



STATE OF NORTH CAROLINA RETAIL COMPENDIUM OF LAW

Prepared by
Josh Durham
Carrie McMillan
301 Fayetteville Street
Suite 1900
Raleigh, NC 27601
(919) 783-6400
jdurham@poynerspruill.com
cmcmillan@poynerspruill.com
www.poynerspruill.com

Guide to North Carolina

Premises Liability

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Introduction

Premises liability is an area of tort law encompassing circumstances where a possessor of real property may be liable for damages, often times bodily injury, as a result from a defect or unsafe condition on their property. This overview highlights case law addressing the most common conditions of real property that give rise to owner liability.

Josh Durham

704.342.5284

jdurham@poynerspruill.com



Carrie McMillan

919.783.2868

cmcmillan@poynerspruill.com



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A. North Carolina State Court System

The trial-level court in North Carolina is the Superior Court. Each county in the state has a Superior Court that hears all manners of civil disputes. Virtually all personal injury actions filed in state court are filed in Superior Court. Superior Court judges are elected officials and serve eight year terms.

The intermediate appellate-level court is the North Carolina Court of Appeals. Fifteen Court of Appeals judges sit in panels of three to review trial court proceedings for errors of law or legal procedure. Court of Appeals judges are elected in non-partisan elections and serve eight year terms.

The North Carolina Supreme Court is the highest-level appellate court in the state. The Supreme Court is comprised of six associate justices and one chief justice who sit together in a panel to review appellate cases. The justices of the Supreme Court are elected in non-partisan elections and serve eight year terms

The procedural rules in North Carolina are controlled by the North Carolina Rules of Civil Procedure.

B. North Carolina Federal Courts

There are three federal judicial districts in North Carolina: the Eastern District, the Middle District, and the Western District.

NEGLIGENCE

A. General Negligence Principles

Negligence refers to a person's failure to follow a duty of conduct imposed by law. Every person is under a duty to use ordinary care to protect himself and others from injury or damage. Ordinary care means the degree of care that a reasonable and prudent person would use under the same or similar circumstances to protect himself and others from injury or damage.¹ A person's failure to use ordinary care is negligence.²

B. Elements of a Cause of Action of Negligence

“To state a claim for common law negligence, a plaintiff must allege: (1) a legal duty; (2) a breach thereof; and (3) injury proximately caused by the breach.”³ “The law imposes upon every person who enters upon an active course of conduct the positive duty to exercise ordinary care to protect others from harm, and calls a violation of that duty negligence.”⁴ The duty extends only to causes of injury that were reasonably foreseeable and avoidable through the exercise of due care.⁵ Thus, “[i]t is sufficient if by the exercise of reasonable care the defendant might have foreseen that some injury would result from his conduct or that consequences of a

¹ *Pinyan v. Settle*, 263 N.C. 578, 582, 139 S.E.2d 863, 866 (1965); *Barnes v. Caulbourne*, 240 N.C. 721, 725, 83 S.E.2d 898, 901 (1954).

² “The law imposes upon every person who enters upon an active course of conduct the positive duty to exercise ordinary care to protect others from harm, and calls a violation of that duty negligence.” *Williamson v. Clay*, 243 N.C. 337, 343, 90 S.E.2d 727, 731 (1956) (quoting *Council v. Dickerson's, Inc.*, 233 N.C. 472, 474, 64 S.E.2d 551, 553 (1951)).

³ *Stein v. Asheville City Bd. Of Educ.*, 360 N.C. at 328, 626 S.E.2d at 267 (2006).

⁴ *Council v. Dickerson's, Inc.*, 233 N.C. 472, 474, 64 S.E.2d 551, 553 (1951).

⁵ See *Stein*, 360 N.C. at 328, 626 S.E.2d at 267; *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 344, 162 N.E. 99, 100 (1928) (“The risk reasonably to be perceived defines the duty to be obeyed . . .”).

generally injurious nature might have been expected. Usually the question of foreseeability is one for the jury.”⁶

1. Creation of the Dangerous **Condition**

A possessor is responsible for knowing of any hidden or concealed dangerous condition caused by his own conduct or that of his agents or employees.⁷ A possessor is also required to give sufficient notice to lawful visitors of any hidden or concealed dangerous condition about which the possessor knows or, in the exercise of ordinary care, should have known. Generally, a warning is adequate when, by placement, size and content, it would bring the existence of the hazardous condition to the attention of a reasonably prudent person. However, he does not have to caution about hidden conditions of which he has no awareness and of which he could not have learned by reasonable inspection and supervision.⁸ He is held responsible for knowing of any condition that a reasonable inspection and supervision of the premises would reveal.

A dangerous condition may be caused by a third party or some outside force rather than the owner. In such case, if the unsafe condition exists long enough to have been noticed through reasonable inspection or supervision, his failure to use ordinary care to remedy the condition or to give adequate warning of it would be negligence.⁹ The owner is not required to warn of

⁶ *Slaughter v. Slaughter*, 264 N.C. 732, 735, 142 S.E.2d 683, 686 (1965) (citations omitted).

⁷ *Norwood v. Sherwin-William Co.*, 303 N.C. 462, 467, 279 S.E.2d 559, 562 (1981); *Long v. Methodist Home*, 281 N.C. 137, 140, 187 S.E.2d 718, 720 (1972).

⁸ The doctrine of *res ipsa loquitur* does not apply in these cases. *Hedrick v. Tigniere*, 267 N.C. 62, 67, 147 S.E.2d 550, 554 (1966); *Morgan v. Great Atlantic and Pac. Tea Co.*, 266 N.C. 221, 226, 145 S.E.2d 877, 881 (1966); *Spell v. Mech. Contractors, Inc.*, 261 N.C. 589, 592, 135 S.E.2d 544, 547 (1964).

⁹ *Long*, 281 N.C. at 140, 187 S.E.2d at 720; *Gaskill v. Great Atlantic and Pac. Tea Co.*, 6 N.C. App. 690, 693, 171 S.E.2d 95, 97 (1969).

obvious dangers or conditions. He does not have to warn of dangerous conditions about which a lawful visitor has equal or superior knowledge.¹⁰

2. Actual Notice

Most cases recognize that the defendant has a duty to remedy a condition only if it has notice of the condition. A plaintiff will be required to show that the area in which he was injured was not in a reasonably safe condition for its contemplated use and that the owner either knew or should have known of the unsafe condition.¹¹ Further, he may not recover if he knew of the unsafe condition or if it should have been obvious to any ordinary person under the circumstances existing at the time he was injured.¹²

3. Constructive Notice

Where the condition is created by a third person or it is impossible to discern “[a] plaintiff can establish constructive knowledge of a dangerous condition in two ways: (1) by presenting direct evidence of the dangerous condition’s duration; or (2) by presenting circumstantial evidence from which a jury could infer that the dangerous condition existed for a sufficient length of time that the defendant should have known of its existence.”¹³ Where there is a “reasonable inference that a dangerous condition had existed for such a period of time as to impute constructive knowledge to the defendant,” it is a question for a jury to decide.¹⁴

C. The “Out of Possession Landlord”

¹⁰ *Long*, 281 N.C. at 139, 187 S.E.2d at 720.

¹¹ *Pulley v. Rex Hosp.*, 326 N.C. 701, 705 (1990).

¹² *Id.*

¹³ *Thompson v. Wal-Mart Stores, Inc.*, 138 N.C. App. 651, 654, 547 S.E.2d 48, 50 (2000).

¹⁴ *Carter v. Food Lion, Inc.*, 127 N.C. App. 271, 275, 488 S.E.2d 617, 620, disc. review denied, 347 N.C. 396, 494 S.E.2d 408 (1997).

The landowner is generally presumed to be liable for conditions on the property, but “it is the control and not the ownership which determines the liability.” It is a “well established common law principle that a landlord who has neither possession nor control of the leased premises is not liable for injuries to third persons.”¹⁵ The general and basic rule is that when a third party is injured as the result of any defective condition in leased premises he may have recourse against the lessee, but not the lessor. The liability may, however, be extended to the landlord or owner when the landlord contracted to repair the property, when the landlord knowingly demised the premises in a ruinous condition or in a state of nuisance, or when the landlord authorized wrongful conduct by the lessee.

D. Assumption of Risk

In *Nelson v. Freeland*, 349 N.C. 615, 507 S.E.2d 882 (1998), the North Carolina Supreme Court nullified the common law practice distinguishing a landowner’s duty to licensees, invitees, and trespassers. The Court clarified that landowners were to “exercise reasonable care in the maintenance of their premises for the protection of lawful visitors.”¹⁶

In general, the doctrine of assumption of risk is not available as a defense where no contractual relationship exists between the parties.¹⁷ Assumption of risk is an affirmative defense which must be pled by the party seeking to use it.¹⁸ The party claiming an affirmative defense has the burden of proof to establish all elements of the defense.¹⁹ The two elements of the common law defense of assumption of risk are: (1) actual or constructive knowledge of the

¹⁵ See *Restatement (Second) of Torts* §§ 355, 360.

¹⁶ *Id.* at 632, 507 S.E.2d at 892.

¹⁷ *Clark v. Pilot Freight Carriers, Inc.*, 247 N.C. 705, 102 S.E.2d 252 (1958); *Gilreath v. Silverman*, 245 N.C. 51, 95 S.E.2d 107 (1956); *Broughton v. Standard Oil Co. of N. J.*, 201 N.C. 282, 159 S.E. 321 (1931).

¹⁸ *Robinson v. Powell*, 348 N.C. 562, 566, 500 S.E.2d 714, 717 (1998); N.C. Gen. Stat. § 1A-1, Rule 8(c) (2013).

¹⁹ *Price v. Conley*, 21 N.C. App. 326, 328, 204 S.E.2d 178, 180 (1974).

risk, and (2) consent by the plaintiff to assume that risk.²⁰ The defense is oftentimes used in sports spectator injury cases to bar recovery by plaintiffs.

SPECIFIC EXAMPLES OF NEGLIGENCE CLAIMS

Various types of situations give rise to traditional negligence claims. Each example requires the plaintiff to make a prima facie showing of the same basic elements of proof that a dangerous condition existed and the defendant had notice.

A. “Slip and Fall” Type Cases

One of the most common types of premises liability claims is the “slip and fall.” An important issue to determine in each case is whether the defendant created the alleged condition or whether it was created by a third person.

1. Snow and Ice on the Ground or Sidewalks

A number of North Carolina cases have addressed situations in which persons fall on ice and have generally held that when the pedestrian has equal knowledge of the ice, the landowner does not have a duty to remove it.²¹ For example, when a pedestrian walked on an owner’s property and slipped on ice, “[p]laintiff’s own testimony demonstrates that she knew of the hazardous condition and, therefore, there exists no issue of genuine fact that defendant owed her no duty.”²² Such cases follow the premises that property owners or possessors generally have no duty to warn of open and obvious conditions.

2. “Black Ice”

²⁰ Charles E. Daye and Mark W. Morris, North Carolina Law of Torts § 19.22, at 328 (2nd ed. 1999) (“Under this doctrine, the plaintiff is barred from recovery if he knew of the risk created by the defendant and knowingly placed himself in a position to be injured by it.”); *see also Cobia v. R.R.*, 188 N.C. 487, 491, 125 S.E. 18, 21 (1924).

²¹ *Grayson v. High Point Dev. L.P.*, 175 N.C. App. 786, 789, 625 S.E.2d 591, 593 (2006).

²² *Id.*

North Carolina courts do not appear to have addressed the specific situation of “black ice” and liability flowing there from.

3. Liability for Contractors on Premises

“Generally, one who employs an independent contractor is not liable for the independent contractor’s negligence.”²³ The owner may be liable where his own negligence combines with that of the contractor or the owner has engaged in a negligent hiring or selection of the contractor. “In order to substantiate a claim of negligent selection, and thus submit it for the jury’s consideration, a plaintiff must prove four elements: (1) the independent contractor acted negligently; (2) he was incompetent at the time of the hiring, as manifested either by inherent unfitness or previous specific acts of negligence; (3) the employer had notice, either actual or constructive, of this incompetence; and (4) the plaintiff’s injury was the proximate result of this incompetence.”²⁴

4. Slippery Surfaces – Cleaner, Polish, and Wax

In cases when then the plaintiff slips on a slippery substance, the first issue is whether the defendant created the condition or whether it was created by a third person. As previously mentioned, where the defendant creates the dangerous condition, he is charged with notice of the condition and therefore must remedy the condition or warn visitors of such condition. For example, where the defendant mops or waxes his floors, he has knowledge of the dangerous condition (the slippery floor), and he has a duty to take reasonable measures to protect the plaintiff (by providing a warning).

²³ *Kinsey v. Spann*, 139 N.C. App. 370, 376, 533 S.E.2d 487, 492-93 (2000).

²⁴ *Medlin v. Bass*, 327 N.C. 587, 591, 398 S.E.2d 460, 462 (1990).

In most cases, the plaintiff slips on a substance that is created by a third person. In these cases, our courts have held that the defendant has a duty to address the dangerous condition only if he has actual or constructive notice of the condition, which depends on the length of time that the substance was on the floor. Whether the defendant should have seen the condition also depends on the location of the condition. It is difficult to set forth any general rules regarding the length of time which the condition must exist before the defendant is on constructive notice of the condition. “Where there exists a reasonable inference that a condition had existed for such a period of time as to impute constructive knowledge to the defendant proprietor of a dangerous or unsafe condition, it is a question for the jury to decide.”²⁵ If the jury finds that the condition existed for such a period of time that the property owner or possessor should have known of it, then he will be found liable for his failure to remedy it or to have warned of it.

5. Defenses

As with any negligence claim in North Carolina, the plaintiff’s contributory negligence will completely bar his claim. A plaintiff is contributorily negligent if his negligence in any way contributed to his injuries. Our Supreme Court stated, “the question is not whether a reasonably prudent person would have seen the [defect,] . . . but whether a person using ordinary care for his or her own safety under similar circumstances would have looked down at the floor.”²⁶ Many cases hold that contributory negligence is generally an issue for the jury to decide.²⁷

A defendant may also escape liability for negligence due to the three year statute of limitations. The statute of limitations generally begins to accrue from the date of the breach or

²⁵ *Carter v. Food Lion, Inc.*, 127 N.C. App. 271, 275, 488 S.E.2d 617, 620 (1997). See *Mizell v. K-Mart Corporation*, 331 N.C. 115, 413 S.E.2d 799 (1992).

²⁶ *Norwood v. Sherwin-Williams Co.*, 303 N.C. 462, 468, 279 S.E.2d 559, 563 (1981).

²⁷ *Newton v. New Hanover County Bd. of Educ.*, 114 N.C. App. 719, 725, 443 S.E.2d , 350 (1994).

the date of the negligent act. When the action is not brought within three years, it is barred. In cases arising from a “defective or unsafe condition of an improvement to real property,” the claim does not accrue until “the injury, loss, defect or damage becomes apparent or ought reasonably to have become apparent to the claimant.”²⁸

B. Liability for Violent Crime

Some cases involve an assault on the premises by a third person. Under the historic common law rule, the intentional acts of a third person would break the chain of causation, meaning that a property owner or possessor could not be liable for the act. The modern cases, however, hold that a criminal assault may be foreseeable, depending primarily upon the record of criminal activity in the area. The general duty imposed upon a business owner is “not to insure the safety of his customers, but to exercise ordinary care to maintain his premises in such a condition that they may be used safely by his invitees in the manner for which they were designed and intended.”²⁹ North Carolina courts have held that “[a] store owner’s duty to invitees to maintain the premises in a reasonably safe condition extends to the manner in which the store owner deals with the criminal acts of third persons.”³⁰ Our Supreme Court has held that “[o]rdinarily the store owner is not liable for injuries to his invitees which result from the intentional, criminal acts of third persons. It is usually held that such acts cannot be reasonably foreseen by the owner, and therefore constitute an independent, intervening cause absolving the owner of liability.”³¹ The foreseeability of whether violent crime is likely to occur, however,

²⁸ N.C. Gen. Stat. § 1-50(a)(5)(f) (2013).

²⁹ *Foster v. Winston-Salem Joint Venture*, 303 N.C. 636, 638, 281 S.E.2d 36, 38 (1981).

³⁰ *Jones v. Lyon Stores*, 82 N.C. App. 438, 440, 346 S.E.2d 303, 304, *disc. review denied*, 318 N.C. 506, 349 S.E.2d 861 (1986).

³¹ *Foster*, 303 N.C. at 638, 281 S.E.2d at 38.

remains the ultimate test for determining an owner's duty to safeguard his customers from the acts of third persons.³² As explained below, control of the property is also an important factor.

1. Control

“[A] landowner's duty to keep property safe (1) does not extend to guarding against injuries caused by dangerous conditions located off of the landowner's property, and (2) coincides exactly with the extent of the landowner's control of his property.”³³ However, “[i]n the absence of any control of the place and of the work there [is] a corresponding absence of any liability incident thereto. That authority [must] precede [] responsibility[] or control [as] a prerequisite of liability, is a well recognized principle of law.”³⁴

2. Foreseeability

The test in determining whether an owner has a duty to safeguard his patrons from injuries caused by the criminal acts of third persons is one of foreseeability.³⁵ The most probative evidence on the question of whether a criminal act was foreseeable is evidence of prior criminal activity that has been committed on the property.³⁶ General considerations used by our courts include the location where the prior crimes occurred,³⁷ the type of prior crimes committed,³⁸ and the amount of prior criminal activity.³⁹

³² *Id.* at 640, 281 S.E.2d at 39.

³³ *Lampkin ex rel. Lampkin v. Housing Management Resources, Inc.*, 725 S.E.2d 432, 435 (N.C. App. 2012).

³⁴ *Wilkerson v. Norfolk S. Ry. Co.*, 151 N.C. App. 332, 343, 566 S.E.2d 104, 111 (2002) (quoting *Mack v. Marshall Field & Co.*, 218 N.C. 697, 700, 12 S.E.2d 235, 237 (1940)).

³⁵ *Murrow v. Daniels*, 321 N.C. 494, 501, 364 S.E.2d 392, 397 (1988).

³⁶ *Sawyer v. Carter*, 71 N.C. App. 556, 558, 322 S.E.2d 813, 815, disc. review denied, 313 N.C. 509, 329 S.E.2d 393 (1985).

³⁷ See, e.g., *Murrow*, 321 N.C. at 501, 364 S.E.2d at 397 (considering location of prior crimes as guiding foreseeability analysis).

³⁸ See, e.g., *Shepard v. Drucker & Falk*, 63 N.C. App. 667, 670, 306 S.E.2d 199, 202 (1983) (considering type of prior crime).

³⁹ See, e.g., *Urbano*, 58 N.C. App. at 798, 295 S.E.2d at 242 (considering number of prior crimes).

In general, “[t]o establish the element of foreseeability, the plaintiff need not prove that the defendant foresaw the injury in the exact form in which it occurred. The plaintiff need only show that in the exercise of reasonable care the defendant should have foreseen that some injury would result from his act or omission or that consequences of a generally injurious nature might have been expected.”⁴⁰

3. Joint and Several Liability

An important facet of North Carolina tort law is joint and several liability, which means that any single person or entity who negligently contributed to another’s injuries can be wholly responsible for all damages sustained, even if another person or entity contributed to the injuries, too. In other words, a plaintiff can recover all of his damages from one single defendant. As stated by our courts, “[w]hen two or more proximate causes join and concur in producing the result complained of, the author of each cause may be held for the injuries inflicted. The defendants are jointly and severally liable.”⁴¹ One defendant does have recourse against the other defendant, however, in the event he has paid more than his share to the injured plaintiff. This right is contained in the North Carolina statutes: “Where two or more persons become jointly or severally liable in tort for the same injury to person or property . . . there is a right of contribution among them even though judgment has not been recovered against all or any of them.”⁴²

4. Security Contractors

⁴⁰ *Id.* at 640, 281 S.E.2d at 40; *see also*, *Williams v. Carolina Power & Light Co.*, 296 N.C. 400, 250 S.E.2d 255 (1979); *McNair v. Boyette*, 282 N.C. 230, 192 S.E.2d 457 (1972); *Johnson v. Lamb*, 273 N.C. 701, 161 S.E.2d 131 (1968).

⁴¹ *Hairston v. Alexander Tank and Equipment Co.*, 310 N.C. 227, 234, 311 S.E.2d 559, 565–66 (1984).

⁴² N.C. Gen. Stat. § 1B-1(a) (2013).

Generally, whether a security contractor is liable to a visitor of property who has been injured by third party criminal conduct is a matter of contract, specifically the contract between the security contractor and the owner of the property.⁴³ “It is well-settled a claimant is a third-party beneficiary if he can establish, ““(1) the existence of a contract between two other persons; (2) that the contract was valid and enforceable; [and] (3) that the contract was entered into for his direct, and not incidental, benefit.””⁴⁴

5. Defenses

Where a plaintiff is injured by the criminal acts of a third party, the plaintiff is required to make a prima facie showing of the owner’s foreseeability and control. An owner may negate such showing if he has undertaken adequate security measures, thus satisfying his obligation to take reasonable steps to provide safe premises. In cases in which future criminal conduct may be foreseeable and the owner does not take steps to provide security, a plaintiff still has a heavy burden of proving that the assault would not have occurred if the defendant had taken reasonable action.

C. Claims Arising From the Wrongful Prevention of Thefts

Owners in the retail industry are all too familiar with problems caused by shoplifting, and many have implemented loss prevention measures to mitigate such problems. However, these measures often give rise to the owner’s liability for claims of false imprisonment, malicious prosecution, and negligent hiring, supervision, or retention of employees.

1. False Arrest and Imprisonment

⁴³ *Cassell v. Collins*, 344 N.C. 160, 472 S.E.2d 770 (1996).

⁴⁴ *State ex rel. Long v. Interstate Casualty Ins. Co.*, 120 N.C. App. 743, 747, 464 S.E.2d 73, 75-76 (1995) (alteration in original) (citations omitted).

In the situation when a store detains someone for a potential theft, the defendant may be liable for the plaintiff's claims of false arrest and imprisonment. False imprisonment is the unlawful restraint of a person against his will.⁴⁵ "False imprisonment may be committed by words alone, or by acts alone, or by both; it is not necessary that the individual be actually confined or assaulted, or even that he should be touched. . . . Any exercise of force, or express or implied threat of force, by which in fact the other person is deprived of his liberty, compelled to remain where he does not wish to remain, or to go where he does not wish to go, is an imprisonment."⁴⁶

Under N.C. Gen. Stat. § 14-72.1, a merchant, or the merchant's agent or employee, who detains or causes the arrest of any person may be free from civil liability for false imprisonment or false arrest of the person detained or arrested if certain circumstances exist. Where such detention is upon the premises of the store or in a reasonable proximity and is conducted in a reasonable manner for a reasonable length of time, and, if in detaining or in causing the arrest of such person, the merchant, or the merchant's agent or employee, had at the time of the detention or arrest probable cause to believe that the person committed an offense, the owner may not be held liable.⁴⁷ It is generally for a jury to decide whether these conditions were satisfied.⁴⁸

2. Malicious Prosecution

In situations in which a plaintiff is arrested and even prosecuted for suspected shoplifting, a store owner can be liable for malicious prosecution if the plaintiff establishes four elements: (1) the defendant instituted, procured, or participated in a criminal proceeding against the plaintiff;

⁴⁵ *State v. Lunsford*, 81 N.C. 528, 529 (1879).

⁴⁶ *Black v. Clark's Greensboro, Inc.*, 263 N.C. 226, 229, 139 S.E.2d 199, 201 (1964).

⁴⁷ N.C. Gen. Stat. § 14-72.1 (2013).

⁴⁸ *Burwell v. Giant Genie Corp.*, 115 N.C. App. 680, 686, 446 S.E.2d 126, 130 (1994).

(2) without probable cause; (3) with malice; and (4) the criminal proceeding terminated in favor of the plaintiff.⁴⁹ “An action in tort for malicious prosecution is based upon a defendant’s malice in causing process to issue.”⁵⁰ “The test for determining probable cause is ‘whether a man of ordinary prudence and intelligence under the circumstances would have known that the charge had no reasonable foundation.’”⁵¹ “The critical time for determining whether or not probable cause existed is when the prosecution begins.”⁵²

3. Negligent Hiring, Retention, or Supervisions of Employees

Another allegation plaintiffs who claim to have been wrongfully accused of shoplifting may raise is that the employee involved was improperly hired, trained, or supervised. In order to make a prima face case for negligent hiring, the plaintiff must prove four additional elements: “(1) the specific negligent act on which the action is founded . . . (2) incompetency, by inherent unfitness or previous specific acts of negligence, from which incompetency may be inferred; and (3) either actual notice to the master of such unfitness or bad habits, or constructive notice, by showing that the master could have known the facts had he used ordinary care in “oversight and supervision,” ...; and (4) that the injury complained of resulted from the incompetency proved.”⁵³

D. Claims Arising From Construction-Related Accidents

The North Carolina Workers’ Compensation Act (“WCA”), N.C. Gen. Stat. § 97-1, et seq, requires all companies with 3 or more employees to purchase worker’s compensation

⁴⁹ *Cook v. Lanier*, 267 N.C. 166, 147 S.E.2d 910 (1966).

⁵⁰ *Middleton v. Myers*, 299 N.C. 42, 44, 261 S.E.2d 108, 109 (1980).

⁵¹ *Becker v. Pierce*, 168 N.C. App. 671, 677, 608 S.E.2d 825, 829-30 (2005) (quoting *Wilson v. Pearce*, 105 N.C. App. 107, 113-14, 412 S.E.2d 148, 151 (1992)) (internal citation omitted).

⁵² *Hill v. Winn-Dixie Charlotte, Inc.*, 100 N.C. App. 518, 521, 397 S.E.2d 347, 349 (1990) (citing *Williams v. Boylan-Pearce, Inc.*, 69 N.C. App. 315, 318, 317 S.E.2d 17, 19 (1984)).

⁵³ *Moricle v. Pilkington*, 120 N.C. App. 383, 386, 462 S.E.2d 531, 533 (1995) (quoting *Medlin v. Bass*, 327 N.C. 587, 591, 398 S.E.2d 460, 462 (1990)).

insurance or qualify as a self-insured for the purpose of paying worker's compensation benefits. The WCA governs whether an employee's injury is covered by the employer's worker's compensation insurance.

1. Workers' Compensation Act

In order for an injury to be compensable under the WCA, the injury must be caused by an accident "arising out of and in the course of" employment.⁵⁴ The phrase "arising out of" refers to the cause of the accident, but North Carolina law does not dictate that the accident be "caused by" the employment.⁵⁵ "[W]here any reasonable relationship to the employment exists, or employment is a contributory cause, the court is justified in upholding the award as 'arising out of the employment.'"⁵⁶ "An injury arises out of employment where it comes from the work an employee is to do, or out of the service he is to perform, or as a natural result of one of the risks of the employment; the injury must spring from the employment or have its origin therein."⁵⁷

To be compensable under the WCA, a claimant's injury must also have occurred in the "course of employment." Whether an accident falls within the scope of this concept requires analysis of the accident's time, place and circumstances.⁵⁸ With respect to time, the course of employment begins a reasonable time before work begins and continues for a reasonable time

⁵⁴ N.C. Gen. Stat. § 97-2(6) (2013).

⁵⁵ See *Hoyle v. Isenhour Brick and Tile Co.*, 306 N.C. 248, 294 S.E.2d 196 (1982) (explaining that whether an accident arises out of and in the course of employment is a mixed question of law and fact), See also *Harless v. Flynn*, 1 N.C. App. 448, 455, 162 S.E. 2d 47, 52 (1968) (holding that "arising out of" and "in the course of" employment are two separate and distinct concepts, which must be satisfied to be compensable under the Act).

⁵⁶ *Id.* (citing *Allred v. Allred-Gardner, Inc.*, 253 N.C. 554, 557, 117 S.E. 2d 476, 479 (1960)).

⁵⁷ *Harless*, 1 N.C. App. at 455, 162 S.E. 2d at 52 (finding that an injury resulting from a collision between two vehicles operated by fellow employees in the company parking lot was an accident arising out of employment).

⁵⁸ See *Harless*, 1 N.C. App. at 459, 162 S.E. 2d at 55 (holding that an injury occurring in the company parking lot while driving to get lunch off the premises was in the course of employment).

after work ends.⁵⁹ “[P]lace” refers to whether the accident occurs on the premises of the employer.⁶⁰ When considering whether the “circumstances” are within the course of employment the court will examine whether the employee was engaged in an activity she is authorized to undertake and which furthers the employer’s business.⁶¹

2. The Woodson Exception

If an employee and employer are “subject to and have complied with” the WCA, the employee is barred from seeking other remedies on account of the injury or death in question against the employer.⁶² However, in *Woodson v. Rowland*, the North Carolina Supreme Court crafted a narrow exception to this rule, allowing employees to pursue personal injury claims through the workers’ compensation system as well as in court under specific circumstances.⁶³ If an employer, “intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees and an employee is injured or killed by that misconduct,” the employee will not be barred by the exclusivity provision of the Act from pursuing a civil action based on that conduct.⁶⁴

⁵⁹ *Id.*; see also *Jennings v. Backyard Burgers of Asheville* (stating that our courts have repeatedly held an injury occurring while an employee travels to or from work does not arise in the course of employment); *Aaron v. New Fortis Homes*, 127 N.C. App. 711, 493 S.E. 2d 305 (1997) (finding that employee’s accident that occurred while transporting a fellow employee from the worksite to the hospital was a “special errand” exception that benefited the employer and thus in the course of employment).

⁶⁰ *Id.*

⁶¹ *Harless*, 1 N.C. App. at 459, 162 S.E. 2d at 55; see also *Parker v. Burlington Industries, Inc.*, 78 N.C. App. 517, 337 S.E. 2d 589 (1985) (ruling that an employee’s accident while cleaning a tote tank did not occur in the course of his employment because the activity was not part of the plaintiff’s job and the cleaning did not further the business of the employer).

⁶² N.C. Gen. Stat. §97-10.1 (2013).

⁶³ *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991); see generally *Whitaker v. Town of Scotland Neck*, 357 N.C. 552, 597 S.E.2d 665, (2003) (describing the gravity of harm required to qualify for a *Woodson* exception).

⁶⁴ *Woodson*, 329 N.C. 330, 407 S.E.2d 222.

This exception is reserved for only the most egregious cases of employer misconduct where there is, “uncontroverted evidence of the employer’s intentional misconduct and where such misconduct is substantially certain to lead to the employee’s serious injury or death.”⁶⁵

INDEMNIFICATION AND INSURANCE-PROCUREMENT AGREEMENTS

Parties often attempt to shift the risk of loss stemming from a plaintiff’s claims by entering into agreements that contain indemnification provisions and require that insurance be purchased for the benefit of one or more parties. While the ability to shift losses may vary with the particular circumstances involved and the language of the agreement at issue, the following is an overview of the law covering indemnification and insurance-procurement agreements.

A. Indemnification

The ordinary rules of contract construction apply to indemnification agreements which will be construed to give effect to the intention of the parties.⁶⁶

Indemnification agreements commonly impose a duty to defend and indemnify and are preferred over contracts whereby one seeks to *wholly* exempt oneself from liability.⁶⁷ The right to indemnity between parties arises when liability is imposed on one party for the conduct of the

⁶⁵ *Whitaker*, 357 N.C. 552, 557, 597 S.E.2d 665, 668 (2003).

⁶⁶ *Schenkel & Shultz, Inc. v. Hermon F. Fox & Associates, P.C.*, 362 N.C. 269, 273, 658 S.E.2d 918, 921 (2008); *Dixie Container Corp. v. Dale*, 273 N.C. 624, 160 S.E.2d 708 (1968).

⁶⁷ *Schenkel*, 362 N.C. 269, 275, 658 S.E.2d 918, 922 (2008).

other through operation of law or through explicit agreement. For example, an owner may require a contractor to indemnify the owner for accidents arising from the contractor's work.

Specifically in situations where parties dealt at arm's length, an indemnity agreement against negligence, "must be made unequivocally clear in the contract."⁶⁸ Provisions that lack clarity include those with all-inclusive language that states that parties will broadly construe the provision in favor of the plaintiff and is insufficient to impose liability.⁶⁹

1. Statutory Limitations on Indemnification

In North Carolina, any indemnity agreement in the construction industry which purports to indemnify or hold harmless the parties receiving indemnity for their own negligence is void and unenforceable due to public policy reasons.⁷⁰ Additionally, North Carolina prohibits corporations from indemnifying a director in connection with a proceeding in which the director was found liable to the corporation or in connection with any other proceeding in which the corporation director received an improper personal benefit, whether or not it involved action in an official capacity.⁷¹

2. Partial Indemnification

Partial indemnification exists when a court is confronted with an indemnity agreement that has certain invalid provisions but is not invalid as a whole. In these situations, a court could determine the part of the agreement that was invalid would be void and unenforceable while finding that the rest of the agreement remains valid and enforceable. In the past North Carolina

⁶⁸ *Hoisington v. ZT-Winston-Salem Associates*, 133 N.C. App. 485, 516 S.E.2d 176 (1999).

⁶⁹ *City of Wilmington v. North Carolina Natural Gas Corp.*, 117 N.C. App. 244, 450 S.E.2d 573 (1994).

⁷⁰ N.C. Gen. Stat. § 22b-1 (2013).

⁷¹ N.C. Gen. Stat. § 55-8-51 (2013).

courts have disagreed as to the issue of whether indemnity agreements are severable.⁷² However, more recent decisions suggest that invalid indemnity clauses can be cured by removing the offending phrase.⁷³

B. Insurance Procurement Agreements

To ensure that there is a financially responsible entity to satisfy claims, contracts frequently contain insurance procurement provisions. An indemnity contract is a contract of insurance against loss or damage while a general insurance liability policy is contract of insurance against *liability* for loss or damage.⁷⁴ The difference between the two depends on the intention of the parties as evidenced in the language of the policy.⁷⁵

Furthermore, if an insurance agent has undertaken to provide coverage but is unable to do so, the agent must give the proposed insured timely notice so that that the proposed insured may obtain coverage elsewhere.⁷⁶ Failure to do so may render the agent liable for resulting damages that the proposed insured suffered from lack of insurance under breach of contract or negligent default in performance of a duty imposed by contract theories.⁷⁷

⁷² *Jackson v. Associated Scaffolders and Equip. Co., Inc.*, 152 N.C. App. 687, 568 S.E.2d 666 (2002) (stating that invalid indemnification provisions were not severable from the remainder of a contract); *see also James v. Burlington Northern Santa Fe Ry. Co.*, 636 F.Supp.2d 961, 974 (D. Ariz. 2007) (applying North Carolina law, disagreeing with the majority opinion in *Jackson* and agreeing with the dissent which determined that the facially invalid paragraph in question could be stricken without voiding the contract and violating the overall purpose of the agreement); *see also Int'l Paper Co. v. Corporex Constructors, Inc.*, 96 N.C. App. 312, 315, 385 S.E.2d 553, 555 (1989) (“a facially invalid indemnity provision may be severed from an otherwise enforceable construction contract under North Carolina law provided it is not a ‘central feature’ of the agreement”).

⁷³ *Vecellio & Grogan, Inc. v. Piedmont Drilling & Blasting, Inc.*, 183 N.C. App. 66, 74, 644 S.E.2d 16, 21 (2007).

⁷⁴ *Boney v. Central Mut. Ins. Co. of Chicago*, 213 N.C. 470, 196 S.E. 837, 839 (1938).

⁷⁵ *Id.*

⁷⁶ *Wiles v. Mullinax*, 267 N.C. 392, 148 S.E.2d 229 (1966).

⁷⁷ *Olvera v. Charles Z. Flack Agency, Inc.*, 106 N.C. App. 193, 415 S.E.2d 760 (1992).

C. The Duty to Defend

Although the duty to defend is much broader than coverage for claims, it is clear that without coverage, there is no duty to defend.⁷⁸

Under North Carolina law, the duty to defend is “broader than [the] obligation to pay damages incurred by events covered by a particular policy,”⁷⁹ and it “may attach even in an action in which no damages are ultimately awarded.”⁸⁰ A duty to defend arises when the claim against the insured sets forth facts representing a risk covered by the policy.⁸¹ To determine whether an insurer's duty to defend arises under North Carolina law, the court employs a “comparison test,” wherein it compares the terms of the insurance policy at issue with the allegations in the complaint in the underlying action.⁸² As explained by the North Carolina Court of Appeals:

The duty to defend is determined by the facts as alleged in the pleadings of the lawsuit against the insured; if the pleadings allege any facts which disclose a possibility that the insured's potential liability is covered under the policy, then the insurer has a duty to defend. If, however, the facts alleged in the pleadings are not even arguably covered by the policy, then no duty to defend exists. Any doubt as to coverage must be resolved in favor of the insured.⁸³

⁷⁸ See *Waste Management v. Peerless Insurance Co.*, 315 N.C. 688, 340 S.E.2d 374 (1986), *reh'g denied*, 316 N.C. 386, 346 S.E.2d 134 (1986)

⁷⁹ *Id.*, 315 N.C. 688, 691, 340 S.E.2d 374, 377

⁸⁰ *Fieldcrest Cannon, Inc. v. Fireman's Fund Ins. Co.*, 124 N.C. App. 232, 242, 477 S.E.2d 59, 66 (1996), *disc. review denied*, 348 N.C. 497, 510 S.E.2d 383 (1998).

⁸¹ See, e.g., *Fieldcrest Cannon*, 124 N.C. App. at 242, 477 S.E.2d at 66.

⁸² See *Peerless Ins. Co. v. Strother*, 765 F. Supp. 866, 869 (E.D.N.C. 1990) (applying North Carolina law).

⁸³ *Wilkins v. Am. Motorists Ins. Co.*, 97 N.C. App. 266, 269, 388 S.E.2d 191, 193 (1990) (internal citations omitted) (emphasis added), *disc. review denied*, 327 N.C. 145, 394 S.E.2d 189 (1990); see also *St. Paul Fire & Marine Ins. Co. v. Vigilant Ins. Co.*, 919 F.2d 235, 239 (4th Cir. 1990) (stating that under North Carolina's “‘comparison test’ . . . the pleadings are read side-by-side with the policy to determine whether the events as alleged are covered or excluded. Any doubt as to coverage is to be resolved in favor of the insured.”); *Duke Univ. v. St. Paul Fire & Marine Ins. Co.*, 96 N.C. App. 635, 637, 386 S.E.2d 762, 763-64 (1990) (“Any doubt as to coverage must be resolved in favor of the insured.”), *disc. review denied*, 326 N.C. 595, 393 S.E.2d 876 (1990).

Where the facts fail to disclose a possibility that the insured's potential liability is covered, the insurer is not obligated to defend the insured.⁸⁴ An “insurer avoids its duty to defend only if ‘the facts are not even arguably covered by the policy.’”⁸⁵

Notwithstanding the “comparison test,” North Carolina courts arguably require insurers in certain circumstances to look beyond the complaint and investigate whether a duty to defend exists. For example, in *Toms v. Lawyers Mut. Liability Ins. Co.*, the court stated: “[w]here the insurer knows or could reasonably ascertain facts that, if proven, would be covered by its policy, the duty to defend is not dismissed because the facts alleged in a third-party complaint appear to be outside coverage, or within a policy exception to coverage.”⁸⁶ Similarly, the United States District Court for the Middle District of North Carolina, applying North Carolina law, held that “an insurer has an affirmative duty to investigate the alleged facts” to determine if alleged property damage is the result of an “occurrence.”⁸⁷

DAMAGES IN PREMISES LIABILITY CASES

A. The Importance of Understanding Damages

The word “damages” compensates a party for an injury or a wrongful act causing loss to another.⁸⁸ A plaintiff may recover for personal injury damages accounting for a variety of items including, but not limited to: past medical bills,⁸⁹ future medical bills,⁹⁰ disfigurement,⁹¹

⁸⁴ See, e.g. *Waste Management*, 315 N.C. 688, 340 S.E.2d 374 (1986).

⁸⁵ See *Vigilant*, 919 F.2d at 240.

⁸⁶ *Toms v. Lawyers Mut. Liability Ins. Co.*, 104 N.C. App. 88, 91, 408 S.E.2d 206, 208 (1991).

⁸⁷ *Prime TV, LLC v. Travelers Ins. Co.*, 223 F. Supp. 2d 744, 751 (M.D.N.C. 2002).

⁸⁸ *Cherry v. Gilliam*, 195 N.C. 233, 141 S.E. 594 (1928).

⁸⁹ *Jyachosky v. Wensil*, 240 N.C. 217, 81 S.E.2d 644 (1954) (medical bills ordinarily are proper elements of damages in a tort action); see also *Ward v. Wentz*, 20 N.C. App. 229, 201 S.E.2d 194 (1973) (regarding the plaintiff’s burden of proof).

⁹⁰ *Dickson v. Queen City Coach Co.*, 233 N.C. 167, 63 S.E.2d 297 (1951) (a plaintiff is entitled to recover for future medical expenses upon a showing that they are reasonable and necessary).

disability,⁹² past pain and suffering,⁹³ future pain and suffering,⁹⁴ loss of consortium (including service, society, companionship, and affection)⁹⁵ and lost income, wages or earnings.⁹⁶

B. Compensatory Damages

Compensatory damages include both general and special damages.⁹⁷ General damages are those that might accrue to any person similarly injured, while special damages are those that did in fact accrue to the specific individual because of the particular circumstances of the case.⁹⁸ The objective of such damages is to restore the plaintiff to his or her original condition; in other words, the purpose of compensatory damages is to make the plaintiff whole.⁹⁹ In order to be entitled to these damages, the plaintiff must show that the damages claimed were the natural and

⁹¹ *Heath v. Kirkman*, 240 N.C. 303, 82 S.E.2d 104 (1954) (a person whose negligence proximately causes injury to another ordinarily is liable for all damages naturally and proximately resulting from the negligent act, including scars and disfigurement).

⁹² N.C.P.I. –Civil 810.06 Personal Injury Damages—Loss of Earnings (damages for personal injury include compensation for loss of earnings, which includes consideration of the effect of the plaintiff’s disability or disfigurement on his earning capacity); N.C.P.I. –Civil 810.12 Personal Injury Damages—Loss (of Use) of Part of the Body (Personal injury damages include fair compensation for the loss of use of a part of the body).

⁹³ *Thompson v. Kyles*, 48 N.C. App. 422, 269 S.E.2d 231 (1980) (plaintiff may make a per diem argument as to damages for past pain and suffering if there is evidence of continuous pain); *see also*, *Weeks v. Holsclaw*, 55 N.C. App. 335, 285 S.E.2d 321 (1982).

⁹⁴ *Id.*, (plaintiff must have an expert opinion concerning the permanency of his or her injury).

⁹⁵ *Nicholson v. Hugh Chatham Mem’l Hosp., Inc.*, 300 N.C. 295, 266 S.E.2d 818 (1980); *see also* *Bishop v. Glazener*, 245 N.C. 592, 96 S.E.2d 870 (1957) and *Knighten v. McClain*, 227 N.C. 682, 44 S.E.2d 79 (1947) (spouse suing for loss of consortium due to third party tort); *Nicholson*, 300 N.C. 295, 266 S.E.2d 818 (1980) (joinder); *Vaughn v. Clarkson*, 324 N.C. 108, 376 S.E.2d 236 (1989) (parental consortium).

⁹⁶ *Smith v. Corsat*, 260 N.C. 92, 131 S.E.2d 894 (1963).

⁹⁷ *Iadanza v. Harper*, 169 N.C. App 776, 611 S.E.2d 217 (2005).

⁹⁸ *Id.* at 779, 611 S.E.2d at 221.

⁹⁹ *Watson v. Dixon*, 352 N.C. 343, 532 S.E.2d 175 (2000).

probable result of the acts complained of and must show the amount of loss with reasonable certainty.¹⁰⁰

1. General Damages

Damages that include matters involving mental or physical pain and suffering, inconvenience, loss of enjoyment and other issues that cannot be definitely measured in monetary terms are considered to be general damages.¹⁰¹

2. Special Damages

Special damages in personal injury cases are usually medical and hospital expenses, loss of wages and other direct financial injury.¹⁰² These kinds of damages are typically synonymous with pecuniary loss.¹⁰³

C. Nominal Damages

Nominal damages are allowed where a legal right was invaded, but there was no substantial loss or injury to be compensated.¹⁰⁴ These damages are awarded in recognition of a right and of a technical injury which resulted from its violation.¹⁰⁵

D. Punitive Damages

¹⁰⁰ *Lieb v. Mayer*, 244 N.C. 613, 94 S.E.2d 658 (1956); *Parris v. H. G. Fischer & Co.*, 221 N.C. 110, 19 S.E.2d 128 (1942).

¹⁰¹ *Iadanza*, 169 N.C. App. 776, 779, 611 S.E.2d 217, 221 (2005).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Lee Cycle Center, Inc. v. Wilson Cycle Center, Inc.*, 143 N.C. App. 1, 545 S.E.2d 745 (2001), *decision aff'd*, 354 N.C. 565, 556 S.E.2d 293 (2001).

¹⁰⁵ *Title Ins. Co. of Minnesota v. Smith, Debnam, Hibbert and Pahl*, 119 N.C. App. 608, 459 S.E.2d 801 (1995), *aff'd in part, dismissed in part*, 342 N.C. 887, 467 S.E.2d 241 (1996).

These damages may be awarded only if the plaintiff proves that the defendant is liable for compensatory damages and also that fraud, malice, or willful or wanton conduct was present and related to the injury for which the compensatory damages were awarded. Punitive damages go beyond compensatory damages and are allowed to punish the defendant and deter others. The plaintiff must prove the existence of fraud, malice, or willful or wanton conduct by clear and convincing evidence.¹⁰⁶ Punitive damages may only be awarded against a defendant who actually participated in the conduct constituting the aggravating factor giving rise to the punitive damages.¹⁰⁷ With respect to a corporation, punitive damages will only be awarded upon a showing that its officers, directors or managers participated in or condoned the behavior giving rise to the punitive claim.¹⁰⁸

The trier of fact shall determine the amount of punitive damages separately from the amount of compensation for all other damages. Punitive damages awarded against a defendant shall not exceed three times the amount of compensatory damages or two hundred fifty thousand dollars (\$250,000), whichever is greater.¹⁰⁹

E. Wrongful Death

When the death of a person is caused by a wrongful act, neglect or fault of another, the person or corporation who was the cause will be liable in an action for damages.¹¹⁰ Damages recoverable under the wrongful death statute include expenses for care, treatment and hospitalization, compensation for pain and suffering of the decedent, reasonable funeral expenses

¹⁰⁶ N.C. Gen. Stat. § 1D-15 (2013).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ N.C. Gen. Stat. § 1D-25 (2013).

¹¹⁰ N.C. Gen. Stat. § 28A-18-2 (2013).

of the decedent, the present monetary value of the decedent to the persons entitled to receive the damages recovered and punitive damages.¹¹¹

There is a two-year statute of limitation for an action for damages on account of the death of a person caused by a wrongful act, neglect, or fault of another. The cause of action does not accrue until the date of death.¹¹²

Recovery in wrongful death actions is based largely on losses suffered by the survivors, who can pursue a survivor action.¹¹³ Compensation is intended to restore the beneficiaries to the same position they would have occupied had there been no death and recovery for any diminishment in the quality of life of survivors may be allowed.¹¹⁴

F. Other Damages Issues

1. Economic loss rule

North Carolina courts recognize an economic loss rule, which states that purely economic losses are not recoverable under tort law.¹¹⁵ The premise is that the rule bars product liability claims that involve solely economic loss and no personal injury or damage to property other than the product that fails to meet expectations.¹¹⁶

2. Bifurcation

¹¹¹ *Id.*

¹¹² N.C. Gen. Stat. §§ 1-53(4), 28A-18-2 (2013).

¹¹³ *Scallon v. Hooper*, 58 N.C. App. 551, 293 S.E.2d 843 (1982).

¹¹⁴ *Livingston v. United States*, 817 F. Supp. 601, 606 (E.D.N.C. 1993) (citing N.C. Gen. Stat. § 28A—18—2(b)(4)(b)-(c) (2013)).

¹¹⁵ *Chicopee, Inc. v. Sims Metal Works, Inc.*, 98 N.C. App. 423, 391 S.E.2d 211 (1990).

¹¹⁶ *Reece v. Homette Corp.*, 110 N.C. App. 462, 429 S.E.2d 768 (1993).

Upon the motion of any party in an action in tort wherein the plaintiff seeks damages exceeding one hundred fifty thousand dollars (\$150,000), the court shall order separate trials for the issue of liability and the issue of damages.¹¹⁷

¹¹⁷ N.C. Gen. Stat. § 1A-1, R. 42(b)(3) (2013) (unless the court orders a single trial for good cause shown).