

# NORTH CAROLINA DAMAGES

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This article addresses the "damages" that are available in North Carolina. This article does not address evaluating a particular element of damage, but rather addresses whether a particular element of damage is recoverable as a matter of law.

#### I. GENERAL RULE AND CONSIDERATIONS.

In North Carolina, the General Rule for the measure of damages is that amount of money which will restore the plaintiff to the position that he would have been in, if the defendant had not wrongfully injured the plaintiff. The precise rules used by our courts to measure damages vary to some degree, depending on the nature of the offense. The General Rule stated above, however, generally applies, regardless of whether the plaintiff's claim sounds in tort or contract or otherwise.

Most of the damages issues which we face are decided upon legal principals which are articulated in appellate cases, and constitute the "common law." Two of the more common claims which we see in litigation are negligence ("tort") and contract. Both of these areas of law are generally governed by the common law, and therefore the damages available under these theories is governed also by "common law."

There are, however, various statutes enacted by the Legislature which determined the measure of damages. For example, in a case governed by the Uniform Commercial Code (UCC), then the damages are specifically governed by the UCC. The

recovery of punitive damages is also now determined by statute. The recoverability of interest and "costs" is also governed by statute.

As stated in the first paragraph of this section, the general purpose of damages is to make the plaintiff "whole." Watson v. Dixon, 352 N.C. 343, 347 (2000) ("The objective of compensatory damages is to restore the plaintiff to his original condition or to make the plaintiff whole.") The cases struggle, however, to define the limits of this general principle.

This article primarily addresses compensatory damages, and to a lesser extent punitive damages. In addition, "nominal" damages may also be available. Robbins v. C. W. Myers Trading Post, Inc., 251 N.C. 663, 666 (1960) ("Where plaintiff proves breach of contract he is entitled at least to nominal damages."). Our courts have held that the plaintiff may recover punitive damages even if the jury awards neither compensatory nor nominal damages. Hawkins v. Hawkins, 101 N.C. App. 529, 533 (1991) ("We reject defendant's argument that plaintiff must have actually recovered at least nominal damages, through a jury award, to be entitled to punitive damages.").

In all cases, attention must be paid to the person actually sustaining the loss, because only this person may recover that element of damages. Thus, as noted in the section addressing the recovery of lost profits, where the plaintiff is employed by a corporation, and the corporation loses money as a result of the

inability of the plaintiff to work, then the corporation (or its shareholders) truly sustains the loss, and thus the plaintiff-employee not allowed to recover for his lost profit to the corporation. In a related vein, in a suit by a minor for personal injury, the claim for the medical expenses of the minor during the age of minority belong to the minor's parents. Ellington v. Bradford, 242 N.C. 159, 160 (1955) (parents recover "the loss of earnings of the child during its minority if unemancipated, and (2) expenses incurred for necessary medical treatment."). Thus, the parents are the "real party in interest" for the recovery of those past and future medical expenses. This can be very significant where the parent may have lost his claim for some reason. For example, where the parent is contributorily negligent (e.g., in supervision of the minor), or the parent has failed to file suit within the statute of limitations, then the claim for the recovery of medical expenses is barred, but the minor's claim for pain and suffering and medical expenses following the age of minority are still recoverable.

Similarly, a tenant may not recover for damage to the leased property; only the owner can sue for such a loss. "The possession of real property is not a sufficient interest upon which to base a recovery for permanent damages to the freehold -- the ownership interest." Woodard v. Marshall, 14 N.C. App. 67, 69, 187 S.E.2d 430, 431 (1972) (reversing judgment for plaintiff for damage to real property where plaintiff did not prove title

to property; "In order to sustain an action for permanent damages to the freehold, or to the ownership interest, such as an action for unlawful cutting of timber, plaintiff must allege and show that he is the owner of the land from which the timber was cut.").

## II. DAMAGES - PARTICULAR THEORIES OF RECOVERY.

As noted in the preceding section, the measure of damages is dependent upon the plaintiff's theory of recovery. This section addresses the most common theories we encounter in litigation in North Carolina.

### 1. Breach of Contract.

The recovery for a breach of contract is highly dependent on the particular contract at issue. The law generally recognizes actual and "consequential" damages.

#### a. General Measure of Actual Damages

The general rule is still that the plaintiff should be restored or placed in the position that he would have attained if the defendant had not breached the contract.

For a breach of contract the injured party is entitled as compensation therefor to be placed, insofar as this can be done by money, in the same position he would have occupied if the contract had been performed. The amount that would have been received if the contract had been kept and which will completely indemnify the injured party is the true measure of damages for the breach. Where one violates his contract he is liable for such damages, including gains prevented as well as losses sustained, which may fairly be supposed to have entered into the contemplation of the parties when they made the contract.

Perfecting Service Co. v. Product Development & Sales Co., 259 N.C. 400, 415 (1963).

Different fact patterns present different measures, but this is the basic rule. In cases involving the failure to deliver a product or land, the general measure of damages is the fair market value of the item compared with the price in the contract. Rose v. Vulcan Materials Co., 282 N.C. 643, 668 (1973) ("The measure of damages for breach of a contract of sale is generally the difference between the contract price and the market price of the goods at the time and place performance is due.").

Where performance of the contract would have required the plaintiff to incur expenses, then the plaintiff's damages are to be reduced by those expenditures. Gore v. George J. Ball, Inc., 279 N.C. 192, 211 (1971) ("the measure of damages for the breach of contract is the value of the crop which the jury so finds would have been raised had the seed been of the Heinz 1350 variety, less the value of the crops actually raised upon these six acres and less any additional expense of cultivation, harvesting and marketing which the plaintiff would have had to incur had he produced and marketed a crop upon the third of the two-acre tracts."); Durham Constr. Co. v. Wright, 189 N.C. 456 (1925) (approving jury instruction that "the rule of damages under the third issue, briefly stated, would be the net profit, if any, the plaintiff construction company would have made if it had been permitted to carry out its alleged contract," and "The

court then follows this with an explanation as to the method of finding the cost and computing thereon 7% of the total cost [which was the contract price], and of deducting therefrom the expenses the plaintiff would have incurred in performing the contract, on its part.”; reversing because contractor is required to mitigate its damages). But see Arnold v. Ray Charles Enterprises, Inc., 264 N.C. 92, 99 (1965) (where Ray Charles breached contract to put on concert, and lower court awarded damages in the amount that promoter would have received from concert, and court noted that “the injured party is entitled . . . to be placed, insofar as this can be done by money, in the same position he would have occupied if the contract had been performed,” and Charles argued that award should be modified “by deducting plaintiff's expected expenses,” this argument was rejected because “the amounts which plaintiff expended or agreed to expend, in promoting, advertising, and preparing for the concert are of no concern to defendants”).

Some cases recognize the “benefit of the bargain.” First Union Nat'l Bank v. Naylor, 102 N.C. App. 719, 725 (1991) (“For a breach of contract the injured party is entitled as compensation therefor to be placed, insofar as this can be done by money, in the same position he would have occupied if the contract had been performed.” The interest being protected by this general rule is the non-breaching party's “expectation interest,” and in so

doing, the injured party receives the "benefit of the bargain."").

In an action for breach of contract arising from defective construction, the general rule is that the damages are measured by the cost of conforming the property to the contract specifications. "[W]here the defects are such that they may be remedied without the destruction of any substantial part of the benefit which the owner's property has received by reason of the contractor's work, the equivalent to which the owner is entitled is the cost of making the work conform to the contract. But where, in order to conform the work to the contract requirements, a substantial part of what has been done must be undone, and the contractor has acted in good faith, or the owner has taken possession, the latter is not permitted to recover the cost of making the change, but may recover the difference in value." Robbins v. C. W. Myers Trading Post, Inc., 251 N.C. 663, 666 (1960). Accord Kenney v. Medlin Constr. & Realty Co., 68 N.C. App. 339, 345 (1984) ("While the diminution in value method can avoid economic waste, when the cost of repair does not involve an imprudent expense, the cost of repair method may best ensure the injured party of receiving the benefit of his or her bargain, even if repair would involve destroying work already completed. When defects or omissions in construction are so major that the building does not substantially conform to the contract, then the decreased value of the building constructed justifies the high

cost of repair.”; allowing cost of repair for breach of implied warranty).

Parties are generally free to specify the damages in the contract. Knutton v. Cofield, 273 N.C. 355, 362 (1968) (“While early opinions tended to regard stipulations in contracts purporting to fix sums to be paid in the event of breach as penalties rather than as liquidated damages, and courts were slow to enforce stipulated sums, “it is doubtful that there is any longer sufficient authority to support a rule that the courts tend to regard such provisions as penalties. In fact, some courts have given expression to the opposite rule and have said that the modern tendency is to look upon stipulated sums with candor, if not with favor.”).

b. Consequential Damages.

In some situations, the plaintiff argues that the measure of damages discussed in the preceding section is insufficient to make him “whole,” i.e., simply providing the plaintiff with the difference in value between the goods as agreed and the goods or services as delivered, would still leave the plaintiff with some “consequential” loss.

In the classic example, Hadley v. Baxendale, the plaintiff claims that he suffered some consequential business or economic harm as a result of the breach. In the seminal case addressing this issue, the plaintiff hired the defendant to deliver a crankshaft to its mill. The defendant failed to deliver the part

in the time specified by the parties. The mill then sought to recover for the lost profits which arose from the days that the mill could not be operated. The English judge stated that the rule is that the plaintiff can recover such consequential damages if they were "in the contemplation of the parties." In that case, the court held that the defendant was not on notice of the potential for loss to the plaintiff's mill, and therefore that the defendant was not liable for the plaintiff's lost profits.

Whether the defendant is on notice of the plaintiff's peculiar loss is highly relevant in determining whether the consequential damages are recoverable. Keels v. Turner, 45 N.C. App. 213, 220 (1980) (where plaintiff-homebuyer had one-time discount with his employer Lowe's, and plaintiff used his discount on this house and thus lost this discount, jury's award could include the loss of this discount; "Nonetheless, there is sufficient evidence in the instant case from which the jury could conclude that the cost of the building materials and the loss of the one-time right to a discount on building materials were foreseeable consequences of the breach. The trial court instructed the jury on the foreseeability requirement and the decision of the jury on this question is final."; "there is some testimony by Robert Keels from which the jury could conclude that Robert Keels explained to defendant Turner that this was a one-time employee benefit as long as Robert Keels worked at that Lowe's store").

Applying this rule, it is generally held that emotional damages are not foreseeable as a result of breach of contract. Stanback v. Stanback, 297 N.C. 181, 188 (1979) ("It is generally acknowledged that financial loss inflicted on an individual by breach of contract may often cause the party to suffer disappointment and mental anguish. Despite the probability of such mental anguish damages, recovery for them has been routinely denied in contract actions, generally on the stated grounds that mental anguish damages are too remote to have been in the contemplation of the parties to the contract."); The court held that the trial court properly dismissed the wife's claim for mental anguish consequential damages because the complaint failed to show that the agreement was one in which the benefits she contracted for were directly related to matters of mental concern and that it directly involved interests and emotions involving great probability of resulting mental anguish if not respected.).

The "contemplation of the parties" rule is, however, easier to state than it is to apply. As a general matter, it appears that the recovery of such consequential damages under a theory of breach of contract is more limited and narrow than under a claim for negligence. (The next section addresses the recovery of damages in an action for negligence. As elaborated upon in that section, the general limitation on such damages is only that they be "foreseeable.")

A personal injury resulting from a breach of contract is generally not foreseeable and not recoverable. Livingston v. Essex Inv. Co., 219 N.C. 416, 431 (1941) (“even where the lessor contracts to keep the premises in repair, the breach by the landlord of his contract will not ordinarily entitle the tenant, personally injured by a defect therein, existing because of the negligence of the landlord in failing to comply with his agreement to repair, to recover indemnity for such injuries, whether in contract or in tort, since such damages are too remote and cannot be said to be fairly within the contemplation of the parties”).

It has been held that increased interest expense may be in the contemplation of the parties. For example, where the defendant agreed to provide financing for a construction project, and then backed out, the developer who had to get a loan at a higher interest rate was entitled to damages based on the lowest prevailing rate for comparable long-term loans as compared with the contract interest rate. Pipkin v. Thomas & Hill, Inc., 298 N.C. 278, 285 (1979) (“Damages for breach of a contract to lend money are measured by the cost of obtaining the use of money during the agreed period of credit, less interest at the rate provided in the contract, plus compensation for other unavoidable harm that the defendant had reason to foresee when the contract was made.””).

## 2. Negligence

There are several elements of damage that a Plaintiff may recover in a negligence action.

a. General Measure of Damages.

In a tort or "negligence" action, the plaintiff generally seeks to be restored to his position prior to the accident. The cases hold that in a negligence action, the plaintiff is generally entitled to be made "whole." In general, the plaintiff in a personal injury action is entitled to recover those out-of-pocket expenses and losses which he incurs as a result of the defendant's negligence, and also the non-economic and hedonic damages of "pain and suffering," disability, scarring, etc.

These damages have been described as follows:

In cases of personal injuries resulting from defendant's negligence, the plaintiff is entitled to recover the present worth of all damages naturally and proximately resulting from defendant's tort. The plaintiff, *inter alia*, is to have a reasonable satisfaction for actual suffering, physical and mental, which are the immediate and necessary consequences of the injury. The award is to be made on the basis of a cash settlement of the plaintiff's injuries, past, present, and prospective. In assessing prospective damages, only the present cash value or present worth of such damages is to be awarded as the plaintiff is to be paid in advance for future losses

King v. Britt, 267 N.C. 594, 598 (1966). See also Rushing v. Seaboard A. L. R. Co., 149 N.C. 158, 163 (1908) ("The true rule is, that where the plaintiff has been injured by the negligent conduct of the defendant, he is entitled to recover damages for past and prospective loss, resulting from the defendant's wrongful and negligent act; and this may embrace indemnity for

actual expense incurred in nursing, medical attention, loss of time, loss from inability to perform mental or physical labor, and of capacity to earn money; and for actual suffering of body and mind, which are the immediate and necessary consequences of his injury."); Dickson v. Queen City Coach Co., 233 N.C. 167, 173 (1951) ("These are understood to embrace indemnity for actual nursing and medical expenses and loss of time, or loss from inability to perform ordinary labor, or capacity to earn money." ).

The damages may not be too "speculative." Oddo v. Presser, 158 N.C. App. 360, 367 (2003) (where plaintiff lost employment with Davidson College, which college provided tuition discount for children of employees, evidence that value to plaintiff was nearly \$300,000 was too speculative, where plaintiff's children were ten, seven, and three years of age). The issue of "remote" losses, which are not "foreseeable," is discussed further in section II.2.i.

#### b. Medical Expenses

The simplest of these damages are the medical expenses. Some case law suggests that the expenses are recoverable if they are "reasonable and necessary." Blackmon v. Bumgardner, 135 N.C. App. 125, 136 (1999) ("[T]o recover medical expenses plaintiff bears the ultimate burden of proving "both that the medical attention [plaintiff] received was reasonably necessary for proper treatment of [plaintiff's] injuries and that the charges

made were reasonable in amount." Put simply, an aggrieved party must satisfy a two-prong test - the claimed medical charges were (1) reasonably necessary, and (2) reasonable in amount."; "The medical expenses presumption does not, however, operate to preclude the jury from finding that [plaintiff's] medical expenses were not reasonably necessary for the proper treatment of his injuries."). Floyd v. McGill, 156 N.C. App. 29, 37 (2003) ("This testimony provided an evidentiary basis for Mrs. Floyd's past and anticipated future medical bills to permit the jury to decide the issue of damages. When considered in a light most favorable to the nonmoving party, there was sufficient evidence presented at trial to permit the jury to decide the issue of damages. The evidence was sufficient to allow the jury to decide the expenses were necessary and reasonable and that they resulted from defendants' negligence.").

The Pattern Jury Instruction simply requires that the bills be "bills reasonably paid or incurred."

These expenses include the expenses for treatment and diagnosis. It also includes any medical expense incurred as the result of the accident. For example, the hospitals often perform a pregnancy test on a female patient before taking x-rays of her or providing her with certain medications. Although the plaintiff's potential pregnancy is not the proximate result of the motor vehicle accident, these procedures are nevertheless reasonable by the hospital to ensure that the x-rays and

medications are safe to administer. "The plaintiff is entitled to recover for medical and hospital bills to the extent that they may or have been incurred as the proximate result of the injuries complained of." Blaine v. Lyle, 213 N.C. 529, 531 (1938) (malpractice plaintiff may not recover for medical expenses incurred prior to negligence).

Even if the treatment is not successful, the expense is recoverable. See Heath v. Kirkman, 240 N.C. 303, 310, 82 S.E.2d 104, 109 (1954) (Injuries resulting from delay in receiving proper medical treatment as well as injuries caused by unsuccessful medical treatment ordinarily tend to aggravate the damages for which the wrongdoer is responsible).

As a general matter, tests and procedures ordered by the doctors are compensable.

Our Legislature has enacted a statute which deems the medical bills to be presumptively reasonable, but this presumption is rebuttable. The statute states, "Whenever an issue of hospital, medical, dental, pharmaceutical, or funeral charges arises in any civil proceeding, the injured party or his guardian, administrator, or executor is competent to give evidence regarding the amount of such charges, provided that records or copies of such charges accompany such testimony. The testimony of such a person establishes a rebuttable presumption of the reasonableness of the amount of the charges." G.S. § 8-58.1.

In addition to past medical expenses, the plaintiff may also recover for the cost of future surgical and medical expenses.

"Damages for personal injuries, such as those complained of in this action, include actual expenses for nursing, medical services, loss of time and earning capacity, mental and physical pain and suffering." Taylor v. Boger, 289 N.C. 560 (1976). The scope of these medical expenses has been described as follows:

"'By actual expenses for nursing and medical expenses is meant such sum as the plaintiff has expended therefor in the past, or for which she has become indebted, and such further expenses for nursing and medical services as she will, in your best judgment, based upon the evidence in this case and by the greater weight thereof, be put to in the future, which flow directly and naturally from any injury she may be found by you to have sustained on account of the negligence of the defendants, complained of in this action.'"

Taylor v. Boger, 289 N.C. 560, 570 (1976) (approving of this jury instruction).

The jury will be instructed that future expenses must be reduced to present value.

In general, the plaintiff must produce expert testimony that the future medical service is reasonable and necessary, and also must produce evidence of the charge for these services. It is not clear whether the plaintiff must produce evidence that he will in fact likely receive the treatment. As with any future economic damage, the award must be reduced to present value.

c. Lost earnings

In addition to recovering for his medical expenses, the plaintiff may also recover for lost earnings. "Compensation for lost earning capacity is recoverable when such loss is the immediate and necessary consequence of an injury." Dunn v. Custer, 162 N.C. App. 259, 264 (2004). This can be very difficult to compute. In the simpler cases, the plaintiff earns an hourly wage, and his recovery is for his actual lost pay as a result of missing work. There is no particular form of proof which is required. The best evidence is evidence of the Plaintiff's actual lost earnings through trial. Dickson v. Queen City Coach Co., 233 N.C. 167, 174 (1951) ("We cannot conceive of a more accurate and less speculative method of proving damages for loss of time than to show the actual salary or wages lost, as the result of an injury, from the date of the injury to the time of the trial."). The pattern Jury Instruction states:

Damages for personal injury also include fair compensation for the loss of income from employment, loss from inability to perform ordinary labor or the reduced capacity to earn money experienced by the plaintiff -- as a consequence of his injury. In determining this amount, you should consider the evidence as to the plaintiff's age and occupation; the nature and extent of the plaintiff's employment; the value of the plaintiff's services; the amount of plaintiff's income at the time of his injury from fixed salary or wages; the disability, if any, affecting earning capacity. Those things are to be considered by you. The plaintiff's damages also include the amount by which his future earnings will be reduced as a consequence of his injury. In determining this amount, you may consider any evidence in regard to past earnings and any evidence as to the loss of future earning capacity.

Conner v. Continental Indus. Chems., 123 N.C. App. 70, 76 (1996)  
(quoting instructions).

The plaintiff can recover the present value of his future lost earnings, typically stated as lost "earning capacity." Johnson v. Seaboard A. L. R. Co., 163 N.C. 431, 452 (1913) ("In an action for injuries by negligence, such as this one, the plaintiff is only entitled to recover the reasonable present value of his diminished earning capacity in the future and not the difference between what he would be able to earn in the future but for such injury, and such sum as he would be able to earn in his present condition."). "The element of loss of time is held properly to include only such loss as has occurred up to the time of trial; a subsequent loss of time is to be included in a recovery for decreased earning capacity." Dickson v. Queen City Coach Co., 233 N.C. 167, 174 (1951).

Many cases address whether a particular claim for lost earnings are too speculative. For example:

Although precise damages are often difficult to ascertain, a jury may award damages based upon evidence that is relatively speculative, and it is well settled that some speculation is inherent in the projection of future earning capacity. Recovery is not permitted, however, where speculation becomes unreasonable. See Di Donato, 320 N.C. at 431, 358 S.E.2d at 494 (holding that, in an action for wrongful death of a stillborn child, losses related to income were too speculative); compare Fox-Kirk v. Hannon, 142 N.C. App. 267, 273, 542 S.E.2d 346, 351 (holding that, in an action for personal injuries to a minor child, evidence pertaining to the child's mental and physical condition at age two years and eleven months was sufficient to provide the jury with a reasonable basis upon which to estimate

damages of the child's lost earnings), disc. review denied, 353 N.C. 725, 551 S.E.2d 437 (2001).

Oddo v. Presser, 158 N.C. App. 360, 366 (2003) ("plaintiff's evidence of his loss of income as an investment advisor, presented in the form of expert testimony, was not [too] speculative").

The claim for lost earnings is much more complicated when the plaintiff operates his own business and works for himself. Some cases view the loss of revenue or profit to the corporation as distinct from the loss to the employee, even when the employee is an owner of the company and in fact sustains a loss. Some cases indicate that the employee-owner may recover for the lost profit to the company, but other cases require the employee-owner to prove the amount which he actually personally lost as a result of his inability to work.

Our courts have held, for example:

It is a generally accepted proposition that evidence of the profits of a business in which the injured party in a personal damage suit is interested, which depend for the most part upon the employment of capital, the labor of others, and similar variable factors, is inadmissible in such suit and cannot be considered for the purpose of establishing the pecuniary value of lost time or diminution of earning capacity, for the reasons that a loss of such profits is not the necessary consequence of the injury and such profits are uncertain and speculative. . . . However, where the business is small and the income which it produces is principally due to the personal services and attention of the owner, the earnings of the business may afford a reasonable criterion to the owner's earning power.

Smith v. Corsat, 260 N.C. 92, 96 (1963) ("In our opinion the evidence of profits was admissible as an aid (considered with other evidence) in determining the pecuniary value of defendant's loss of time or loss or impairment of earning capacity."). Young v. Stewart, 101 N.C. App. 312, 314 (1991) ("A person engaged in a business who is injured by the negligence of another may recover lost earnings. However, as a general rule a person cannot recover lost business profits. A major exception to this general rule is that evidence of lost business profits is admissible as evidence of plaintiff's lost earning capacity in a proper case where the business earnings are due predominantly to a person's personal efforts and not from capital investment or employee labor."); "Other states have held admissible the evidence of partnership profits as long as the profits were generated by personal services and not the result of capital investments and employee labor. To hold otherwise would unreasonably and unfairly deny recovery of lost earning capacity for persons engaged in business partnerships. Plaintiffs offered sufficient evidence of past earnings from which the jury could determine with reasonable certainty the profits of B & Y Associates. The B & Y Associates' business records offered into evidence reflect that those profits fluctuated very little during the years preceding the accident.").

A business, however, may not recover for its lost profits due to injury to an employee. "Plaintiff, however, seeks in the

present action to recover for its corporate losses occasioned by the incapacity of Mr. Jones as a result of injuries which he sustained in the accident. Although we have found no North Carolina cases dealing with such a claim, the great weight of modern authority holds that an employer may not maintain an action to recover damages from a tortfeasor because of negligent injury to an employee." Rolling Fashion Mart, Inc. v. Mainor, 80 N.C. App. 213, 217 (1986).

As a general matter, any sort of "sick leave" or disability benefits are not admissible to reduce the defendant's liability. Fisher v. Thompson, 50 N.C. App. 724, 731 (1981) ("Plaintiff also objected to questions about whether she had received her full salary, during her absence from work as a schoolteacher, because she had sick leave. She contends that evidence of her sick leave pay violated the collateral source rule. We agree. "Evidence of plaintiff's receipt of benefits from his injury or disability from collateral sources generally is not admissible to reduce his claim for damages." The majority rule excludes evidence of the wages, salary or commissions paid to the plaintiff by an employer during the period of disability, regardless of whether such payments were gratuitous or in discharge of a legal obligation. A tort-feasor should not be permitted to reduce his own liability for damages by the amount of compensation the injured party receives from an independent source. We believe that proper

enforcement of this policy requires that sick leave benefits be included within the protection of the collateral source rule.").

The plaintiff may recover for lost earning capacity even if the plaintiff is not working at the time of the accident. Jung Keun Kim v. Hansen, 86 N.C. App. 629, 632 (1987) ("That plaintiff was not employed when she was injured and had not been employed for wages since coming to this country does not eliminate the fact that the jury could have properly found from the evidence that except for defendant's negligence she would have obtained and held a financially remunerative schoolteaching job during some part of the four and a half years preceding the trial of the case.").

The plaintiff may also seek to recover future lost earnings. If this claim is based on an allegation that the plaintiff will be medically unable to perform his job, then he must present expert medical testimony regarding these limitations.

Some cases indicate that it is more difficult to recover for future lost profits. Smith v. Corsat, 260 N.C. 92, 100 (1963) ("Of course, future business profits may not be recovered as such, they are too remote and uncertain to sustain a judgment for their loss."). Most modern cases indicate that recovery may be had for lost earning capacity even if it is based on some speculation. Fox-Kirk v. Hannon, 142 N.C. App. 267, 272 (2001) ("It is also recognized that some speculation is inherent in the projection of future earning capacity of a child or an adult.").

Most modern cases allow the lost earnings claim to go to the jury. Dunn v. Custer, 162 N.C. App. 259 (2004) (where plaintiff-dentist had worked part time job briefly and had received only one paycheck, and he had previously had to retire from dental practice due to neck pain, allowing recovery of earnings based on this part-time job was not too speculative); Curry v. Baker, 130 N.C. App. 182, 192 (1998) ("We conclude that the trial court properly admitted testimony regarding plaintiff's aspiration to one day become the General Manager of Ideal Lighting. It was undisputed that prior to the collision, plaintiff desired to one day become the General Manager of Ideal Lighting, and that because he was on a "very good career path[,] he had the ability to do so within four or five years.").

In a case with significant future lost earnings, the plaintiff will often employ a vocational expert to testify as to the types of employment which the plaintiff can attain with his particular qualifications and abilities. Any future lost earnings must be reduced to present value.

The jury will generally not be instructed to consider the tax ramifications of the plaintiff's earnings, i.e., the jury should not award a lesser amount because the net earnings to the plaintiff are lower than his gross earnings, due to the income tax. Scallon v. Hooper, 58 N.C. App. 551, 555 (1982) ("The reason courts adopt the majority view of refusing to take income tax consequences into consideration in awarding damages for

wrongful death is that the amount of a recipient's future income tax liability is too conjectural or speculative a factor." ). This rule makes sense because in theory, the plaintiff will be taxed on any recovery which represents lost earnings. As a practical matter, however, a settlement and judgment is usually not allocated, and in our experience, a personal injury plaintiff does not pay taxes on any of his recovery, even when a portion of it represents lost earnings.

The plaintiff may have various other miscellaneous economic losses as a result of the loss of employment. Some plaintiffs allege that they have lost benefits, such as health insurance.

d. Pain and Suffering.

The plaintiff is also entitled to recover for past and future "pain and suffering." A verdict which does not include pain and suffering is probably grounds for a new trial.

The jury is not to put a "price" on the pain-and-suffering; i.e. "The question in any given case is not what sum of money would be sufficient to induce a person to undergo voluntarily the pain and suffering for which recovery is sought or what it would cost to hire someone to undergo such suffering." Dunlap v. Lee, 257 N.C. 447, 452 (1962) (the issue is "what, under all the circumstances, should be allowed the plaintiff in addition to the other items of damage to which he is entitled, in reasonable consideration of the suffering necessarily endured. The amount allowed must be fair and reasonable, free from sentimental or

fanciful standards, and based upon the facts disclosed. In making the estimate the jury may consider the nature and extent of the injuries and the suffering occasioned by them and the duration thereof. They may also consider the age, health, habits, and pursuit of the injured party and his health and condition before the injury as compared with his condition in consequence thereof." ).

If the plaintiff has presented medical testimony that his symptoms are likely permanent, then he is entitled to recover future pain and suffering. In such a case, the plaintiff is allowed to make a "per diem" argument to the jury, in which he suggests a given amount of money per day to award the plaintiff for his pain and suffering. Weeks v. Holsclaw, 306 N.C. 655, 661 (1982) ("We are persuaded by the reasoning of those courts which conclude that the per diem argument may be used provided it is accompanied by cautionary instructions to the jury." ).

An award of future pain and suffering must theoretically be reduced to present value, but in practice, it is difficult to imagine how a jury would do this.

There is no cap on pain-and-suffering in North Carolina. The court may overturn an excessive award, but this is discretionary.

e. Permanent Injury.

A plaintiff with a permanent injury, as corroborated by expert medical testimony, or as may be self-evident, is entitled to recover for a permanent injury. In our standard jury instructions, this is regarded as a distinct element of damage, aside from pain and suffering, and the plaintiffs typically suggest a figure for this separate element of damage.

Brown v. Neal, 283 N.C. 604, 613 (1973) (judge erred in instructing on permanent injuries where “there was no evidence whatever that the plaintiff, as of the time of the trial, would suffer any pain or disability in the future, and none affording any reasonable basis for a finding of a causal connection between the injury for which he sues and any pain or disability which he might experience after the trial”; “the court inadvertently invited the jury to speculate as to whether the plaintiff would experience pain or disability in the future, and if so, how much, and as to whether, if such pain or disability should occur, it would have a causal connection with the injury sustained in the collision which is the subject of this action.”; doctors did not “suggest any apprehension of permanent disability. Both anticipated that the plaintiff would return for further observation, which he did not do. Nothing in the plaintiff's testimony indicates that the difficulties he experienced with his back while in military service in Vietnam continued over any extended period of time or substantially impaired the performance of his military duties. He is still on active duty.”); Short v.

Chapman, 261 N.C. 674, 136 S.E. 2d 40 ("To warrant an instruction permitting an award for permanent injuries, the evidence must show the permanency of the injury and that it proximately resulted from the wrongful act with reasonable certainty. While absolute certainty of the permanency of the injury and that it proximately resulted from the wrongful act need not be shown to support an instruction thereon, no such instruction should be given where the evidence respecting permanency and that it proximately resulted from the wrongful act is purely speculative or conjectural."); defendant, in support of her counterclaim, testified that at the time of the trial her leg still hurt, had never gotten better, and had a numbness, but her doctor expressed no opinion that her injuries were permanent and no opinion as to the cause of the pain and numbness in her leg).

f. Scarring.

The plaintiff is also entitled to compensation for his scars and disfigurement. There is no fixed formula for this element of damages.

g. Loss of Use of Body Part.

Our jury instructions also allow the plaintiff to recover for the loss of use of a body part. This is separate and distinct from the claim for permanent injury and the claim for pain and suffering.

h. Emotional Damages.

There is not a specific jury instruction in North Carolina addressing the recovery of emotional damages in a standard negligence action. It is generally assumed that the plaintiff can recover for any alterations in his or her mental condition as a result of an accident caused by the negligence of the defendant. King v. Britt, 267 N.C. 594, 597 (1966) ("In actions for personal injuries, one of the elements for the assessment of actual or compensatory damages is mental anguish."); Hargis v. Knoxville Power Co., 175 N.C. 31, 34 (1917) ("As all pain is mental and centers in the brain, it follows that as an element of damage for personal injury the injured party is allowed to recover for actual suffering of mind and body when they are the immediate and necessary consequences of the negligent injury."). Wyatt v. Gilmore, 57 N.C. App. 57, 60 (1982) ("We also distinguish that line of cases in which the tort-feasor's conduct risks direct physical injury to the plaintiff but causes only emotional distress and consequential physical injury. In these cases liability is imposed although neither the distress nor the resulting injury is foreseeable"; "Plaintiff, in the case sub judice, had what appeared to be a normal reaction to the loud crashing noise she heard when defendants' vehicle struck the tree in her yard. She was understandably startled and frightened. She had no peculiar susceptibility to fright."; where plaintiff had heart attack, jury could determine proximate cause).

North Carolina has cases which state that "fright" is not compensable, but when the plaintiff has a physical injury, his "fright" may be compensable. To the extent that the plaintiff has a diagnosable condition, such as depression or post-traumatic stress disorder, or a brain injury, then he can be compensated for that injury. The plaintiff of course must prove, probably through expert testimony, that the alteration in his mental and psychological condition was the proximate result of the negligence of the defendant. A brain injury may also of course lead to a loss of income, the measure of which is addressed in a previous section.

North Carolina recognizes torts of "negligent infliction of emotional distress" and "intentional infliction of emotional distress." These claims are distinct from a claim by a plaintiff who sustains a bodily injury and suffers emotional damages as a result. This tort was recognized in Johnson v. Ruark Obstetrics & Gynecology Assocs., P.A., 327 N.C. 283, 304 (1990), in which the North Carolina Supreme Court held:

Our cases have established that to state a claim for negligent infliction of emotional distress, a plaintiff must allege that (1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress (often referred to as "mental anguish"), and (3) the conduct did in fact cause the plaintiff severe emotional distress. Although an allegation of ordinary negligence will suffice, a plaintiff must also allege that severe emotional distress was the foreseeable and proximate result of such negligence in order to state a claim; mere temporary fright, disappointment or regret will not suffice. In this context, the term "severe emotional distress" means any emotional or mental

disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so.

These two torts require the plaintiff to prove a "diagnosable" mental problem, which must be "severe and disabling." Our cases have not clearly delineated what constitutes this type of injury, but it appears to be much more serious than those injuries that are compensable in a case where the plaintiff himself suffers a bodily injury. The claim for "negligent infliction of emotional distress" typically arises when, for example, the plaintiff witnesses a family member injured in an accident. Where the parent does not actually witness the accident, then he or she generally cannot recover. Gardner v. Gardner, 334 N.C. 662 (1993) (where child was riding with father, and father negligently caused accident resulting in death of son, and mother went to hospital and saw her son brought in and resuscitative techniques were applied, mother did not have claim for NIED because she did not witness accident nor was she in sufficiently close proximity).

It therefore appears that if the claimant sustains a bodily injury (i.e. other than simply an emotional injury), then all of his or her emotional injuries are recoverable). If, however, the claimant's only injuries are emotional or psychological, then he must meet the criteria for recovery (e.g. witnessing a bodily

injury to another person), and he must also have an emotional injury that is "severe and disabling."

i. Proximate Cause -- "eggshell skull" rule

Where the defendant negligently causes an injury to the plaintiff, the defendant is liable for all damages which "naturally and proximately" result from the negligence. Holderfield v. Rummage Bros. Trucking Co., 232 N.C. 623, 625 (1950) ("the tort-feasor is liable for all damages which may naturally and proximately result from his wrong without regard to whether he could have foreseen such injurious result."). "Under our general rules of negligence, a tort-feasor is liable if, by the exercise of reasonable care, he might have foreseen that some injury would result from his conduct or that consequences of a generally injurious nature might have been expected." Slaughter v. Slaughter, 264 N.C. 732, 142 S.E. 2d 683 (1965). "A tort-feasor is liable to the injured party for all of the consequences which are the natural and direct result of his conduct although he was not able to have anticipated the peculiar consequence that did ensue." Lockwood v. McCaskill, 262 N.C. 663, 670, 138 S.E. 2d 541, 547 (1964).

"It does not matter that [the particular consequences] are unusual, unexpected, unforeseen, and unforeseeable." Wyatt v. Gilmore, 57 N.C. App. 57, 58 (1982).

The only limit on this recovery are damages which are speculative or "remote." "A wrong-doer is liable for all damages

which are the proximate effect of his wrong, and not for those which are remote . . . ." Binder v. General Motors Acceptance Corp., 222 N.C. 512, 514 (1943) (in addition to value of automobile wrongfully seized, plaintiff may recover for loss of the use the automobile). Van Dyke v. Chadwick-Hoskins Co., 187 N.C. 695, 697 (1924) (where defendant-employer told plaintiff-employee to give order to another employee, which resulted in altercation between employees and plaintiff was charged with manslaughter of co-employee, and plaintiff sought to recover for legal fees and humiliation against employer, "We think the damages sought to be recovered by the plaintiff are too remote, even if Kirby were negligent in giving the order in question, which is not conceded.").

The jury will, however, be given several instructions regarding proximate cause. For example, the jury is instructed that there may be more than one proximate cause of an accident or of an injury.

An important aspect of proximate cause is commonly known as the "eggshell skull" rule. This rule has been stated as follows:

The general rule is that where the result of the accident is to bring into activity a dormant or incipient disease, or one to which the injured person is predisposed, the defendant is liable for the entire damages which ensue, for it cannot be said that the development of the disease as a result of the injury was not the consequence which might naturally or ordinarily follow as a result of the injury, and therefore, the negligent person may be held liable therefor." . . . [I]f defendant's misconduct "amounted to a breach of duty to a person of ordinary susceptibility, he is liable for all damages suffered

by plaintiff notwithstanding the fact that these damages were unusually extensive because of peculiar susceptibility."

Potts v. Howser, 274 N.C. 49, 54 (1968).

Therefore, if the motor vehicle accident could have caused a whiplash or other relatively minor injury to a plaintiff of ordinary susceptibility, and the particular plaintiff involved in this accident sustained an aggravation or activation of an underlying degenerative disk condition, then the plaintiff may recover for all of his injuries, including those which are the result of the underlying and pre-existing condition. There is very little case law addressing these points. This issue will almost always be submitted to the jury; i.e., it is unlikely that the court would allow a directed verdict to the defense based on the doctrine of peculiar susceptibility.

A related rule deals with "but for" causation. If the plaintiff's underlying would have ultimately manifested itself in the future, then theoretically the defendant is not liable for all of the plaintiff's future injuries. Instead, the defendant is liable only for the hastening of the plaintiff's symptoms. "[W]here a pre-existing disease is aggravated by the wrongful act of another person, the victim's recovery in damages is limited to the additional injury caused by the aggravation over and above the consequences, which the pre-existing disease, running its normal course, would itself have caused if there had been no

aggravation by the wrongful injury." Potts v. Howser, 274 N.C. 49, 54 (1968).

j. multiple causes

There may be more than one proximate cause of an injury. In such a case, each tort-feasor is liable for the full amount of the loss.

In some cases, the plaintiff's original injury is aggravated by the subsequent acts of a third person. For example, a plaintiff may sustain a minor injury at the scene, which would typically result only in a mild whiplash with minor abrasions, and thereafter receive treatment from a doctor who fails to sterilize the wound, resulting in a serious infection caused at the hospital. The defendant-driver is liable for all of the plaintiff's damages. In North Carolina, these enhanced damages may still be the "proximate" result of the defendant/driver's original negligence. "Injuries resulting from delay in receiving proper medical treatment as well as injuries caused by unsuccessful medical treatment ordinarily tend to aggravate the damages for which the wrongdoer is responsible." Heath v. Kirkman, 240 N.C. 303, 310 (1954). Recoverable damages for pain and suffering include those caused by negligence of the original treating physician, unless the injured person was negligent in selecting the physician. Bost v. Metcalf, 219 N.C. 607, 609, 14 S.E.2d 648, 651 (1941).

k. Business Losses.

As indicated earlier, an individual plaintiff may recover for his lost earnings or wages. Similarly, a business which is injured by the negligence of the defendant may recover for its lost profits. The rules applicable to such a claim are similar to those which are applicable to an individual. (i.e., the plaintiff-business must establish that it lost profit as a result of the negligence of the defendant.)

This measure has been held to include, in a proper case, damages for lost profits.

. . .

Such damages, however, may not be awarded where the evidence permits no more than speculation. "Absolute certainty is not required but evidence of damages must be sufficiently specific and complete to permit the jury to arrive at a reasonable conclusion." The difficulty of showing, with any degree of reliability, either the probability of the occurrence of profits or their amount, has led to the observation that ordinarily "[i]n an action for damages for a breach of contract . . . the law will not permit mere profits, depending upon the chances of business and other contingent circumstances, and which are perhaps merely fanciful, to be considered by the jury as a part of the compensation."

Weyerhaeuser Co. v. Godwin Bldg. Supply Co., 292 N.C. 557, 561

(1977). Reliable Trucking Co. v. Payne, 233 N.C. 637, 639 (1951)

("Under the modern rule, then, it may be said that lost profits

constitute a proper element of damage where such loss is the

direct and necessary result of the defendant's wrongful conduct,

and such profits are capable of being shown with a reasonable

degree of certainty."); Champs Convenience Stores, Inc. v. United

Chemical Co., 329 N.C. 446, 462 (1991) (in action against

supplier of chemical for negligence, when improper chemical caused store to close, store entitled to recover lost profits, in addition to rent and note payments while building was being repaired; "In a tort action the general rule in North Carolina is that a plaintiff is 'entitled to recover an amount sufficient to compensate . . . for all pecuniary losses sustained . . . which are the natural and probable result of the wrongful act and which . . . are shown with reasonable certainty by the evidence.'" ).

Some jurisdictions had adopted the "New Business Rule," which prevents a new business from recovering lost profits, because of the inherent speculation as to whether a new business will be profitable. North Carolina has rejected a bright line approach to this issue. Our Supreme Court stated, "While we agree . . . that lost future profits are difficult for a new business to calculate and prove, we are persuaded that there should be no per se rule against the award of such damages where they may be shown with the requisite degree of certainty. Accordingly, we hold, along with what appears to be a majority of jurisdictions reaching the issue, that the new business rule is not the law of our state." Olivetti Corp. v. Ames Business Systems, Inc., 319 N.C. 534, 547 (1987) (action for fraud; "It is a well-established principle of law that proof of damages must be made with reasonable certainty."; plaintiff failed to prove with reasonable certainty either that it lost the opportunity to

become an NBI dealership or what, if any, profits it would have made as an NBI dealership).

1. property damage (e.g. vehicle)

As a general rule, the measure of damage for property damage is the difference in fair market value to the item prior to the defendant's negligence, and the value of the item after the damage. The measure of property damage is the difference between what the vehicle was worth before the accident and after the accident. There are, however, also cases indicating that a plaintiff can recover for the cost of repair and depreciation. The North Carolina rule has been stated as follows:

North Carolina is committed to the general rule that the measure of damages for injury to personal property is the difference between the market value of the damaged property immediately before and immediate after the injury. This difference may be established by showing the reasonable cost of necessary repairs to restore the property to its previous condition. However, the cost of repair is an appropriate measure for determining damages "'provid[ed] that such is less than value of property before damage.' The purpose of th[is] proviso is to prevent the owner of property from profiting by the injury."

Matter of Davis, 483 S.E.2d 440 (1997) (citations omitted; emphasis in original).

The Davis case relied heavily on Carolina Power & Light Co. v. Paul, 261 N.C. 710 (1964), in which the defendant-motorist damaged the power company's pole. The plaintiff sought to recover the cost of replacing the pole, and "The defendant claims the plaintiff installed a new pole and a new transformer more

valuable than the old ones and that the proper measure of damages should be the difference in the market value of the damaged property immediately before and immediately after the damage." The Court noted the before-and-after test, and further wrote, "However, if there is no market, there can be no market value. The foundation for the before and after rule is lacking. Cost of repairs is then about the only available evidence of the extent of the loss. Ordinarily, power systems are not on the market. Less so are small component parts of the system." The Court concluded, "The cost of repairs furnishes the more satisfactory test by which to determine the plaintiff's damages; however, the defendant was properly given credit for the salvage value of the replaced parts. The record fails to show the repairs perceptibly increased the value of the plaintiff's property." Carolina Power & Light Co. v. Paul, 261 N.C. 710, 712 (1964).

An estimate is admissible as evidence of depreciation. And one proper formulation is the cost of repair and consideration of the value after repairs. As stated by our Supreme Court:

While evidence of such an estimate of the cost of repairs might not be as convincing as evidence of the cost of the actual repairs, we think this difference relates to the weight thereof rather than to its competency, and the weight of evidence is for the jury, while the admissibility of evidence is for the court. . . . While the recovery would by no means be limited to the amount of the cost of repairing the automobile, we are of the opinion that such cost would be some evidence to guide the jury in determining the difference in the market value of the automobile before and after the injury thereto. . . . Evidence of the cost of repairs of the automobile was admissible as proof of the difference between the value of the

automobile before the accident and after it occurred. This difference was the measure of damages that the plaintiff was entitled to recover. . . . In determining the depreciation in value of a motor vehicle as the result of an injury, the jury may take into consideration the reasonable cost of the repairs made necessary thereby, and the reasonable market value of the vehicle as repaired.

U. S. Fidelity & Guaranty Co. v. P. & F. Motor Express, 18 S.E.2d 116 (1942) (emphasis added).

Many cases reiterate that the proper measure of damages is diminution in value, but there are some cases indicating that the cost of repair is an appropriate measure of damages.<sup>1</sup> Although the trier of fact can use "the cost of repair as evidence of this difference between the before and after injury value, it alone is not the difference, nor is it an additional element of damages." Sprinkle v. N.C. Wildlife Res. Comm'n, 165 N.C. App. 721, 728 (2004) (reversing award where "plaintiff was awarded double recovery: the difference in value before repair, plus the cost of repair").

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<sup>1</sup> Compare Lee v. Bir, 449 S.E.2d 34 (1994) (affirming jury instruction that "it's important that you keep in mind that the cost of replacing or restoring the trees and landscaping is not the true measure of damages. However, you may consider the evidence with respect to the estimated cost to replace or restore trees and landscaping as an aid in arriving at the true measure of damages, which as I have already instructed you, is the difference between the fair market value of the property immediately before it was damaged and its fair market value immediately after it was damaged.") with Plow v. Bug Man Exterminators, Inc., 290 S.E.2d 787 (1982) ("Defendant next argues that the trial court erred in awarding damages based on the cost of repairs, alleging that the only proper measure of damages for negligent injury to real property is diminution in value. We find this argument to be wholly without merit. While the difference in market value before and after injury is one permissible measure of damages, it is by no means the only one. Damages based on cost of repair are equally acceptable.").

There are some cases where the damages are difficult to calculate. The cost of replacement is clearly inappropriate where that is disproportionate to the plaintiff's use of the property and the value of the property. William F. Freeman, Inc. v. Alderman Photo Co., 89 N.C. App. 73, 77 (1988) ("Plaintiff objects to the "actual value" measure of damages in the above instruction because it does not require the jury to award plaintiff a sum sufficient to recreate the drawings. The evidence, however, tended to show plaintiff would never use most of the drawings and those which might be used could be redrawn when needed. It would be unreasonable and impractical to recreate each drawing when most would never be used again. The trial court's instruction was appropriate because it allowed the jury to consider the reasonableness and practicability of recreating the drawings in determining their actual value. Whereas the replacement cost measure of damages requested by plaintiff would compensate plaintiff for recreating hundreds of potentially useless drawings. We believe the trial court's instruction adequately permitted the jury to consider that some portion of the drawings might have to be recreated while most would not.").

Where the vehicle is repaired and has a diminished fair market value as a result of the initial property damage, even after the repairs, then the plaintiff is also entitled to recover for this diminution in value following repairs. The technical

measure of damages, however, would still be the difference in value of the vehicle immediately before and immediately after the accident, irrespective of the repairs. Roberts v. Pilot Freight Carriers, Inc., 160 S.E.2d 712 (1968) ("When a plaintiff's vehicle is damaged by the negligence of a defendant, the plaintiff is entitled to recover the difference between the fair market value of the vehicle before and after the damage. Evidence of the cost of repairs or estimates thereof are competent to aid the jury in determining that difference.").

The case law does not thoroughly address the computation of damages where a vehicle is repaired and has a diminution in value. Assuming that the original repair of the vehicle was not unreasonable (i.e. the cost was not disproportionate to the value of the vehicle), then presumably the plaintiff can also recover for this diminished value following repairs.

Where the property has sentimental value, it is not clear whether the damages are enhanced. Thomason v. Hackney & Moale Co., 159 N.C. 299, 304 (1912) ("The value to the owner may be enhanced by personal or family considerations, as in the case of family pictures, plate, etc., and we do not doubt that the 'pretium affectionis,' instead of the market price, ought then to be considered by the jury or court in estimating the value. When analyzed, the damage caused by the loss or destruction of property of this nature consists of two elements: First, the loss of the real property value; second, the grief or mental suffering

at the loss of the cherished article. From this we gather what we apprehend to be the true rule, which is that, where property is of such a nature that its loss or destruction, under the circumstances, naturally and proximately causes mental suffering, compensation for such mental suffering may be recovered, in a proper action, in addition to the actual value of the property." There is some conflict in the authorities relating to this matter, and we will not now attempt to reconcile them or decide what is the correct principle . It has been held that 5the sentimental value of property, the "pretium affectionis," as it is called, cannot be recovered as compensation for the destruction or conversion of such property.").

The Plaintiff may also recover for loss of use, stated as follows:

When a vehicle is negligently damaged, if it can be economically repaired, the plaintiff will also be entitled to recover such special damages as he has properly pleaded and proven for the loss of its use during the time he was necessarily deprived of it.

Roberts v. Pilot Freight Carriers, Inc., 160 S.E.2d 712 (1968)

(emphasis added). The rule has also been stated:

In order to recover for loss of use of damaged vehicle, it must be possible to repair the vehicle at a reasonable cost and within a reasonable time, and, under such circumstances, the measure of damages to be recovered would be the cost of renting a similar vehicle during a reasonable time for repairs; if the vehicle cannot be repaired or if it cannot be repaired within a reasonable time, plaintiff is obligated to purchase a replacement vehicle and will be entitled to reimbursement for costs of a rental vehicle during the interval necessary to acquire the replacement vehicle.

Gillespie v. Draughn, 283 S.E.2d 438 (1981); see also Roberts v. Pilot Freight Carriers, Inc., 160 S.E.2d 712 (1968) (“the cost of renting a similar vehicle during a reasonable period for repairs.”; “the cost of hiring it during the time reasonably necessary to acquire a new one or to repair the old one is the measure of his damage even though no other vehicle was rented.”).

Where the plaintiff uses his vehicle to earn money, he likewise may recover for his lost earnings, but he has a duty to obtain a substitute vehicle where it is reasonable to do so.

m. loss of consortium

Where the defendant causes injury to a married claimant, then the claimant’s spouse can sue for loss of consortium. Nicholson v. Hugh Chatham Memorial Hospital, Inc., 300 N.C. 295, 302 (1980) (“[W]hile we recognize that consortium is difficult to define, we believe the better view is that it embraces service, society, companionship, sexual gratification and affection, and we so hold today. We do so in recognition of the many tangible and intangible benefits resulting from the loving bond of the marital relationship.”).

n. Tax Consequences.

As a general matter, the jury will not be instructed to consider the tax consequences of its award, or to consider that the plaintiff would have been taxed on his earnings. Scallon v. Hooper, 58 N.C. App. 551, 555 (1982) (“The reason courts adopt the majority view of refusing to take income tax consequences

into consideration in awarding damages for wrongful death is that the amount of a recipient's future income tax liability is too conjectural or speculative a factor.").

It bears noting that theoretically, the plaintiff should pay taxes on his recovery which represents lost earnings. His recovery for bodily injury is, however, exempt from taxation.

o. Economic Loss Rule.

North Carolina recognizes what is known as the "Economic Loss Rule." The cases are not entirely clear on the proper application of this rule. For the most part, the rule is that in a negligence action against the manufacturer of a product, or an intermediary vendor of a product, the plaintiff may not recover "economic losses" from the defendant under a negligence claim.

"North Carolina has adopted the economic loss rule, which prohibits recovery for economic loss in tort." Moore v. Coachmen Indus., 129 N.C. App. 389, 401 (1998). And "Our state courts have not decided whether, in the context of a products liability suit, purely economic losses can be recovered in an action for negligence. The majority of courts which have considered this question have held that purely economic losses are not ordinarily recoverable under tort law." Chicopee, Inc. v. Sims Metal Works, Inc., 98 N.C. App. 423, 432 (1990) (adopting rule).

The doctrine should be is limited to claims arising from a defective product. Service providers probably do not receive the benefit of this doctrine. Alva v. Cloninger, 51 N.C. App. 602,

277 S.E.2d 535 (1981) (home buyer not in contractual privity with appraiser may recover damages for "economic loss" proximately caused by negligence in the performance of a real estate appraisal.; the plaintiff in *Alva* alleged that he had suffered economic loss by relying on defendant's appraisal which indicated that the home purchased by plaintiff was in good condition when in fact the house contained serious defects). Accord HBS Contrs. v. National Fire Ins. Co., 129 N.C. App. 705, 712-713 (1998) (third party general contractor has a cause of action for economic loss against the architect); Davidson & Jones, Inc. v. County of New Hanover, 41 N.C. App. 661, 255 S.E.2d 580 (1979) (economic loss foreseeably resulting from breach of an architect's common law duty of due care in performing his contract with the owner); Shoffner Industries, Inc. v. W. B. Lloyd Constr. Co., 42 N.C. App. 259; 257 S.E.2d 50 (1979). But see McKinney Drilling Co. v. Nello L. Teer Co., 38 N.C. App. 472, 476 (1978) (in the absence of privity of contract, the supervising engineer could not be liable for negligent performance of the contract with the general contractor to supervise the excavation caisson shafts).

The defective product is encompassed within the damages that are not recoverable. "The courts have construed the term 'economic losses' to include damages to the product itself." Moore v. Coachmen Indus., 129 N.C. App. 389, 401 (1998) (purchaser of RV could not sue seller or manufacturer in

negligence for loss of RV). Accord Reece v. Homette Corp., 110 N.C. App. 462, 466 (1993) (plaintiff's claim for defects in mobile home is limited to UCC action); Terry's Floor Fashion v. Georgia-Pacific Corp., 1998 U.S. Dist. Lexis 15392 (E.D.N.C. 1998) (in action against manufacturer-vendor of floor underlayment, claim for replacing defective replacement, which damaged flooring, was barred by economic loss rule); AT&T Corp. v. Medical Review of N.C., Inc., 876 F. Supp. 91 (E.D.N.C. 1995) (action by purchaser of phone system against manufacturer for phone charges incurred due to alleged defects in security of phone and system; finding that under either theory, purchaser's losses constitute "economic loss" and are barred).

The economic loss rule, however, does not apply to consequential damage to property other than the product itself. In Coachmen, the Court stated that the "other losses" are recoverable in tort. Moore v. Coachmen Indus., 129 N.C. App. 389, 402 (1998) ("Where a defective product causes damage to property other than the product itself, losses attributable to the defective product are recoverable in tort rather than contract."); claims for contents of RV would generally be recoverable in tort; claims are, however, barred by provision in express warranty limiting recovery of consequential damages). Accord Chicopee, Inc. v. Sims Metal Works, Inc., 98 N.C. App. 423 (1990) (where pressure vessel exploded, damaging fabric and chemicals used in manufacturing process, plaintiff buyer could

sue manufacturer in negligence for damage to fabric and chemicals); Reece v. Homette Corp., 110 N.C. App. 462, 466 (1993) (limiting plaintiff's claim in negligence arising from defective product to "physical injury to person or to a tangible thing other than the defective product itself.").

It should be noted, however, that in some instances, the "economic loss" rule bars not only a claim for the product itself, but to resulting damage. Gregory v. Atrium Door & Window Co., 106 N.C. App. 142, 144 (1992) (homeowner sued manufacturer of defective door which leaked and caused damage to the floor; economic loss rule barred claim for implied warranty; "The trial court's findings reflect that only economic loss resulted from the alleged breach in the form of malfunctioning and deteriorating doors, along with some water damage to flooring."). Some cases have construed this rule to preclude recovery only for consequential damages to a larger product with which the defective product is merged. Wilson v. Dryvit Systems, Inc., 206 F. Supp. 2d 749 (E.D.N.C. 2002) ("when a component or part of a system or product injures the rest of the product or the system, only economic loss has occurred"). See also Chicopee, Inc. v. Sims Metal Works, Inc., 98 N.C. App. 423 (1990) (where pressure vessels were installed in plant, and one exploded, and it was discovered that approximately three-quarters of the pressure vessels had not been manufactured in accordance with the ASME Code, and plaintiff replaced all the defective cans, "[A]s a

matter of law, the plaintiff's recoverable damages must be limited to actual damage to property resulting from the alleged negligence of the defendants and cannot include economic or pecuniary losses such as the costs to replace property not damaged by the explosion described in the complaint.”; cost of inspecting and replacing defective pressure vessels not recoverable in negligence); 2000 Watermark Asso. v. Celotex Corp., 784 F.2d 1183, 1186 (4th Cir. 1986) (rejecting argument that when shingles are removed, felt paper is damaged, creating actual property damage, because “The cost of replacing the old felt is an incidental expense which may be recoverable in a warranty action, but it will not support an action for negligence”).

p. Workers Compensation lien

Where the plaintiff sues for personal injuries, and where he also filed a worker's compensation claim against his employer arising out of the same incident, the defendant is entitled to an offset in the amount of the worker's compensation lien if the jury finds that the employer was negligent. The net effect of this is typically to avoid paying the plaintiff's medical expenses and two-thirds of his lost earnings for a given period of time, and possibly additional sums for ongoing limitations and permanent injury.

3. Negligent Representation.

North Carolina also recognizes a type of negligence action called negligent representation (or negligent misrepresentation). This is similar to an action for fraud, except that this claim does not require proof of an intent to deceive; a merely negligent mis-statement may lead to liability. The primary context in which this tort occurs is in providing financial or accounting or other business advice. Our courts have adopted the measure of damage set forth in the Restatement of Torts, which states:

The damages recoverable for a negligent misrepresentation are those necessary to compensate the plaintiff for the pecuniary loss to him of which the misrepresentation is a legal cause, including (a) the difference between the value for what he has received in the transaction and its purchase price . . . and (b) pecuniary loss suffered otherwise as a consequence of the plaintiff's reliance upon the misrepresentation.

Middleton v. Russell Group, 126 N.C. App. 1, 30 (1997) (citing 8<sup>th</sup> Circuit case which denied recovery for mental anguish, and concluding "the trial court correctly limited plaintiffs' damages to the lost insurance coverage").

In the typical scenario in which this tort occurs, the plaintiff has acquired information prepared by the defendant, and the plaintiff has relied on that information in entering a transaction, such as the purchase of goods or a stock or a company. In these cases, the general measure of damages is the difference in the value of the property or goods as represented

by the defendant, and the actual value of the item. The plaintiff may also recover certain consequential damages.

4. Wrongful death.

In a wrongful death action (i.e. an action by the estate of a person whose death is caused by the negligence or other wrongful conduct of the defendant), the plaintiff (estate) is entitled to damages pursuant to a formula proscribed by statute. In general, this provides recovery for the medical and funeral expenses, the economic loss to the intestate heirs, and that loss to these heirs of the society and companionship of the deceased. Therefore, in general, the measure of damages is the value of the deceased to those persons who would recover his estate if he were to die intestate (i.e. without a will). This would typically include the most immediate family members, such as spouse and children, and sometimes siblings and parents.

The statute states that "Damages recoverable for death by wrongful act include:

- (1) Expenses for care, treatment and hospitalization incident to the injury resulting in death;
- (2) Compensation for pain and suffering of the decedent;
- (3) The reasonable funeral expenses of the decedent;
- (4) The present monetary value of the decedent to the persons entitled to receive the damages recovered, including but not limited to compensation for the loss of the reasonably expected;
  - a. Net income of the decedent,

- b. Services, protection, care and assistance of the decedent, whether voluntary or obligatory, to the persons entitled to the damages recovered,
  - c. Society, companionship, comfort, guidance, kindly offices and advice of the decedent to the persons entitled to the damages recovered;
- (5) Such punitive damages as the decedent could have recovered pursuant to Chapter 1D of the General Statutes had he survived, and punitive damages for wrongfully causing the death of the decedent through malice or willful or wanton conduct, as defined in G.S. 1D-5;
- (6) Nominal damages when the jury so finds.

N.C. Gen. Stat. § 28A-18-2(b).

The real focus of the wrongful death statute is the benefit, economic and non-economic, which the deceased would have given to those persons who are entitled to recover under the intestate laws (i.e. the law addressing those persons who receive the estate of a decedent if he or she did not leave a will).

It is important to note that the measure of damages is not the "gross" economic loss. (i.e., the defendant is not liable for all of the earnings which the plaintiff would have earned during his lifetime. Instead, the defendant is liable only for those earnings that would have inured to the benefit of the heirs during the lifetime of the deceased. Therefore, a decedent without any dependents may result in a fairly low economic recovery for wrongful death.

Where one of these intestate heirs was also negligent in contributing to the death of the decedent, then the recovery is

reduced by that amount which this heir would recovery, and that heir in fact makes no recovery. Therefore, for example, if the deceased was the wife and a passenger in a car driven by her husband, which collided with a vehicle driven by another person, and the accident was the fault of both drivers, then the amount (or percentage) which the husband would be entitled to recovery will essentially be reduced from the liability of the other driver in a suit against the other driver by the estate of the wife.

5. Punitive Damages.

The recovery of punitive damages in North Carolina is now governed by statute. Prior to 1995, punitive damages were a matter of common law. We therefore do not have a lot of appellate cases to answer a lot of questions which arise with respect to the recovery of punitive damages.

There is no formula for the amount of punitive damages. "In determining the amount of punitive damages, if any, to be awarded, the trier of fact:"

- (1) Shall consider the purposes of punitive damages set forth in G.S. § 1D-1 [i.e. "to punish a defendant for egregiously wrongful acts and to deter the defendant and others from committing similar wrongful acts"]; and
- (2) May consider only that evidence that relates to the following:
  - a. The reprehensibility of the defendant's motives and conduct.
  - b. The likelihood, at the relevant time, of serious harm.

- c. The degree of the defendant's awareness of the probable consequences of its conduct.
- d. The duration of the defendant's conduct.
- e. The actual damages suffered by the claimant.
- f. Any concealment by the defendant of the facts or consequences of its conduct.
- g. The existence and frequency of any similar past conduct by the defendant.
- h. Whether the defendant profited from the conduct.
- i. The defendant's ability to pay punitive damages, as evidenced by its revenues or net worth.

G.S. § 1D-35.

Further, the damages are capped at the greater of three times the compensatory damages or \$250,000, whichever is greater.

G.S. § 1D-25.

#### 6. Miscellaneous Torts and Offenses.

There are, of course, several other types of tort and other claims, each of which has a distinct measure of damages. This article, of course, cannot address the damages recoverable in every possible claim. A few claims are addressed briefly below.

In an action for fraud, the measure of damages is the difference in the value of the value of the item as sold and as represented. River Birch Assoc. v. Raleigh, 326 N.C. 100, 130 (1990) ("The measure of damages for fraud in the inducement of a contract is the difference between the value of what was received and the value of what was promised").

In an action for "unfair and deceptive trade practices" (Chapter 75 of North Carolina General Statutes), the measure of damages is often akin to the measure of damages for fraud. The damages awarded are automatically trebled.

In an action for criminal conversation, the measure of damages includes mental anguish and other losses. Nunn v. Allen, 154 N.C. App. 523, 537 (2002) ("In a cause of action for criminal conversation the measure of damages is incapable of precise measurement; however, it has been held, and we think properly so, that the jury in awarding damages may consider the loss of consortium, mental anguish, humiliation, injury to health, and loss of support by the wife")

In an action for alienation of affections, the measure of damages is "the value" of the spouse. Johnston v. Johnston, 213 N.C. 255, 257 (1938) ("The services, conjugal affection and society of a husband is valuable property, and, in a suit by the wife for the alienation of her husband's affections, the measure of damages is the value of the husband of whom she has been deprived."). Damages also include mental anguish. Cottle v. Johnson, 179 N.C. 426, 429 (1920) (the finding upon the first issue that the defendant alienated the affections of the plaintiff's wife and caused her to separate from him, as alleged in the complaint, that is, maliciously, entitled the plaintiff to recover compensatory damages, which includes loss of the society

of his wife, loss of her affection and assistance, as well as for his humiliation and mental anguish).

In an action for trespass, the measure of damages is the damage to (or diminution in value to) the defendant's property. Jones v. McBee, 222 N.C. 152, 154 (1942) ("where an action is brought to recover for damages for logs cut and removed by one in the honest belief on the part of the trespasser that he had title to them, the measure of damages is the value of the logs in the woods from which they were taken, together with the amount of injury incident to removal. However, notwithstanding the good faith of the party removing the logs, he may not be allowed compensation for converting the trees into personal property."); Eller v. Greensboro, 190 N.C. 715, 721 (1925) ("In affording redress for wrongs of this character, injuries caused by a nuisance wrongfully created in the exercise of governmental functions, our decisions hold as the correct deduction from the above principle that the damages are confined to the diminished value of the property affected."); Bishop v. Reinhold, 66 N.C. App. 379, 386 (1984) ("Where a trespass is shown the party aggrieved is entitled at least to nominal damages. \* \* \*" In an action in trespass, "the defendant is liable for all damages which proximately resulted from his illegal act. In law he is required to contemplate all damages which proximately resulted from his wrongful act whether or not produced intentionally or through negligence. 'It is wholly immaterial whether the

defendant in committing the trespass actually contemplated this, or any other species of damages, to the plaintiff"; Under these principles of damages, a plaintiff in an appropriate case of trespass may prove the value of his monetary loss through the use of the measure of the difference between the fair market value before and after the trespass, or the rental value of the land actually occupied, plus the decrease in the rental value of the remainder of the land caused by the presence of the encroaching structure. In certain cases fair rental value may be received into evidence regardless of operating losses shown by the defendant.").

Copyright, patent, and trademark law each have a distinct, and largely statutory measure of damages. These may include actual damages to the plaintiff as a result of the violation (e.g. copyright violation), disgorgement of profits by the defendant, fixed damages, and attorney's fees.

In actions for defamation (libel or slander), the measure of damages are complicated. Bryant v. Reedy, 214 N.C. 748, 757 (1939) ("general damages included actual or compensatory damages, and embrace compensation for those injuries which the law will presume must naturally, proximately, and necessarily result from the utterance of words which are actionable per se, such as the charge made in this case. Such damages include injury to the feelings and mental suffering endured in consequence"); Fields v. Bynum, 156 N.C. 413, 418 (1911) ("General damages are sometimes

called substantial damages, and are based upon the theory that it is competent for the jury to award, where the words are actionable per se, a figure which will fairly compensate the plaintiff for the injury sustained").

### III. COSTS AND ATTORNEY'S FEES

The extent to which the plaintiff can recover certain costs and his attorney's fees continues to be a problematic issue in North Carolina. The ability of the plaintiff to recover costs, such as interest and deposition expenses, and his ability to recover attorney's fees, are addressed below.

#### 1. Costs.

By statute, the prevailing party (either a plaintiff or a defendant) is entitled to recover "costs." The statute does not, however, define "costs," and therefore there is a great deal of uncertainty in determining whether a particular item of damage or cost is recoverable by the prevailing party.

As a general matter, unless there is a specific statute allowing the recovery of attorney's fees, these fees are not encompassed with the term "costs." The ability to recover attorney's fees is discussed below in sub-section 6.c.

"Costs" probably includes the plaintiff's filing fee and service fee. The plaintiff can also probably recover the cost of depositions. The plaintiff may also recover the cost of depositions. This will typically be the court reporter (stenographer) fee and the fee of any videographer. The

plaintiff can also recover the cost of any expert fees, such as fees paid to doctors to substantiate the personal injury claim.

Beyond these items, there has been much litigation in North Carolina addressing the other expenses which are recoverable as "costs." It is not clear whether the following expenses are recoverable as costs: Mediator's fees, travel expenses (e.g. attorney's mileage and air fare to depositions), copying fees, postage (e.g. overnight delivery), outside copying expenses, exhibit expenses.

## 2. Interest.

In North Carolina, pre-judgment interest is recoverable as costs. (After entry of a judgment, or "post-judgment," the plaintiff is also entitled to recover interest at the legal rate.) In an action for negligence, the pre-judgment interest begins to accrue on the date suit is filed. In an action for breach of contract, interest begins to run from the date of breach of contract.

## 3. Attorney's Fees.

The general rule in North Carolina is that the prevailing party is not entitled to recover his attorney's fees. This is therefore arguably an exception to the general rule that the damages should make the plaintiff "whole."

Therefore, in order to recover attorney's fees, the plaintiff must have a specific statute which authorizes the recovery of attorney's fees. (There are, however, claims for

breach of contract in which the plaintiff may be entitled to recover attorney's fees incurred as a result of the defendant's breach of a contractual duty to pay for attorney's fees. For example, in a suit against an insurer for a wrongful refusal to defend a lawsuit, the plaintiff-insured may recover its attorney's fees incurred in defending the tort action against it; the plaintiff insured may not, however, generally recover those attorney's fees incurred in prosecuting the claim for breach of contract against the insurer for failing to defend.) A few of the most common provisions for attorney's fees are addressed below.

The provision which we most frequently encounter in North Carolina is G.S. § 6-21.1. This states as follows:

In any personal injury or property damage suit, or suit against an insurance company under a policy issued by the defendant insurance company and in which the insured or beneficiary is the plaintiff, upon a finding by the court that there was an unwarranted refusal by the defendant insurance company to pay the claim which constitutes the basis of such suit, instituted in a court of record, where the judgment for recovery of damages is ten thousand dollars (\$10,000) or less, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the litigant obtaining a judgment for damages in said suit, said attorney's fee to be taxed as a part of the court costs.

Therefore, if the jury's award is less than \$10,000, then the Court may, in its discretion, award the plaintiff an attorney's fee. It is not entirely clear to which types of actions this statute applies. By its terms, the statute applies

to a claim for "personal injury or property damage." Our North Carolina Court of Appeals addressed a case in which the plaintiff sued a home inspector for breach of contract for failing to detect the presence of termites in his home. The plaintiff alleged that the termites caused damage to his wood. Notwithstanding the presence of this damage, the Court of Appeals held that the statute does not apply. "It appears from the title of the statute that it is to apply to "certain cases," and from the text of the statute it seems clear that these certain cases are "personal injury or property damage suits," as well as particular suits against insurance companies. G.S. § 6-21.1. There is no mention of breach of contract cases." Hicks v. Clegg's Termite & Pest Control, Inc., 132 N.C. App. 383, 385 (1999). Regarding the damage to the wood, the court said, "To embrace property damages under this statute because some damage may have resulted from the termites would be to make attorney's fees in every contract case compensable by extending the damages to some sort of property or personal injury." Hicks v. Clegg's Termite & Pest Control, Inc., 132 N.C. App. 383, 385 (1999). The Court's reasoning seems to be that the statute does not apply because the action was largely premised upon a breach of a contractual duty. It is difficult, however, to reconcile this case with the literal language of the statute.

The appellate court will look at several factors to determine whether the trial court abused its discretion in

awarding fees, but the award is generally very difficult to overturn. The factors which the appellate court will review are the following:

The discretion accorded the trial court in awarding attorney fees pursuant to N.C. Gen. Stat. § 6-21.1 is not unbridled. On remand, the trial court is to consider the entire record in properly exercising its discretion, including but not limited to the following factors: (1) settlement offers made prior to the institution of the action; (2) offers of judgment pursuant to Rule 68, and whether the "judgment finally obtained" was more favorable than such offers; (3) whether defendant unjustly exercised "superior bargaining power"; (4) in the case of an unwarranted refusal by an insurance company, the "context in which the dispute arose."; (5) the timing of settlement offers; (6) the amounts of the settlement offers as compared to the jury verdict; and the whole record.

Washington v. Horton, 132 N.C. App. 347, 351 (1999).

Aside from this statute, attorney's fees are rarely awarded in North Carolina. In an action for a "unfair and deceptive trade practice," the plaintiff may recover attorney's fees in the discretion of the court. Where the plaintiff is required to prove a matter which it attempted to establish through a request for admission, then the plaintiff may recover his attorney's fees incurred in having to establish that fact. Various Federal statutes allow for the recovery of attorney's fees, such as copyright and trademark and 42 U.S.C. § 1983 (violation of civil rights). There are also provisions which may require a party to pay the other side's attorney's fees for frivolous or "bad faith" conduct or actions in connection with the legal proceeding.

#### 4. Offer of Judgment.

The Rules of Civil Procedure have a rule which allows the defendant to serve a "offer of judgment" on the plaintiff, which the plaintiff may accept and file as a judgment. The primary purpose behind this rule was to force the plaintiff to elect whether to accept this offer. In theory, if the ultimate award to the plaintiff is less than (or "less favorable") than the amount offered in the offer of judgment, then the plaintiff bears all "costs" incurred after the offer is made. Therefore, where this rule applies, it prohibits the plaintiff from recovering interest and other costs (such as deposition and expert expenses) following the offer; it also requires the plaintiff to pay the defendant's costs incurred after the date of this offer. It does not affect the right of the plaintiff to recover his costs incurred prior to the offer of judgment.

In North Carolina, however, the offer of judgment rule has been largely stripped of any meaning. In a case decided by the North Carolina Supreme Court, the defendant's offer of judgment must not only be greater than the jury's verdict, but must also be greater than all of the costs incurred subsequent to the offer of judgment.

#### IV. COLLATERAL SOURCE RULE

As stated at the outset, the general intent and measure of damages is to make the plaintiff "whole." Thus, the plaintiff should be in the same position that he or she would have been in if the defendant had not wrongfully harmed the plaintiff. As a

general matter, the plaintiff should not recover a "windfall," or make a "double recovery" in the lawsuit. See, e.g., Baity v. Brewer, 122 N.C. App. 645, 647 (1996) (where plaintiff was injured in accident and received settlement from a driver, who later was found to be not negligent, other driver was still entitled to an offset based on "the common-law principle that a plaintiff should not be permitted a double recovery for a single injury"); Cone Mills Corp. v. Allstate Ins. Co., 114 N.C. App. 684, 692 (1994) (where insured already received payment from another party for attorneys fees, "the trial court correctly reduced the judgment against defendant to prevent Cone from obtaining a double recovery."). See also Tart v. Register, 257 N.C. 161, 174 (1962) (defendant gets offset for med-pay payment issued under his auto policy; "In our opinion it was not within the contemplation of the contracting parties that there should be a double recovery of medical expenses. It was intended that injured parties have minimal protection (medical payments) where negligence is not involved, and full protection (to the limits of the policy) and no more, where negligence is involved. It is manifestly inequitable for plaintiff to recover twice against the same defendant, even though payment was in part voluntary.").

Under the "collateral source rule," however, the defendant sometimes does not get a reduction in his liability even though the plaintiff has another source of recovery. This rule has been stated as follows:

Exclusion of prejudicial evidence is the foundation of the collateral source rule. This rule provides that "evidence of a plaintiff's receipt of benefits for his or her injury or disability from sources collateral to defendant generally is not admissible." These benefits include payments from both public and private sources. This rule gives force to the public policy which prohibits a tortfeasor from reducing "his own liability for damages by the amount of compensation the injured party receives from an independent source." Evidence of collateral source payments violate the rule whether admitted in the defendant's case-in-chief or on cross examination of the plaintiff's witness. "[T]he erroneous admission of collateral source evidence often must result in a new trial."

Badgett v. Davis, 104 N.C. App. 760, 763 (1991). Espino v. Allstate Indem. Co., 159 N.C. App. 686, 689 (2003) ("the collateral source rule . . . seeks to prevent a tortfeasor from "'reducing his own liability for damages by the amount of compensation the injured party receives from an independent source.").

Although the specific language of the collateral source rule varies from state to state, the gist of these rules is to "exclude[] evidence of payments made to the plaintiff by sources other than the defendant when this evidence is offered for the purpose of diminishing the defendant tortfeasor's liability to the injured plaintiff." The policy behind the rule is to prevent a tortfeasor from "reducing his own liability for damages by the amount of compensation the injured party receives from an independent source."

Kaminsky v. Sebile, 140 N.C. App. 71, 77 (2000).

For example, it has been held that "under the collateral source rule, neither defendant may benefit from a credit or setoff of money paid to plaintiff under the

medical payment coverage." Muscatell v. Muscatell, 145 N.C. App. 198, 201 (2001). But see Tart, supra.

"[T]he plaintiff's recovery will not be reduced by the fact that the medical expenses were paid by some source collateral to the defendant, such as by a beneficial society, by members of the plaintiff's family, by the plaintiff's employer, or by an insurance company." Young v. Baltimore & O. R. Co., 266 N.C. 458, 466 (1966). Cates v. Wilson, 83 N.C. App. 448, 454 (1986) ("Plaintiffs are entitled to have the issue of Dr. Wilson's liability determined without evidence of benefits from collateral sources like Medicaid included for the jury's consideration notwithstanding the State's right to reimbursement for benefits pursuant to G.S. § 108A-59. To hold otherwise would serve to transfer responsibility for malfeasance from the tortfeasor to the victim and the State. Availability of public assistance should not operate to reduce a tortfeasor's legal liability.").

#### V. MITIGATION OF DAMAGES.

The law requires the plaintiff to "mitigate," or minimize, his damages. For example, where a builder sues for breach of contract, following the owner's failure to hire the builder, the builder is obligated to try to obtain other work. "The courts, will not let them permit the plaintiff to recover more damages than his actual loss is; consequently, the plaintiff has lost nothing, except the contract price, less the expenses that he

would have incurred in performing it, on his part, and less the amount that he would have earned during the same period in such other employment as he could have obtained by the exercise of ordinary prudence and diligence." Durham Constr. Co. v. Wright, 189 N.C. 456, 459 (1925) ("While the burden is on the defendant to show matters in diminution of plaintiff's damages, we perceive from the instant record, that it was in evidence that the plaintiff has continued in business as a general contractor in building houses, in the city of Durham, at all times since the treaty began with the defendant, concerning the contract established by the verdict herein, and that the defendant was entitled to have this view of the case submitted to the jury.").

The plaintiff is not, however, required to take unreasonable measures to mitigate his losses. Yowmans v. City Of Hendersonville, 175 N.C. 574, 579 (1918) ("one who has been injured by a wrong of this character is not compelled to counter drain or incur substantial expense in protection of his property where such a course is largely experimental in its nature and might result in incurring liability to a lower proprietor").

Where the plaintiff's doctor suggests that the plaintiff not work during rehabilitation following a surgery, then the defense may not argue that the plaintiff failed to mitigate damages by not returning to work. Oakes v. Wooten, 173 N.C. App. 506, 513 (2005) (also rejecting argument that "Oakes failed to mitigate damages by continuing chiropractic care, although it resulted in

increased pain and potentially resulted in a need for surgery" because "evidence presented at trial showed only that Oakes continued in chiropractic care at his treating physician's instruction, and that the chiropractic care resulted in no physical change to Oakes's herniation").

A related doctrine is called the Doctrine of "Avoidable Consequences." Some cases seem to confuse this with the issue of mitigation of damages. Miller v. Miller, 273 N.C. 228, 239 (1968) ("the avoidable consequences generally arise after the wrongful act of the defendant. That is, damages may flow from the wrongful act or omission of the defendant, and if some of these damages could reasonably have been avoided by the plaintiff, then the doctrine of avoidable consequences prevents the avoidable damages from being added to the amount of damages recoverable.").

The true "avoidable consequences" doctrine (apart from simply mitigating damages) holds that where the plaintiff aggravates his injury, he cannot recover for that aggravation based on his negligent or wrongful conduct. On the other hand, if the plaintiff is simply following his physical therapy regimen and re-injures his knee, then his monetary recovery will not be limited.

Thus where the plaintiff "engaged in high-impact aerobics (against [Dr.] Gorlesky's advice), snow-skiing, and water-skiing," "[t]he avoidable consequences doctrine allows the jury

to relieve the defendant of responsibility for the consequences of an injury to the extent that it finds that the plaintiff acted unreasonably and thereby enhanced his or her damages." Holtman v. Reese, 119 N.C. App. 747, 751 (1995).

The issue of mitigation of damages addresses the plaintiff's duty to take affirmative action after the injury to minimize his losses; the Doctrine of Avoidable Consequences addresses the duty of the plaintiff to refrain from active conduct which aggravates his injuries. There is yet another related doctrine which is not clearly addressed in North Carolina. This addresses the duty of the plaintiff to minimize his injuries prior to the accident.

North Carolina has very little legal authority on this point. In one case, the plaintiff was injured in a motor vehicle accident, and the plaintiff was not wearing a seatbelt. The defendant argued that the plaintiff's recovery should be limited to those damages which he would have sustained if he had been wearing his seatbelt. The North Carolina Supreme Court rejected this argument, but its holding is primarily based on the fact that at the time this case was decided, North Carolina did not have a statute requiring the use of seatbelts, and the court did not want to judicially impose such a duty.