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NORTH CAROLINA PREMISES LIABILITY LAW

This article addresses the most common issues we encounter in premises liability actions, defined broadly, in North Carolina. This article is outlined as follows:

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“Premises liability” is an area of tort law addressing those circumstances in which the owner or other possessor of real property may be sued for damages, typically bodily injury, arising from a defect or unsafe condition in real property. Technically speaking, “premises liability” may entail only actions regarding the “condition or maintenance of property,” as opposed to any activity on the property. Some cases, however, address premises liability as encompassing any conditions or activities on the land. See Blevins v. Taylor, 103 N.C. App. 346, 351 (1991) (plaintiff injured during Civil War reenactment; addressing issue as premises liability).

This article focuses on cases arising from the condition of real property. In cases of activity on real property, the plaintiff may pursue a negligence claim, in addition to or in lieu of a “premises liability” claim. Council v. Dickerson's, Inc., 233 N.C. 472, 474 (1951) (“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.”).

## I. EXISTENCE OF DUTY

As with any negligence claim, the plaintiff must establish the existence of a duty of the defendant toward him, a breach of that duty (i.e. negligence), proximate causation (i.e. that the plaintiff’s injuries were the foreseeable consequence of the defendant’s negligence), and damages.

The first inquiry in a premises liability case is whether the defendant owed a duty of care to the plaintiff. In general, the court (and not the jury) decides whether the defendant owed a duty to the plaintiff. The issue of “duty” is rather elusive. In some cases the court addresses the issue of duty broadly, e.g., stating that the defendant owed a duty of reasonable care toward the plaintiff, and at other times the court addresses the issue of duty more specifically (e.g., a defendant has a duty to install additional lighting to prevent an assault).

The issue of duty is extremely important, because in the absence of a duty, the defendant cannot be liable to the plaintiff. Even where the defendant is aware of a risk to the plaintiff and could easily avoid that injury, the defendant is not liable in the absence of a duty.

### 1. Duty of Possessor toward person on land

Until 1998, North Carolina recognized three classes of entrants upon land; the trespasser, the licensee, and the invitee. In 1998, the North Carolina Supreme Court in Nelson v. Freeland eliminated the distinction between invitees and licensees, and now North Carolina recognizes only two classes of entrants to the property: the trespasser and the person lawfully on the premises (i.e., non-trespasser).

#### a. Duty to lawful entrant

Although the cases do not yet clearly define the scope of this duty, it is our best guess that the practical effect of Nelson v. Freeland is to elevate a licensee to the status of an invitee (i.e., the landowner has a duty to make reasonable inspection of his property, and has a duty to take reasonable measures to avoid injury to persons upon the land caused by dangerous conditions of which the landowner is aware or should be aware (upon reasonable inspection of the property)).

It is not clear the extent to which Nelson has affected older common law rules regarding the liability of a landowner. It appears, however, that the older common law rules still apply. For example, after Nelson, the Supreme Court recognized that “[U]nder the common law, the ‘landlord is under no duty to make repairs.’ In addition, ‘the owner is not liable for personal injury caused by failure to repair.’” Conley v. Emerald Isle Realty, Inc., 350 N.C. 293, 296 (1999). Therefore, the older rules of landowner liability presumably still apply, unless they are founded on the distinction between licensees and invitees.

The majority of cases do not involve trespassers, but rather involve a lawful visitor on the property. This category of persons would include the customer at a mall or grocery store, or a person occupying a motel or a guest in a friend’s home, or a service person, such as an appliance repairman. Following the court’s declaration of law in Nelson v. Freeland, there have been less than ten years of appellate cases applying this new rule. The rule set forth in Nelson states as follows:

Given the numerous advantages associated with abolishing the trichotomy, this Court concludes that we should eliminate the distinction between licensees and invitees by requiring a standard of reasonable care toward all lawful visitors. Adoption of a true negligence standard eliminates the complex, confusing, and unpredictable state of premises-liability law and replaces it with a rule which focuses the jury's attention upon the pertinent issue of whether the landowner acted as a reasonable person would under the circumstances.

In so holding, we note that we do not hold that owners and occupiers of land are now insurers of their premises. Moreover, we do not intend for owners and occupiers of land to undergo unwarranted burdens in maintaining their premises. Rather, we impose upon them only the duty to exercise reasonable care in the maintenance of their premises for the protection of lawful visitors.

Nelson v. Freeland, 349 N.C. 615, 631-632 (1998) (emphasis added).

General statements about the landowner’s duties, and specific activities and conditions, are discussed in detail in Sections III and IV.

It would appear that the owner of the property, or a part owner, is not a “lawful entrant” pursuant to Nelson.

By statute, the trespasser standard applies where the landowner allows others to use his land for recreational or educational purposes for free. G.S. § 38A-4.

b. Duty to Trespasser

With regard to a trespasser, the old rule applicable to trespassers still applies (i.e. the defendant is required only to refrain from willful conduct toward the plaintiff). The willful and wanton standard is difficult for a plaintiff to meet.

In general, “one who enters without permission or other right is a trespasser.” There are, however, several situations in which determining whether the plaintiff is a trespasser or a lawful entrant is unclear. “Whether a person has implied permission to enter another's land must be evaluated on the basis of the reasonableness of the visitor's entry, with due regard given "to customs prevailing in the community.”” Holcomb v. Colonial Assocs., L.L.C., 358 N.C. 501, 510 (2004) (affirming jury finding that plaintiff was lawful visitor, where owner placed "For Sale" sign on property and allowed buyers and their agents to inspect property, and plaintiff was an employee of prospective buyer and entered the property for sole purpose of inspecting it for potential purchaser).

The “construction of a driveway or a walkway leading to the entrance of a residence may, in the absence of notice to the contrary, be reasonably construed, not only by acquaintances of the landowner but also by strangers, as an expression of the landowner's consent to their entry thereon for the purpose of approaching and entering the house on any lawful mission.” Smith v. Voncannon, 283 N.C. 656, 662-663 (1973).

It is not clear whether a person who is initially a lawful entrant may become a trespasser if he exceeds the scope of his permission. The older law recognized that an invitee could lose his status. “The obligation imposed on a host to keep his property in safe condition is . . . limited to the areas the guest is expected to use. When an invitee exceeds his invitation and goes to areas not open to his use, he ceases to be an invitee -- he is a mere licensee. . . . Normally, one who invites another to visit in his home does not expect the guest to be prowling in either the attic or the basement. He is under no obligation to protect a guest against defects in those places.” Cobb v. Clark, 265 N.C. 194, 197 (1965).

Thus, a trespasser injured by a dangerous and defective condition on the defendant’s land may not sue the landowner in the absence of willful contact by the defendant, even if the defendant is aware of the dangerous condition and fails to take “reasonable” measures to correct or warn of the defect.

i. Attractive nuisance

An important exception to the trespasser rule is the “attractive nuisance” doctrine. Pursuant to this rule, if the landowner anticipates that minors will come to its property, then the defendant has a duty to take reasonable care to prevent injury to the minors. “At the heart of land owner liability under the doctrine of attractive nuisance is the duty to protect children of tender years who "because of their youth do not discover the condition or realize the risk." "The attractive nuisance doctrine is designed to protect 'small children' or 'children of tender age.’” Coleman v. Rudisill, 131 N.C. App. 530, 533 (1998).

The doctrine does not apply to “common dangers.” “In the context of attractive nuisance cases, it is incumbent upon parents to warn and guard their children against "common dangers, existing in the order of nature" and where they fail to do so, "they should not expect to hold others responsible for their own want of care.”” Vares v. Vares, 154 N.C. App. 83, 89 (2002).

Some cases hold that the landowner’s higher duty toward children applies only where the defendant is aware that the minors are on the property. It appears, however, that constructive knowledge is sufficient.

An example of an attractive nuisance was presented in Broadway v. Blythe Industries, Inc., 313 N.C. 150 (1985). In this case, the defendant Lisk delivered a large concrete storm drainage pipe to a construction site across the street from the public housing project. A woman who lived across the street from the construction site asked the defendant’s employees to secure the pipes for the safety of children who played in that area. A five year old boy was playing around the pipes and was crushed when the pipe rolled on him. The Court held that the defendant was not entitled to summary judgment, stating:

[The] evidence tends to show, inter alia, that Lisk placed the pipes on an incline within the construction site some five to fifteen feet from the edge of a street on which, on the other side, stands a housing project; that Lisk was warned that there were children nearby and that they would likely play on the pipes; that unsecured pipes of the size and weight left at the site by Lisk involved an unreasonable risk of death or serious bodily harm to children who might play on them; that children would not realize the risk of becoming hurt by playing on the pipes; that the pipes could easily have been secured from playing children; and that Lisk failed to exercise reasonable care to eliminate the danger or otherwise to protect the children. We hold that this forecast of the evidence discloses genuine issues of material facts which require resolution by a jury.

Broadway v. Blythe Industries, Inc., 313 N.C. 150, 156 (1985). See also Brannon v. Sprinkle, 207 N.C. 398 (1934) (presence of well was actionable where four-year old child drowned; owner knew that children played around well).

Where the children are being supervised by an adult who fails to exercise ordinary care for the safety of the children, then the chain of causation is broken and the landowner is not liable.

Similarly, the landowner's duty toward children "does not apply, however, where the minor child is being actively supervised by a parent who has full knowledge of the condition of the premises and appreciation of the danger thereby presented." Vares v. Vares, 154 N.C. App. 83, 88 (2002).

## 2. Duty of landowner to persons off land

The Nelson case does not apply to liability arising from injuries occurring off the landowner's land. Therefore, the old common law presumably continues to apply.

### i. Liability for acts of third persons (e.g. licensees)

The tenant or licensee on the land is not the landlord's agent. As stated by our Supreme Court:

With reference to negligence of a landowner in controlling the activities of third persons on the land, where there is injury to persons outside the premises and where there is no vicarious liability, . . . . "It is not enough here, of course, to show that the third person's conduct foreseeably and unreasonably jeopardized plaintiff. Plaintiff must also show that the occupier (a) had knowledge or reason to anticipate that the third person would engage in such conduct upon the occupier's land, and (b) thereafter had a reasonable opportunity to prevent or control such conduct."

Benton v. Montague, 253 N.C. 695, 117 S.E.2d 771 (1961).

The landowner has no duty to periodically inspect his premises in order to ascertain whether third persons might have created dangerous artificial conditions on its land.

### ii. Liability for acts of landowner

Where the landowner is sued for his own conduct, the action may sound in "negligence" or "nuisance" or "trespass." These rules can be very complicated, and this article does not thoroughly address these theories.

#### a. Negligence

Where the landowner is negligent and injures an adjoining landowner, then he may be held liable for his negligence. Jones v. Home Bldg. & Loan Asso., 252 N.C. 626

(1960) (where defendant built brick wall on its lot, causing water to back up into plaintiffs' basement, evidence showed negligent obstruction of percolating waters).

b. Nuisance

"[A] private nuisance exists in a legal sense when one makes an improper use of his own property and in that way injures the land or some incorporeal right of one's neighbor." Evans v. Lochmere Rec. Club, 627 S.E.2d 340, 342 (2006). A nuisance may be based on intentional, negligent or non-negligent conduct.

The cases apply a reasonableness test to the defendant's use of the land. "[T]he general rule which fixes the mutual and reciprocal rights and liabilities of adjoining landowners under the maxim *sic utere tuo ut alienum non laedas*, require[es] that each use and maintain his own land in a reasonable manner as not to injure the property or invade the legal rights of his neighbor." Johnson v. City Of Winston-Salem, 239 N.C. 697, 706 (1954). The "reasonableness" inquiry focuses on the inconvenience to the plaintiff and the benefit to the defendant.

A defendant may be held liable for nuisance even if he is not the land-owner, if his actions contribute to the nuisance. Jordan v. Foust Oil Co., 116 N.C. App. 155, 167 (1994) ("To recover in nuisance, plaintiffs must show an unreasonable interference with the use and enjoyment of their property. Since the evidence forecast raises genuine issues as to plaintiffs' loss of use and enjoyment of their property, and as to whether Foust unreasonably interfered with plaintiffs' use of their land by knowingly delivering gasoline into leaking tanks, we conclude that summary judgment was also improperly granted on plaintiffs' nuisance claim.").

c. Trespass

An action for "trespass" has been defined as follows:

A trespass is a wrongful invasion of the possession of another. "The elements of a trespass claim are that plaintiff was in possession of the land at the time of the alleged trespass; that defendant made an unauthorized, and therefore unlawful, entry on the land; and that plaintiff was damaged by the alleged invasion of his rights of possession."

Electronic World, Inc. v. Barefoot, 570 S.E.2d 225, 230 (2002).

Where the defendant should know that its activity will result in an invasion of plaintiff's land, an action for trespass lies.

Further, an inadvertent invasion, resulting from intentional conduct, may constitute a trespass. The defendant's diversion sediment to the plaintiff's land is actionable as a "trespass."

Nevertheless, there must be some wrongdoing by the defendant. Where the defendant-motorist operated a vehicle onto the defendant's property and into a building, and asserted that the accident was unavoidable, the Court held that the defendant was allowed to plead that the accident was unavoidable.

There is some authority in North Carolina that a person is strictly liable for his intentional acts on his land that result in a trespass on adjoining property, even if he is not negligent. Newsom v. Anderson, 24 N.C. 42, 43 (1841).

Where, however, the defendant physically trespasses on the plaintiff's land, then the defendant is liable for all damages resulting from the invasion, regardless of negligence. Lee v. Stewart, 218 N.C. 287 (1940).

### iii. Liability for acts of independent contractor

Where the negligence of a contractor causes property damage to adjoining land, the owner is not liable. Superior Tile, Marble Terrazzo Corp. v. Rickey Office Equipment, Inc., 70 N.C. App. 258, 261 (1984).

This case (Rickey Office) also noted the Restatement position, and stated:

There is some authority that the landowner is strictly liable for the negligence of a contractor who negligently fails to repair a structure.

"A possessor of land is subject to liability to others outside the land for physical harm caused by the disrepair of a structure or other artificial condition thereon, if the exercise of reasonable care by the possessor or by any person to whom he entrusts the maintenance and repair thereof

(a) would have disclosed the disrepair and the unreasonable risk involved therein, and

(b) would have made it reasonably safe by repair or otherwise."

The court noted that this section applies only to "personal injury" based on the comments to the Restatement. Superior Tile, Marble Terrazzo Corp. v. Rickey Office Equipment, Inc., 70 N.C. App. 258, 261 (1984). There could thus be an argument that were a person off the land sustains a bodily (or "personal") injury, that the landowner may be liable based on the failure of a contractor to repair the structure.

### iv. diversion of water and related cases

Many cases address the diversion of water. Some of these cases are addressed by the law of negligence, nuisance, or trespass. The general rule is that, "Each possessor is legally privileged to make a reasonable use of his land, even though the flow of surface water is altered thereby and causes some harm to others, but liability is incurred when his harmful interference with the flow of surface waters is unreasonable and causes substantial damage." Pendergrast v. Aiken, 293 N.C. 201, 216 (1977). See also Woodward v. Cloer, 68 N.C. App. 331, 336 (1984) ("the rights and duties established by the restrictive covenants governing the subdivision supersede the principle or doctrine of reasonable use articulated in Pendergrast").

"An upper riparian landowner's unreasonable use of water quantity or diminution of its quality permits a lower riparian owner to maintain a civil action in nuisance or trespass to land." Biddix v. Henredon Furniture Industries, Inc., 76 N.C. App. 30, 35

(1985) (where defendant discharged waste and hazardous substances into stream which damaged plaintiff's property, common law theories of continuing trespass to land and nuisance were not abrogated by North Carolina Clean Water Act, and plaintiff stated claim for relief under N.C. Gen. Stat. § 143-215.93, which imposes strict liability for discharging of oil or other hazardous substances).

Some cases indicate that a diversion of water is actionable as trespass. BNT Co. v. Baker Precythe Development Co., 151 N.C.App. 52, 55, 564 S.E.2d 891, 894 (“plaintiffs alleged that since the closing of the ditch, the properties south of the Masonboro Village Subdivision experienced repeated flooding resulting in substantial property damage.”; affirming judgment against developer who closed ditch). In Phillips v. Chesson, 231 N.C. 566, 567, 58 S.E.2d 343, 345 (1950), the defendants “in improving their lot the defendants made an extensive excavation thereon, and in doing so, as plaintiff's evidence shows, dumped a substantial portion of the excavated clay on the upper part of plaintiff's lot.” They also “built a 'slab' wall above their garden, to prevent the flow of water from the hillside from injuring or destroying it.” “The excavation and the wall referred to had the effect of diverting the water from its natural flow down the hillside from which he had adequately protected his buildings by deep and wide ditches, at great expense, and caused an overflow which greatly damaged his property; that the water broke through the mound of clay referred to above, as well as through the excavation defendants had made, spread a deep deposit of clay on his lot, reaching down to his buildings.” Regarding the defendant's liability, the court stated:

With respect to surface water, the duties of owners of adjoining lands respectively on a different level are reciprocal and complementary. The lower land is servient to that on a higher level in the sense that it must receive the natural flow of surface water from the higher land; and the servient owner must dispose of it as best he can without in turn becoming an offender.

Here we are concerned with the duties of the owners or occupants of the land on the higher level. Such owners or occupants cannot divert the surface water or interfere with its natural flow by artificial obstruction or device so as to injure the premises of the servient owner without incurring actionable liability.

The question whether more water or less water is caused to flow on to the lower land--which may be a factor bearing on liability,--is often by no means the most important. The manner of its collection and release, the intermittent increase in volume, and destructive force, its direction to a more vulnerable point of invasion, may often become important.

Phillips v. Chesson, 231 N.C. 566, 567, 58 S.E.2d 343, 345 (1950).

## II. PERSONS HAVING CONTROL

The basic duties described in the preceding section generally apply to those persons in “control” or “possession” of the land. This section addresses the persons who have these obligations and who may be held liable.

### 1. Landowner

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."

Our Court of Appeals addressed the issue of the owner’s liability in Petty v. Charlotte, 85 N.C. App. 391, 394-396 (1987), in which the plaintiff-motorist was forced off the roadway by another motorist, and she was then impaled on a defective fence on the defendant’s property. The defendant housing authority tried to disclaim responsibility, and the Court of Appeals wrote:

The Housing Authority's motion for directed verdict was grounded on its contention it had no duty to plaintiff because the fence injuring plaintiff was under the "dominion and control" of the City. However, defendant has failed to offer any evidence sufficient to demonstrate the City's exclusive "dominion and control" of the defective fence. The fact of possession or occupation underlies most forms of premises liability. However, the rebuttable "presumption [is] that possession is in him who has the true title." Section 328E(c) of the Restatement (Second) of Torts similarly presumes that the "possessor of land" is the "person who is entitled to immediate occupation of the land, if no other person" occupies, or last occupied, the land "with the intent to control it."

Accordingly, once its ownership (and therefore its right to immediate occupancy) of the park land and fence was sufficiently established, the Housing Authority was required to rebut its duty as presumed possessor or occupier by coming forward with evidence sufficient to show it had parted so completely with possession and control of the offending fence that it was unable to perform its duty of care.

The overwhelming evidence is that the fence along McCall Street was located on Housing Authority property. Despite its superior position of knowledge as record titleholder, the Housing Authority came forward with no evidence from which the jury could fairly determine either the nature of the relationship between the Housing Authority and the City or the extent to which either the City or the Housing Authority controlled the fence. The City's occasional repair of the fence does not itself prove the City's intent to possess and control the fence since these repairs might reflect no

more than the City's statutory duty as a municipality to clear streets and rights-of-way.

The evidence was insufficient to show the City exercised such control over the fence that defendant's duty of care as possessor or occupier was supplanted. Considered in the light most favorable to plaintiff, the evidence of defendant's ownership of the fence, coupled with actual notice of its disrepair, was therefore sufficient under these facts to establish defendant's duty to plaintiff.

Petty v. Charlotte, 85 N.C. App. 391, 394-396.

Thus, the owner bears the burden of proving a lack of control. Many cases involved leased property. When the landowner leases the property to another, then his liability is limited, as follows:

"The general and basic rule is that when third parties are injured as the result of any defective condition in leased premises he may have recourse against the lessee, but not against the lessor. The liability may, however, be extended to the landlord or owner--(a) When he contracts to repair; (b) where he knowingly demises the premises in a ruinous condition or in a state of nuisance; (c) where he authorizes a wrong.

Wellons v. Sherrin, 217 N.C. 534, 540 (1940).

Thus, where the plaintiff slips on coffee in a restaurant, the owner (or "lessor") of the property is not liable. Where, however, the owner retains control and actively participates in the activities on the land, then it can be held liable. Thus, even though a movie studio allowed a film company to enter the property to make a movie, where its employee worked with and advised the film company's employees on a daily basis on such routine matters as the placement of electric poles, its substantial authority, taken together with its active involvement in the daily routines, placed a duty upon the studio. The studio could be liable to a worker who was electrocuted while working on the set. Martishius v. Carolco Studios, Inc., 355 N.C. 465 (2002).

A landowner has been held to not be liable for injuries arising from a transformer on its land, which is subject to an easement. A property owner is generally liable for an underground drainage line unless it has been dedicated to the municipality. Where the owner acts in concert with another person having control over the property, the owner is not relieved of liability.

The owner is generally not liable for dangerous conditions off its property.

## 2. Liability of Lessee or Tenant

“Occupiers” of the land other than the owner may have a duty to keep the land safe. Our Supreme Court has held that “it is the control and not the ownership which determines the liability.” Green v. Duke Power Co., 305 N.C. 603, 611, 612 (1982).

A residential or commercial tenant generally has a duty toward a guest on the property. “The general and basic rule is that when third parties are injured as the result of any defective condition in leased premises he may have recourse against the lessee, but not against the lessor.” Wilson v. Downtin, 215 N.C. 547, 550, 2 S.E. 2d 576, 577 (1939). “[T]he general rule is that the tenant who occupies the premises is liable for injury caused by the defective condition.” Markham v. Duke Land & Imp. Co., 201 N.C. 117, 122 (1931) (lessee liable for defective condition in sidewalk, even if condition existed at time of lease; manager admitted knowledge of defect).

The tenant may be held liable only if it has actual or constructive notice of the defective condition, and has the opportunity and ability to remedy the condition.

### 3. Liability of Contractors Working on Land

A contractor working on the land is liable for its active negligence which creates a hazard to a person on the property. Further, a contractor generally has the same duties as the owner with respect to active operations. Broadway v. Blythe Industries, Inc., 313 N.C. 150, 154 (1985) (“one upon land under a grant or license from the owner is subject to the same rules of liability which define the duty of the landowner.”; “Although Lisk [contractor] was not a possessor of the construction site, it still can be held liable under the attractive nuisance rule.”). Our Supreme Court has clarified that the contractor’s duty is not as broad as the owner’s duty with respect to conditions not created by the contractor, stating:

Citing section 383 of the Restatement of Torts, both the majority and the dissent concluded that ASI [security contractor] owed the same duties to plaintiff, and thus was subject to the same liability in tort, as the landowner. Section 383 provides:

One who does an act or carries on an activity upon land on behalf of the possessor is subject to the same liability, and enjoys the same freedom from liability, for physical harm caused thereby to others upon and outside of the land as though he were the possessor of the land.

Restatement (Second) of Torts § 383 (1965). We reemphasize yet again that the Restatement of Torts is not North Carolina law. While section 383 may be persuasive in other contexts, we reject it in the context of this case with respect to the duties owed the guest of an apartment complex tenant by a security services company. Rather, the extent of ASI’s duty to plaintiff, if any, is governed by the contract between ASI and NPI.

Cassell v. Collins, 344 N.C. 160, 163 (1996).

A contractor does not, however, have to go to extraordinary measures to insure the safety of persons on the property.

After the contractor completes its work and the work is accepted, a third person cannot sue the contractor pursuant to the “completed and accepted” doctrine. The completed and accepted doctrine does not, however, extend to services, such as the delivery of ice.

Where the non-owner (and non-possessor) does not create the hazard to the plaintiff, then it is not clear whether the defendant can be liable to the plaintiff, based on its contractual duties alone. One case suggests that the service-provider (which does not create the risk) can be liable if its contract with the property owner imposed a duty on the service-provider. In Cassell v. Collins, 344 N.C. 160 (1996), a guest at an apartment complex was assaulted in the presence of a security guard at the complex. She sued the security company alleging that it failed to protect her. “The extent of ASI's duty to plaintiff, if any, is governed by the contract between ASI and NPI.” Cassell v. Collins, 344 N.C. at 163-166. The Supreme Court held that the security company’s contractual duties were only to be visible and to ensure that certain doors were locked, and thus it had no duty to protect the plaintiff during the assault. This case appears to be wrongly decided, because it gives the plaintiff the benefit of the defendant’s contractual duties under a tort theory, whereas the plaintiff would probably not meet the requirements of a third-party beneficiary of the contract under a contract theory. See Hoots v. Pryor, 106 N.C. App. 397, 408 (1992) (where plaintiff operated ATV onto property of another, onto dirt path created by gas company, and were injured, they could not sue gas company as third-party beneficiary between land owner and gas company “granting Gas Company the easement and requiring it to erect barriers to prevent motor vehicle access onto the easement”; plaintiff did not allege that contract was entered into for the direct, not incidental, benefit of plaintiff). In any event, this case puts a wrinkle on the potential liability of a contractor on the premises.

There is other authority that the contractual duties may impose liability on the contractor (or other non-owner). Markham v. Duke Land & Imp. Co., 201 N.C. 117, 122 (1931) (plaintiff tripped when heel was caught in hole in sidewalk; in holding that plaintiff has claim against lessee, noting that “Not only was the Corley Company in the actual possession of the building; it had possession under a lease of the Land and Improvement Company in which it contracted to keep the premises "in good repair except the roof and floor of said storebuilding," and to "make all repairs which might be necessary during said term."”). On the other hand, there is authority that the non-owner cannot be held liable on a premises liability theory. Freeman v. Food Lion, LLC, 173 N.C. App. 207, 212 (2005) (“Because neither Budget Services [which contracted with store to maintain floors] nor Frank's Floor Care [which contracted with Budget to maintain floors] owned nor operated the store in which plaintiff's injury occurred and

because plaintiff has failed to allege in her complaint that Budget Services or Frank's Floor Care were agents of Food Lion, we hold that they had no duty to plaintiff and that, therefore, they may not be held liable under a theory of premises liability.”).

The negligence of the contractor may be superseded by the intervening negligence of the owner, but this is difficult to show.

Many cases address a claim by sub-contractor’s employee against the general contractor. The law applicable to a claim by a sub-contractor’s employee against the general contractor has been stated as follows:

The general rule in North Carolina is that the general contractor is not required to provide a safe work place for the employees of a subcontractor. There are basically three exceptions to this doctrine, which have been stated as follows:

The Courts of North Carolina have long recognized that a general contractor is not liable for injuries sustained by a subcontractor's employees. North Carolina law provides that a general contractor does not have a duty to furnish a subcontractor or the subcontractor's employees with a safe place in which to work. Instead, it is the duty of the subcontractor to provide himself and his employees with a safe place to work and, also, to provide proper safeguards against the dangers of the work.

However, North Carolina does recognize a few exceptions to the general rule of no liability. These exceptions are: (1) situations where the contractor retains control over the manner and method of the subcontractor's substantive work, (2) situations where the work is deemed to be inherently dangerous, and (3) situations involving negligent hiring and/or retention of the subcontractor by the general contractor. In the case sub judice, plaintiffs can recover from [contractor] only if plaintiffs' forecast of evidence establishes that the circumstances surrounding the decedent's accidental death place plaintiffs' claim within one of the aforementioned exceptions.

Hooper v. Pizzagalli Constr. Co., 112 N.C. App. 400, 403-404 (1993) (finding that contractor could not be found liable where contractor did not retain the right to control the method and manner in which the subcontractor and its employees performed their job; while the contractor maintained a supervisory role, the subcontractor was expected to comply with the plans and specifications of the overall project, and the subcontractor was free to perform its job according to its own independent skill, knowledge, and experience; subcontractor's plumbing work did not have any substantial and recognizable dangers inherent in the work).

#### 4. Liability of Franchisor

Whether a franchisor is liable for a defective condition on the property depends on the degree of control of the franchisor. Thus, where the franchisor does not control the day-to-day operation of a motel, it is not liable for an assault on the property. On the other hand, where the management agreement between the McDonald's franchisor and the franchisee where the customer fell raised a question as to the level of control that the franchisor had over the franchise's operations, the franchisor could be liable.

#### 5. Property Manager

It is not clear whether a property manager can be held liable for injuries occurring on the property.

There is authority that a property manager cannot be sued for a construction defect, because that is the responsibility of the owner and that is beyond the responsibility of the manager. In Collingwood v. General Electric Real Estate Equities, Inc., 324 N.C. 63, 66 (1989), the plaintiff rented an apartment and the apartments caught on fire. The plaintiff jumped from the apartment and was injured. She alleged that the apartment owner and the property manager were negligent in the design and construction of the apartments in using combustible materials, having a lengthy escape path made of wood and without a sprinkler system, and failing to install an alarm system to warn residents before the escape path was engulfed in flames. The court disposed of the case against the property manager, stating:

At the outset we dispose summarily of the inquiry regarding defendant Walsh. The Court of Appeals held that summary judgment for defendant Walsh was proper because Walsh, as manager of Cedar Creek, was not responsible for the alleged defects in the design and construction of the apartments. We agree that the pleadings, affidavits, and other materials of record fail to establish that Walsh owed plaintiff a legal duty with respect to the design and construction of the complex. We therefore affirm the Court of Appeals decision as it applies to Walsh . . . .

Collingwood, 324 N.C. at 67.

On the other hand, in another case our Supreme Court seemingly held, without any analysis, that the property manager had the same duty as the owner. Lamm v. Bissette Realty, Inc., 327 N.C. 412, 416 (1990) (plaintiff fell on stairs; "The Court of Appeals is correct that plaintiff is a business invitee of defendants, who are the owners and manager of the building. The owner owes a duty to a business invitee to keep "entrances to his business in a reasonably safe condition for the use of customers entering or leaving the premises." An owner also has a duty to warn invitees of hidden dangers about which the owner knew or should have known.").

The property manager is liable for its (or his) own torts. Where the evidence shows that the manger acted reasonably, the claim fails.

#### 6. Owner's Liability for Contractor on Premises

“Generally, one who employs an independent contractor is not liable for the independent contractor's negligence.” Kinsey v. Spann, 139 N.C.App. 370, 376, 533 S.E.2d 487, 492-93 (2000) (the plaintiff sued a defendant-landowner for negligence of the defendant's independent contractor in cutting down a tree, which resulted in personal injury, the defendants' negligence should not have been submitted to the jury); Harris v. Tri-Arc Food Sys., 165 N.C. App. 495, 499 (2004) (“a possessor of land who carefully selects an independent contractor to construct a building on his land is subject to liability for harm caused to invitees by the negligent acts of the contractor”; where restaurant customer was injured by falling ceiling, resulting from improper construction, restaurant is not liable).

The owner may be liable where its own negligence combines with that of the contractor.

##### a. negligent hiring

The owner can be sued for negligent hiring. “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.” Kinsey v. Spann, 139 N.C.App. 370, 376, 533 S.E.2d 487, 492-93 (2000).

##### b. ultra-hazardous

The owner may be liable for the contractor's negligence if the work is ultra-hazardous (or intrinsically dangerous or hazardous). In general, construction is not ultra-hazardous such that the duties are not delegable. Our courts have addressed this argument as follows:

Defendant Carlisle argues that Olympic [owner] was under a nondelegable duty to ascertain whether its building would support the new roof because reroofing a building is intrinsically dangerous. If Olympic was under a nondelegable duty to check the roof support, any negligence in failing to adequately determine the support would be imputed to Olympic, if it were a proximate cause of Olympic's damage, whether the negligence was on the part of a servant or independent contractor. However, our Supreme

Court has found that the erection of a building is not "intrinsically dangerous" and does not fall within those activities considered nondelegable in nature. We similarly conclude that the reroofing of a building is not within the purview of "intrinsically dangerous" or "specially hazardous" work. Furthermore, we find no other grounds for a nondelegable duty on Olympic arising from the reroofing project.

Olympic Products Co., Div. of Cone Mills Corp. v. Roof Systems, Inc., 88 N.C. App. 315, 334 (1988) (emphasis added). In North Carolina, only blasting operations are considered ultrahazardous, such that the owner is strictly liable. Kinsey v. Spann, 139 N.C. App. 370, 374 (2000).

c. inherently dangerous

Where the activity is inherently dangerous, the owner may be liable. This law appears to be in a state of flux. Where the work is susceptible to effective risk control through the use of adequate safety precautions, it is deemed inherently dangerous.

According to one case, the plaintiff must show that the activity is inherently dangerous and that "at the time of the injury, the employer either knew, or should have known, that the activity was inherently dangerous [and] the employer failed to take the necessary precautions to control the attendant risks." Kinsey v. Spann, 139 N.C.App. 370, 376, 533 S.E.2d 487, 492-93 (2000).

Also, it has been held that a developer, as a matter of law, was not aware of the dangerous conditions. Most activities do not involve inherently dangerous and non-delegable duties. "There is a spectrum of activities, some of which are never inherently dangerous, as a matter of law, and some of which are always inherently dangerous, as a matter of law." Lilley v. Blue Ridge Elec. Mbrshp. Corp., 133 N.C. App. 256, 260 (1999).

Trenching can be inherently dangerous, depending on the trenching conditions. For example, where the landowner knew that the trench had not been properly sloped, and the landowner observed that the slope was not stable and told the contractor's employees to slope before allowing anyone into the trench, the jury can conclude that the trench was inherently dangerous at the time. In Dunleavy v. Yates Constr. Co., 114 N.C. App. 196 (1994), a worker was killed in a trenching accident. The court held that the landowner who hired an independent contractor (who employed the worker) was not liable, because there was no evidence that the owner knew or had reason to know of the danger. Accord Cook v. Morrison, 105 N.C. App. 509 (1992) (landowner entitled to summary judgment in a wrongful death action arising from the death of a contractor's employee in a trench cave-in where; facts do not show that the defendant knew or should have known of the circumstances creating the danger to which the decedent was exposed).

d. property manager

Applying the general rule that the owner is not vicariously liable for the acts of an independent contractor, one would assume that the owner is not vicariously liable for any negligence of its independent property manager. In a recent case, however, our Supreme Court held that the landlord could be liable for an attack by the tenant's dogs, and the Court held that the owner was vicariously liable for the negligence of the property manager. Holcomb v. Colonial Assocs., L.L.C., 358 N.C. 501, 507 (2004). The dogs had attacked others before, and the management company knew this. The "lease agreement required the tenant to "remove any pet . . . within forty-eight hours of written notification from the landlord that the pet, in the landlord's sole judgment, creates a nuisance or disturbance or is, in the landlord's opinion, undesirable." The Court found that "[t]his lease provision granted Colonial [owner] and Management sufficient control to remove the danger posed by Olson's dogs." The court held that a jury instruction on agency was proper, stating:

The evidence supports a finding that Colonial possessed control over Management with respect to the subject of the litigation--the dogs. Olson's lease gave Dillard Powell, owner of Colonial, the authority to remove Olson's dogs at any time. After [\*510] plaintiff filed suit against Colonial, Powell exercised this control, requesting Management to order Olson to remove the dogs. Management complied with Powell's request and, pursuant to this request, Olson removed his dogs from the property. Thus, a jury could find Colonial had control over the harboring of the dogs and had the ability to order Management to order Olson to remove the dogs. Looking at the evidence in the light most favorable to plaintiff, the evidence supports both the jury instruction on agency and the jury's finding that Management was Colonial's agent.

Holcomb v. Colonial Assocs., L.L.C., 358 N.C. 501, 509-510 (2004).

In another recent case, the Court held that where a resort owner allowed a parade by the lessee, and the owner had the right to control the details of the lessee association's activities, the owner could be liable for an injury during the parade because there was an "agency" relationship. In Jones v. Lake Hickory R.V. Resort, Inc., 359 N.C. 181 (2004), the Court adopted the dissent at 162 N.C. App. 618 , which stated:

In this case, there is evidence that the Resort delegated the duty to hold social functions on the Resort property to the Lessee Association and retained the right to review all those functions. In addition, there was testimony from employees that the Resort retained the power to deny activities, that employees would sit in on committee meetings held by the Lessee Association, that the committee would supply the Resort with a list of activities on a monthly basis, and that the Resort enforced its rules to keep the grounds safe.

...

In this case, there is evidence that the Resort delegated the duty to hold social functions on the Resort property to the Lessee Association and retained the right to review all those functions. In addition, there was testimony from employees that the Resort retained the power to deny activities, that employees would sit in on committee meetings held by the Lessee Association, that the committee would supply the Resort with a list of activities on a monthly basis, and that the Resort enforced its rules to keep the grounds safe. Thus, the majority opinion errs in concluding that there was no evidence on the element of control over the details of the activities by the Lessee Association, and the Resort is not entitled to judgment notwithstanding the verdict on the issue of agency. Based on the foregoing, I would affirm the trial court's denial of the motion for judgment notwithstanding the verdict as to the issue of agency.

A subsequent case from the Court of Appeals held that Holcomb was limited to situations where the owner has an immediate right to control the property. In Walden v. Morgan, 635 S.E.2d 616, 623 (2006), the plaintiff was injured when a fire erupted on the adjoining property. The defendant-landowner (BRC) leased the property to a convenience store (Basyooni), which entered an agreement with a gas company (Pace Oil). Pace Oil was changing the gas when the fire erupted. The plaintiffs argued that the owner had control over the property based on a provision in the lease which stated that the lessee will "Not use the premises for any unlawful or immoral purposes or occupy them in such a way as to constitute a nuisance." The court held that the landowner was not liable, stating:

Here, BRC's lease provision does not provide it control over the premises. In Holcomb, the landlord could remove any pet within forty-eight hours. Under section 7 of its lease with Basyooni, BRC could only re-enter the property upon sixty days prior notice of default for a non-monetary lease provision. In Holcomb, the lease provision addressed the issue of liability and a third party was injured. The lease provision before us is too broad and indefinite to create liability for negligence for BRC's failure to exercise control over the premises. This lease governs the business relationship between BRC and Basyooni, not BRC and Pace Oil. Under the lease, Basyooni possessed the right to "[u]se the premises for purposes in keeping with the proper zoning." Beasley's affidavit showed the convenience store was operating in compliance with applicable zoning regulations.

#### 8. Residential and Rental Landlords

The common law rule in North Carolina was generally one of *caveat emptor*, meaning that the tenant could not sue the landlord for a defective condition of the

premises. In 1977, the North Carolina Legislature changed this common law by enactment of the Residential Landlord Tenant Act. This Act imposes various duties on the lessor of residential property. In a nutshell, the landlord issues an implied warranty to the Tenant that the dwelling is fit and habitable.

The statute setting forth the landlord's duties is G.S. § 42-42, which states:

(a) The landlord shall:

- (1) Comply with the current applicable building and housing codes, whether enacted before or after October 1, 1977, to the extent required by the operation of such codes; no new requirement is imposed by this subdivision (a)(1) if a structure is exempt from a current building code;
- (2) Make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition;
- (3) Keep all common areas of the premises in safe condition;
- (4) Maintain in good and safe working order and promptly repair all electrical, plumbing, sanitary, heating, ventilating, air conditioning, and other facilities and appliances supplied or required to be supplied by him provided that notification of needed repairs is made to the landlord in writing by the tenant except in emergency situations; and
- (5) Provide operable smoke detectors, . . . .

“A landlord must have knowledge, actual or imputed, or be notified, of a hazard's existence before being held liable in tort. N.C.G.S. § 42-42(a)(4).” DiOrio v. Penny, 331 N.C. 726 (1992).

Our cases hold that the landlord must make a reasonable inspection of the premises. Again, the scope and extent and frequency of these inspections is not clear.

The landlord's duties run only toward the tenant. Therefore, other persons injured on the premises generally may not sue the landlord. For example, a person delivering a package to the residence who is injured on the steps cannot sue the landlord.

North Carolina has also enacted the Vacation Rental Act at G.S. § 42A-31. This essentially tracks the requirements of the aforementioned Residential Act. There are, however, a few technical distinctions. For example, the VRA does not define the word “landlord,” and thus it is not clear whether all of the duties apply to the property manager.

### III. GENERAL DUTIES OF POSSESSOR TOWARD LAWFUL VISITOR

After ascertaining that the defendant has a duty toward the persons lawfully upon the property, the inquiry is the scope of the defendant's duty. The cases have several statements setting forth the duty of the landowner.

1. General statements of duty

A broad rule has been stated as follows: "A landowner has a duty to any lawful visitor on his property to take reasonable precautions to ascertain the condition of [his] property and to either make it reasonably safe or give warnings as may be reasonably necessary to inform . . . of any foreseeable danger." Hussey v. Seawell, 137 N.C. App. 172, 175, 527 S.E.2d 90, 92 (2000).

"The mere existence of a condition which causes an injury is not negligence per se, and the occurrence of the injury does not raise a presumption of negligence." Spell v. Contractors, 261 N.C. 589, 592, 135 S.E.2d 544, 547 (1964). See Harris v. Tri-Arc Food Sys., 165 N.C. App. 495 (2004) (where ceiling fell on BoJangles customer, and accident was caused by a latent construction defect in the restaurant's ceiling which the restaurant did not know about, nor did it have reason to discover, defendant was not liable).

Further, "The doctrine of res ipsa loquitur has no application to a case in which recovery is sought for injuries received in a fall upon or from the entryway of a shop or store." Garner v. Atlantic Greyhound Corp., 250 N.C. 151, 155 (1959).

"Defendant had a duty to keep the aisles and passageways in reasonably safe condition." Farmer v. Wellons Village Shopping Center Drug Corp., 7 N.C. App. 538, 540 (1970).

Our courts have recited the Restatement of Torts, which states:

A possessor of land is subject to liability for bodily harm caused to business visitors by a natural or artificial condition thereon if, but only if, he

(a) knows, or by the exercise of reasonable care could discover, the condition which, if known to him, he should realize as involving an unreasonable risk to them, and

(b) has no reason to believe that they will discover the condition or realize the risk involved therein, and

(c) invites or permits them to enter or remain on the land without exercising reasonable care

(i) to make the condition reasonably safe, or

(ii) to give a warning adequate to enable them to avoid the harm without relinquishing any of the services which they are entitled to receive, if the possessor is a public utility.

Williams v. McSwain, 248 N.C. 13, 18 (1958) (quoting section 343) (beach owner is not liable for minor who was struck by boat in water, where it was not shown that the son was an invitee of the beach owner or that boy intended to use beach).

Whether the defendant was reasonable in maintaining his property is often very fact-specific. As stated by our Supreme Court:

What constitutes a reasonably safe condition of premises depends, of course, upon the uses which the proprietor invites his business guests to make of them and those which he should anticipate they will make. It also depends upon the known or reasonably foreseeable characteristics of the invitees. A condition reasonably safe for invitees upon an ice skating rink is far different from a condition reasonably safe upon the stairway of a rest home for the aged, or in the aisle between the counters and display racks of a store whose proprietor hopes his invitees' attention will be attracted to the articles there displayed for sale. The rule of law is stated in the same words for all these situations -- the proprietor must use the care a reasonable man similarly situated would use to keep his premises in a condition safe for the foreseeable use by his invitee -- but the standard varies from one type of establishment to another because different types of businesses and different types of activities involve different risks to the invitee and require different conditions and surroundings for their normal and proper conduct. The proprietor of a business establishment is not required to take precautions for his invitees' safety such as will make it impracticable for him to operate or such as will destroy the attractiveness of his establishment for those who normally patronize such places.

Hedrick v. Tigniere, 267 N.C. 62, 67 (1966).

A “Defendant [is] not required to take extraordinary precautions for the safety of its invitees, or to take precautions that would render the operation of its business impractical.” Southern R. Co. v. ADM Milling Co., 58 N.C. App. 667, 674 (1982). “The law does not require the owner to take steps for the safety of his invitees such as will unreasonably impair the attractiveness of his establishment for its customary patrons. Thus, a dance hall need not be brightly lighted and the bleachers bordering the more remote areas of a baseball field need not be screened against batted balls.” Aaser v. Charlotte, 265 N.C. 494, 499 (1965).

## 2. Requirement of Notice of Condition

Most cases recognize that the defendant has a duty to remedy a condition only if it has notice of the condition. (See also subsection II.7. regarding conditions created by the defendant, of which the defendant is immediately charged with notice.) In a case in which the plaintiff fell on a sidewalk, the North Carolina Supreme Court wrote:

Pulley thus will be required to show that the area in which she was injured was not in a reasonably safe condition for its contemplated use. Pulley will also have to show that the hospital either knew or should have known of the unsafe condition. Further, she may not recover if she knew of the unsafe condition or if it should have been obvious to any ordinary person under the circumstances existing at the time she was injured.

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

In one case, for example, the Court held that the defendant-husband could be liable to the visitor because he was aware of the hazard, but that the defendant-wife was not liable because she did not know of the danger and was not present. Some cases suggest that where the hazard is in view of the defendant, that he can be charged with knowledge of it. On the other hand, another case held that testimony that the dangerous activity was in “plain view” of the defendant was insufficient to charge the defendant with notice.

### 3. Duty to inspect property

The landowner thus has a duty to inspect his property. It is not clear, however, the extent to which he must so inspect his property. It is not clear, for example, how frequently these inspections must be made. It is also not clear how detailed and thorough these inspections must be. Similarly, it is not clear how many persons the defendant must employ to monitor his premises. One case suggests that where there is no evidence as to how long a hazard (consisting of an item on the floor) existed, that a failure to inspect is immaterial. A business may have a greater duty to inspect a bustling store.

The “landowner does not have a duty to inspect or protect against harm where the injury is caused by “a danger collaterally created” by the negligence of another.” Blevins v. Taylor, 103 N.C. App. 346, 350 (1991).

### 4. Sufficiency of posting warning

Most cases suggest that the landowner may elect to remedy the condition or to post a warning. “A landowner has a duty to any lawful visitor on his property “to take reasonable precautions to ascertain the condition of [his] property and to either make it reasonably safe or give warnings as may be reasonably necessary to inform”. . . of any foreseeable danger.” Hussey v. Seawell, 137 N.C. App. 172, 175 (2000).

There may be some situations where a warning is insufficient. “In any case where the occupier, as a reasonable man, should anticipate an unreasonable risk of harm to the invitee notwithstanding his knowledge, warning, or the obvious nature of the condition, something more in the way of precautions may be required.” Southern R. Co. v. ADM Milling Co., 58 N.C. App. 667, 673 (1982). “It is true also where the condition is one such as icy steps, which cannot be negotiated with reasonable safety even though the invitee is fully aware of it, and, because the premises are held open to him for his use, it is to be expected that he will nevertheless proceed to encounter it. In all such cases the jury may be permitted to find that obviousness, warning or even knowledge is not enough.” Id.

Where the owner is prohibited from posting a sign, the of course the absence of a sign cannot be the basis for liability. Williams v. McSwain, 248 N.C. 13, 18 (1958) (“The regulations did not permit defendants Womble to erect any sign in the waters of White Lake or to mark or chart any area prohibited to boats in their use of White Lake.”).

#### 5. Statutory duties

Some statutes impose specific duties on landowners. E.g. G.S. § 14-138.1 (person who starts fire on grassland must extinguish fire); § 14-136 (person setting fire to grassland shall notify adjoining landowners). See also Benton v. Montague, 253 N.C. 695, 117 S.E.2d 771 (1961) (“It has been held, in a case involving fire damage to adjoining property, that failure to give the notice required by this statute is negligence per se.”).

At least one statute lowers the landowner’s duty. G.S. § 38A-4 (trespasser standard applies where the landowner allows others to use his land for recreational or educational purposes for free).

#### 6. No duty to address obvious hazards

Where the hazard is obvious, or is known to the plaintiff, then the defendant has no duty to remove the condition or post a warning. “There is a presumption . . . that a reasonable person will be "vigilant in the avoidance of injury" when faced with a "known and obvious danger.”” Freeman v. Food Lion, LLC, 173 N.C. App. 207, 211 (2005).

Many cases have held that where the plaintiff had equal or greater notice of the hazard, that the defendant has no duty to protect the plaintiff of that condition. Newsom v. Byrnes, 114 N.C. App. 787, 443 S.E.2d 365 (1994) (gray clay on unfinished driveway upon which plaintiff slipped would have been obvious to any person under the circumstances); Bolick v. Bon Worth, Inc., 150 N.C. App. 428, 430, 562 S.E.2d 602, 604, disc. review denied, 356 N.C. 297, 570 S.E.2d 498-99 (2002) (defendant not liable when plaintiff admitted she was able to see the floor and had at least equal knowledge of the floor's treacherous conditions; plaintiff fell on steps leading from a bathroom on the owner's premises, and had used the same steps to enter the bathroom; plaintiff had full

knowledge of the condition of the doorway to the bathroom by virtue of having safely negotiated her way inside the bathroom moments before she fell.).

The existence of an obvious hazard affects both the existence of the landowner's duty, and the plaintiff's contributory negligence. "Although this "no duty" rule for obvious dangers "bears a strong resemblance to the doctrine of contributory negligence," it in fact negates the defendant's duty of care and eliminates any occasion for reliance on the defense of contributory negligence." Lorinovich v. K Mart Corp., 134 N.C. App. 158, 163 (1999).

There is some authority that even though a given hazard is obvious, that the defendant must still anticipate an injury. In a case where the plaintiff fell down a steep hill following a concert, the court stated, "Although there is evidence that the steep hill was an obvious danger, there is also evidence that would support a conclusion that the defendant should have anticipated that patrons could be injured on the unprotected hill." Williams v. Walnut Creek Amphitheater Ptnr., 121 N.C. App. 649, 652 (1996).

As stated in one case:

An owner or occupier of land ordinarily has no duty to warn of an obvious condition of which its invitee has equal or superior knowledge.

But this is certainly not a fixed rule, and all of the circumstances must be taken into account. In any case where the occupier, as a reasonable man, should anticipate an unreasonable risk of harm to the invitee notwithstanding his knowledge, warning, or the obvious nature of the condition, something more in the way of precautions may be required. . . . It is true also where the condition is one such as icy steps, which cannot be negotiated with reasonable safety even though the invitee is fully aware of it, and, because the premises are held open to him for his use, it is to be expected that he will nevertheless proceed to encounter it. In all such cases the jury may be permitted to find that obviousness, warning or even knowledge is not enough.

Southern R. Co. v. ADM Milling Co., 58 N.C. App. 667, 673 (1982).

In ADM Mining, a worker a switchman a railroad on defendant's property. He slipped from a railroad car and injured himself. He alleged that he slipped on slippery feed from defendant's plant. He had slipped on this condition for nine years. The defendant never swept the area clean in response to complaints about the condition of the tracks. The court held, "While the deposition clearly establishes that Whitson had knowledge of the obvious condition equal or superior to that of defendant, under the particular facts there was nevertheless a jury question as to whether defendant fulfilled its responsibility to keep the premises in a reasonably safe condition so as not to expose Whitson to unnecessary dangers." "[B]ecause defendant's spur tracks were "held open

to [Whitson] for his use," defendant should have expected that Whitson would "proceed to encounter" the slippery tracks. Under these circumstances, reasonable care may have required more than a warning of the danger." Southern R. Co. v. ADM Milling Co., 58 N.C. App. 667, 674 (1982) ("It was, however, required to exercise reasonable care for the protection of its invitees under the circumstances; and the circumstances here included defendant's knowledge that plaintiff's employee, despite his knowledge of the obvious dangerous condition, had no choice but to encounter it in the fulfillment of the duties of his employment.").

#### 7. Conditions created by Defendant versus Conditions created by Third Persons

The first issue is generally whether the dangerous condition was created by the defendant, or whether it was created by a third person. The plaintiff must show that the defendant "(1) negligently created the condition causing the injury or (2) negligently failed to correct the condition after actual or constructive notice of its existence." Nourse v. Food Lion, Inc., 127 N.C. App. 235, 238, 488 S.E.2d 608, 611 (1997), aff'd, 347 N.C. 666, 496 S.E.2d 379 (1998). As stated by our Supreme Court:

In the place of amusement or exhibition, just as in the store, when the dangerous condition or activity is created or engaged in by the owner or his employee, the owner is charged with immediate knowledge of its existence, but where it arises from the act of third persons, whether themselves invitees or not, the owner is not liable for injury resulting unless he knew of its existence or it had existed long enough for him to have discovered it by the exercise of due diligence and to have removed or warned against it.

Aaser v. Charlotte, 265 N.C. 494, 499 (N.C. 1965)

If the defendant creates the dangerous condition, then it obviously has notice of the condition, and has a duty to take reasonable measures to protect the plaintiff. Aaser v. Charlotte, 265 N.C. 494, 499 (1965).

Where the condition is created by a third person (or is created by the defendant or a third person and it is impossible to discern which), the cases state that in these cases, "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." Thompson v. Wal-Mart Stores, Inc., 138 N.C. App. 651, 654, 547 S.E.2d 48, 50 (2000).

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. 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).

### 7. Causation -- Proximate Cause -- Foreseeability

The landowner is not liable if the injury (or “accident”) is not foreseeable. For example, the negligent acts of persons on the land may render the injury unforeseeable. Many cases in the section on assault hold that a given assault was not foreseeable and hence is not actionable.

The negligence must also be the “but for” cause of the injury to be actionable. Freeman (“Plaintiff presents no evidence beyond his speculative generalizations to demonstrate just how many ski patrols would be adequate to keep him from harm.”). For example, in a case involving an allegedly dangerous stairway, the court stated:

The only evidence introduced by the plaintiff as to the condition of the step on which she fell was that it was "worn" and that it was "very slick." Plaintiff, however, does not know on which step she fell, or even which foot slipped and caused her to fall. There is no evidence in this record that the condition of the step upon which plaintiff slipped was any different from that of the entire flight of steps. Plaintiff's evidence tending to show that the steps had a metal strip on them, and that the metal strip was "worn" and that the steps were "very slick" apparently refers to all the steps. This is not sufficient evidence to support a finding by the jury that the steps had become so worn that their use would be hazardous to the store's patrons. The unsupported allegations by the plaintiff that the set of steps on which she fell were "worn" or "slick", without evidence of the particular defective condition that caused the fall, is insufficient to overcome a motion for a directed verdict.

Hedgepeth v. Rose's Stores, Inc., 40 N.C. App. 11, 15 (1979). Accord Royal v. Armstrong, 136 N.C. App. 465, 470 (2000) (action for drowning at pool; “plaintiffs . . . have been unable to demonstrate that, even if such devices [whistles, alarms, safety lines] were necessary to meet the reasonable landowner standard, their absence was the proximate cause of Darion's death. . . . An alarm triggered by a disturbance in the water would have been ineffective at a pool party attended by splashing, swimming children. . . . Because no one observed him in distress before Mr. Burton saw him at the bottom of the pool, lifesaving devices would have been useless; . . .”).

## III. SPECIFIC CONDITIONS

This section addresses the primary categories of cases which we see in litigation.

### 1. Slip and Fall (Slippery Substance).

One of the more common types of premises liability claims is the “slip and fall.” There are several different fact patterns in which the plaintiff slips or trips and injures himself. This particular section addresses only those cases in which the plaintiff slips on a slippery substance.

The first issue is whether the substance was created by the defendant, or whether it was created by a third person. As noted above in subsection II.7., where the defendant creates the dangerous condition, then it is charged with notice of the condition. For example, where the defendant mops or waxes its floors, it has knowledge of the dangerous condition (slippery floor) and has a duty to take reasonable measures to protect the plaintiff (e.g. placing a warning sign or placing barricades).

In most cases, the plaintiff slips on a substance which is created by a third person (or is created by the defendant or a third person and it is impossible to discern which). In these cases, our courts have held that the defendant has a duty to address the dangerous condition only if it has actual or constructive notice of the condition. The cases state that in these cases, “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.” Thompson v. Wal-Mart Stores, Inc., 138 N.C. App. 651, 654, 547 S.E.2d 48, 50 (2000).

Where the defendant has actual knowledge of the hazard, he has a duty to correct or warn of the condition. 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. 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).

In most cases, whether the plaintiff has a claim depends on the length of time that the substance was on the floor. These cases typically turn on whether the plaintiff can produce this evidence, either by an eye witness or by circumstantial evidence. Whether the defendant should have seen the condition also depends on the location of the condition. If, for example, the dangerous condition is within view of the defendant's cashier, then that is a factor which makes it more likely that the defendant should have been aware of the condition. For these reasons, it is impossible to set forth any general rule regarding the length of time which the condition must exist before the defendant is on constructive notice of the condition.

The cases are highly fact-specific. Some of the cases in this area have held as follows:

Evidence insufficient:

- Mere speculation about how long a dangerous condition existed was not enough to create a material issue of fact for a jury; “she presented evidence that another customer, who had been in the store fifteen or twenty minutes and was checking out when plaintiff entered, had seen the broken pickle jar on the floor before plaintiff fell. The customer did not say exactly when he observed the pickle jar. From this evidence the jury could only speculate as to how long the pickle juice had been on the floor and as to whether defendant had actual or constructive notice of the dangerous condition”
- The plaintiff slipped on a puddle and fell in the aisle of Wal-Mart's store; puddle's existence and glass under shelf did not show how long the puddle had existed in the aisle before she fell; jury would have to make "too many inferences based on other inferences" to hold defendant liable.
- "Plaintiff could not say that the floor was wet when she walked to the bathroom and did not notice water on the floor after she fell," although "her clothes were wet after her fall.”
- Where plaintiff fell on greasy substance in BoJangles parking lot, but plaintiff could show that defendant had actual or constructive notice of the presence of the greasy substance, defendant entitled to summary judgment.
- Plaintiff slipped on water in K-Mart, defendant entitled to summary judgment where plaintiff cannot show how long water was on floor.
- Defendant prevails where plaintiff testified that she had "no idea" how long the grape had been on the floor, or how it got there.
- “The plaintiff’s evidence affirmatively shows there was no wet spot on the floor when she took her seat, and, having remained only about ten minutes, the spilling of a little coffee by another customer within that interval of time would hardly give defendants reasonable time to acquire notice under the circumstances disclosed by the evidence in this case.”

Evidence sufficient:

- Plaintiff slipped in K-Mart on liquid detergent that had leaked from a container down the side of the shelving structure and onto the floor, and evidence showed that detergent on shelving structure had dried and become pink; evidence is "sufficient to raise an inference that the liquid detergent had been leaking for such a length of time that defendant should

have known of its existence in time to have removed the danger or to have given proper warning of its presence."

- "The plaintiff introduced evidence that the grape stuck beneath her shoe was brown, thus giving rise to an inference that the grapes had been on the floor for some time. The inference that the grape had been on the floor for some period of time prior to the plaintiff's fall is supported by the presence of water on the floor. A reasonable inference is that the water came from ice (from the grape display) that had dropped on the floor and remained there long enough to melt. Thus a genuine issue of material fact is raised as to whether the defendant failed, after constructive notice of their presence, to remove the grapes from the floor."
- "Plaintiff presented evidence that he slipped and fell on a piece of green vegetable material, that the floor was dirty with visible "buggy tracks," that receipts and coupons littered the area around the checkout counters between the counters and the automatic doors, and that defendant's accident report noted the floor appeared unclean due to the vegetable material which was present on the floor. Thus, plaintiff's evidence raised an inference of negligence that defendant failed to keep the floors inspected and cleared of debris."
- Evidence of grapes on the floor that were "full of lint and dirt" was sufficient to show that the store owner had knowledge of their presence.
- "Defendants admitted to owning and exercising control over the hallway where plaintiff was injured, as well as the carts and trays littering the hallway and the kitchen where dishes were being washed. By admitting to ownership, Forsyth Hospital owed a duty to plaintiff to keep the hallway safe for passage, its contemplated use. Therefore, it was appropriate to deny motions for summary judgment or directed verdict on this basis."
- Where child vomited on landing of stairs, and store employee saw that child was sick and hanging head over railing but did not know of presence of vomit, and child and mother had time to ascent 15-20 steps before plaintiff began to descent steps, time was sufficient "[c]onsidering the size of the store, the nature of its business, the location of the vomit on the landing of the stairway from the ground floor to the basement floor which made the landing extremely slippery, the number of customers using the stairway on Christmas Eve"

A distinct issue is also presented when the plaintiff falls on rain water. It has been held in such cases that the plaintiff is entitled to introduce evidence of the customs of other stores to keep their floors safe and dry.

## 2. Trip and Fall (e.g. Fixed Objects).

Another common category is the “trip and fall” type of case. This subsection addresses those cases in which the plaintiff trips on a more permanent or stationary object on the defendant’s premises. These cases often involve the plaintiff stepping into a crack, or tripping over a brick or similar aesthetic or functional item.

In these cases, the issue is typically not one of notice, because the item is fixed and therefore the defendant is probably on actual or constructive notice of the condition. Similarly, the cases are different because the defendant cannot easily remedy this condition (e.g. as opposed to mopping up a spill).

The primary issue in these cases tends to be whether the condition is in fact a defect. Cases in this context have held as follows:

A metal mesh screen at the exit of a grocery store is not a defective condition. A jagged concrete slab in a parking lot is obvious and the owner is not liable when a patron falls over it. A concrete barrier in a walkway is not negligence.

## 3. Stairways

Many cases involve an allegedly defective condition on a stairway. Some cases involve awkward or dangerous dimensions of the riser and treads. Some cases involve a wobbly or otherwise broken stairway. Each of these types of cases likewise presents its own unique analysis. Many of these cases also involve a violation of the State Building Code; the significance of a violation of the Building Code is addressed in the next subsection. Some cases also involve a defect or inadequacy of the handrail.

In these cases, the issue is generally whether there is a condition on the stairway such that it is foreseeable that a person may lose his or her balance and fall. For example, a slick tread may be negligence.

The most recent case from our Supreme court addressing stairways is Lamm v. Bissette Realty, Inc., 327 N.C. 412 (1990). In this case, the plaintiff fell down exterior stairs and sued the owner of the property and the property management company. She fell on the last step, which had a deeper (i.e. lower) riser than the previous steps. The Court held that the plaintiff could proceed on a common law negligence claim, stating, “We conclude that plaintiff’s forecast of evidence was sufficient to make out a prima facie case of defendants’ common law negligence in failing to warn of the variation in height of the risers and failing to provide a handrail.” Lamm, 327 N.C. at 416. The court further stated, “The owner owes a duty to a business invitee to keep ‘entrances to his business in

a reasonably safe condition for the use of customers entering or leaving the premises.’ An owner also has a duty to warn invitees of hidden dangers about which the owner knew or should have known.” Lamm, 327 N.C. at 416. “A jury could find that this variation in riser height, in part caused by the slope of the asphalt, was a hidden defect which defendants should have known about and that defendants had a duty to warn plaintiff that the last step down was deeper than the previous two steps. Summary judgment for defendants, thus foreclosing jury consideration of this issue, was error.” Lamm, 327 N.C. at 417. The Court further noted, “a jury could find that defendants were negligent for not . . . adding a handrail to make it reasonably safe.” Lamm, 327 N.C. at 417.

A raised metal nosing probably does not establish. In some cases, the presence of an unexpected stairway can be negligence. Where, however, the stairs are obvious, then the defendant is not liable.

Many cases involve a drop-off (or drop-down) or change in elevation at the entrance to a store. A drop-off at the entrance of the store is not necessarily negligence. “Generally, in the absence of some unusual condition, the employment of a step by the owner of a building because of a difference between levels is not a violation of any duty to invitees.” Reese v. Piedmont, Inc., 240 N.C. 391, 395, 82 S.E. 2d 365 (1954) (step was 7 3/4 inches high).

Where the lighting at the entrance is dim, however, and the visitor must step down from the basement floor to the coffee shop, and there is no warning, the defendant is negligent.

In general, however, where the condition is obvious, the defendant is not liable.

#### 4. Significance of Building Code.

In some cases, the plaintiff will allege that the defendant’s premises were in violation of the North Carolina Building Code. The basic law in North Carolina is that a violation of the Building Code (by a person charged with compliance with the Code) is negligence *per se*, if the defendant knew or should have known of the violation. This theory of recovery therefore raises several sub-issues.

The first issue is whether the structure in fact violates the Building Code. It is important to note that the applicable Building Code may not be the current Building Code, but rather is often a former version of the Building Code. The basic rule is that an older building is “grandfathered,” and does not have to continually comply with the current Code. When, however, substantial renovations are made, the owner may be required to essentially upgrade to comply with the current Code. Determining the applicable Building Code and interpreting the Code can be extremely complex, often requiring the use of an expert.

If there is a violation of the Building Code, then the next issue is whether the defendant is charged with compliance with the Code. The North Carolina Building Code is ambiguous as to those persons to whom it applies. We tend to believe that the Building Code applies to, and imposes a duty upon, the owner of the property at the time of construction, as well as the general contractor and any subcontractors working on the construction. It may also apply to a subsequent owner. It is less clear whether the Building Code applies, for example, to a lessee of real property, so as to impose liability on the lessee for a violation of the Building Code.

Assuming that the building violates the Code and that the Code imposes a duty on the defendant (to comply with the Code), then the final issue is whether the defendant knew or should have known of the violation. "A building's owner may not be found negligent *per se* for a Code violation 'unless: (1) the owner knew or should have known of the Code violation; (2) the owner failed to take reasonable steps to remedy the violation; and (3) the violation proximately caused injury or damage.'" Oglesby v. S.E. Nichols, Inc., 101 N.C. App. 676, 679 (1991).

It appears to be difficult to prove that the owner should have known of the defect. In Lamm v. Bisette Realty, Inc., 327 N.C. 412 (1990), the plaintiff fell down exterior stairs and sued the owner of the property and the property management company. She fell on the last step, which had a deeper (i.e. lower) riser than the previous steps. The lower court had ruled that the stairs violated the North Carolina Building Code and that this constituted negligence *per se* against the defendants. The Supreme Court rejected this argument, because "plaintiff has not shown that defendants are negligent *per se* for a violation of the Code because plaintiff made no showing that either the Wetheringtons, who are the second owners of the building, or Bisette [manager] knew or should have known of the violation of the Code." Lamm, 327 N.C. at 415. See also Sink v. Andrews, 81 N.C. App. 594, 344 S.E. 2d 831 (1986) (plaintiff who was injured in house fire sued former owners of house; owners presented evidence that wiring had passed inspection by city inspectors, and that they had no previous electrical problems; even though owner observed the wiring when he installed paneling in the house, he knew nothing about electrical wiring and assumed the wiring to have been installed properly because, *inter alia*, it had been inspected; plaintiff's "evidence falls short of that required to present a genuine issue of fact as to defendants' knowledge or reason to know of the alleged hazardous condition.").

The cases do not clearly establish whether the owner must be aware of the particular Building Code requirements, or merely aware of the conditions which violate the Building Code. This theory of recovery against the defendant (or this defense alleged against the plaintiff) continues to present difficult issues under North Carolina law.

## 5. Lighting in General

Some of the previous sections address the lighting of a step. Other cases generally recognize that a landowner may have a duty to provide lighting where guests are expected to walk.

Where a power outage causes the absence of lighting, the defendant is not liable.

Where there is a reason for having the area dark, such as at a dance hall, then the defendant is not required to add more lighting.

#### 6. Rugs and Carpets.

Many cases involves a person who slips or trips on a rug or carpet. The cases general hold that a carpet, even on a slick floor, is not negligence.

The mere presence of a rug at the entrance of the defendant's store did not constitute actionable negligence. Where a rug is blown ten feet and trips the plaintiff, the defendant is not liable.

Where the plaintiff has equal knowledge of the presence of the rug, then the defendant is not negligent.

“The fact that a floor is waxed does not constitute evidence of negligence.” Murrell v. Handley, 245 N.C. 559, 562 (1957). See also Hedrick v. Tigniere, 267 N.C. 62, 67 (1966) (“Neither is it negligence per se to wax and polish a dance floor.”; minor at dance studio did “pique” turn on waxed floor at dance studio).

#### 7. Condition of Sidewalk

Many cases recognize that "slight depressions, unevenness and irregularities in outdoor walkways, sidewalks and streets are so common that their presence is to be anticipated by prudent persons." Evans v. Batten, 262 N.C. 601, 602, 138 S.E.2d 213, 214 (1964). Our Supreme Court faced a sidewalk case and wrote:

Both the defendant and the Court of Appeals cite to several cases from the large body of North Carolina cases in which plaintiffs who tripped and fell on sidewalks failed to recover either because the existence of a defect in the sidewalk did not amount to negligence by the defendant, or because the plaintiff was contributorily negligent in not seeing or avoiding an obvious hazard, or both. See, e.g., Evans v. Batten, 262 N.C. 601, 138 S.E.2d 213 (1964) (trip and fall over slight fault in wet sidewalk on clear day; plaintiff should have anticipated fault); Falatovitch v. Clinton, 259 N.C. 58, 129 S.E.2d 598 (1963) (per curiam) (plaintiff tripped over minor defect in sidewalk on clear day; no breach of duty by the defendant); Murchinson v. Apartments, 245 N.C. 72, 95 S.E.2d 133 (1956) (per curiam) (plaintiff

tripped at night over "step" where street and sidewalk join); Watkins v. Raleigh, 214 N.C. 644, 200 S.E. 424 (1939) (daytime trip and fall over fault in sidewalk, nearby trees cast shadows on sidewalk, but the plaintiff could have seen the fault had she looked; either the defendant breached no duty, or the plaintiff was contributorily negligent); Houston v. Monroe, 213 N.C. 788, 197 S.E. 571 (1938) (trip and fall at night over depression in crosswalk; either the defendant breached no duty, or the plaintiff was contributorily negligent). We do not find such cases to be controlling authority in the present case.

While we recognize that "slight depressions, unevenness and irregularities in outdoor walkways, sidewalks and streets are so common that their presence is to be anticipated by prudent persons," none of our prior cases - - singularly or in their totality -- establish a rule that a plaintiff can never state a valid case for recovery based upon tripping on a sidewalk. Viewed in sum, our prior cases merely establish that the facts must be viewed in their totality to determine if there are factors which make the existence of a defect in a sidewalk, in light of the surrounding conditions, a breach of the defendant's duty and less than "obvious" to the plaintiff. Such factors may include the nature of the defect in the sidewalk, the lighting at the time of the accident, and whether any other reasonably foreseeable conditions existed which might have distracted the attention of one walking on the sidewalk.

Pulley v. Rex Hosp., 326 N.C. 701, 706 (1990) ("There was evidence that where the two sections of the sidewalk joined, one section was as much as three inches higher than the abutting section. Other evidence tended to show that as a result of dim, dappled lighting, the plaintiff did not see the alleged three-inch rise in the sidewalk. From the forecast of evidence, we conclude that a reasonable juror might find that the plaintiff's attention was diverted from the uneven sidewalk by low-hanging tree branches, so that she did not see the rise in the sidewalk.").

An irregularity in the sidewalk of 1-2 inches is not negligence. Joyce v. City of High Point, 30 N.C. App. 346, 226 S.E.2d 856 (1976). A change in sidewalk elevation of approximately one inch is not negligence. Bagwell v. Brevard, 256 N.C. 465, 124 S.E.2d 129 (1962). An elevation difference of 1.6 inches is not negligence. Desmond v. City of Charlotte, 142 N.C. App. 590 (2001).

Where a hole in a walkway is covered by leaves, it may be actionable. McIntosh v. Carefree Carolina Communities, Inc., 328 N.C. 87, 399 S.E.2d 114, (1991) (affirming dissent at 98 N.C. App. 653, 655 (1990), which held that plaintiff's case proceeds where he slipped and fell on flagstone walkway, some of which were broken and created a hole one to three inches deep and eight to twelve inches wide, and hole was partially covered by fallen leaves) .

The duty of a municipality over the sidewalks has been described as follows:

The law imposes upon the governing authorities of a city or town the duty of exercising ordinary care to maintain its streets and sidewalks in a condition reasonably safe for those who may have occasion to use them in a proper manner. Such authorities are liable only for a negligent breach of duty, and for this reason it is necessary for a complaining party to show more than the existence of a defect and the occurrence of an injury; he must show that the officers of the city knew, or by ordinary diligence, might have known of the defect. But actual notice is not required. Notice of a dangerous condition in a street may be implied, and indeed will be imputed to the city or town if its officers should have discovered it in the exercise of due care.

*Markham v. Duke Land & Imp. Co.*, 201 N.C. 117, 120 (1931) (“there is evidence tending to disclose a dangerous condition which had existed for a week or more in the sidewalk, while it was in constant use by the public. This of itself is sufficient to bar the nonsuit; but there is evidence, also, that the city manager had knowledge of the defect.”).

Where the defect in the sidewalk occurs over a period of time, the plaintiff must show that the landowner (or other person with a duty to maintain the sidewalk) had notice of the condition. *Sowers v. Forsyth Warehouse Co.*, 256 N.C. 190, 194 (1962) (“the evidence, when considered in the light most favorable to plaintiff, was sufficient to support a finding that the hole in the sidewalk exposing the metal cover of the culvert had existed for such length of time as to give notice of the defective condition of the sidewalk to a person charged with the legal duty of exercising due care to maintain the sidewalk in a reasonably safe condition.”).

#### 8. Objects (Movable)

Some cases involve a movable object on the defendant’s property. In such a case, the plaintiff must show that the defendant created or knew of the presence of the object.

For example, where the plaintiff collided with a stock cart, but there was no evidence regarding who left the stock cart in that position or when it was placed there, or how long it remained there, the plaintiff’s case failed. *Herring v. Food Lion, LLC*, 175 N.C. App. 22 (2005) (“When I took a step, I hit the edge of the [stock cart] . . . which I did not see. I hit the edge of it and I started to fall . . .”; store’s evidence “tended to show that vendors, such as Pepsi, Coca-Cola, and Frito Lay, are permitted to use stock carts owned by defendant. Based on plaintiff’s evidence, the jury could only speculate who left the stock cart in a position causing plaintiff to fall, whether it be an employee, a vendor, or another customer, and how long it remained there.”). *See also Revis v. Orr*, 234 N.C. 158 (1951) (invitee tripped over chair in dance hall; there was no evidence indicating who turned the chair over or how long it had been there before the invitee struck it).

Where the defendant-store places a display in its store, it may be negligent if the display presents a hazard. For example, a plaintiff who tripped over a pallet at the end of an aisle had a claim against a paint store. Norwood v. Sherwin-Williams Co., 303 N.C. 462 (1981) (plaintiff tripped over corner of pallet that protruded into the aisle; corner extended six inches into aisle, and display on platform drew patrons' attention away from floor; edges of the platform were not painted and were not readily distinguishable from the color of the floor, and lighting was poor).

Bags of dog food which protrude into the aisle may be negligent. Kremer v. Food Lion, Inc., 102 N.C. App. 291 (1991) (also noting that "Plaintiff testified that the store manager reprimanded the stock boy upon discovering the bags in that location, saying, "You don't leave anything in an aisle protruding the way that was. That's not the way we put up a display. Get those damn bags out of here." Plaintiff also testified that the stock boy failed to deny responsibility. This evidence was sufficient to take the issue of defendant's negligence to the jury.").

#### 9. Ice on Ground or Sidewalks

Many cases address a plaintiff who slips on ice. Where the pedestrian has equal knowledge of the ice, the landowner does not have a duty to remove it. Grayson v. High Point Dev. L.P., 175 N.C. App. 786 (2006) (pedestrian was returning to vehicle in parking lot on owner's property when she slipped on ice; pedestrian's own testimony demonstrated that she knew of the hazardous condition of the parking lot; "In spite of the darkness, plaintiff was able to see that the parking lot was covered with ice as the lights in the parking lot were shining on the ice. Plaintiff testified that the condition of the parking lot was worse than when she went into work and she knew that the ice would be slippery and took short steps to keep from falling. Plaintiff even commented to two co-workers who were walking with her that "somebody's going to get killed out here" as she stepped onto the ice in the parking lot. Plaintiff slipped on the ice and fell almost immediately after making that comment."; "Plaintiff'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."). Accord Southerland v. Kapp, 59 N.C. App. 94; 295 S.E.2d 602 (1982) (landowners committed no breach of duty of care owed to the invitee where the fact that steps and patio were icy was obvious to invitee); Wrenn v. Hillcrest Convalescent Home, Inc., 270 N.C. 447, 449 (1967) (plaintiff fell on walkway; "There is plenary evidence that plaintiff had full knowledge of the freezing and icy condition of the area. The danger created by this condition was obvious, and plaintiff's evidence presents no facts from which it can be inferred that defendant had more knowledge than plaintiff of the alleged dangerous or unsafe condition. Thus, considering all of the evidence in the light most favorable to plaintiff, which we must do on motion to nonsuit, we hold that the evidence shows no actionable negligence on the part of defendant.").

One case, in the context of landlord-tenant, allowed the claim for slipping on ice to proceed. Lenz v. Ridgewood Associates, 55 N.C. App. 115, 121 (1981) ("At the place on defendants' sidewalk where plaintiff fell, there was ice which had formed during a

previous ice storm a month before, and newer, "slicker" ice which had accumulated during the day and night of 19 January.”; “plaintiff was defendants' tenant; that defendants allowed a natural accumulation of ice to remain on the common areas of their premises devoted to plaintiff's use; that such accumulation of ice was an unsafe condition; that defendants knew or in the exercise of ordinary care should have known of the presence of the ice; that defendants failed to exercise ordinary care to remove the unsafe condition; and that such failure was the proximate cause of plaintiff's injury”; case subject to Residential Rental Act, but court also noting common law duty; landlord has duty “to safely maintain those portions of rental property over which he maintains control, including so-called "common areas", such as hallways, steps, and sidewalks.”).

#### 10. Assaults.

Some cases involve an assault on the premises by a third person (i.e. other than the defendant). There are many cases in which the plaintiff visits a mall or store or motel or convenience store and is assaulted by a third person. Under the historic common law rule, the intentional acts of a third person would break the chain of causation. The modern cases, however, hold that a criminal assault may be foreseeable, depending primarily upon the history of criminal activity in the area. The primary case addressing this issue in North Carolina is Foster v. Winston-Salem Joint Venture, 303 N.C. 636 (1981). That case held as follows:

Ordinarily 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. Nevertheless, the Court recognized in these cases that where circumstances existed which gave the owner reason to know that there was a likelihood of conduct on the part of third persons which endangered the safety of his invitees, a duty to protect or warn the invitees could be imposed.

...

Thus, under both the Restatement (Second) of Torts and the prior decisions of this Court, foreseeability is the test in determining the extent of a landowner's duty to safeguard his business invitees from the criminal acts of third persons. If an invitee, such as the plaintiff in this case, alleges in a complaint that he or she was on the premises of a store owner, during business hours for the purpose of transacting business thereon, and that while he or she was on the premises injuries were sustained from the criminal acts of a third person, which acts were reasonably foreseeable by the store owner, and which could have been prevented by the exercise of ordinary care, then the plaintiff has set forth a cause of action in

negligence which, if proved, would entitle that plaintiff to recover damages from the store owner.

Foster v. Winston-Salem Joint Venture, 303 N.C. 636, 639 (1981).

The primary issue in each of these cases is whether the history of criminal activity at the location is sufficient to impose a duty on the landowner. The following is a list of fact patterns in which the court held that the history of criminal activity was insufficient:

- Plaintiff was shot during robbery at convenience store; history of crime was too scattered; two of defendant's stores had been robbed, most convenience stores in area have been robbed, police officer testified to eight robberies in past (three at convenience stores), another officer testified to 20 robberies at convenience-type stores in past, particular store had one prior armed robbery five years earlier; court noting that the most probative evidence pertains to crime at particular location, but court will look to crime in the general area; "We doubt there exists a community in this State which is entirely crime-free. In the broadest sense, all crimes anywhere are 'foreseeable.'"
- An apartment tenant sued her landlord as the result of personal injuries suffered during a sexual assault at gunpoint in the complex parking lot; evidence of crimes committed at the same complex wherein a passkey was used to break into apartments was held inadmissible because the burglaries "had nothing to do with this attack in the parking lot."
- A student was assaulted after teacher left room; evidence that the students were throwing an eraser the day before the incident and had been throwing oranges in the hall a few weeks before the incident was insufficient to charge the teacher with the requisite knowledge that the students might harm each other in her absence.

The following fact patterns have been held to constitute a sufficient history of criminal activity to impose a duty:

- Evidence of one-hundred incidents of criminal activity in five years at intersection where defendant motel was located held sufficient.
- Evidence of forty-two episodes of criminal activity taking place on motel premises during three-year period prior to plaintiff's injury, twelve in the three and a half month period immediately prior to incident, raised triable issue of reasonable foreseeability.
- Plaintiff was shot in convenience store parking lot after trying to flee from armed robber; expert testified that there were twenty-four criminal incidents at the store and the intersection wherein it was located, including seven

violent crimes; defendant agreed that forecast showed four assaults and two armed robberies over a three year period; “We agree that property crimes committed on defendant's property, such as shoplifting and "gas driveoffs", do not likely establish the foreseeability necessary to create a duty in this case.”

- Plaintiff was assaulted in her hotel room and recovered verdict against motel; one hundred incidents of criminal activity at the I-95 and Highway 70 intersection near defendant’s motel had been reported to the sheriff's department from 1978 to June 1982; these reported incidents included five armed robberies at a motel next to the defendants' motel, one kidnapping, three assaults, one vehicle theft, and sixty-three breaking and enterings and larcenies; several people testified that was a high-crime area; at defendant’s motel, crimes occurred consisting of damage to private property, larceny and vehicle theft.
- Crimes occurring 20 miles away are too remote; 160 incidents of criminal activity at intersection in preceding five years, including activity ranging from minor to serious; instances of “public drunkenness, shoplifting, vandalism and disorderly conduct” do not establish foreseeability; but two armed robberies, eleven assaults (three with intent to kill), five instances of breaking and entering, thirty-six instances of breaking and entering and larceny, forty-three larcenies, one attempted larceny, and two instances of pointing a firearm are relevant; at intersection in last five years, 100 instances of criminal activity bearing on the issue of foreseeability occurred.

The cases also require that the defendant be aware of this history of crime, but they will easily infer that a property owner should have known of crime in the area, even occurring off its property. “Establishing a duty on the claim of negligence here is contingent upon notice to the proprietor of that criminal activity, which notice may be either actual or constructive.” Connelly v. Family Inns of Am., Inc., 141 N.C. App. 583, 585-591 (2000) (“it is reasonable to infer that if criminal incidents occurred so close to defendants' motel, the defendants were or should have been aware of those facts which should have prompted them to take adequate safety measures”).

Even if the history of criminal conduct is sufficient, the plaintiff must prove that the defendant could have prevented the assault. This raises issues of “but for” causation and proximate causation. Liller v. Quick Stop Food Mart, Inc., 131 N.C. App. 619, 620-626 (1998) (“the forecast of evidence failed to show how the foregoing actions, or any other measures, would have prevented plaintiff's assault”).

In most cases, the allegation of negligence against the defendant is that it should have installed additional lighting, hired security, or installed security cameras. Other cases involve unique fact patterns; for example, a motel may be sued for failing to change

its locks periodically, or upon notice of a particular risk. The plaintiff generally faces a heavy burden of proving that the assault upon him would not have occurred if the defendant had taken reasonable action.

In addition to taking precautions prior to a crime, the landowner has some right to remove an offending person on the property.

In addition to establishing “but for” causation, the plaintiff must establish a proximate causation. In most cases, the issue of proximate cause raises again the issue of the history of criminal activity in the area. The courts tend to say that the defendant’s negligence is the proximate cause of the plaintiff’s injuries (incurred in an assault) if the injuries were foreseeable. The foreseeability issue again turns on the issue of the history of crime in the area. This issue of proximate cause is therefore often similar to the initial issue regarding the existence of a duty.

#### 11. Condition of Ground and Real Property

In some cases, the plaintiff alleges that the condition of the ground is defective. The landowner’s liability extends to “natural conditions.” Williams v. McSwain, 248 N.C. 13, 18 (1958) (citing Restatement).

Our courts have held that the presence of wet leaves, which are slippery, is not a defective condition. The presence of a root, which causes a child to fall, is not a defect. A bumpy field which causes a softball to bounce and strike a minor plaintiff is not negligence.

There is also a small body of cases addressing the liability of a landowner if his tree falls on a person or an adjoining landowner. The general rule is that the defendant is not strictly liable for such injuries. The plaintiff must show that the defendant knew or should have known of the dangerous condition of the tree. This typically requires proof that the tree was rotten or old or broken.

Where the landowner is not aware that his tree is unhealthy or may fall onto a roadway, he is not liable to a motorist who is injured by the fallen tree. The liability of a landowner for a falling tree is based on ordinary negligence principles, and the defendant is liable if it knew of the danger.

#### 12. Pools

A homeowner does not have to post a lifeguard at a pool.

Some cases reject claims against the owner of a pool on the basis that the plaintiff cannot establish causation. E.g., the plaintiff cannot prove that additional safety precautions would have prevented the drowning.

Where the defendant knows that children may go to the pool, he must exercise care to protect them from.

A person has the right to maintain even an unenclosed pond or pool on his premises, and it is not negligence per se to do so. "When, however, he exercises this right and children of tender years are attracted thereto and it becomes a common resort of persons of tender years to which they go to play, and it appears that the owner knows or by the exercise of ordinary care should know that it is being so used, then it becomes his duty to exercise ordinary care to provide reasonably adequate protection against injury. Failure so to do constitutes an act of negligence.

Matheny v. Stonecutter Mills Corp., 249 N.C. 575, 578 (1959) (defendant erected metal fence of "small mesh, topped by three strands of barbed wire -- in all seven feet high, " "There was no gate. The fence was kept in good condition. It was difficult to furrow under and to climb over." "There were no windows in defendant's buildings facing the reservoir. The office was some distance away."; defendant did not have duty to place watchman at reservoir).

### 13. Negligence by third-persons on land

The landowner is generally not liable for injuries on the land caused by the negligence of other persons on the land. "Where the danger on land is not hidden but arises out of the negligent or intentional act of a third person, the owner or occupier will not be held liable for negligence if he did not know of the danger and it had not existed long enough for him to have discovered it, corrected it or warned against it." Blevins v. Taylor, 103 N.C. App. 346, 349 (1991) (addressing injury occurring off property).

For example, where the plaintiff was injured at the sports arena by children who were playing with a hockey puck, the proprietor was not liable where it did not know of the activity, and the activity had not existed long enough for the proprietor to have discovered it by the exercise of due diligence and to have removed it or warned against it.

As shown in subsection III.10., the landowner may be liable for an assault by a third-person if the assault is foreseeable.

### 14. Entertainment Places

It is not clear whether a landowner who hosts an entertainment event owes the invitees an elevated duty.

"The owner of a place of entertainment is charged with an affirmative, positive obligation to know that the premises are safe for the public use, and to furnish adequate appliances for the prevention of injuries which might be anticipated from the nature of the performance, and he impliedly

warrants the premises to be reasonably safe for the purpose for which they are designed." He is not an insurer of the safety of those attending the exhibition, but he must use care and diligence to prevent injury, and by policemen or other guards warn the public against dangers that can reasonably be foreseen.

Smith v. Cumberland County Agri. Soc., 163 N.C. 346, 350 (1913) ("plaintiff went to fair, and was caught in ropes attached to balloon which pulled him into air, causing him injury"; case goes to jury).

The owner may also be liable for the negligence of an independent contractor. "[T]he owner "is not exonerated because the exhibition where the injury was received was provided and conducted by an independent contractor.'" Smith v. Cumberland County Agri. Soc., 163 N.C. 346, 350 (1913).

The owner must, however, have notice of the hazard to be liable.

#### 15. Miscellaneous

A lamp plug may be a hazardous condition giving rise to liability. One plaintiff has argued that a person was a dangerous condition on the land, but the court did not squarely address this issue.

### IV. CONTRIBUTORY NEGLIGENCE

As with any negligence claim in North Carolina, the plaintiff's contributory negligence will completely bar his claim, i.e. if the plaintiff was negligent in any way that contributed to his injuries, then he makes no recovery under North Carolina law. This rule is especially applicable to most premises liability cases.

In those cases where the plaintiff is a pedestrian, he has a duty to keep a reasonable lookout. If he is aware of the hazard and voluntarily walks or enters upon it, then he is contributorily negligent. Similarly, if the plaintiff should be aware of the risk, then he is also contributorily negligent. Where the plaintiff was looking for her car in a lot and fell in an indentation, she was contributorily negligent.

Our Court of Appeals briefly held that a pedestrian has a duty to look at the ground in front of him where he is walking. Our Supreme Court, however, reversed this, and held that the pedestrian only has a duty of keeping a reasonable lookout. 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." Norwood v. Sherwin-Williams Co., 303 N.C. 462, 468, 279 S.E.2d 559, 563 (1981) (reinstating

verdict for plaintiff). The inference is therefore that a pedestrian need not always specifically look at the ground directly in front of him.

Plaintiffs who trip on cracks and stumble over fixed objects and who slip on slick places may be found to be contributorily negligent. Many cases hold that contributory negligence is generally an issue for the jury to decide. Newton v. New Hanover County Bd. of Educ., 114 N.C. App. 719, 725 (1994) (plaintiff fell on narrow stairs; "Once plaintiff was at the top of the stairs, he had no choice but to come down. Plaintiff testified that he made a conscious effort to use care as he descended the stairs. The determination of whether plaintiff exercised the care of an ordinary prudent person under all the attendant circumstances was a determination properly before the jury, and the jury's finding that plaintiff was not contributorily negligent was supported by the evidence at trial. Thus, the trial court erred in holding that plaintiff was contributorily negligent as a matter of law."); Williams v. Walnut Creek Amphitheater Ptnr., 121 N.C. App. 649, 652 (1996) ("Whether plaintiff should have recognized the danger of walking along the crest of the hill and chosen an exit alternative, that may or may not have been safer under the circumstances, or waited in line behind the crowd is a question of fact for the jury.").

Where the plaintiff knew that the premises were dangerous, then she may be contributorily negligent as a matter of law. Where the plaintiff has a greater awareness of the danger than the defendant, he is contributorily negligent. Where, however, the plaintiff is aware that steps are dark, but is not aware that the steps are dangerous, he is not necessarily negligent.

Where the plaintiff saw the object which caused her to fall, she is contributorily negligent. Even if the plaintiff has been aware of the defective condition for months, and claims to be distracted at the time of her injury, she may be contributorily negligent as a matter of law.

Where the plaintiff walks upon an obvious condition, she is negligent.

Where the plaintiff enters a bright room from a dark area, she is also given more leeway. A plaintiff who thought that a curb went to the street, but instead went into a pit, was not contributorily negligent as a matter of law. \_

Several cases recognize that "If two ways are open to a person to use, one safe and the other dangerous, the choice of the dangerous way, with knowledge of the danger, constitutes contributory negligence." Dunnevant v. R.R., 167 N.C. 232, 83 S.E. 347 (1914). In Dunbar v. City of Lumberton, 105 N.C. App. 701, 414 S.E.2d 387 (1992), the Court stated:

It is a basic legal tenet that the law imposes upon a person the duty to use due care to protect himself or herself from injury, and the degree of care should be commensurate with the danger to be avoided. Furthermore, it is

well-settled that a person is contributorily negligent if he or she knows of a dangerous condition and voluntarily goes into a place of danger.

Id. at 703, 414 S.E.2d at 388 (citations omitted) (affirming summary judgment where “Plaintiff, while carrying a ten-pound bag of clothing, tried to maneuver her way through several large limbs and branches which had been left on her lawn,” even though plaintiff had safer routes to her car).

Many cases note that where the defendant has distracted the plaintiff (or diverted his attention), this militates against a finding of contributory negligence. For example, in Norwood v. Sherwin-Williams Co., 303 N.C. 462, 468 (1981), the Court wrote:

Plaintiff gave evidence that the extension of the platform into the aisle was not obvious due to poor lighting and lack of contrast between the platform and the floor. Although defendant offered contradictory evidence, plaintiff's evidence is sufficient to permit the inference that the corner of the pallet would not have been obvious to one exercising ordinary care. Additionally, there is evidence that the display and the placing of the impulse items were intended to attract and keep the customer's attention at eye level. When a merchant entices a customer's eyes away from a hazardous condition, we do not think he should be heard to complain when his efforts succeed.

In another case, the plaintiff asked a cashier at the drugstore to help her locate an item, and she “noticed advertisements hanging from the ceiling. Paying attention to the cashier's directions, the plaintiff turned and began walking. The box over which she fell was so close to her that she had barely taken two steps before tripping over it.” The court held that a jury must decide her contributory negligence. Price v. Jack Eckerd Corp., 100 N.C. App. 732 (1990). See also Kremer v. Food Lion, Inc., 102 N.C. App. 291 (1991) (plaintiff tripped on bag of dog food protruding into aisle; her attention was distracted by a display above her head).

Even a distraction from a third person (i.e. not the defendant-store) may excuse the plaintiff's failure to avoid a hazard – even a known hazard. For example, where the plaintiff was riding on a truck carrying hay and was aware of a wire hanging on the property, and he had known about the wire for ten weeks, and “When he was within ten feet of the power line, a workman called to him from the church steeple: “Hello, Old Man Teeman”,” and “Instinctively, he looked in that direction and answered: “Good morning, son.”,” “the momentary and involuntary diversion of plaintiff's attention was properly considered by the jury, in conjunction with all other circumstances, in resolving the issue of plaintiff's alleged contributory negligence.” Dennis v. Albemarle, 243 N.C. 263 (1955).

Where the plaintiff is aware of the hazard and is distracted by speaking with another customer, however, she may be negligent as a matter of law.

Our Court of Appeals recently held that a plaintiff who walks across pine needles, as opposed to a paved walkway, and trips on a divider which is buried by the pine needles may be contributorily negligent.

## V. STATUTE OF LIMITATIONS AND REPOSE

A premises liability claim may be subject to a statute of limitations and a statute of repose.

### A. Statute of Limitations.

An action for negligence has a three year statute of limitations. The statute of limitations generally begins to accrue (i.e. begin) from the date of the breach or the date of the negligent act. Where 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.” G.S. § 1-50(a)(5)f. Most of the cases addressing this provision involve only property damage.

Where, for example, the plaintiff had only a suspicion that their well water was contaminated, their statute of limitations did not run on their claim against a party who contaminated the water until they were officially notified of the problem.” Wilson v. McLeod Oil Co., 327 N.C. 491, 512 (1990).

In the case of a trespass to property, where the owner is aware of the trespass more than three years before suit is filed, he can recover for those injuries within three years before the filing of the suit, but not for those occurring before that.

### B. Statute of Repose.

In actions “arising from damage to real property,” there is a six-year statute of repose. If the claim is not brought within this period, then it is barred in its entirety. G.S. § 1-50(a)(5)a. states, “No action to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property shall be brought more than six years from the later of the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement.”

Where the lawsuit is not filed within six years, the claim is barred.

There is, however, a “control exception.” G.S. § 1-50(a)(5)d. states:

The limitation prescribed by this subdivision shall not be asserted as a defense by any person in actual possession or control, as owner, tenant or otherwise, of the improvement at the time the defective or unsafe condition constitutes the proximate cause of the injury or death for which it is proposed to bring an action, in the event such person in actual possession or control either knew, or ought reasonably to have known, of the defective or unsafe condition.

The “control exception” applies only if the defendant (the defendant raising the repose defense) was in control of the improvement at the time of the injury.

Where the defendant was in control of the property at the time of the injury, the control exception prevents him from raising the statute of repose. Wilson v. McLeod Oil Co., Inc., 398 S.E.2d 586, 327 N.C. 491, reh’g denied, 402 S.E.2d 844, 328 N.C. 336 (1990) (action against landowners for leaking gas tanks not barred by statute of repose where tanks were on land when landowner purchased land, even though tanks were installed years earlier; summary judgment for defendant reversed).