

CHAPTER 15

INTENTIONAL TRESPASS TO PERSON AND PROPERTY

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I. INTRODUCTION

One of the fundamental premises of the U. S. legal system is that an individual has certain inalienable rights of person and property. Our legal system, which was largely inherited from Great Britain, provides a civilized means of remedying the violation of individual rights. What follows is a summary analysis of North Carolina law with regard to trespasses against person and property.¹

Our statutory and common law recognizes causes of action to remedy restraints upon our freedom of movement (false imprisonment), threats and physical attacks against our bodies (assault and battery), unfair damage to our reputations (slander and libel), outrageous and uncivilized conduct intended to cause psychological harm (intentional infliction of emotional distress), malicious litigation against us personally (malicious prosecution), misuse of valid legal process against our persons (abuse of process), trespasses upon our land (trespass to realty), unreasonable interference with our enjoyment of our land (nuisance), wrongful restraints upon our property through legal proceedings (wrongful attachment), wrongful interference with our personal property (trover and conversion), and damage to our personal property while held by another (bailment).

¹This paper deals solely with intentional torts and is only an overview. The author is indebted to the North Carolina Academy of Trial Lawyers, Prima Facie Tort Manual (Robert “Hoppy” M. Eliot et al. eds., 1996) and highly recommends that publication for a more comprehensive treatment of this subject. Other valuable resources include David Logan and Wayne Logan, North Carolina Torts (Carolina Academic Press, 1996) and Charles Daye and Mark Morris, North Carolina Law of Torts, (Michie Company, 1991). Jennifer Wagner assisted with research.

II. FALSE IMPRISONMENT

A. Elements

- Illegal restraint of the plaintiff by the defendant;
- By force or express or implied threat of force; and,
- Against the plaintiff's will.

West v. King's Dept. Store, 321 N.C. 698, 365 S.E.2d 621 (1988); Black v. Clark's Greensboro, Inc., 263 N.C. 226, 139 S.E.2d 199 (1964); Hales v. McCrory-McLellan Corp., 260 N.C. 568, 133 S.E.2d 225 (1963); Hoffman v. Clinic Hosp., 213 N.C. 669, 197 S.E. 161 (1938).

B. False Imprisonment Defined

False imprisonment is the illegal restraint of a person against his will. Marlowe v. Piner, 119 N.C. App. 125, 458 S.E.2d 220 (1995). A restraint is illegal if not lawful or consented to. An imprisonment is "any force, or express or implied threat of force, by which [one] is deprived of . . . liberty, compelled to remain where [one] does not wish to remain, or to go where [one] does not wish to go." Hales v. McCrory-McLellan Corp., 260 N.C. 568, 571, 133 S.E.2d 225, 227 (1963). An action for false imprisonment may arise without an arrest or physical imprisonment, as a result of any words or acts that deprive one of liberty. Black v. Clark's Greensboro, Inc., 263 N.C. 226, 139 S.E.2d 199 (1964). If the aggressor uses no physical force or violence, the words or acts must be such as to induce a reasonable apprehension that the aggressor will resort to force to prevent the detainee from leaving. Hoffman v. Clinic Hosp., 213 N.C. 669, 197 S.E. 161 (1938).

The action for false imprisonment requires that the actions of the defendant be deliberate; it does not apply to a negligent or inadvertent restraints on liberty. Harwood v. Johnson, 326 N.C. 231, 388 S.E.2d 439 (1990)(parole commission only liable for deliberate failure to follow statutory release standards). Hemric v. Groce, 609 S.E. 2d 276, ___ N.C. App. ___, rev. denied, 359 N.C. 631, 616 S.E. 2d 234(2005)(Motion to show cause and enforce consent judgment insufficient to show deliberate attempt to restrain liberty).

C. False Arrest

A false arrest, i.e., an arrest without proper legal authority, is one means of committing a false imprisonment. Mobley v. Broome, 248 N.C. 54, 56, 102 S.E.2d 407, 409 (1958). For a false imprisonment action, the state law of arrest (N.C.G.S. Sections 15A-401 et seq.) determines whether the defendant is legally justified in depriving the detainee of liberty. Myrick v. Cooley, 91 N.C. App. 209, 212, 371 S.E.2d 492, 494 (1988). Some false arrests are unconstitutional and may form the basis of a civil rights action under 42 U.S.C. § 1983. Id. Other arrests may be illegal under state law, but constitutionally valid. State v. Eubanks, 283 N.C. 556, 196 S.E.2d 706, reh. denied, 285 N.C. 597 (1973) (decided under prior law). An action for false arrest may arise when an arrest or detention is without a warrant; when the warrant charges no offense, or is void; or when the person arrested is not the person named in the warrant. Melton v. Rickman, 225 N.C. 700, 36 S.E.2d 276 (1946).

1. Arrest With Warrant

If a warrant is defective on its face, having a warrant does not insulate an officer from liability for false arrest. Alexander v. Lindsey, 230 N.C. 663, 55 S.E.2d 470 (1949). When the person arrested is not the person named in the warrant, the arresting officer will be liable for false arrest only when the officer has failed to use reasonable diligence to determine that the party arrested was the person described in the warrant. Robinson v. City of Winston-Salem, 34 N.C. App. 401, 238 S.E.2d 628 (1977).

2. Arrest Without Warrant

An officer making a warrantless arrest is not liable for false imprisonment when conforming substantially with prescribed procedures for a warrantless arrest. State v. Mobley, 240 N.C. 476, 83 S.E.2d 100 (1954). When the facts are at issue with regard to the arrest, it is for a jury to determine whether the arrest was based upon probable cause. Glenn-Robinson v. Acker, 140 N.C.App. 606, 538 S.E.2d 601(2000). When the facts are not at issue, probable cause for the arrest is a question of law for the court. Thomas v. Sellers, 142 N. C. App. 310, 542 S.E.2d 283 (2001).

3. Arrest By Private Citizen

Any person who detains another without legal justification may be liable for false imprisonment. N.C.G.S. § 15A-405(a) provides that a private citizen assisting an officer in an arrest does not incur civil or criminal liability unless he knows the arrest to be invalid. N.C.G.S. § 15A-405(a) (2001). A private citizen is liable for

false imprisonment if, at the citizen's request, a police officer makes an unlawful arrest without a warrant or with a void warrant. Blackwood v. Cates, 297 N.C. 163, 254 S.E.2d 7 (1979).

4. Effect Of Conviction

If a plaintiff is convicted in district court on the charge for which he was arrested, any false imprisonment claim based on that arrest is barred. Myrick v. Cooley, 91 N.C. App. 209, 371 S.E.2d 492, review denied as to add'l issues, 323 N.C. 477, 373 S.E.2d 865 (1988). See, Mays v. Clanton, ___ N.C. App. ___ 609 S.E. 2d 453,(2005)(evidence of conviction admissible to support dismissal of false imprisonment claim)

D. Defenses & Immunities

1. Judicial Officers

Judicial officers are immune from suit for false imprisonment in carrying out their official duties. Foust v. Hughes, 21 N.C. App. 268, 204 S.E.2d 230, cert. denied, 285 N.C. 589, 205 S.E.2d 722 (1974).

2. State Institutions/Involuntary Commitment

N.C.G.S. § 122C-210.1 creates a qualified privilege for individuals and facilities following accepted professional standards in treating clients in state institutions. N.C.G.S. § 122C-210.1 (1999). Even if a hospital does not comply with statutory guidelines for involuntary commitment, the hospital is not liable for false imprisonment for not permitting a patient to leave a psychiatric ward if the committing physician was not the hospital's agent and the physician's instructions were not obviously negligent or dangerous to the patient. Sumblin v. Craven Co. Hosp., 86 N.C. App. 358, 357 S.E.2d 376 (1987); but see, Kwan-sa You v. Roe, 97 N.C. App. 1, 387 S.E.2d 188 (1990) (question of fact whether hospital security officers had falsely imprisoned plaintiff in escorting him to the psychiatric wing of the hospital).

3. Merchant's And Security Guard's Defense

N.C.G.S. § 14-72.1(c) (1999) provides immunity from civil liability for a store and its agents who detain a customer in a reasonable manner and with probable cause.; see Mullins ex rel. Mullins v. Friend, 116 N.C. App. 676, 449 S.E.2d 227 (1994) (affirming judgment for plaintiff store customer in false imprisonment claim and holding that the defense under N.C.G.S. § 14-72.1(c) was unavailable to defendant store manager since she did not have probable cause to believe that plaintiff store customer had wilfully concealed merchandise from the store); Burwell v. Giant Genie Corp., 115 N.C. App. 680, 686, 446 S.E.2d 126, 129-130 (1994) (reversing directed verdict for defendant's store, store manager, and off-duty police officer and remanding for new trial on false imprisonment claims) because jury questions existed as to whether detention was conducted in a reasonable manner where store manager had grabbed plaintiff's arm and had moved him two aisles down toward the store office for public patdown search.

4. Good Faith Not A Defense

A defendant's good faith is not a defense to false imprisonment although it may be considered in mitigation of damages. Alexander v. Lindsey, 230 N.C. 663, 55 S.E.2d 470 (1949); Caudle v. Benbow, 228 N.C. 282, 45 S.E.2d 361 (1948).

5. Public Official Immunity

Public officers are immune from individual liability for false arrest unless they act with corruption or malice. Campbell v. Anderson, 156 N.C. App. 371, 576 S.E.2d 726(2003).

E. Damages

1. Compensatory Damages

Compensatory damages may be recovered for the actual damages resulting from the false imprisonment, including damages for injury to feelings, mental suffering, and loss of earnings. Rhodes v. Collins, 198 N.C. 23, 150 S.E. 492 (1929). The duration of restraint will likely play upon the jury's award of damages, but a short restraint will not defeat the action. West v. King's Dep't Store, 321 N.C. 698, 703, 365 S.E.2d 621, 624 (1988).

2. Punitive Damages

Chapter 1D of the North Carolina General Statutes now governs every claim for punitive damages. It requires a showing of malice, fraud, or wilful and wanton behavior. N.C.G.S. § 1D-15(1999). The statute caps punitive damages at \$250,000 or three times the compensatory damages, whichever is greater. N.C.G.S. § 1D-25(1999). A corporate defendant is only liable if management participated in or condoned the aggravated conduct; however, a jury may grant separate punitive damage awards against the individual and the corporate defendant. Id.; Watson v. Dixon, 352 N. C. 343, 532 S.E. 2d 175 (2000)

F. Statute Of Limitations

Suit must be filed within three years from the time of imprisonment. N.C.G.S. § 1-52(19) (2001). There is a three year limitation on actions against a public officer for false imprisonment claims under color of his office. N.C.G.S. § 1-52(13) (2001); Fowler v. Valencourt, 334 N.C. 345, 432 S.E.2d 306 (1993).

G. References

False Imprisonment, N.C.P.I. -- Civil 802.00; 15 N.C. Index 4th False Imprisonment (1992).

III. ASSAULT AND BATTERY

A. Elements

ASSAULT

- A show of violence or other intentional conduct by the defendant.
- Which put plaintiff in reasonable apprehension of immediate harmful or offensive contact.

BATTERY

- Intentional infliction of harmful or offensive contact upon plaintiff's person.
- Without plaintiff's consent.

Dickens v. Puryear, 302 N.C. 437, 276 S.E.2d 325 (1981).

B. Definition Of Assault

An action for assault protects the plaintiff's interest in freedom from apprehension of harmful or offensive contact. Id. To be an assault, the apprehension created must be of an immediate contact, as distinguished from future contact. Id. A mere threat, unaccompanied by an offer or attempt to show violence, is not an assault. Id.

C. Definition Of Battery

The action for battery protects the interest in freedom from intentional and unpermitted contacts with the plaintiff's person. In an action for battery the contact need not be brought about by a direct application of force. The defendant need only set a force in motion which ultimately produced the result. McCracken v. Sloan, 40 N.C. App. 214, 252 S.E.2d 250 (1979). A certain amount of personal contact is inevitable and must be accepted. Consent is assumed to all those ordinary contacts which are customary and reasonably necessary to the common intercourse of life. Id. A person who is unconscious or insensibly drunk cannot give consent to physical contact. Id. A police officer may be liable for assault and battery if, in making an arrest or securing control of an offender, he uses unnecessary and excessive force. Perry v. Gibson, 249 N.C. 134, 105 S.E.2d 277 (1958); Sossamon v. Cruse, 133 N.C. 470, 45 S.E. 757 (1903).

D. Liability Of Employers

An employer may be held liable for an assault or battery committed by an employee within the scope of employment and in furtherance of the employer's business. Edwards v. Akion, 52 N.C. App. 688, 279 S.E.2d 894, aff'd per curiam, 304 N.C. 585, 284 S.E.2d 518 (1981).

E. Defenses

1. Self-Defense

A person is justified in defending himself if he is without fault in provoking or continuing a confrontation, and if responding to an actual or apparent danger of injury. The law does not compel any person to submit meekly to indignities or violence merely because they stop short of threats of death or great bodily harm. A person who is without fault in provoking or continuing a confrontation is privileged by the law of self-defense to use such force as is reasonably necessary under the

circumstances to protect himself from bodily injury or offensive physical contact, even there is no actual or apparent danger of death or great bodily harm. When a person who wrongfully provoked the confrontation abandons the conflict in good faith and adequately informs his adversary of his withdrawal, the right of self-defense may be restored. State v. Anderson, 230 N.C. 54, 51 S.E.2d 895 (1949); Juarez-Martinez v. Deans, 108 N.C. App. 486, 424 S.E.2d 154 (1993).

2. Defense Of Property

One in possession of property has the right to defend and protect it against aggression; however, deadly force may only be used in defense of property when the aggressor feloniously uses force, and where deadly force appears to be necessary to prevent death or great bodily harm. Dickens v. Puryear, 302 N.C. 437, 276 S.E.2d 325 (1981); Bailey v. Ferguson, 209 N.C. 264, 183 S.E. 275 (1936)

3. Provocation Not A Defense

Provocation is not a defense to an action for assault and battery, but may be considered in mitigation of damages. Lewis v. Fountain, 168 N.C. 277, 84 S.E. 278 (1915); Hall v. Coplou, 85 N.C. App. 505, 355 S.E.2d 195 (1987).

4. Consent To Fight Not A Defense

Consent of the parties to a fight is no bar to an action for assault and battery by one of the parties. Where two or more persons join in an affray, each is guilty of an assault and battery upon the others, and each may maintain an action against the others. Bell v. Hansley, 48 N.C. 131 (1855); Lail v. Woods, 36 N.C. App. 590, 244 S.E.2d 500, review denied, 295 N.C. 550, 248 S.E.2d 727 (1978).

F. Damages

1. Compensatory Damages

Compensatory damages may be recovered by the plaintiff for past, present and future medical expenses; physical and mental pain and suffering, lost earnings, and loss of earning capacity. Kirkpatrick v. Crutchfield, 178 N.C. 348, 100 S.E. 602 (1919); Trogden v. Terry, 172 N.C. 540, 90 S.E. 583 (1916); Overton v. Henderson, 28 N.C. App. 699, 222 S.E.2d 724, review denied, 290 N.C. 95, 225 S.E.2d 324 (1976). Note that it may be difficult to recover on an insurance policy for an assault and battery claim due to the exclusions for intentional acts. See, e.g., Allstate

Insurance Co. V. Lahoud, 167 N.C. App. 205, 605 S.E. 2d 180.

2. Punitive Damages

Chapter 1D of the North Carolina General Statutes now governs every claim for punitive damages. It requires a showing of malice, fraud, or wilful and wanton behavior. N.C.G.S. § 1D-15(1999). The statute caps punitive damages at \$250,000 or three times the compensatory damages, whichever is greater. N.C.G.S. § 1D-25(1999). A corporate defendant is only liable if management participated in or condoned the aggravated conduct; however, a jury may grant separate punitive damage awards against the individual and the corporate defendant. Id.; Watson v. Dixon, 352 N. C. 343, 532 S.E. 2d 175 (2000).

G. Statute Of Limitations

An action for assault or battery must be brought three years from the time the wrongful acts occurred for each tort. N.C.G.S. 1-52(19) (2001).

H. References

Assault and Battery, N.C.P.I. -- Civil 800.50-800.54; 2 N.C. Index 4th Assault and Battery §§ 1-11 (1990).

IV. SLANDER AND LIBEL

A. Elements Of Slander Per Se

- Publication by the defendant;
- To someone other than the plaintiff;
- Of a spoken statement;
- Which, when considered alone without innuendo, falls into one of three categories:
 - a. accusations that the plaintiff committed crime or offense involving moral turpitude;
 - b. defamatory statements about a person with respect to his trade, business, or profession; and,
 - c. imputations that the plaintiff has a loathsome disease.
- The statement was false.

West v. King's Dep't Store, 321 N.C. 698, 365 S.E.2d 621 (1988).

B. Elements Of Slander Per Quod

- Publication by the defendant;
- To someone other than the plaintiff;
- Of a spoken statement;
- Which, when considered only in consequence of extrinsic, explanatory facts showing its injurious effect, falls into one of three categories:
 - a. accusations that the plaintiff committed a crime or offense involving moral turpitude;
 - b. defamatory statement about a person with respect to his trade, business, or profession; and,
 - c. imputations that the plaintiff has a loathsome disease.
- The statement was false.
- The statement was spoken with malice.
- The plaintiff suffered special damages (economic loss) as a result of the publication.

Beane v. Weiman Co., 5 N.C. App. 276, 168 S.E.2d 236 (1969). "Where the injurious character of the words do not appear on their face as a matter of general acceptance, but only in consequence of extrinsic, explanatory facts showing their injurious effect, such utterance is actionable only per quod." Morrow v. King's Dep't Store, 57 N.C. App. 13, 20, 290 S.E.2d 732, 737, review denied, 306 N.C. 385, 294 S.E.2d 210 (1982).

C. Elements Of Libel Per Se

- Publication by the defendant;
- By writing, printing, signs or pictures;
- Which, when considered alone without innuendo:
 - a. charges that the plaintiff has committed an infamous crime;
 - b. charges the plaintiff with having an infectious disease;
 - c. tends to impeach the plaintiff in that person's trade or profession; or,
 - d. otherwise tends to subject the plaintiff to ridicule, contempt, or disgrace.
- The publication was false.

Ellis v. Northern Star Co., 326 N.C. 219, 388 S.E.2d 127 (1990); Renwick v. News & Observer Publishing Co., 310 N.C. 312, 316, 312 S.E.2d 405, 409, cert. denied, 469

U.S. 85, 105 S.Ct. 187, 83 L.Ed. 121 (1984) "[D]efamatory matter written or printed, or in the form of caricatures or other signs, may be libelous and actionable per se . . . if they tend to expose plaintiff to public hatred, contempt, ridicule, aversion or disgrace and to induce an evil opinion of him in the minds of right thinking persons and to deprive him of their friendly intercourse and society." Flake v. Greensboro News Co., 212 N.C. 780, 786, 195 S.E. 55, 60 (1938) (citations omitted).

D. Elements Of Class Two Libel

- A publication by the defendant subject to two interpretations, one defamatory and the other not;
- By writing, printing, signs or pictures;
- Referring to the plaintiff;
- Intended by the defendant to be defamatory;
- Published to a third party who understood that it conveyed a defamatory meaning; and,
- The publication was false.

Cathy's Boutique v. Winston-Salem Joint Venture, 72 N.C. App. 641, 325 S.E.2d 283 (1985). Class two libel is a publication by the defendant "susceptible of two meanings, one defamatory, and . . . the defamatory meaning was intended and was so understood by those to whom the publication was made. Renwick v. News & Observer Publishing Co., 310 N.C. 312, 317, 312 S.E.2d 405, 409, cert. denied, 469 U.S. 85, 105 S.Ct. 187, 83 L.Ed. 121 (1984). North Carolina is the only state that uses this "class two" libel distinction. The other states merely treat it as a form of libel per quod. David Logan and Wayne Logan, North Carolina Torts, p. 488, n. 60 (Carolina Academic Press, 1996).

E. Elements Of Libel Per Quod

- Publication by the defendant;
- By writing, printing, signs or pictures;
- Referring to the plaintiff;
- Which is not defamatory on its face but becomes so when considered with innuendo, colloquium and explanatory circumstances; and,
- The publication was false.

Arnold v. Sharpe, 296 N.C. 533, 251 S.E.2d 452 (1979).

F. Slander And Libel Historically

In North Carolina, the term defamation covers two distinct torts, libel and slander. In general, libel is written while slander is oral. Phillips v. Winston-Salem/Forsyth County Bd. of Educ., 117 N.C. App. 274, 450 S.E.2d 753 (1994), review denied, 340 N.C. 115, 456 S.E.2d 318 (1995); Iadanza v. Harper, ___ N.C. App. ___, 611 S.E. 2d 217 (reaffirming the historical distinction between libel and slander); but see Andrews v. Elliot, 109 N.C. App. 271, 274, 426 S.E.2d 430, 432 (1993) (blurring distinction by speaking of plaintiff's action as one for defamation and using language from cases dealing with both libel and slander); Tyson v. L'Eggs Products, 84 N.C. App. 1, 351 S.E.2d 834 (1987) (stating the elements of defamation).

The formulation of separate rules for libel and slander appears to have been influenced by the growth of education and printing, as courts engaged in a deliberate attempt to tip the scales 'against those who deliberately put down on paper a lasting memorial of any lie against a neighbor's good name' and to handicap those who complain to the courts for 'oral detractions of the more trivial sort.' Donovan v. Fiumara, 114 N.C. App. 524, 535, 442 S.E.2d 572, 579 (1994). In an action for libel, damages may be presumed for a great many categories of publication considered libelous per se, because of the much greater harm and likelihood of malice associated with written publications. Thus, it is sufficient that a written statement merely exposed another to hatred, ridicule, contempt or disgrace to make out a claim. Further, there is no requirement of economic damages to satisfy the elements of a non-per se claim to avoid the requirement of proving special damages.

G. The Two Classes Of Slander

Slander is "oral defamation," or "the speaking of base or defamatory words which tend to prejudice another in his reputation, office, trade, business, or means of livelihood." Donovan v. Fiumara, 114 N.C. App. 524, 442 S.E.2d 572 (1994).

Our court have long recognized two actionable classes of oral defamation: slander per se and slander per quod. In one class the false remarks in themselves (per se) form the basis of the action; both malice and damage are, as a matter of law, presumed. There is a presumption of malice and of damage for slander per se, entitling plaintiff to recover nominal damages at least without specific allegations of proof of damages. Stewart v. Nation-Wide Check Corp., 279 N.C. 278, 182 S.E.2d 410 (1971) (slander per se) Only three categories of defamatory statements are slander per se: (1) accusations that the plaintiff committed a crime or offense

involving moral turpitude; (2) defamatory statements about a person with respect to his trade, business, or profession; and (3) imputations that the plaintiff has a loathsome disease. Penner v. Elliot, 225 N.C. 33, 33 S.E.2d 124 (1945); Kroh v. Kroh, ___ N.C.App ___, 567 S.E.2d 760 (2002)(wife accuses husband, police officer, of having sex with children and family dog).

In the other class, the false utterance may sustain an action only when it causes some special damage (per quod), in which case both malice and special damage must be alleged and proved. Beane v. Weiman Co., 5 N.C. App. 276, 277, 168 S.E.2d 236, 237 (1969). Where the injurious character of the words do not appear on their face as a matter of general acceptance, but "only in consequence of extrinsic, explanatory facts showing their injurious effect," such utterance is actionable only per quod. Morrow v. King's Dep't Store, 57 N.C. App. 13, 290 S.E.2d 732, review denied, 306 N.C. 385, 294 S.E.2d 210 (1982). Where the words spoken are actionable only per quod, the injurious character of the words and some special damage must be pleaded and proved. Badame v. Lampke, 242 N.C. 755, 89 S.E.2d 466 (1955).

H. The Meaning Of "Publication"

Publication refers to the sharing of the defamatory statement with another person. The statement published must refer to some ascertained or ascertainable person and that person must be the plaintiff. If the words used contain no reflection on any particular individual, no averment can make them defamatory. Arnold v. Sharpe, 296 N.C. 533, 251 S.E.2d 452 (1979). The publication by the defendant must be to one other than the plaintiff. Robinson v. Nationwide Ins. Co., 273 N.C. 391, 159 S.E.2d 896 (1968). In an action for slander or libel it is not necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the claim for relief arose, but it is sufficient to state generally that the same was published or spoken concerning the plaintiff, and if such allegation is controverted, the plaintiff is bound to establish on trial that it was so published or spoken. N.C.G.S. § 1A-1, Rule 9(i). If a person allegedly libeled, or someone acting on that person's behalf, procured or invited the publication, an action for defamation will not lie. Taylor v. Jones Bros. Bakery, 234 N.C. 660, 68 S.E.2d 313 (1951).

I. The Three Classes of Libel

The three classes of libel are recognized under North Carolina law. They are: (1) publications obviously defamatory which are called "libel per se" (2) publications susceptible of two interpretations, one of which is defamatory and the other not known as "Class 2 Libel" and, (3) publications not obviously defamatory but when considered with innuendo, colloquium and explanatory circumstances become libelous, which are termed "libel per quod." Renwick v. News & Observer Publishing Co., 310 N.C. 312, 316, 312 S.E.2d 405, 409, cert. denied, 469 U.S. 85, 105 S.Ct. 187, 83 L.Ed. 121 (1984).

False statements charging that another has committed a punishable offense or has been arrested for a crime are actionable per se. Stewart v. Nation-Wide Check Corp., 279 N.C. 278, 182 S.E.2d 410 (1971); Woody v. Catawba Valley Broadcasting Co., 272 N.C. 459, 158 S.E.2d 578 (1968).

Defamatory statements about a businessperson imputing conduct derogatory to that person's reputation are actionable per se if they are uttered about a person's business relationship and affect that person in the person's particular occupation. To be actionable without proof of special damage, the false words (1) must touch the plaintiff in his special trade or occupation, and (2) must contain an imputation necessarily hurtful in its effect on his business. It is not enough that the words used tend to injure a person in his business. To be actionable per se, they must be uttered about him in his business relation. Badame v. Lampke, 242 N.C. 755, 89 S.E.2d 466 (1955).

When an unauthorized publication is libelous per se, malice and damage are presumed from the fact of publication and no proof is required as to any resulting injury. The law presumes that general damages will result from an unauthorized publication which is libelous per se because the written lie has the immediate tendency to impair plaintiff's reputation. Renwick v. News & Observer Publishing Co., 310 N.C. 312, 312 S.E.2d 405, cert. denied, 469 U.S. 816, 105 S. Ct. 83 (1984). Whether a publication is libel per se is a question of law for the court. Boyce & Isley, PLLC v. Cooper, 153 N. C. App. 25, 568 S.E.2d 893(2002), appeal dismissed and rev. denied, 357 N. C. 163, 580 S.E. 2d 361(2003)(suit for false political advertising).

To state a claim within the second class of libel, the complaint must allege that the defamatory material is susceptible of two meanings one of which is defamatory and that the defamatory meaning was intended and so understood by those to whom the publication was made. Tyson v. L'Eggs Products, Inc., 84 N.C. App. 1, 351 S.E.2d

834 (1987); Renwick v. News & Observer Publishing Co., 310 N.C. 312, 312 S.E.2d 405, cert. denied, 469 U.S. 816, 105 S. Ct. 83 (1984).

Libel per quod refers to a written communication that does not appear to be false on its face, or to have an interpretation that could be false, but which is made false when considered in light of other extrinsic facts and circumstances. Arnold v. Sharpe, 296 N.C. 533, 251 S.E.2d 452 (1979).

J. Issues Regarding The Construction Of A Publication

The initial question for a court reviewing a claim for libel per se is whether the publication is such as to be subject to only one interpretation. If the court determines that the publication is subject to only one interpretation, then it is for the court to say whether that interpretation is defamatory. It is only after the court has decided that the answer to both of these questions is affirmative that the case should be submitted to the jury on a theory of libel per se. Tyson v. L'Eggs Products, Inc., 84 N.C. App. 1, 351 S.E.2d 834 (1987); Renwick v. News & Observer Publishing Co., 310 N.C. 312, 312 S.E.2d 405, cert. denied, 469 U.S. 816, 105 S. Ct. 83 (1984) The principle of common sense requires that courts interpret the publication as ordinary people would. The fact that supersensitive persons with morbid imaginations might, by reading between the lines of an article, discover some defamatory meaning, is insufficient to make them libelous. In determining whether the article is libelous per se the article alone must be construed, stripped of all insinuations, innuendo, colloquium and explanatory circumstances. Id.

To be defamatory, the publication must be "of such nature that the court can presume as a matter of law that (it tends) to disgrace and degrade the plaintiff or hold him up to public hatred, contempt or ridicule, or cause him to be shunned and avoided." Id. Where an allegedly libelous publication is susceptible of two interpretations, the jury must determine whether, under the circumstances, the publication was defamatory and "was so understood by those who saw it." Arnold v. Sharpe, 296 N.C. 533, 251 S.E.2d 452 (1979).

K. The Meaning Of "Malice"

Libel of a public official or public figure and slander per quod both require a showing of "actual malice." The term "actual malice" has been used to describe both common law malice (see Ponder v. Cobb, 257 N.C. 281, 126 S.E.2d 67 (1962)) and constitutional malice (see Sleem v. Yale Univ., 843 F. Supp. 57 (M.D.N.C. 1993) (discussing the limits of the first amendment on libel claims in North Carolina)). To

prove common law malice -- the standard for the private plaintiff on a non-public issue -- the plaintiff may show (1) that the defendant knew when using the words that they were false, or (2) that the defendant neglected to use means at hand for ascertaining the truth of the matter, or (3) extrinsic evidence of the defendant's personal hostility or ill feeling toward of the plaintiff, or (4) the words of the libel itself and the circumstances attending its publication. Id.

Public officials must establish in their prima facie case that the defamatory falsehood was published with constitutional malice. To prove constitutional malice, the plaintiff must show that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard of whether it was false or not. Id. Constitutional malice must be proved by clear and convincing evidence. Bose Corp. v. Consumers Union of the United States, 466 U.S. 485, 514 (1984). Constitutional malice under the New York Times standard should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will. Varner v. Bryan, 113 N.C. App. 697, 704, 440 S.E.2d 295, 300 (1994). Reckless disregard may be shown by evidence sufficient to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of the publication. Dellinger v. Belk, 34 N.C. App. 488, 238 S.E.2d 788 (1977), review denied, 294 N.C. 182, 241 S.E.2d 517 (1978).

The "public official" designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs. This includes law enforcement officers (sheriffs, deputy sheriffs, and police officers) (id.) and town managers. Varner v. Bryan, 113 N.C. App. 697, 440 S.E.2d 295 (1994). The "public official" designation may persist even after a person is terminated from employment in a public office. Id.

"Public figures" must also establish that the defendant published the defamatory falsehood with constitutional malice. See New York Times v. Sullivan, 376 U.S. 254, 84 S. Ct. 710 (1964); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967). Generally "public figures" includes public officials, politicians, or anyone who occupies a position of prominence in the affairs of society. See Time, Inc. v. Firestone, 424 U.S. 448 (1976); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). Gaunt v. Pittaway, 135 N. C. App. 442, 520 S.E.2d 603 (1999)(fertility doctor held limited-purpose public figure).

One is not automatically a public figure merely because of newsworthiness or even criminal activity, but generally becomes a public figure by occupying a position of influence, voluntarily thrusting oneself to the forefront of a public controversy, or

engaging the attention of the public in an attempt to influence resolution of certain issues. Id.

L. Employer Liability

An employer may be liable for slanderous statements made by the employer's agent while acting within the scope of the agent's employment. See Stewart v. Nation-Wide Check Corp., 279 N.C. 278, 182 S.E.2d 410 (1971) (corporate liability arising out of employee's having accused a second employee of embezzlement); Sawyer v. Gilmers, Inc., 189 N.C. 7, 126 S.E. 183 (1925) (corporate liability arising out of store employee's having accused a store customer of shoplifting).

M. Defenses

1. Truth As A Complete Defense

The truth of a statement is a complete defense to a plaintiff's claim of defamation. Parker v. Edwards, 222 N.C. 75, 21 S.E.2d 876 (1942); Long v. Vertical Technologies, Inc., 113 N.C. App. 598, 439 S.E.2d 797, 800 (1994), and must be affirmatively pled. See N.C.G.S. § 1A-1, Rule 8(c) (1990) (requiring that truth be pled as an affirmative defense in action for defamation).

2. Privilege

Privilege is an affirmative defense. The defendant must allege the ultimate facts which bar the defendant's being held liable in damages for publishing an otherwise actionable false statement. See R.H. Bouligny, Inc v. United Steelworkers, 270 N.C. 160, 154 S.E.2d 344 (1967); see also Ward v. Turcotte, 79 N.C. App. 458, 339 S.E.2d 444 (1986)(qualified privilege is an affirmative defense and must be specially pleaded). Privilege is a question of law for the court, and not for the jury, unless the circumstances of the publication are in dispute, when it becomes a mixed question of law and fact. Stewart v. Nation-Wide Check Corp., 279 N.C. 278, 182 S.E.2d 410 (1971). Privileged communications are of two kinds: (1) absolutely privileged and (2) qualifiedly privileged.

3. Absolute Privilege

The absolute privilege to make a defamatory communication is restricted to those cases in which the public interest demands that the defendant be allowed to speak his mind fully and freely. No cause of action may be brought against such a

speaker, even if the publication in question was false and malicious. This complete immunity obtains only where public service or the due administration of justice requires it, e.g., words used in debates in congress and the state legislatures, reports of military or other officers to their superiors in the line of their duty, everything said by a judge on the bench, by a witness in the box, and the like. In these cases the slander action is absolutely barred. Smith v. McDonald, 895 F.2d 147 (1990) (quoting Ramsey v. Cheek, 109 N.C. 270, 13 S.E. 775 (1891) (seminal case on privilege)).

Thus, there is an absolute privilege to communicate potentially defamatory statements during a judicial proceeding, A judicial proceeding "includes every proceeding of a judicial nature before a competent court or before a tribunal or officer clothed with judicial or quasi-judicial powers." Jarmun v. Offutt, 239 N.C. 468, 473, 80 S.E.2d 248, 250 (1954). Likewise, defamatory statements in pleadings or other papers are privileged if relevant to the action's subject. Whether such statements are relevant is a matter of law; to be declared not privileged the statement "must be so palpably irrelevant to the subject matter of the controversy that no reasonable person could doubt its irrelevancy or impropriety." Scott v. Statesville Plywood & Veneer Co., 240 N.C. 73, 76, 81 S.E.2d 146, 149 (1954). Ordinarily, an affiant's statements are privileged if pertinent to matters involved in a judicial proceeding, or if the affiant has reasonable grounds to believe are pertinent. Jarmun v. Offutt, 239 N.C. 468, 80 S.E.2d 248 (1954). A witness' defamatory statement is absolutely privileged if made in the due course of a judicial proceeding, if it is material to the inquiry, even though the testimony is given with express malice and knowledge of its falsity. Id.

An attorney's statements in the course of a trial are absolutely privileged, if the statements are material and pertinent to the proceeding. Wall v. Blalock, 245 N.C. 232, 95 S.E.2d 450 (1957). An attorney is also absolutely privileged to publish defamatory matter in communications preliminary to a proposed judicial proceeding if the material is relevant to the anticipated litigation and published to persons significantly interested in the litigation. Smith v. Carolina Coach Co., 120 N.C. App. 106, 461 S.E.2d 362 (1995). Out-of court statements between parties to a judicial proceeding or their attorneys and relevant to the proceeding are absolutely privileged, Gibson v. Mutual Life Ins. Co., 121 N.C. App. 284, 465 S.E.2d 56 (1996).

An attorney's statements given to a newspaper concerning a case but not part of a judicial proceeding are not privileged. Andrews v. Elliot, 109 N.C. App. 271, 426 S.E.2d 430 (1993).

4. Qualified Privilege

Defamatory statements may be protected by a qualified privilege. A qualified or conditionally privileged communication is one made in good faith, on any subject matter in which the person communicating has an interest or in reference to which he has a right or duty, if made to a person having a corresponding interest or duty, on a privileged occasion and, in a manner and under circumstances fairly warranted by the occasion and the duty, right, or interest. Long v. Vertical Technologies, Inc., 113 N.C. App. 598, 439 S.E.2d 797, 800 (1994). For example, a qualified privilege has been extended to communications made by a police officer during an investigation. Averitt v. Rozier, 119 N.C. App. 216, 458 S.E.2d 26 (1995). Failure to make a statement in good faith may nullify the privilege. Smith-Price v. Charter Behavioral Health Systems, 164 N.C. App. 349, 595 S.E. 2d 778 (2004)(claim of sexual harassment not made in good faith).

Once the defendant establishes the existence of a qualified privilege to publish the communication, the plaintiff must prove that (1) the statements were false and (2) were made with actual malice. Presnell v. Pell, 298 N.C. 715, 260 S.E.2d 611 (1979); Stewart v. Nation-Wide Check Corp., 279 N.C. 278, 182 S.E.2d 410 (1971). "Actual malice may be proven by evidence of ill-will or personal hostility on the part of the declarant . . .or by a showing that the declarant published the defamatory statement with knowledge that it was false, with reckless disregard to the truth or with a high degree of awareness of its probable falsity." Kwan-Sa You v. Roe, 97 N.C. App. 1, 12, 387 S.E.2d 188, 193 (1990)(citations omitted). A defendant's qualified privilege to publish may be lost if the plaintiff proves excessive publication. Harris v. Procter & Gamble Mfg. Co., 102 N.C. App. 329, 330, 401 S.E.2d 849, 851 (1991).

N. Actions Against Newspapers, Periodicals, Radio, And Television – N.C.G.S. § 99-1 to -5

1. Written Notice Required

N.C.G.S. § 99-1 requires that at least five days before an action for libel by a newspaper or periodical or for slander by a radio or television station, the plaintiff must serve written notice on the defendant. The notice must specify the article and statements alleged to be false and defamatory and as to the radio or television broadcast, the time as well. Upon subsequent action the complaint must allege that notice was given pursuant to this statute. Roth v. Greensboro News Co., 272 N.C. 459, 158 S.E.2d 578 (1968); Osborn v. Leach, 135 N.C. 628, 47 S.E. 811 (1904).

2. Failure To Give Notice

The purpose of the notice requirement is to give the defendant an opportunity to retract the statements. The North Carolina Supreme Court has held that this provision relates solely to the question of punitive damages. A plaintiff's failure to allege that the plaintiff gave notice has no bearing on the sufficiency of the allegations, and an action for libel may proceed for recovery of compensatory damages whether or not the notice has been given. Kindley v. Privette, 241 N.C. 140, 84 S.E.2d 660 (1954); Paul v. National Auction Co., 181 N.C. 1, 105 S.E. 881 (1921).

3. Good Faith And Retraction

N.C.G.S. § 99-2 provides that the plaintiff may recover only actual damages if the defendant shows at trial (1) that the statements were published or broadcast in good faith, that their falsity was due to an honest mistake of the facts, or without prior notice or approval of the station, and that there were reasonable grounds for believing that the statements were true, and (2) that within 10 days after the notice was served, a full and fair correction, apology and retraction was published or broadcast. Roth v. Greensboro News Co., 217 N.C. 13, 6 S.E.2d 882 (1940). Good faith and retraction are affirmative defenses, and the defendant has the burden of proof on these issues. See Woody v. Catawba Valley Broadcasting Co., 272 N.C. 459, 158 S.E.2d 578 (1968); Roth v. Greensboro News Co., 217 N.C. 13, 6 S.E.2d 882 (1940).

O. Damages

1. Nominal

If the defamation is actionable per se, the plaintiff is entitled to recover at least nominal damages without specific allegations or proof of damages. Arnold v. Sharpe, 296 N.C. 533, 251 S.E.2d 452 (1979) (libel per se); Stewart v. Nation-Wide Check Corp., 279 N.C. 278, 182 S.E.2d 410 (1971) (slander per se).

2. Compensatory Damages

The plaintiff may recover compensatory damages for those injuries which naturally result from the false publication, including mental suffering and damage to reputation. Fields v. Bynum, 156 N.C. 413, 72 S.E. 449 (1911) (slander per se). See also, Osborn v. Leach, 135 N.C. 628, 47 S.E. 811 (1904) (in an action for libel against a newspaper discussing damages available under the London Libel Law, the forerunner to N.C.G.S. § 99-1 to -5). The plaintiff must offer proof of the damage

suffered as a result of the publication; damage is not presumed. R.H. Bouligny, Inc. v. United Steelworkers, 270 N.C. 160, 154 S.E.2d 344 (1967).

3. Special Or Economic Damages

In the law of defamation, "special damage" means pecuniary loss, as distinguished from humiliation. Morris v. Bruney, 78 N.C. App. 668, 677, 338 S.E.2d 561, 567 (1986) Except for claims actionable per se, special damage is an element of the claim which must be pled and proved. Johnson v. Bollinger, 86 N.C. App. 1, 356 S.E.2d 378 (1987).

4. Mitigation Of Damages

In libel [and slander] per se claims, in which good faith and absence of malice are not defenses, both "may be urged in mitigation of damages." Ivie v. King, 167 N.C. 174, 177-78, 83 S.E. 339, 340 (1914). N.C.G.S. § 1A-1, Rule 9(i) permits a defendant in his answer to allege "both the truth of the matter charged as defamatory, and any mitigating circumstances to reduce the amount of damages; and whether he proves the justification or not, he may give in evidence the mitigating circumstances." N.C.G.S. § 1A-1, Rule 9(i) (2001) (pleading libel and slander).

5. Secondary Publication Or Repetition

The author of a defamation, whether it be libel or slander, is liable for damages caused by or resulting directly and proximately from any secondary publication or repetition which is the natural and probable consequence of this act. Although he is not liable for such damages where the secondary publication or repetition is without authority from him, express or implied, if the defamation is uttered under circumstances in which a repetition or secondary publication is the natural and probable consequence of the original defamation, then he is liable for the resulting damages. It is for the jury to determine whether a secondary publication or repetition was the natural and probable consequence of the original defamation. Sawyer v. Gilmers, Inc., 189 N.C. 7, 126 S.E. 183 (1925).

6. Punitive Damages

Chapter 1D of the North Carolina General Statutes now governs every claim for punitive damages. It requires a showing of malice, fraud, or wilful and wanton behavior. N.C.G.S. § 1D-15(1999). The statute caps punitive damages at \$250,000 or three times the compensatory damages, whichever is greater. N.C.G.S.

§ 1D-25(1999). A corporate defendant is only liable if management participated in or condoned the aggravated conduct; however, a jury may grant separate punitive damage awards against the individual and the corporate defendant. Id.; Watson v. Dixon, 352 N. C. 343, 532 S.E. 2d 175 (2000).

P. Statute Of Limitations

An action for libel or slander must be brought within one year of the date of publication. See N.C.G.S. § 1-54(3)(2001); Pressley v. Continental Can Co., 39 N.C. App. 467, 250 S.E.2d 676, cert. denied, 297 N.C. 177, 254 S.E.2d 37 (1979); Price v. J.C. Penney Co., 26 N.C. App. 249, 216 S.E.2d 154, cert. denied, 288 N.C. 243, 217 S.E.2d 666 (1975). When multiple statements are alleged, each publication is a separate tort which accrues upon publication, regardless of when such publications are discovered. See Gibson v. Mutual Life Ins. Co., 121 N.C. App. 284, 465 S.E.2d 56 (1996).

An action for libel or slander against a law enforcement officer must be brought within three years. See Fowler v. Valencourt, 334 N.C. 345, 435 S.E.2d 530 (1993), overruling by implication Jones v. City of Greensboro, 51 N.C. App. 571, 277 S.E.2d 562 (1981).

Q. References

Libel per quod, N.C.P.I. -- Civil 806.60; Libel per se, N.C.P.I. -- Civil 806.50; Truth as defense, N.C.P.I. -- Civil 806.75; Words susceptible of two meanings, N.C.P.I. -- Civil 806.55; Slander per quod, N.C.P.I. -- Civil 806.70; Slander per se, N.C.P.I. -- Civil 806.65; Truth as defense, N.C.P.I. -- Civil 806.75; 20 N.C. Index 4th Libel and Slander Sections 1-47 (1992)(civil liability).

V. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

A. Elements

- Extreme and outrageous conduct by the defendant;
- Which is intended to cause severe emotional distress;
- Which indicates a reckless indifference to the likelihood that such conduct will cause severe emotional distress; and,
- Which does cause severe emotional distress to the plaintiff.

Dickens v. Puryear, 302 N.C. 437, 276 S.E.2d 325 (1981); Stanback v. Stanback, 297

N.C. 181, 254 S.E.2d 611 (1979); Waddle v. Sparks, 331 N.C. 73, 83, 414 S.E.2d 22, 27 (1992). The Supreme Court of North Carolina first expressly recognized the tort of intentional infliction of emotional distress (IIED) in the 1979 case Stanback v. Stanback: "liability arises under this tort when a defendant's `conduct exceeds all bounds usually tolerated by decent society' and the conduct causes mental distress of a very serious kind." 297 N.C. 181, 254 S.E.2d 611 (1979) (quoting William L. Prosser, Handbook of the Law of Torts § 12 at 56 (4th ed. 1971)). Two years later, in Dickens v. Puryear, the court outlined the elements of IIED and clarified the requirements of the claim. In 1992 the court narrowed the element of "severe emotional distress," adopting in Waddle v. Sparks the same standard in IIED claims that it had adopted in claims for negligent infliction of emotional distress (NIED). 331 N.C. at 83, 414 S.E. 2d at 27.

B. Definition Of Extreme And Outrageous Conduct

For a plaintiff to establish extreme and outrageous conduct, the defendant's conduct must go beyond all possible bounds of decency, and be regarded as atrocious, and utterly intolerable in a civilized community. The liability clearly does not extend to mere insult, indignities, threats. Wagoner v. Elkin City Schools' Bd. of Educ., 113 N.C. App. 579, 440 S.E.2d 119 (1994). Whether or not the defendant's conduct constitutes extreme and outrageous behavior is initially a question of law for the court. Briggs v. Rosenthal, 73 N.C. App. 672, 676, 327 S.E.2d 308, 311, cert. denied, 314 N.C. 114, 332 S.E.2d 479 (1985); Beck v. City of Durham, 154 N. C. App. 221, 573 S. E. 2d. 183 (2002).

After conduct is shown which may be reasonably regarded as extreme and outrageous, the jury determines, whether the conduct complained of is, in fact, sufficiently extreme and outrageous to result in liability. Bryant v. Thalhimer Bros., 113 N.C. App. 1, 15, 437 S.E.2d 519, 527 (1993), review denied, 336 N.C. 71, 445 S.E.2d 29 (1994). Conduct constituting extreme and outrageous conduct has included a threat of serious harm or death (Dickens v. Puryear, 302 N.C. 437, 276 S.E.2d 325 (1981)), a breach of a provision of a separation agreement (Stanback v. Stanback, 297 N.C. 181, 254 S.E.2d 611 (1979)), an unfounded accusation of shoplifting (West v. King's Dept. Store, 321 N.C. 698, 365 S.E.2d 621 (1988)), harassment and ridicule in the workplace (Dixon v. Stuart, 85 N.C. App. 338, 354 S.E.2d 757 (1987)) sexually-related language, gestures, and non-consensual touching (Bryant v. Thalhimer Bros., 113 N.C. App. 1, 437 S.E.2d 519 (1993); Brown v. Burlington Indus., 93 N.C. App. 431, 378 S.E.2d 232 (1989), review improvidently allowed, 326 N.C. 356, 388 S.E.2d 769 (1990); Hogan v. Forsyth Country Club, 79 N.C. App. 483, 340 S.E.2d 116, review denied, 317 N.C. 334, 346 S.E.2d 140 (1986); Watson v.

Dixon, 352 N.C. 343, 532 S.E.2d 175 (2000)); but see, Guthrie v. Conroy, ___ N. C. App. ___, 567 S.E.2d 403 (2002) (Conduct "juvenile, obnoxious and offensive" deemed inadequate to make out claim; good review of case law relating to sexual misconduct at work). The public duty doctrine will not protect a police officer from calculated conduct that shows the intent to engage in outrageous behavior. Smith v. Jackson Cty Bd. of Ed., 168 N.C. App. 452, 608 S.E. 2d 399 (2005) (officer may be liable for participating in teacher's plot to encourage sexual encounters by students).

C. Ratification Of An Agent's Outrageous Conduct

To show that an employer has ratified an employee's wrongful acts, the plaintiff must show that the employer had knowledge of all material facts and circumstances relative to the wrongful act and that the employer, by words or conduct, showed an intention on his part to ratify the act. The jury may find ratification from any course of conduct on the part of the principal which reasonably tends to show an intention on his part to ratify the agent's unauthorized acts. Such course of conduct may involve an omission to act. Brown v. Burlington Indus., 93 N.C. App. 431, 378 S.E.2d 232 (1989), review improvidently allowed, 326 N.C. 356, 388 S.E.2d 769 (1990)), including a failure to correct sexual misconduct, such as sexual harassment. Bryant v. Thalheimer Bros., 113 N.C. App. 1, 11, 437 S.E.2d 519, 525 (1993), review denied, 336 N.C. 71, 445 S.E.2d 29 (1994); Brown v. Burlington Indus., 93 N.C. App. 431, 378 S.E.2d 232 (1989), review improvidently allowed, 326 N.C. 356, 388 S.E.2d 769 (1990); Hogan v. Forsyth Country Club, 79 N.C. App. 483, 340 S.E.2d 116, review denied, 317 N.C. 334, 346 S.E.2d 140 (1986).

D. Proof Of Intent

The plaintiff must prove the defendant's "intent to cause emotional distress." Stack v. Mecklenburg Co., 86 N.C. App. 550, 359 S.E.2d 16, review denied, 321 N.C. 121, 361 S.E.2d 597 (1987).

E. Severe Emotional Distress Defined

To establish "severe emotional distress," the plaintiff must produce evidence of "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." Holloway v. Wachovia Bank & Trust Co., 339 N. C. 338, 354-55, 452 S.E.2d 233, 243 (1994) (citing Waddle v. Sparks, 331 N.C. 73, 83, 414 S.E.2d 22, 27 (1992) and Johnson v. Ruark Obstetrics & Gynecology Assoc., 327 N.C. 283, 304,

395 S.E.2d 85, 97, reh. denied, 327 N.C. 644, 399 S.E.2d 133 (1990)).

F. Damages

1. Compensatory Damages

The plaintiff may recover for the mental distress caused by the defendant's conduct and for any other harm proximately resulting from the distress. Daum v. Lorick Enters., 105 N.C. App. 428, 413 S.E.2d 559 (1992) (ordering a new trial on the issue of damages for failure of the jury to award damages for pain and suffering on an IIED claim), review denied, 331 N.C. 383, 417 S.E.2d 789 (1992).

2. Punitive Damages

Chapter 1D of the North Carolina General Statutes now governs every claim for punitive damages. It requires a showing of malice, fraud, or wilful and wanton behavior. N.C.G.S. § 1D-15(1999). The statute caps punitive damages at \$250,000 or three times the compensatory damages, whichever is greater. N.C.G.S. § 1D-25(1999). A corporate defendant is only liable if management participated in or condoned the aggravated conduct; however, a jury may grant separate punitive damage awards against the individual and the corporate defendant. Id.; Watson v. Dixon, 352 N. C. 343, 532 S.E. 2d 175 (2000).

G. Statute Of Limitations

The claim must be filed within three years of the time the emotional distress manifests itself. N. C. G. S. § 1- 52(5)(2001).

H. References

Intentional Infliction of Emotional Distress, -- N.C.P.I. -- Civil 800.60; 18 N.C. Index 4th Intentional Infliction of Mental Distress (1992).

VI. MALICIOUS PROSECUTION

A. Elements

- Defendant instituted or caused to be instituted against plaintiff;
- Prior criminal or civil proceedings that terminated in favor of plaintiff;
- Arrest of the person, seizure of property, or some other special damage resulting from the action such as would not necessarily result in all similar cases;
- With malice, either actual, or implied;
- Without probable cause; and,
- The proceedings terminated in plaintiff's favor.

Jones v. Gwynne, 312 N.C. 393, 323 S.E.2d 9 (1984) (prior criminal prosecution); Stanback v. Stanback, 297 N.C. 181, 254 S.E.2d 611 (1979) (prior civil proceeding).

B. Institution Of Proceedings

Plaintiff must establish that the defendant 'instituted, procured or participated in the criminal proceeding against plaintiff.' Williams v. Kuppenheimer Mfg. Co., 105 N.C. App. 198, 200, 412 S.E.2d 897, 899 (1992). Merely giving honest assistance and information to prosecutors does not constitute institution of proceedings, nor does reporting suspicious circumstances to the authorities. Harris v. Barham, 35 N.C. App. 13, 239 S.E.2d 717 (1978). However, if it is likely that a criminal prosecution of plaintiff would not have occurred but for the efforts of the defendant, then summary judgment is not appropriate. Becker v. Pierce, 168 N.C. App. 671, 608 S.E. 2d 825 (2005)(reversing grant of summary judgment to defendant who told authorities that plaintiffs were stealing and selling vehicles).

A defendant's procuring or causing civil proceedings to be instituted by a third party may be "instituting a proceeding." Moore v. City of Creedmoor, 120 N.C. App. 27, 460 S.E.2d 899 (1995), affirmed by equally divided court, 345 N.C. 356, 481 S.E.2d 14 (1997).

C. Malice

The malice required to support a claim for malicious prosecution may be actual or implied. Pitts v. Village Inn Pizza, Inc., 296 N.C. 81, 249 S.E.2d 375 (1978). Malice may be inferred from the lack of probable cause. Id., Williams v. Kuppenheimer Mfg. Co., 105 N.C. App. 198, 412 S.E.2d 897 (1992); Wilson v. Pearce, 105 N.C. App. 107, 412 S.E.2d 148, review denied, 331 N.C. 291, 417 S.E.2d 72 (1992); U v. Duke Univ., 91 N.C. App. 171, 371 S.E.2d 701, review denied, 323

N.C. 629, 374 S.E.2d 590 (1988).

D. Want Of Probable Cause

Where the claim is one for malicious prosecution, probable cause is defined as the existence of such facts and circumstances, known to the defendant when the prior proceeding was instituted, as would induce a reasonable person to commence a prosecution. Cook v. Lanier, 267 N.C. 166, 170, 147 S.E.2d 910, 914 (1966). Whether probable cause exists is a mixed question of law and fact, but where the facts are admitted or established, it is a question of law for the court. Id. When the facts are in dispute, the question of probable cause is for the jury. Pitts v. Village Inn Pizza, 296 N.C. 81, 249 S.E.2d 375 (1978); Williams v. Kuppenheimer Mfg. Co., 105 N.C. App. 198, 412 S.E.2d 897 (1992).

Probable cause for a criminal prosecution does not depend on the accused's guilt or innocence of the crime charged, rather, it "depends on the prosecutor's honest belief in such guilt based on reasonable grounds." Cook v. Lanier, 267 N.C. 166, 170, 147 S.E.2d 910, 914 (1966). Having instituted a proceeding on advice of counsel does not as a matter of law protect one who has instituted an unsuccessful prosecution against another. In a subsequent action for malicious prosecution such legal advice is evidence for the jury on the issues of probable cause and of malice. Bassinov v. Finkle, 261 N.C. 109, 134 S.E.2d 130 (1964); Nelson v. Chin Yung Chang, 78 N.C. App. 471, 337 S.E.2d 650 (1985), review denied, 317 N.C. 335, 346 S.E.2d 501 (1986) (advice of a magistrate). Mere termination of a lawsuit in favor of an adverse party does not mean that there was a want of probable cause to believe on a set of stated facts that a cause of action against the adverse party did exist. Murray v. Justice, 96 N.C. App. 169, 385 S.E.2d 195 (1989), review denied, 326 N.C. 265, 389 S.E.2d 115 (1990); Juarez-Martinez v. Deans, 108 N.C. App. 486, 424 S.E.2d 154, review denied, 33 N.C. 539, 429 S.E.2d 558 (1993).

Proof that the earlier prosecution was instituted to accomplish some collateral purpose, or to forward some private interest can show the absence of probable cause. Carson v. Moody, 99 N.C. App. 724, 394 S.E.2d 194 (1990), review improvidently allowed, 328 N.C. 565, 402 S.E.2d 408 (1991) (per curiam).

A prima facie showing of probable cause in the prior proceeding is made out if the committing magistrate found probable cause to bind plaintiff over for trial (Newton v. McGowan, 256 N.C. 421, 124 S.E.2d 142 (1962)), if plaintiff waived the preliminary hearing, (Williams v. Kuppenheimer Mfg. Co., 105 N.C. App. 198, 412 S.E.2d 897 (1992)), or if a grand jury returned a bill of indictment. Id. However, the

fact that a magistrate has found probable cause in a prior proceeding and issued a warrant is not determinative of the existence of probable cause in a subsequent malicious prosecution action. Wilson v. Pearce, 105 N.C. App. 107, 412 S.E.2d 148, review denied, 331 N.C. 291, 417 S.E.2d 72 (1992).

A conviction or plea of guilty in the prior proceeding conclusively establishes probable cause in a subsequent action for malicious prosecution unless the conviction was procured by fraud or other unfair means. Smith v. Thomas, 149 N.C. 100, 62 S.E. 772 (1908); Hill v. Winn-Dixie Charlotte, Inc., 100 N.C. App. 518, 397 S.E.2d 347 (1990). A prima facie showing of want of probable cause is made out in a later malicious prosecution action if the committing magistrate examined the plaintiff and discharged him (Abbitt v. Bartlett, 252 N.C. 40, 112 S.E.2d 751 (1960)), or if the District Attorney voluntarily dismisses the action in absence of other evidence of probable cause. See Best v. Duke Univ., 337 N.C. 742, 448 S.E.2d 506 (1994). Want of probable cause in the prior proceeding may not be inferred from malice. Cook v. Lanier, 267 N.C. 166, 147 S.E.2d 910 (1966).

E. Termination Of Prior Proceeding

Terminations in plaintiff's favor have been found in malicious prosecution actions in criminal proceedings: (a) voluntary dismissal of criminal charges in superior court with no reason assigned for the dismissal (Pitts v. Village Inn Pizza, 296 N.C. 81, 249 S.E.2d 375 (1978); Carson v. Moody, 99 N.C. App. 724, 394 S.E.2d 194 (1990), review improvidently allowed, 328 N.C. 565, 402 S.E.2d 408 (1991)); (b) dismissal for failure of complainant to appear and prosecute (Cook v. Lanier, 267 N.C. 166, 147 S.E.2d 910 (1966)), and (c) prosecutor's entry of nolle prosequi. In civil proceedings, termination in plaintiff's favor occurred from (a) dismissal of amended complaint or (b) a consent judgment favorable to plaintiff. Bryant v. Short, 84 N.C. App. 285, 352 S.E.2d 245, review denied, 319 N.C. 458, 356 S.E.2d 2 (1987).

F. Damages

1. Compensatory Damages

Compensatory damages may be recovered for all actual damages which proximately resulted from the defendant's wrongful action, including loss of business, injury to reputation, mental suffering, and expenses reasonably necessary for plaintiff to defend against the original charge. Carver v. Lykes, 262 N.C. 345, 137 S.E.2d 139 (1964).

2. Punitive Damages

Chapter 1D of the North Carolina General Statutes now governs every claim for punitive damages. It requires a showing of malice, fraud, or wilful and wanton behavior. N.C.G.S. § 1D-15(1999). The statute caps punitive damages at \$250,000 or three times the compensatory damages, whichever is greater. N.C.G.S. § 1D-25(1999). A corporate defendant is only liable if management participated in or condoned the aggravated conduct; however, a jury may grant separate punitive damage awards against the individual and the corporate defendant. Id.; Watson v. Dixon, 352 N. C. 343, 532 S.E. 2d 175 (2000).

G. Statute of Limitations

The malicious prosecution action must be filed three years from termination of the prior proceeding. N.C.G.S. § 1-52(5) (2001); Barnette v. Woody, 242 N.C. 424, 88 S.E.2d 223 (1955).

H. References

Malicious Prosecution, N.C.P.I. -- Civil 801.00; 20 N.C. Index 4th Malicious Prosecution (1992).

VII. ABUSE OF PROCESS

A. Elements

- A wilful act by defendant;
- With bad intent or ulterior motive;
- After valid process has been issued at defendant's behest; and,
- Whereby the defendant attempts to use the process to accomplish a purpose for which it was not intended.

Stanback v. Stanback, 297 N.C. 181, 254 S.E.2d 611 (1979); Carson v. Moody, 99 N.C. App. 724, 394 S.E.2d 194 (1990), review improvidently allowed, 328 N.C. 565, 402 S.E.2d 408 (1991) (per curiam).

B. Both Ulterior Motive And Wilful Act Required

The gist of the tort is not the wrongful issuance of process but the misuse of process for a purpose foreign to those it was designed to effect. Stanback v. Stanback, 297 N.C. 181, 254 S.E.2d 611 (1979); Lyon v. May, 108 N.C.App. 633 424 S.E.2d 655(1993); W. Page Keeton, Prosser and Keeton on the Law of Torts, § 121 (5th ed. 1984). The existence of an ulterior motive, malice or bad intent in getting process issued does not alone give rise to an action for abuse of process. There must also be a wilful act by the defendant whereby the defendant attempts to use that process to harass or pressure the plaintiff regarding a matter outside the scope of the original writ. Melton v. Rickman, 225 N.C. 700, 36 S.E.2d 276 (1946); Beroth Oil Co. v. Whiteheart, ___ N.C. App. ___, 618 S.E.2d 739 (2005). An example of a "wilful act not proper in the regular prosecution of the proceeding" is an offer made after the proceeding has been initiated to discontinue it in return for the payment of money. Stanback v. Stanback, 297 N.C. 181, 201, 254 S.E.2d 611, 624 (1979).

C. Timing Of The Abuse

Although many decisions state that the wrongful act, such as an extortion attempt, must occur after process issues (Benbow v. Caudle, 250 N.C. 371, 108 S.E.2d 663 (1959) (stating "there is no evidence of abuse or misuse of the execution after its issuance"); Melton v. Rickman, 225 N.C. 700, 36 S.E.2d 276 (1946) (stating "there can be no abuse of a writ before its issuance")), Professor Keeton states that "[m]ost of these cases probably stand only for the narrower proposition that there must be an overt act and that bad purpose alone is insufficient. Thus a demand for collateral advantage that occurs before the issuance of process may be actionable so long as process does in fact issue at the defendant's behest, and as a part of the attempted extortion." W. Page Keeton, Prosser and Keeton on the Law of Torts § 121 (5th ed. 1984); see Carson v. Moody, 99 N.C. App. 724, 394 S.E.2d 194 (1990).

D. Distinguished From Malicious Prosecution

The fundamental distinction between malicious prosecution and abuse of process is that malicious prosecution refers to the use of process for its intended purpose but without probable cause, whereas, abuse of process refers to the use of process for a purpose not contemplated by law. A second distinction relates to an additional requirement of the malicious prosecution claim: the plaintiff in the malicious prosecution action must show that the maliciously prosecuted action terminated favorably for the plaintiff. 72 C.J.S. Process § 106 (1987). By contrast, in an abuse of process action, the underlying proceeding need not have terminated in

plaintiff's favor, and may be unresolved when the abuse of process action is begun. Id. § 114(a).

E. Damages

1. Compensatory Damages

Compensatory damages may be recovered for the natural results of the wrong, including mental injury, if any. Counsel fees incurred trying to protect against an abuse of process are recoverable. Id. § 114 (c).

2. Punitive Damages

Chapter 1D of the North Carolina General Statutes now governs every claim for punitive damages. It requires a showing of malice, fraud, or wilful and wanton behavior. N.C.G.S. § 1D-15(1999). The statute caps punitive damages at \$250,000 or three times the compensatory damages, whichever is greater. N.C.G.S. § 1D-25(1999). A corporate defendant is only liable if management participated in or condoned the aggravated conduct; however, a jury may grant separate punitive damage awards against the individual and the corporate defendant. Id.; Watson v. Dixon, 352 N. C. 343, 532 S.E. 2d 175 (2000).

E. Statute Of Limitations

The claims must be filed three years from the termination of the acts which constitute the abuse. N.C.G.S. § 1-52(5) (2001).

F. References

Abuse of Process, N.C.P.I. -- Civil 803.00; 24 N.C. Index 4th Process and Service § 205-214 (1993).

VIII. TRESPASS TO REALTY

A. Elements

- Plaintiff was in possession of the land at the time of the alleged trespass;
- Defendant made an unauthorized, and therefore unlawful, entry on the land; and,
- Plaintiff was damaged by the alleged invasion of his rights of possession.

Matthews v. Forrest, 235 N.C. 281, 69 S.E.2d 553 (1952).

B. Protection Of The Interest In Possession

A trespass to realty is the wrongful, unauthorized invasion of the possessory rights of another. Since title is not implicated, anyone in possession, not just the owner, may bring an action for trespass. Armstrong v. Armstrong, 230 N.C. 201, 52 S.E.2d 362 (1949); Lee v. Stewart, 218 N.C. 287, 10 S.E.2d 804 (1940). However, only an owner can recover for permanent damage to the freehold, after first alleging and proving title and trespass. Tripp v. Little, 186 N.C. 215, 119 S.E. 225 (1923); Dobbs, "Trespass to Land in North Carolina -- Part I. The Substantive Law," 47 N.C.L. Rev. 31 (1968).

C. Actual And Constructive Possession

Actual possession consists of exercising acts of dominion over the land and making the ordinary use of it to which it is adapted. Constructive possession is a legal fiction applied when no one is in possession. When land is not physically enjoyed or occupied by anyone, the law declares the person whose title gives the right to assume physical possession to be in constructive possession of the land. Matthews v. Forrest, 235 N.C. 281, 69 S.E.2d 553 (1952); Waters v. Dennis Simmons Lumber Co., 154 N.C. 232, 70 S.E. 284 (1911).

D. Unauthorized Entry

The general rule is that every unauthorized entry on land in the peaceable possession of another is a trespass, regardless of the degree of force used, the intent of the defendant, or whether damage resulted. Letterman v. English Mica Co., 249 N.C. 769, 107 S.E.2d 753 (1959). Except in cases of ultrahazardous activity, a person is not liable for trespass if the entry was involuntary; a wrongful act is required. Smith v. VonCannon, 283 N.C. 656, 197 S.E.2d 524 (1973); Guilford Realty Ins. Co. v. Blythe Bros. Co., 260 N.C. 69, 131 S.E.2d 900 (1963).

E. Mistake As To Ownership

Mistake as to ownership of the land is not a defense. An action for trespass will lie if the defendant entered the land in the mistaken belief that he or she was the owner of the land and entitled to its possession. York Indus. Center v. Michigan Mut. Liability Co., 271 N.C. 158, 155 S.E.2d 501 (1967); McBryde v. Coggins-McIntosh Lumber Co., 246 N.C. 415, 98 S.E.2d 663 (1957).

F. Defense Of Consent

Generally, a person entering upon land with a possessor's consent will not be liable for trespass. Smith v. VonCannon, 283 N.C. 656, 197 S.E.2d 524 (1973); Williford v. Williams, 127 N.C. 60, 37 S.E. 74 (1900). However, one entering with the possessor's consent may become liable for trespass by subsequent wrongful acts in excess or abuse of the authority to enter. Blackwood v. Cates, 297 N.C. 163, 254 S.E.2d 7 (1979); Freeman v. General Motors Acceptance Corp., 205 N.C. 257, 171 S.E. 63 (1933). Similarly, a person invited to come on land becomes a trespasser when he puts himself in open opposition to the occupant of the premises, for example, when he refuses to leave after being requested to do so. Suggs v. Carroll, 76 N.C. App. 420, 333 S.E.2d 510 (1985).

The consent of the person in possession may be express or implied. Smith v. VonCannon, 283 N.C. 656, 197 S.E.2d 524 (1973). However, a landlord's consent is insufficient. Absent consent from the person in possession, the landlord's consent will not relieve a wrongdoer of liability for trespass. Maintenance Equip. Co. v. Godley Builders, 107 N.C. App. 343, 420 S.E.2d 199 (1992), review denied, 333 N.C. 345, 426 S.E.2d 707 (1993).

G. Trespass To Try Title

An action for “trespass to try title” enables a landowner to recover possession of real property and damages for its detention. The plaintiff must prove (1) title in himself, (2) unauthorized entry by defendant and (3) damage from the trespass. Cutts v. Casey, 271 N.C. 165, 155 S.E.2d 519 (1967); Short v. Nance-Trotter Realty, 262 N.C. 576, 138 S.E.2d 210 (1964). If the defendant does not deny title, the action is merely one in trespass. If the defendant denies plaintiff’s title, the action is in trespass to try title. If each party admits that the other has title but the boundary is disputed, the action is converted into a possession proceeding to resolve the boundary dispute.

If defendant denies plaintiff’s title, plaintiff has the burden of proving title. Cutts v. Casey, 271 N.C. 165, 155 S.E.2d 519 (1967). In addition to the six methods of proving title set forth in Mobley v. Griffin, 104 N.C. 112, 10 S.E. 142 (1889) and reiterated in Woodard v. Marshall, 14 N.C. App. 67, 187 S.E.2d 430 (1972), evidence of title is also sufficient to go to the jury if plaintiff testifies without objection that he is owner of the tract in question. Hefner v. Stafford, 64 N.C. App. 707, 308 S.E.2d 93 (1983).

The plaintiff must recover on the strength of plaintiff’s own title, not on the weakness of defendant’s claim to title. In other words, one party’s failure to carry the burden of proof on the issue of title does not, ipso facto, entitle the adverse party to an adjudication that title is in the adverse party. Cutts v. Casey, 278 N.C. 390, 180 S.E.2d 297 (1971). The plaintiff is also required to show that the land claimed fits the description in the instruments constituting the claim of title. Id.

H. Damages

1. Compensatory Damages

One in possession is entitled to recover at least nominal damages for the invasion of his possessory interests. Letterman v. English Mica Co., 249 N.C. 769, 107 S.E.2d 753 (1959). Actual damages do not have to be proven. Taha v. Thompson, 120 N.C. App. 697, 463 S.E.2d 553 (1995). The defendant is liable for all damages which proximately result from the trespass whether produced intentionally or negligently. Suggs v. Carroll, 76 N.C. App. 420, 333 S.E.2d 510 (1985). Damages a plaintiff may recover include: (1) loss of profits, (2) loss of use of the land, including rental value (Leigh v. Garysburg Mfg. Co., 132 N.C. 167, 43 S.E. 632 (1903)), (3) temporary injury to the land (Rudisail v. Allison, 108 N.C. App.

684, 424 S.E.2d 696, review denied, 333 N.C. 575, 429 S.E.2d 572 (1993), and (4) mental suffering (Matthews v. Forest, 235 N.C. 281, 69 S.E.2d 553 (1952)).

2. Punitive Damages

Chapter 1D of the North Carolina General Statutes now governs every claim for punitive damages. It requires a showing of malice, fraud, or wilful and wanton behavior. N.C.G.S. § 1D-15(1999). The statute caps punitive damages at \$250,000 or three times the compensatory damages, whichever is greater. N.C.G.S. § 1D-25(1999). A corporate defendant is only liable if management participated in or condoned the aggravated conduct; however, a jury may grant separate punitive damage awards against the individual and the corporate defendant. Id.; Watson v. Dixon, 352 N. C. 343, 532 S.E. 2d 175 (2000)

3. Special Damages

Special damages are available if pled and proved. Bishop v. Reinhold, 66 N.C. App. 379, 311 S.E.2d 298, review denied, 310 N.C. 743, 315 S.E.2d 700 (1984). Only a landowner may recover for permanent injury, if any, to the freehold or "inheritance." Woodard v. Marshall, 14 N.C. App. 67, 187 S.E.2d 430 (1972). The measure of damages is generally the difference between the market value of the land before and after the trespass. Phillips v. Chesson, 231 N.C. 566, 58 S.E.2d 343 (1950); see Huberth v. Holly, 120 N.C. App. 348, 462 S.E.2d 239 (1995); see generally Dobbs, "Trespass to Land in North Carolina -- Part II. Remedies for Trespass," 47 N.C.L. Rev. 334 (1969). A restitutional measure may also be available. Id. If a plaintiff is seeking "damages for defendant's unauthorized cutting of trees and shrubs from the plaintiff's property, the jury [may] consider the aesthetic value of the property to the landowner [plaintiff] and the replacement cost of the trees and shrubs as is reasonably practical in determining the diminished value of the property." Lee v. Bir, 116 N.C. App. 584, 590, 449 S.E.2d 34, 37 (1994), cert. denied, 340 N.C. 113, 454 S.E.2d 652 (1995). Expert testimony has been required to support an instruction on intrinsic or aesthetic value. Blum v. Worley, 121 N.C. App. 166, 465 S.E.2d 16 (1995).

4. Timber Losses

When timber is unlawfully cut, the owner may elect to recover either (1) the difference between the market value of the land before and after the cutting, or (2) the market value of the timber at the time and place of its severance plus incidental damages caused in removal. Andrews v. Bruton, 242 N.C. 93, 86 S.E.2d 786 (1955);

Williams v. Elm City Lumber Co., 154 N.C. 306, 70 S.E. 631 (1911). A related statutory provision, N.C.G.S. § 1-539.1(a), provides that a trespasser who "injure[s], cut[s] or remove[s] any valuable wood, timber, shrub or tree . . . shall be liable to the owner" for double its value. N.C.G.S. § 1-539.1(a) (1999); Perry-Griffin Found. v. Proctor, 107 N.C. App. 528, 421 S.E.2d 186 (1992), review improvidently allowed, 333 N.C. 573, 429 S.E.2d 176 (1993) (per curiam). Double damages are mandatory, not discretionary. Id. To recover under this section, the plaintiff must establish ownership of the land. Hefner v. Stafford, 64 N.C. App. 707, 308 S.E.2d 93 (1983).

5. Easements

In some cases, a landowner may recover permanent damages for what amounts to compensation for the defendant's acquisition of an easement. If the landowner's injuries are (1) by reason of permanent structures or conditions, and (2) their existence or maintenance is guaranteed or protected by the power of eminent domain or the public interest, the plaintiff or defendant may demand that permanent damages (present and future) be decided in one action in the nature of a condemnation proceeding. Clinard v. Town of Kernersville, 215 N.C. 745, 3 S.E.2d 267 (1939). Continuous use of property by construction of a power line without a legal right to do so may constitute a trespass, despite allegations that an easement has been created. Singleton v. Haywood Elec. Membership Corp., 151 N.C.App. 197 565 S.E.2d 234 (2002).

6. Injunctive Relief

Injunctive relief is available where there is a need for it. Young v. Lica, 156 N.C. App. 301, 576 S.E.2d 421 (2003)(court describes balancing test for right to obtain mandatory injunction for a continuing trespass); See also, Dobbs, "Trespass to Land in North Carolina -- Part II. Remedies for Trespass," 47 N.C.L. Rev. 334 at 351 (1969).

7. Encroachment

If the trespass creates an encroachment, and if the defendant is not a public authority or clothed with any right of eminent domain, the plaintiffs can elect either to keep the encroachment on their property, or demand that the defendant remove it and seek damages for the trespass. Bishop v. Reinhold, 66 N.C. App. 379, 311 S.E.2d 298, review denied, 310 N.C. 743, 315 S.E.2d 700 (1984); Young v. Lica, 156 N.C. App. 301, 576 S.E.2d 421 (2003).

I. Statute Of Limitations

The statute of limitations is three years for trespass upon real property. N.C.G.S. § 1-52(3) (1999) and N.C.G.S. § 1-52(13) (1999) (against a public officer, for a trespass, under color of his office).

If the trespass is a continuing one, the action must be commenced within three years from the original trespass, and not thereafter. Id. The Supreme Court of North Carolina stated in Sample v. Roper Lumber Co., 150 N.C. 161, 165-66, 63 S.E. 731, 732 (1909) that the term "continuing trespass" refers (1) to trespass "caused by structures permanent in their nature and made by companies in the exercise of some quasi-public franchise. . . ."; and (2) "to cases where a wrongful act, being entire and complete, causes continuing damage, . . . [It does not] apply when every successive act amounts to a distinct and separate renewal of the wrong." Oakley v. Texas Co., 236 N.C. 751, 73 S.E.2d 898 (1952), review denied, 310 N.C. 743, 315 S.E.2d 700 (1984).

J. References

Trespass, N.C.P.I. – Civil 805.0; Trespass – Damages, N.C.P.I. – Civil 805.05; Land Actions, N.C.P.I. – Civil 920.00 - 925.00; 28 N.C. Index 4th Trespass Sections 1-65 (1994); 28 N.C. Index 4th Trespass to Try Title (1994).

IX. NUISANCE

A. Elements

- Defendant's unreasonable interference with plaintiff's interest in the use and enjoyment of land; and
- Resulting in substantial injury or damage to the plaintiff's interest in land.

Watts v. Pama Mfg. Co., 256 N.C. 611, 124 S.E.2d 809 (1962) (complete, coherent statement of the law of nuisance by Justice Sam Ervin).

B. Unreasonable Interference With Use And Enjoyment Of Land

Nuisance is a field of tort liability which rests upon an unreasonable interference with another's use and enjoyment of land. Id. A nuisance may be classified as a nuisance per se (nuisance at law), or a nuisance per accidens (nuisance

fact). Id. A nuisance per se is "[A]n act, occupation or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings." Id. A nuisance per accidens is an act, occupation, or structure which becomes a nuisance "because of [its] location, or because of the manner of in which [it is] constructed, maintained, or operated." Id. In order to prevail in a claim of nuisance, the plaintiff must prove that the defendant's activities were the cause of the harm suffered by plaintiff. 127 N.C.App. 172, 487 S.E.2d 843(1997)(directed verdict affirmed where plaintiff failed to offer expert testimony that gasoline leak contaminated well).

C. Private Versus Public Nuisances

Nuisances are classified as either private or public. Id. Barrier v. Troutman, 231 N.C. 47, 55 S.E.2d 923 (1949). A public nuisance is an unreasonable interference with a right common to the general public," such as a use affecting public health, safety, or morals. See Twitty v. State, 85 N.C. App. 42, 354 S.E.2d 296, review denied, 320 N.C. 177, 358 S.E.2d 69 (1987) (state-run PCB landfill); State v. Everhardt, 203 N.C. 610, 166 S.E. 738 (1932) (woman charged with public nuisance, "keeping a disorderly house"). State ex rel. City of Salisbury, ___ N.C.App. ___, 610 S.E. 2d 799)(drug activities and breaches of peace found insufficient to create public nuisance.(2005).

A private nuisance is a "substantial nontrespassory invasion of another's interest in the private use and enjoyment of land" Morgan v. High Penn Oil Co., 238 N.C. 185, 77 S.E.2d 682 (1953); Hill v. Perkins, 84 N.C. App. 644, 353 S.E. 686 (1987) (good review of case law). Absent a statute creating a private right of action (N.C.G.S. § 19-1 to § 19-8.3 (1999)(abatement of nuisances against public morals)), an individual has no common law right of action for a purely public nuisance in the absence of a showing of unusual and special damage, peculiar to oneself, and differing from that suffered by the general public. Barrier v. Troutman, 231 N.C. 47, 55 S.E.2d 923 (1949); Neuse River Foundation, Inc. v. Smithfield Foods, Inc., 155 N.C. App. 110, 574 S.E.2d 48 (2002), review denied, 356 N.C. 675, 577 S.E. 2d 628(2003)(private individuals lacked standing to sue hog farms for pollution from waste management systems authorized by legislation). However, this requirement -- that a plaintiff show special damage -- "does not obtain when a public nuisance involves also the invasion of the private right of the litigant. In these cases, a person is not deprived of his action because the wrong done is so extensive and of such a character and placing that it amount to an indictable offense." McManus v. Southern R.R., 150 N.C. 655, 64 S.E. 766 (1909). These nuisances which are at the same time public and private nuisances are "mixed nuisances." Id.

D. Intentional And Unintentional Nuisances

A nuisance may be intentional or unintentional. Morgan v. High Penn Oil Co., 238 N.C. 185, 77 S.E.2d 682 (1953). An invasion is "intentional in the law of private nuisance when the person whose conduct is in question as a basis for liability acts for the purpose of causing it, or knows that it is resulting from his conduct, or knows that it is substantially certain to result from his conduct." Id. A person is subject to liability for an intentional invasion when that person's conduct is unreasonable under the circumstances of the case. Id.

A person will be liable for an unintentional invasion when the person's conduct is negligent, reckless or ultrahazardous. Id. Although negligence and nuisance are separate fields of tort liability, the same act or omission may constitute negligence and give rise to a private nuisance per accidens. The two torts may coexist; however, a private nuisance per accidens may be created or maintained without negligence. Watts v. Pama Mfg. Co., 256 N.C. 611, 124 S.E.2d 909 (1962); Swinson v. Cutter Realty Co., 200 N.C. 276, 156 S.E. 545 (1930).

E. Reasonableness Standard

The essential inquiry in any nuisance action is whether the defendant's conduct was unreasonable. Reasonableness is a question of fact to be determined in each case by weighing the gravity of the harm to the plaintiff against the utility of the defendant's conduct. Id.; Pendergrast v. Aiken, 293 N.C. 201, 236 S.E.2d 787 (1977). The question is not whether a reasonable person in the plaintiff's or defendant's position would regard the invasion as unreasonable, but whether reasonable persons generally, looking at the whole situation impartially and objectively, would consider it unreasonable. Id. Determining the gravity of harm to the plaintiff involves consideration of the (1) extent and (2) character of the harm to the plaintiff, (3) the social value which the law attaches to the type of use which is invaded, (4) the suitability of the locality for that use, (5) the burden on plaintiff to minimize the harm, and (6) other relevant considerations arising upon the evidence. Determination of the utility of the defendant's conduct involves consideration of (1) the purpose of the defendant's conduct, (2) the social value which the law attaches to that purpose, (3) the suitability of the locality for the use defendant makes of the property, and (4) other relevant considerations arising upon the evidence. Id.

F. Requirement Of Substantial Damage Required

The damage to the plaintiff must be substantial. Id. Substantial damage means an invasion involving more than a slight inconvenience or petty annoyance. Id. The condition complained of must create some substantial annoyance, some material physical discomfort to the plaintiffs or injury to their health or property. Id.

G. Farming And Other Lawful Enterprises

The operation of a lawful enterprise is not a nuisance per se. Watts v. Pama Mfg. Co., 256 N.C. 611, 124 S.E.2d 809 (1962)(textile mill); Andrews v. Andrews, 242 N.C. 382, 88 S.E.2d 88 (1955)(maintaining a pond with bait and lame wild geese); Morgan v. High Penn Oil Co., 238 N.C. 185, 77 S.E.2d 682 (1953)(oil refinery); Pake v. Morris, 230 N.C. 424, 53 S.E.2d 300 (1949)(fish factory); Town of Clinton v. Ross, 226 N.C. 682, 40 S.E.2d 593 (1946)(tobacco leaf warehouse). However, it may become a nuisance per accidens if operated or maintained in a way that results in a substantial invasion in the private use and enjoyment of another's property. Id. ; BNT Co. v. Baker Precythe Development Co., 151 N.C.App. 52, 564 S.E.2d 891(2000)(developer filling in ditch).

Under the "Right to Farm" law, N.C.G.S. § 106-701(1999), existing farm and forestry operations are protected from liability as nuisances. But, the "right to farm" law does not protect a person from nuisance liability if one fundamentally changes the nature of the agricultural activity which had been covered by the statute, for example, changing the use of land from turkey production to hog production. Durham v. Britt, 117 N.C. App. 250, 451 S.E.2d 1 (1994), review denied, 340 N.C. 260, 456 S.E.2d 828 (1995). For report of a case in which hog farmer prevailed, see Parker v. Barefoot, 130 N.C.App. 18, 502 S.E.2d 42 (1998), reversed, 351 N.C. 40, 519 S.E.2d 315 (1999).

H. Surface Water Drainage

North Carolina follows the rule of reasonable use regarding surface water drainage. Pendergrast v. Aiken, 293 N.C. 201, 236 S.E.2d 787 (1977)(rejecting the civil law rule). Each possessor of land is legally privileged to make a reasonable use of it, even if the flow of surface water is altered by that use and causes some harm to others. A possessor incurs liability when that possessor's interference with the flow of surface waters is unreasonable and causes substantial damage. Id.; Whiteside Estates, Inc., v. Highlands Cove, L.L.C., 146 N.C.App. 449, 553 S.E.2d 431 (2001)(developer held liable for sediment clouding downstream lake); The Shadow

Group, LLC v. Heather Hills Home Owners Association, 156 N.C. App. 197, 579 S.E.2d 285(2003)(owner of townhouse may recover for flooding from commonly owned areas); Coastal Plains Utilities, Inc. v. New Hanover County, 166 N.C. App. 333, 601 S.E.2d 915 (2004)(water utility may maintain claim against beach town for depletion of water supply by use of competing wells).

I. Public Nuisance

To constitute a public nuisance, the condition . . . must injuriously affect the community at large, and generally, at common law a crime. Id. Maintenance of a public nuisance "constitutes an offense against the State. Twitty v. State, 85 N.C. App. 42, 354 S.E.2d 296, review denied, 320 N.C. 177, 358 S.E.2d 69 (1987); State v. Everhardt, 203 N.C. 610, 617, 166 S.E. 738, 741-42 (1932). For example, the "release of hazardous waste injuriously affects the community and, thus, is a public nuisance." State ex rel. Howes v. W.R. Peele, Sr. Trust, 876 F. Supp. 733 (E.D.N.C. 1995)(citing New York v. Shore Realty Corp., 759 F.2d 1032, 1051 (2d Cir. 1985)). A state may summarily abate a public nuisance, as doing so is within its police power. The person who creates the nuisance is liable and that liability continues as long as the nuisance exists. A court may order abatement of an existing public nuisance and award damages for injury already sustained. Id. To establish a defendant's liability for creation of a public nuisance, the plaintiff must present evidence of (1) [defendant's] ownership of the property and knowing of or having reason to know of the nuisance's existence, or (2) [defendant's] participation in its creation. Nuisance liability does not attach by mere ownership of the subject property. Id.

N.C.G.S. § 19-1, et seq. (1999) provides for the abatement of public nuisances offending the public morals. These include houses of prostitution, gambling houses, and places selling illegal drugs, illegal alcohol, and obscene motion pictures or publications. Id. A criminal prosecution for prostitution and a civil action pursuant to the public nuisance statute do not offend the constitutional prohibition against double jeopardy. State v. Arellano, 165 N.C. App. 609, 599 S.E.2d 415 (2004) A private citizen may maintain a civil action in the name of the state to abate any of the enumerated nuisances except for places possessing or selling obscene motion pictures or publications. Id.

J. Nuisance Maintained By Government Agency

A nuisance maintained by a governmental agency impairing private property is a taking in the constitutional sense. Midgett v. North Carolina State Highway Comm'n, 260 N.C. 241, 132 S.E.2d 599 (1963); see U.S. Const. amend. V; N.C.

Const., Art. I, § 19. A county commission that operates a coliseum as a proprietary function may be sued for creating a nuisance per accidens. Pierson v. Cumberland County Civic Center Com'n, 141 N.C.App. 628, 540 S.E.2d 810 (2000)(neighbors allege noise, traffic, and trash create nuisance).

K. Damages

1. Removal And/Or Compensatory Damages

N.C.G.S. § 1-539 (1999) provides that remedies in a nuisance action include damages, removal, or both. To recover damages, the plaintiff's injury must be "substantial." Hanna v. Brady, 73 N.C. App. 521, 327 S.E.2d 22, review denied, 313 N.C. 600, 332 S.E.2d 179 (1985); Hawkins v. Hawkins, 101 N.C. App. 529, 400 S.E.2d 472 (1991). Plaintiff must incur actual damage -- an actual loss, hurt, or harm resulting from the illegal invasion of the legal right. Id. Recoverable damages related to one's loss of use and enjoyment of one's land include physical pain, annoyance, stress, deprivation of the use and comforts of one's home. Id. If the damage is due to a cause that will be removed or a nuisance that may be abated, such as the flooding of the plaintiff's land by a polluted stream, the measure of damages is determined by comparing the land's productiveness before and after the flooding rather than by comparing the difference in the market value of the land, the measure for permanent damages. Oates v. Algodan Mfg. Co., 217 N.C. 488, 8 S.E.2d 605 (1940). Future damages are generally unavailable to private parties. Plaintiff's remedy is by successive suits brought from time to time against the author of the nuisance as long as the noxious condition is maintained in which he may recover past damages down to the time of trial. Cox v. Robert C. Rhein Interest, Inc., 100 N.C. App. 584, 397 S.E.2d 398 (1990)(action to recover damages from flooding)(quoting Phillips v. Chesson, 231 N.C. 566, 58 S.E.2d 343 (1950)). However, a property owner may collect damages for the preventive measures necessary to stop future injury from occurring. Whiteside Estates, Inc., v. Highlands Cove, L.L.C., ___ N.C.App. ___, 609 S.E.2d 804 (2005)

When a governmental agency or corporation having the power of eminent domain creates or maintains a nuisance which is permanent in character and which substantially impairs the value of plaintiff's land, the nuisance amounts to a taking in the constitutional sense. The plaintiff's only remedy is to recover permanent damages as compensation. Hughes v. City of High Point, 62 N.C. App. 107, 302 S.E.2d 2, review denied, 309 N.C. 320, 307 S.E.2d 164 (1983). If the permanent nuisance is created or maintained by a private corporation, the plaintiff is not entitled to permanent damages as a matter of right, but the parties may elect to treat the nuisance

as a taking and determine the issue of permanent damage. Clinard v. Town of Kernersville, 215 N.C. 745, 3 S.E.2d 267 (1939); Aydlett v. Carolina By-Products Co., 215 N.C. 700, 2 S.E.2d 881 (1939). The measure of permanent damages is the difference between the market value of the property before and after the damage occurred. Gray v. City of High Point, 203 N.C. 756, 166 S.E. 911 (1932) (operation of sewage plant); Hanna v. Brady, 73 N.C. App. 521, 327 S.E.2d 22, review denied, 313 N.C. 600, 332 S.E.2d 179 (1985) (operation of a quarry).

2. Punitive Damages

Chapter 1D of the North Carolina General Statutes now governs every claim for punitive damages. It requires a showing of malice, fraud, or wilful and wanton behavior. N.C.G.S. § 1D-15(1999). The statute caps punitive damages at \$250,000 or three times the compensatory damages, whichever is greater. N.C.G.S. § 1D-25(1999). A corporate defendant is only liable if management participated in or condoned the aggravated conduct; however, a jury may grant separate punitive damage awards against the individual and the corporate defendant. Id.; Watson v. Dixon, 352 N. C. 343, 532 S.E. 2d 175 (2000).

L. Injunctive Relief

To obtain injunctive relief for an anticipated nuisance, the plaintiff must show either (a) that the proposed construction or the use to be made of the property will be a nuisance per se; or (b) that, while it may not amount to a nuisance per se, under the circumstances of the case a nuisance must necessarily result. It must further be shown that the threatened injury will be an irreparable one which cannot be compensated by damages in an action at law. Hooks v. International Speedways, 263 N.C. 686, 140 S.E.2d 387 (1965); Wilcher v. Sharpe, 236 N.C. 308, 72 S.E.2d 662 (1952); Moody v. Lundy Packing Co., 7 N.C. App. 463, 172 S.E.2d 905 (1970).

Where the nuisance is continuous and recurrent and the injury irreparable, and remedy by way of damages is adequate an injunction may issue, even against a lawful enterprise; however, interference by the court does not extend beyond what is necessary to correct the evil and prevent the injury. Id.

M. Statute Of Limitations

The action must be filed three years from the time the injury was sustained. See N.C.G.S. § 1-52(3)(1999) (three-year statute of limitation for trespass on real property). If the nuisance is a continuing one, then the action must be commenced

within three years of the original injury; Morrow v. Florence Mills, 181 N.C. 423, 107 S.E. 445 (1921); see also Hughes v. City of High Point, 62 N.C. App. 107, 302 S.E.2d 2 (holding defendant city had started to maintain a nuisance when it had notified property owner it would no longer try to correct the sewage problem), review denied, 309 N.C. 320, 307 S.E.2d 164 (1983). However, some cases have held that mere inaction on the part of the plaintiff will not bar his claim, unless the nuisance has continued long enough to effect a change of title. Wilson v. McLeod Oil Co., 327 N.C. 491, 398 S.E.2d 586 (1990), reh. denied, 328 N.C. 336, 402 S.E.2d 844 (1991) Moreover, where the trespass is recurrent, as opposed to continuing, the limitations period does not bar the claim. James v. Clark, 118 N.C. App. 178, 454 S.E.2d 826, review denied, 340 N.C. 359, 458 S.E.2d 187 (1995). The release of gasoline from an underground storage tank into the groundwater of an adjoining property owner over a period of years is a "renewing rather than a continuing trespass." Unless otherwise provided by statute, for personal injury or physical damage to claimant's property, the cause of action . . . shall not accrue until bodily harm to the claimant or physical damage to his property becomes apparent to the claimant or ought reasonably to have become apparent to the claimant, whichever event first occurs. But no cause of action will accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action. N.C.G.S. § 1-52(16) (1999).

N. General References

Private Nuisance, N.C.P.I. – Civil 805.25; Wrongful Alteration of Surface Water Flow, N.C.P.I. – Civil 805.30.

X. WRONGFUL ATTACHMENT

A. Elements

- The defendant obtained an order of attachment against the plaintiff's property;
- Without probable cause to believe that the alleged basis for the attachment existed;
- With malice;
- The order was levied on the plaintiff's property;
- Depriving the plaintiff of the use of the property for any legitimate purpose; the attachment proceeding terminated in the plaintiff's favor; and,
- The plaintiff suffered damage as a result of the levy on the property.

Brown v. Guaranty Estates Corp., 239 N.C. 595, 80 S.E.2d 645 (1954); Whitaker v. Wade, 229 N.C. 327, 49 S.E.2d 627 (1948) (construing N.C.G.S. § 1-440.45; Tyler v. Mahoney, 166 N.C. 509, 82 S.E. 870 (1914).

B. Malicious Prosecution Against Property

Wrongful attachment is a form of malicious prosecution. Pittsburg, Johnstown, Ebensburg & Eastern R.R. v. Wakefield Hardware Co., 143 N.C. 54, 55 S.E. 422 (1906). Like malicious prosecution, it is distinguishable from abuse of process. Lyon v. May, 108 N.C.App. 633 424 S.E.2d 655 (1993). If an attachment order is improperly obtained or employed, the attachment defendant may have several options: (1) proceeding on the attachment bond under N.C.G.S. § 1-440.10, (2) suing for wrongful attachment, or (3) suing for abuse of process.

The statutory procedure and grounds for attachment are set out in N.C.G.S. § 1-440.1 to 1-440.46 (2001); Brown v. Guaranty Estates Corp., 239 N.C. 595, 80 S.E.2d 645 (1954). N.C.G.S. § 1-440.10 provides that the attachment defendant may proceed on the bond under two conditions: (1) if the attachment order is dissolved, dismissed, or set aside, or (2) if the plaintiff fails to obtain judgment against the defendant. Godwin v. Vinson, 254 N.C. 582, 119 S.E.2d 616 (1961). In enforcing liability on the attachment bond, the attachment defendant may proceed against the attachment plaintiff and the surety jointly or separately. Brown v. Guaranty Estates Corp., 239 N.C. 595, 80 S.E.2d 645 (1954). From the attachment plaintiff, the attachment defendant may recover all costs awarded to the defendant and all damages resulting from the attachment. From the surety, the defendant's recovery is limited to the amount of the bond. N.C.G.S. § 1-440.10 (2001). This proceeding may be prosecuted by a motion in the original cause after judgment or by an independent action. N.C.G.S. § 1-440.45(c) (2001); Whitaker v. Wade, 229 N.C. 327, 49 S.E.2d 627 (1948). The attachment defendant cannot unite in one suit an action against the attachment plaintiff for wrongful attachment and a proceeding against the surety for enforcement of liability on the attachment bond. Brown v. Guaranty Estates Corp., 239 N.C. 595, 80 S.E.2d 645 (1954).

C. Damages

1. Compensatory Damages

The plaintiff is entitled to recover the actual damages suffered by reason of the defendant's wrongful attachment, including compensation for injury to his or her credit, business or feelings. Id.

2. Punitive Damages

In an action on the bond, the action is based on the contract embodied in the attachment bond, no punitive damages are available. See Brown v. Guaranty Estates Corp., 239 N.C. 595, 80 S.E.2d 645 (1954). Chapter 1D of the North Carolina General Statutes now governs every claim for punitive damages. It requires a showing of malice, fraud, or wilful and wanton behavior. N.C.G.S. § 1D-15(1999). The statute caps punitive damages at \$250,000 or three times the compensatory damages, whichever is greater. N.C.G.S. § 1D-25(1999). A corporate defendant is only liable if management participated in or condoned the aggravated conduct; however, a jury may grant separate punitive damage awards against the individual and the corporate defendant. Id.; Watson v. Dixon, 352 N. C. 343, 532 S.E. 2d 175 (2000)

D. Statute Of Limitations

The claim must be filed within three years from the time the order of attachment is judicially determined to be groundless, either by judgment vacating the order, or judgment against the attachment plaintiff. N.C.G.S. § 1-52(5) (2001); Whitaker v. Wade, 229 N.C. 327, 49 S.E.2d 627 (1948); Kramer v. Thomson-Houston Elec. Light Co., 95 N.C. 277 (1886).

E. General References

No N.C.P.I. for Wrongful Attachment; 2 N.C. Index Attachment and Garnishment, Sections 40-41 (1990).

XI. TROVER AND CONVERSION

A. Elements

- Defendant's unauthorized assumption and exercise of the right of ownership;
- Over goods or personal chattels;
- Owned by the plaintiff; and,
- To the alteration of their condition or the exclusion of the owner's rights.

Wall v. Colvard, Inc., 268 N.C. 43, 149 S.E.2d 559 (1966); Peed v. Burleson's Inc.,

244 N.C. 437, 94 S.E.2d 351 (1956); Taha v. Thompson, 120 N.C. App. 697, 463 S.E.2d 553 (1995).

B. Evolution Of The Common Law

At common law, the action for trover and conversion allowed recovery of damages against a person who had found another's goods and wrongfully converted them to his own use. Subsequently, the allegation of the loss of the goods by the plaintiff and the finding of them by the defendant was merely fictitious, and the action became the remedy for any wrongful interference with or detention of the goods of another. Black's Law Dictionary 1508 (6th ed. 1990).

In North Carolina conversion is defined as an "unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another to the alteration of their condition or the exclusion of an owner's rights." Taha v. Thompson, 120 N.C. App. 697, 463 S.E.2d 553 (1995); Southeastern Shelter Corp. v. BTU, Inc., 154 N. C. App. 321, 572 S.E. 2d 200 (2002). A claim for conversion may lie based upon the improper administration of an estate. State ex rel. Pilard v. Berninger, 154 N. C. App 215, 571 S.E.2d 836 (2002); Estate of Graham v. Morrison, 168 N.C. App. 63, 607 S.E. 2d 295 (2005)(insufficient evidence to support conversion claim because no showing of property's fair market value) or the refusal to allow the removal of personal property from a repossessed auto. Eley v. Mid/East Acceptance Corp. of NC, ___ N.C. App. ___, 614 S.E.2d 555(2005)(conversion of watermelons in repossessed truck).

The essence of conversion is not the defendant's acquisition of property, but the wrongful deprivation of the owner's dominion over or rights in the property. Consequently, the defendant's subsequent use of the property is immaterial, as is the defendant's lack of benefit from the plaintiff's property. Gallimore v. Sink, 27 N.C. App. 65, 218 S.E.2d 181 (1975).

C. Conversion Of Instruments

The law applicable to conversion of personal property applies to financial instruments. N.C.G.S. § 25-3-420 (1999). An instrument is converted if the defendant obtains payment with respect to the instrument when he was not entitled to receive payment. Lake Mary Ltd. Partnership v. Johnston, 145 N.C.App. 525, 551 S.E.2d 546 (2001). Liability is presumed to be the amount payable on the instrument, but recovery may not exceed the amount of the plaintiff's interest in the instrument. N.C.G.S. § 25-3-420 (1999); NCNB v. McCarley & Co., 34 N.C. App. 689, 239

S.E.2d 583 (1977) (decided under prior law).

D. The Requirement Of Demand For Return

To establish a conversion claim where the defendant has not disposed of the property, the plaintiff must demand the return of the property and be refused by the defendant. This is necessary if the defendant has come rightfully into possession and retains the property, for example, as in a bailment. Herring v. Creech, 241 N.C. 233, 84 S.E.2d 886 (1954); Kitchen v. Wachovia Bank & Trust Co., 44 N.C. App. 332, 260 S.E.2d 772 (1979). After an act of conversion has become complete, the wrongdoer's offer to return or restore the property will not bar the cause of action for conversion. Wall v. Colvard, Inc., 268 N.C. 43, 149 S.E.2d 559 (1966).

E. Statutory Claims For Interference With Property Rights

N.C.G.S. § 99A-1 (1999) provides for recovery of damages for interference with property rights involving situations pertaining to possession of stolen property, unlawful interference with possession of property, bailments, and abuse of personal property.

F. Defenses

1. Abandonment

The defendant may claim the plaintiff's abandonment of the personal property as a bar to an action to conversion. Intent to relinquish the property permanently is an essential element of abandonment. Kitchen v. Wachovia Bank & Trust Co., 44 N.C. App. 332, 260 S.E.2d 772 (1979).

2. Surrender To True Owner

Proof of surrender of the property to the true owner is a complete defense. Herring v. Creech, 241 N.C. 233, 84 S.E.2d 886 (1954).

3. Innocent Conversion By Agents, Including Securities Brokers, And Bailees

N.C.G.S. § 25-8-318 (1999), provides a defense for the innocent conversion of certain securities by agents, including securities brokers, and bailees. Under N.C.G.S. § 44A-4 (1999), an equipment repair shop has a statutory right to sell goods when

the repair bill remains unpaid. Rowell v. North Carolina Equipment Co. , 146 N.C.App. 431 552 S.E.2d 274 (2001).

G. Damages

1. Election Of Remedies

The plaintiff may elect either to recover the property or to hold the defendant liable for its value. Hawkins v. M & J Finance Co., 238 N.C. 174, 77 S.E.2d 669 (1953); Mabe v. Dillon, 46 N.C. App. 340, 264 S.E.2d 796 (1980). The plaintiff may recover the fair market value of the property at the time and place of the conversion, with interest. Wall v. Colvard, Inc., 268 N.C. 43, 149 S.E.2d 559 (1966). Plaintiff may also have a claim for damage to the property and/or for emotional distress. See Ford v. NCNB Corp., 104 N.C.App. 172, 408 S.E.2d 738 (1991).

2. Punitive Damages

The North Carolina Court of Appeals has held that subsection (4) of N.C.G.S. § 99A-1 does not authorize the recovery of punitive damages in a conversion action where there was no finding that the wrong was done wilfully, recklessly, or wantonly so as to entitle the plaintiff to punitive damages at common law. Russell v. Taylor, 37 N.C. App. 520, 246 S.E.2d 569 (1978)(decided under old law). Chapter 1D of the North Carolina General Statutes now governs every claim for punitive damages. It requires a showing of malice, fraud, or wilful and wanton behavior. N.C.G.S. § 1D-15(1999). The statute caps punitive damages at \$250,000 or three times the compensatory damages, whichever is greater. N.C.G.S. § 1D-25(1999). A corporate defendant is only liable if management participated in or condoned the aggravated conduct; however, a jury may grant separate punitive damage awards against the individual and the corporate defendant. Id.; Watson v. Dixon, 352 N. C. 343, 532 S.E. 2d 175 (2000).

H. Statute Of Limitations

The conversion action must be filed three years from the time the goods are wrongfully taken from the plaintiff's possession or otherwise converted. N.C.G.S. § 1-52(4) (1999); White v. White, 76 N.C. App. 127, 331 S.E.2d 703 (1985) (holding that plaintiff had no right of action for conversion against her estranged husband until he changed locks on their former residence denying her access to her belongings); Hoch v. Young, 63 N.C. App 480, 305 S.E.2d 201 (1983) (holding that a question of fact existed as to whether the conversion occurred when the defendant received the

stock certificate or when he refused to deliver it on demand); 89 C.J.S. Trover & Conversion § 91 (1955). In general, conversion claims are not subject to the “discovery” clause in N.C. Gen. Stat. §1-52(16). White v. Consolidated Planning, Inc., 166 N.C. App. 283, 603 S.E.2d 147 (2004).

I. References

Civil Conversion, N.C.P.I. -- Civil 806.00; Civil Conversion, Damages, N.C.P.I. -- Civil 806.05; Civil Conversion, Defense of Abandonment, N.C.P.I. -- Civil 806.10; Civil Conversion, Defense of Sale or Exchange, N.C.P.I. -- Civil 806.11; Civil Conversion, Defense of Gift, N.C.P.I. -- Civil 806.12; 6 N.C. Index Conversion § 1-15 (1990).

XII. BAILMENT: ACTION FOR DAMAGE TO PROPERTY

A. Elements

- The property was delivered to the bailee;
- Upon a contract, express or implied, that the property would be returned by the bailee as soon as the purposes of the bailment were carried out;
- The bailee accepted the property and thereafter had possession and control of it; and,
- The bailee failed to return the property or returned it in a damaged condition.

State Auto. Mut. Ins. Co. v. Smith Dry Cleaners, 285 N.C. 583, 206 S.E.2d 210 (1974); Clott v. Greyhound Lines, Inc., 278 N.C. 378, 180 S.E.2d 102 (1971); Pennington v. Styron, 270 N.C. 80, 153 S.E.2d 776 (1967); Miller's Mut. Ins. Assoc. v. Atkinson Motors, 240 N.C. 183, 81 S.E.2d 416 (1954). The bailor has the burden of establishing the existence of the bailor-bailee relationship. Barnes v. Erie Insurance Exchange, 156 N.C. App. 270, 576 S.E. 2d 681(2003)(bailment for mutual benefit of the parties).

B. Nature Of Bailment

A bailment is created upon the bailor's delivery of possession of goods and the bailee's subsequent acceptance of their delivery. U.S. Helicopters, Inc. v. Black, 318 N.C. 268, 347 S.E.2d 431 (1986). The delivery of personal property for “storage” may give rise to a bailment, even where the parties characterize the contract between

them as a “lease.” Atlantic Contracting and Material Company, Inc.v. Adcock, 161 N.C. App. 273, 588 S.E. 2d 36 (2003).

The bailor makes out a prima facie case of negligence by showing that the property was delivered to and accepted by the bailee in good condition and was not returned or was returned in a damaged state. Pennington v. Styron, 270 N.C. 80, 153 S.E.2d 776 (1967). The degree of care required in all classes of bailments is the care of the man of ordinary prudence as adapted to the particular circumstances. Clott v. Greyhound Lines, Inc., 278 N.C. 378, 180 S.E.2d 102 (1971); Safeguard Ins. v. Wilmington Cold Storage Co., 267 N.C. 679, 149 S.E.2d 27 (1966). It is contrary to public policy for a repair shop to obtain a release of liability for damages sustained during the course of the bailment. Brockwell v. Lake Gaston Sales and Service. 105 N.C.App. 226, 412 S.E.2d 104 (1992).

C. Professional Bailees

Professional bailees, those who hold themselves out to the public as having convenient means and special facilities to furnish the service offered for a price (such as proprietors of parking lots, garages, parcel check rooms, and warehouses), may not limit their liability for their own negligence. However, this rule may not apply to parking arrangements if the automobile owner is a licensee or invitee under the terms of the contract between the parties. Miller's Mut. Fire Ins. Assoc. v. Parker, 234 N.C. 20, 65 S.E.2d 341 (1951); Brockwell v. Lake Gaston Sales and Serv., 105 N.C. App. 226, 411 S.E.2d 104 (1992).

D. Action By Bailor And Bailee Against Third Party

The bailor and bailee may each sue a third person, who by negligence has caused the loss of or damage to the bailed articles, or both may jointly maintain an action. Hopkins v. Colonial Stores, 224 N.C. 137, 29 S.E.2d 455 (1944); Neff v. Queen City Coach Co., 16 N.C. App. 466, 192 S.E.2d 587 (1972).

E. Unauthorized Transfer Of Property To A Third Party

A bailee's authority is limited strictly by the terms of the bailment contract. Except as authorized, the bailee has no authority to sell, transfer or give away the bailed goods. Thus, in the absence of grounds for an estoppel and except as provided in N.C.G.S. § 25-2-403(2) or § 25-2-401, no right, title or interest may be acquired as the result of an unauthorized transfer by the bailee, even to an innocent purchaser, and the bailor may recover the property or its value from the transferee. To create an

estoppel against the bailor, the bailor must have done more than entrust possession of the property to the bailee; it must have done something to mislead the transferee to the transferee's prejudice. Toyomenka, Inc. v. Mount Hope Finishing Co., 432 F.2d 722 (4th Cir. 1970); Hawkins v. M & J Finance Corp., 238 N.C. 174, 77 S.E.2d 669 (1953).

F. Damages

1. Action For Damage To The Bailed Property

The bailee (or a third party) is liable for any damages to the bailed goods proximately caused by the negligence of the bailee (or third party) or of his agent. U.S. Helicopters, Inc. v. Black, 318 N.C. 268, 347 S.E.2d 431 (1986); Vincent v. Woody, 238 N.C. 118, 76 S.E.2d 356 (1953).

2. Emotional Distress Resulting From Loss of Bailed Property

The Court of Appeals has upheld an award of damages for emotional distress suffered by a depositor after the bank lost the deposit he had placed in a night depository for his employer. Ford v. NCNB Corp., 104 N.C. App. 172, 408 S.E.2d 738 (1991).

3. Punitive Damages

Chapter 1D of the North Carolina General Statutes now governs every claim for punitive damages. It requires a showing of malice, fraud, or wilful and wanton behavior. N.C.G.S. § 1D-15(1999). The statute caps punitive damages at \$250,000 or three times the compensatory damages, whichever is greater. N.C.G.S. § 1D-25(1999). A corporate defendant is only liable if management participated in or condoned the aggravated conduct; however, a jury may grant separate punitive damage awards against the individual and the corporate defendant. Id.; Watson v. Dixon, 352 N. C. 343, 532 S.E. 2d 175 (2000).

G. Statute Of Limitations

Action in tort: Three years from the time the wrongful act occurred. N.C.G.S. § 1-52(4) (2001) (for taking, detaining, converting or injuring goods).

Action in contract: Three years from the breach. N.C.G.S. § 1-52(1) (2001); Little v. Rose, 21 N.C. App. 596, 205 S.E.2d 150, aff'd, 285 N.C. 724, 208 S.E.2d 666

(1974).

H. References

Bailment, N.C.P.I. -- Civil 814.00; Mutual Benefit, N.C.P.I. -- Civil 814.05; Negligent Loss of or Damage to Bailment Property, N.C.P.I. -- Civil 814.10; Negligence by Bailor for Mutual Benefit, N.C.P.I. -- Civil 814.15; 4 N.C. Index 4th Bailment (1990).