceives a person and induces him to act." ***Keith v. Wilder***, 241 N.C. 672, 86 S.E.2d 444, 446 (1955).

We believe the representation that no Order of Consent existed was a material one that more likely than not influenced CGR's decision to enter into the June 17, 1993, settlement agreement. The fact that CGR's counsel specifically inquired as to whether Hackney had signed such an order indicates that the matter was of importance to CGR. Reffit testified that, had he

known of the existence of the Order, he would not have agreed to the terms of the settlement agreement as executed by the parties. Furthermore, when asked in his deposition whether an owner of a gasoline service station would want to know about such an order, John Redwine, a vice president at Hackney, stated, "I guess it is something they would want to know."[6] Redwine was unable to explain why Reffit was never informed of the existence of the Order.

The trial court held that the misrepresentation was not material, due to the fact that the Order essentially required Hackney to take the same action that it had promised CGR it would take in the settlement agreement. We disagree with this assessment, in part because there are some differences between the requirements imposed upon Hackney under the two documents. For instance, the primary purpose of the Order of Consent was to bring the tanks into compliance with *1998* environmental standards; the settlement agreement, on the other hand, states that the work to be performed by Hackney is only intended to bring the equipment into compliance with *current* standards.

In addition, the settlement agreement contains, in paragraph 10(c) quoted above, a certification by Hackney that all four of the tanks were in compliance with all applicable laws and regulations. In light of the fact that those same tanks were the

[6]By agreement of the parties, Redwine's deposition was entered into evidence as his testimony in lieu of his personal appearance. While the question that elicited this response was objected to in the deposition, there is nothing in the record to indicate that the objection was pursued at trial. This being the case, the objection is deemed to have been waived. *Cf.* ***Baxter v. Vandenheovel***, 686 S.W.2d 908, 911 (Tenn. App. 1984) ("evidence admitted without objection at the trial level cannot be the subject of complaint at the appellate level").

subject of an Order of Consent with the North Carolina Environmental Management Commission, this statement appears to be false. The Order specifically provides that Hackney had not brought the tanks into compliance with applicable regulations. The trial court found that the effect of the Order was to bring Hackney into compliance. We disagree. This would only be true if the regulations themselves so provided. Counsel for Hackney has not directed our attention to any regulation or law providing that the execution of an order of the type now before us is the same as compliance with the subject regulations. Such an order may postpone compliance, but it does not, as far as we can tell, amount to compliance under North Carolina law. We cannot agree that Hackney's being subject to an order, the very basis of which was Hackney's *non-compliance* with environmental standards, is somehow equivalent to compliance with all applicable laws and regulations.

More importantly, to assess the misrepresentation as immaterial overlooks the larger context in which it took place. The negotiations leading up to the execution of the settlement agreement involved more than just a transfer of fuel tanks; on the contrary, the parties were attempting to settle a much broader dispute that related to the lease and other issues. By entering into the agreement, CGR agreed to terminate the lease and forego its claim against Hackney for its alleged breach of the lease, as well as to settle environmental issues and obtain storage tanks and money to resume business at the site. In other words, CGR had much at stake in the settlement discussions. It seems clear, as Reffit testified, that had Hackney disclosed the

existence of the Order, the settlement negotiations would have taken a somewhat different course, perhaps causing the agreement to contain terms different from those to which the parties ultimately agreed; or perhaps there would have been no settlement of the parties' disputes. Materiality must be viewed in the context of CGR's stake in the negotiations, rather than in hindsight and then only in light of the settlement terms ultimately negotiated by the parties.

Therefore, when viewed in the overall context of the settlement negotiations between the parties, the representation that no Order of Consent existed must be seen as material. It appears that CGR's lack of knowledge due to the misrepresentation "influenced [its] judgment or decision in entering into the contract." ***Homelite***, 272 F.2d at 691.

We must next answer the question of whether CGR justifiably relied on the false statement by Hackney's counsel. The well-established rule is that the party to whom a misrepresentation is made is entitled to rely upon the misrepresentation if it is of a character to induce action by a person of reasonable prudence, and is reasonably relied upon. ***Fox v. Southern Appliances, Inc.,*** 264 N.C. 267, 141 S.E.2d 522, 526 (1965); ***Keith v. Wilder***, 241 N.C. 672, 86 S.E.2d 444, 447 (1955); ***Parker v. Bennett***, 32 N.C.App. 46, 231 S.E.2d 10, 14 (1977).

In determining whether a party has relied upon a misrepresentation, "proof of circumstances from which the [trier

of fact] may reasonably infer the fact [of reliance] is sufficient." ***Rowan County Bd. of Educ. v. U.S. Gypsum Co.***, 332 N.C. 1, 418 S.E.2d 648, 661 (1992)(quoting ***Grace v. Strickland***, 188 N.C. 369, 374, 124 S.E. 856, 858 (1924)). In this case, CGR's attorney specifically asked and was told that there was no Order of Consent. The trial judge, holding that there was no proof of reliance on the misrepresentation, noted that there was no evidence that CGR's attorney had passed this information on to his client.

We do not agree that this lack of proof constitutes a failure by CGR to prove reliance on the misrepresentation. Knowledge of CGR's counsel can be attributed to CGR as well. Arguably, Reffit's testimony can be read as indicating that his attorney told him of the statement. For example, with regard to the existence of the Order, Reffit stated, "I have no reason to believe my attorney would lie to me." This implies that there was some affirmative statement made to Reffit by his attorney. Even assuming, for the sake of argument, that Reffit was not informed of the statement, the false representation, once uttered to his attorney, nevertheless became part of the basis for the opinions and advice that the attorney gave CGR over the course of the settlement negotiations. Thus, the false statement that Hackney had not entered into an Order of Consent played a part in the overall process of negotiation, at least as far as the legal advice utilized by Reffit was concerned. To the extent that the attorney relied on the misrepresentation, CGR can be said to have relied upon it as well. We believe that this at least constitutes sufficient proof of circumstances from which the

inference of reliance can and should be drawn. ***Rowan County Bd. of Educ.***, 418 S.E.2d at 661.

There is no proof in the record that CGR knew of the Special Order of Consent while the parties were engaged in settlement discussions. As far as CGR was concerned, the State of North Carolina had not, at that time, become involved regarding the tanks and ground contamination. CGR was justified in proceeding on the assumption that North Carolina was not involved. Hackney, on the other hand, knew better. The erroneous statement of its counsel--the conveying of a "negative"--did nothing to dispel CGR's assumption with respect to the non-involvement of North Carolina. His statement to CGR's counsel, albeit innocently made, had the natural effect of lulling CGR into a false sense of security on this issue while prompting a false expectation of a possible $20,000 payment.

The final aspect of our analysis concerns the requirement that CGR's reliance upon the misrepresentation was reasonable. *See,* ***Fox***, 141 S.E.2d at 526; ***Keith***, 86 S.E.2d at 447; and ***Parker***, 231 S.E.2d at 14. As stated in ***Johnson v. Owens***, 263 N.C. 754, 140 S.E.2d 311 (1965),

> [j]ust where reliance ceases to be reasonable and becomes such negligence and inattention that it will, as a matter of law, bar recovery for fraud is frequently very difficult to determine.

Id. at 314.

Given the circumstances of this case, we believe that CGR's reliance was entirely reasonable. CGR was not, as Hackney implies, under a duty to independently search the public records and discover the Order of Consent on its own. Generally speaking, the mere fact that public records, if examined, would reveal the falsity of a representation does not preclude a finding of justifiable reliance upon a misrepresentation. ***Fox v. Southern Appliances***, 264 N.C. 267, 141 S.E.2d 522, 525-26 (1965). On the contrary, CGR was entitled to rely upon the representation of Hackney's counsel that his client had not agreed to an Order of Consent.

We therefore conclude that CGR's reliance upon the misrepresentation was both actual and justified. Hackney's misrepresentation--that something relevant and important had not occurred--was certainly such that it would induce action by a person of reasonable prudence. *See* ***Fox***, 141 S.E.2d at 526; ***Keith***, 86 S.E.2d at 447; and ***Parker***, 231 S.E.2d at 14.

V.

Conclusion

In light of the foregoing, we hold that the evidence preponderates in favor of a finding that Hackney made a misrepresentation of a material fact, which was relied upon by CGR in its decision to execute the settlement agreement. The misrepresentation went to the heart of the settlement negotiations between CGR and Hackney and necessarily affected the terms of that settlement as ultimately agreed-upon by the

parties. Therefore, we conclude that the evidence preponderates against the trial court's findings that the misrepresentation was neither material, nor relied upon by CGR. The result of our decision is that the settlement agreement of June 17, 1993, is adjudged to be invalid and no longer an impediment to CGR's claim for breach of the lease by Hackney. We offer no opinion as to whether Hackney's termination of the lease was properly effected.

The judgment of the trial court dismissing CGR's claim under the North Carolina Act is affirmed. The judgment of the trial court in favor of Hackney on CGR's claim to set aside the settlement agreement is reversed. Costs on appeal are assessed against the appellee. This case is remanded to the trial court for such further proceedings as may be necessary, consistent with this opinion.

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Charles D. Susano, Jr., J.

CONCUR:

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Houston M. Goddard, P.J.

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Don T. McMurray, J.