

Liability Law Overview

NEGLIGENCE ACTIONS

Contributory Negligence

The doctrine of contributory negligence bars any recovery by a plaintiff if the plaintiff's negligence was a proximate cause of his injury. Contributory negligence is not a bar to recovery if the defendant was grossly negligent or acted in a willful and wanton manner unless the plaintiff was also grossly negligent or acted in a willful or wanton manner.

Last Clear Chance

The doctrine of last clear chance allows a plaintiff who is contributorily negligent to recover damages if it is shown that 1) the plaintiff negligently placed himself in a position of helpless peril; 2) the defendant knew or, by the exercise of reasonable care, should have discovered the plaintiff's perilous position and his incapacity to escape from it; 3) the defendant had the time and ability to avoid the injury by the exercise of reasonable care; 4) the defendant negligently failed to use available time and means to avoid injury to the plaintiff; and 5) as a result, the plaintiff was injured.

Family Purpose Doctrine

The family purpose doctrine allows a plaintiff to maintain a cause of action against an owner or person in control of a vehicle for the negligence of the driver of such vehicle where 1) the driver was a member of the family or household of the owner or person with control of the vehicle and was living in such person's home; 2) the vehicle was owned, provided, and maintained for the general use, pleasure, and convenience of the family; and 3) the vehicle was being so used with the express or implied consent of the owner or person in control at the time of the accident.

Joint and Several Liability

North Carolina follows joint and several liability when multiple tortfeasors are negligent. This allows a claimant to recover all damages for personal injury from any party (or parties) whose negligence was a proximate cause of the damages. However, the claimant can have only one total recovery. See also section on Contribution.

Proximate Cause: Peculiar Susceptibility

Ordinarily, a defendant is liable for all harmful consequences that result from a plaintiff's peculiar susceptibilities, including an aggravation of the plaintiff's preexisting condition or disease.

However, when the defendant's actions would not have caused any injury to an ordinary person, the defendant is not liable for the harmful consequences suffered by the peculiarly susceptible plaintiff unless the defendant knew or should have known of the existence of the susceptibilities.

PREMISES LIABILITY

Duty of a Landowner

A landowner owes every person lawfully on his land the duty to exercise reasonable care under the circumstances in the maintenance of his premises. The duty requires the landowner to give adequate warning to lawful visitors of any hidden or concealed dangerous condition about which the landowner knows or could have discovered through reasonable inspection and supervision. The landowner is also responsible to warn of any hidden or concealed dangers caused by his conduct or the conduct of his agents. The landowner is not required to warn others of open and obvious dangers or dangerous conditions about which the lawful visitor has equal or superior knowledge. A landowner owes a trespasser the duty not to cause injury through willful or wanton action. See N.C. Gen. Stat. §38B-2 and 38B-3.

PRODUCTS LIABILITY

Defenses to Products Liability Claims

The doctrine of contributory negligence (see definition under Negligence Actions) bars recovery in all products liability actions. This includes situations where the product is used contrary to written instructions, where the injured party failed to use reasonable care in the use of the product, and where the injured party unreasonably proceeds to use the product after discovering a defect. N.C. Gen. Stat. §99B-4.

Alteration and Modification of the Product

No manufacturer or seller of a product can be held liable if the proximate cause of the injury was an alteration or modification of the product after the product left the control of the manufacturer or seller unless:

- 1) the alteration or modification was in accordance with the product instructions or specifications or
 - 2) the alteration or modification was made with the consent of the manufacturer or seller.
- Alteration or modification includes the failure to observe routine care and maintenance of the product. N.C. Gen. Stat. §99B-3.

Claims Based on Inadequate Warning or Instruction

For a manufacturer or seller to be held liable for inadequate product warnings or instructions, the manufacturer or seller must have known at the time the product left its hands that the inadequate warning or instruction created a condition that is, or could be, unreasonably dangerous to the consumer. The manufacturer or seller has no duty to warn of open and obvious risks. N.C. Gen. Stat. §99B-5.

Claims Based on Inadequate Design

In order to prevail on a claim for inadequate product design, the plaintiff must show that 1) a safer, feasible alternative design could have been adopted which would have substantially reduced the risk of harm without impairing the usefulness or desirability of the product or 2) the product was so unreasonably dangerous that no reasonable person aware of the relevant facts would use the product. N.C. Gen. Stat. §99B-6.

Strict Liability

Strict liability is not recognized under North Carolina Law in products liability cases. N.C. Gen. Stat. §99B-1.1.

PROVIDING POLICY INFORMATION

N.C. Gen. Stat. §58-3-33 (2007) requires a carrier to provide the insured's policy limits to a claimant's attorney once the claimant provides a consent or authorization to release all medical records for the injury and for a three year period prior to the injury, provides written consent to participate in mediation, and provides the accident report and a description of the accident.

DAMAGES

Punitive Damages

Punitive damages may be awarded at the discretion of the fact-finder if compensatory damages have been awarded and the party seeking such damages demonstrates by clear and convincing evidence one or more of the following aggravating factors: 1) fraud, 2) malice, or 3) willful/wanton conduct. Punitive damages may not be awarded solely on the basis of vicarious liability for the acts or omissions of another. Punitive damage awards are limited to the greater of \$250,000 or three times the amount of compensatory damages. N.C. Gen. Stat. §1D-1, et seq. The exception to this rule is there is no limit on an award of punitive damages in driving while impaired cases.

This overview is intended as a concise summary of North Carolina Liability Law. It is not intended to be all-encompassing and does not cover all situations and exceptions to general rules. To discuss the applicability or interpretation of any provision of the law to a specific situation, please contact an attorney at Hedrick Gardner Kincheloe & Garofalo, L.L.P.

Attorney Fees

In personal injury claims, property damage claims, or first party claims against an insurer where the court enters a judgment for the plaintiff, the trial court has the discretion to award a reasonable attorney fee. N.C. Gen. Stat. §6-21.1.

In 2011, N.C. Gen. Stat. §6-21.1 was amended to allow the trial court to award a reasonable attorney fee (capped at \$10,000) where the amount of damages recovered is not in excess of \$20,000 (applicable to claims arising after October 1, 2011, where suit is filed prior to August 1, 2013). In 2013, N.C. Gen. Stat. 6-21.1 was amended again to allow attorney fees where the amount of damages recovered is not in excess of \$25,000 (applicable to claims arising after October 1, 2011 where suit is filed after August 1, 2013). The attorney fee statute provides that the amount of damages recovered by plaintiff must exceed the highest offer extended by defendant at least 90 days before the commencement of trial. In addition, the court must find that there was an unwarranted refusal by the defendant to pay or negotiate the claim.

A reasonable attorney fee shall be awarded to a party prevailing on a punitive damages claim provided the defense or prosecution of such claim was frivolous or malicious. N.C. Gen. Stat. §1D-45.

A reasonable attorney fee may be awarded to the party prevailing on a claim for unfair and deceptive trade practices if the party committing such practices willfully engaged in the act and refused to resolve the matter underlying the claim. A prevailing party defending a claim for unfair and deceptive trade practices may likewise be entitled to a reasonable attorney fee in the event the party making the claim knew, or should have known, that such a claim was frivolous or malicious. N.C. Gen. Stat. §75-16.1.

Release

The release of one defendant does not discharge the liability of other defendants unless expressly

provided for in the release agreement. This is true even when the basis of the liability of one of the parties is vicarious liability. N.C. Gen. Stat. §1B-4.

Contribution

When the negligence of two or more defendants jointly causes injury to a plaintiff, each defendant who pays more than his proportional share has the right of contribution from the other defendants. This right does not exist when one party has acted intentionally in causing or contributing to the injury. N.C. Gen. Stat. §1B-1. If a release or covenant not to sue has been executed by the plaintiff in favor of a defendant, that defendant is no longer subject to claims for contribution. N.C. Gen. Stat. §1B-4. However, the released party may be subject to claims for indemnity.

Property Damage

In an action for property damage, a plaintiff may be entitled to actual damages to the property (diminution in value to the property) and loss of use. The measure of diminution in value is the difference between fair market value (i.e., what someone would have paid in a private sale) of the property immediately before it was damaged and the fair market value after it was damaged. The owner of the property can also collect for loss of use of the property for a reasonable period of time while awaiting repair. The owner of destroyed property can only recover for the loss of use of that property if a suitable replacement is not immediately available.

Wrongful Death

Damages recoverable for death by wrongful act include 1) expenses for care, treatment, and hospitalization incident to the injury resulting in death; 2) compensation for the conscious pain and suffering of the decedent; 3) the reasonable funeral expenses of the decedent; 4) the present monetary value of the decedent to persons entitled to receive the damages recovered. Present monetary value includes, but is not limited

to, compensation for the loss of the reasonably expected future net income of the decedent and the value of the companionship the decedent would have provided; and 5) punitive damages, where appropriate. Beneficiaries are determined by the Intestate Succession Act. N.C. Gen. Stat. §28A-18-2.

COURTS

Trial Courts

District Court is the proper division for cases in which the amount in controversy does not exceed \$25,000.

Superior Court is the proper division when the amount in controversy exceeds \$25,000. (Cases in which the amount in controversy falls between \$10,000 and \$25,000 could be filed in either division until June 30, 2015.) N.C. Gen. Stat. §7A-243.

Small Claims Court may handle civil matters when the amount in controversy does not exceed \$10,000. N.C. Gen. Stat. §7A-210.

Appellate Courts

The Court of Appeals has jurisdiction to hear appeals from the Superior Court and District Court divisions. The Court of Appeals is comprised of 15 judges who hear cases in alternating panels of three judges each. N.C. Gen. Stat. §7A-16.

The North Carolina Supreme Court has seven justices who all participate in the hearing and decision of a case before the Court. N.C. Gen. Stat. §7A-10. A party may appeal to the North Carolina Supreme Court as a matter of right when there has been a dissent in the decision of a Court of Appeals. N.C. Gen. Stat. §7A-30. Otherwise, the decision as to whether to hear civil appeals is in the discretion of the Court. N.C. Gen. Stat. §7A-31.

IMPORTANT STATUTES OF LIMITATION

Negligence Resulting in Property Damage

Three years from the discovery of the damage, but no more than 10 years from the date of the last act or omission giving rise to the claim. N.C. Gen. Stat. §1-52.

Negligence Resulting in Personal Injury

Three years from the discovery of the injury, but no more than 10 years from the date of the last act or omission giving rise to the claim. N.C. Gen. Stat. §1-52. (Exception: professional malpractice.)

Medical Malpractice

Three years from when the injury should have been discovered. If the date of discovery is after two years of the occurrence of the last act of defendant, suit must be commenced within one year. No suit can be commenced after 4 years from the last act of defendant. N.C. Gen. Stat. §1-15.

Breach of Contract

Three years from the date of the breach. N.C. Gen. Stat. §1-52.

Fraud or Negligent Misrepresentation

Three years from the discovery of facts giving rise to the claim. N.C. Gen. Stat. §1-52.

Civil Assault

Three years from the incident. N.C. Gen. Stat. §1-52.

Civil Battery

Three years from the incident. N.C. Gen. Stat. §1-52.

Action for Wrongful Death

Two years from the date of the death. N.C. Gen. Stat. §1-53.

Libel/Slander

One year from the incident. N.C. Gen. Stat. §1-54.

Products Liability

Three years from the date of the injury, but no more than 12 years from the date of the initial purchase for use or consumption. N.C. Gen. Stat. §1-46.1.

Injury Resulting from Defective or Unsafe

Condition Cause by Improvement to Real Property

Three years from the date of injury, but no more than six years from the later of specific last act or omission of the defendant or substantial completion of the improvement. N.C. Gen. Stat. §1-50.

Unfair or Deceptive Trade Practices

Four years from the date when the cause of action accrues. N.C. Gen. Stat. §75-16.2.