CHAPTER 3

NEGLIGENCE IN OPERATION OF MOTOR VEHICLES

Table of Contents

I. NEGLIGENCE III-1

A. Definitions III-1

1. Negligence III-1

2. Highway III-2

3. Impairing Substance III-2

4. Intersection III-2

5. Owner III-2

6. Public Vehicular Area III-2

7. Types of Vehicles III-3

a. Moped III-3

b. Motor Vehicle III-3

c. Motorcycle III-3

d. Vehicle III-4

8. Operator III-4

B. Specific Acts of Negligence III-4

1. Reasonable Lookout III-4

2. Proper Control III-5

3. Speed Restrictions III-5

a. Reasonable and Prudent Speed III-5

b. Speed Limits III-6

c. Warning Signs as to Speed III-6

d. Authority to Alter Statutory Speed Limits III-6

e. Driving at Slow Speeds III-7

f. Duty to Decrease Speed III-7

g. Failure to Stop Within Headlights III-8

h. Bridges, Causeways and Viaducts III-8

i. School and Nonprofit Buses III-8

j. School Zones III-8

k. Emergency Vehicles III-9

l. Speed Competition III-10

4. Reckless Driving III-10

5. Right-of-Way Between Motor Vehicles III-11

a. Uncontrolled Intersections III-11

b. Vehicles Turning Left III-12

c. Traffic Circles III-12

d. Entry Onto or Crossing of Highway From Private Property III-12

e. Stop Signs III-12

f. Yield Signs III-13

g. Traffic Lights at Intersections III-14

h. Traffic Lights Other Than at Intersections III-14

6. Stopping or Parking on the Highway III-14

a. Parking on a Paved Highway or Highway Bridge III-14

b. Parking on Shoulder of Highway III-16

c. Disabled Trucks, Truck Tractors, Trailers, and Semi-trailers on a Highway III-16

d. Required Lighting III-17

e. Unattended Motor Vehicle on Highway III-17

7. Proper Lane III-19

a. Duty to Drive on the Right III-19

b. Duty to Drive Within Demarcated Lanes III-19

c. Traffic Control-Devices III-19

d. Hills and Curves III-20

e. One-way Traffic III-20

f. Motorcycles III-20

8. Following Too Closely III-20

9. Passing III-21

a. Vehicles Traveling in Opposite Directions III-21

b. Vehicles Traveling in the Same Direction III-22

c. Passing on the Right III-23

d. Common-law Duty to Sound Horn III-23

e. Passing Horses or Other Draft Animals III-23

10. Backing of Vehicles III-24
11. Turning III-24

a. Turn Signals III-24

b. Duty to Comply with Traffic Control Devices III-25

c. Duty to See that Movement can be Made in Safety III-25

d. Right Turns at Intersections III-25

e. Left Turns at Intersections III-26
12. Alcohol and Impairing Substances III-26

a. Driving While Impaired III-26

b. Blood and Intoxilyzer Tests III-28

c. Aiders and Abettors III-30

d. Liability for Providing Another with Alcohol III-30

e. Liability for Providing Underage Person with Alcohol III-30
13. Emergency Vehicles III-31

a. General Considerations III-31

b. Not Subject to Right-of Way Rules III-32

14. Pedestrians III-33

a. Pedestrian Control Signals III-33

b. Traffic-Control Signals Only III-33

c. Crosswalks III-34

d. Other Crossings III-35

e. Duty to Walk on the Left III-36

f. Pedestrian's Duty of Lookout III-36

g. Miscellaneous Provisions Relating to Pedestrians III-36

i. Obstructing Traffic III-36

ii. Hitchhikers III-37

iii. Solicitation III-37

h. Special Duties Owed by Motorists to Certain Pedestrians III-37

i. Children III-37

ii. Workmen III-38

15. Stopping at the Scene of an Accident III-38

16. Required Equipment III-39

a. Lighting III-39

b. Windshield and Window Requirements III-40

c. Mirrors III-41

d. Brakes III-41

e. Tires III-42

f. Seatbelts and Child Restraints III-42

g. Overloaded or Overcrowded Vehicles III-43

h. Motorcycles III-43

i. Steering Mechanism III-43

j. Securing Loads III-44

k. Towed Vehicles III-45

l. School Buses III-45

17. Operating Vehicle Without a License III-45

18. Interstate and State-System Controlled-Access Highway Violation III-46

19. Miscellaneous Acts of Negligence III-48

a. Television Sets III-48

b. Coasting III-48

c. Safety Zone III-47

d. Driving on Sidewalks III-49

e. Persons Riding Animals and Animal-Drawn Vehicles III-49

II. AGENCY & VICARIOUS LIABILITY III-49

A. Use of Agent's Own Vehicle III-49

B. Respondeat Superior III-50

1. Negligent Hiring III-51

C. Independent Contractors III-52

1. Inherently Dangerous Work/Nondelegable Duty III-53

2. Borrowed Servants III-54

3. Bailments III-55

D. Family Purpose Doctrine III-55

E. Negligent Entrustment III-57

F. Parent's Liability for Actions of Child III-57

1. Intentional/Malicious Acts III-57

2. Negligent Acts III-58

G. Joint Tortfeasors III-59

1. Traditional Concepts III-59

2. Concert of Action III-59

3. Joint Venturers III-60

H. Contribution And Indemnity III-61

I. Liability Of Governmental Agency III-63

III. CONTRIBUTORY NEGLIGENCE AND OTHER DEFENSES III-65
A. Contributory Negligence III-66
1. General Principles III-66
a. Minors III-67
b. Passengers III-68

2. Assumption of the Risk III-69

3. The "Seat Belt Defense" III-69
4. The Avoidable Consequences Rule III-70
B. Time Based Defenses: Statutes of Limitation and Repose III-69

1. Distinction III-69

2. Specific Applications III-70

3. Disabilities III-71

a. Tolling Statutes of Limitations III-71

b. Tolling Statutes of Repose III-71

C. <u>Immunities III-72</u>

1. Family Immunities III-72

a. Actions Between Husband and Wife III-72

b. Actions Between Parent and Child III-72

i. Child v. Parent III-72

ii. Parent v. Child III-73

c. Actions Between Siblings III-74

2. Sovereign Immunity III-74

a. Actions Against the State or its Agencies III-74

b. Actions Against Cities and Counties III-75

i. The Public Duty Doctrine III-76

ii. Governmental/Proprietary Distinction III-76

iii. Waiver Through Purchase of Insurance III-77

iv. Bases of Liability III-78

v. City's Failure to Maintain Public Streets III-78

c. Immunity of Government Officers and Employees III-79

3. Charitable Immunity III-83

a. Qualified Immunity for Volunteers III-83

b. Good Samaritan Statutes III-83

c. Mental Health Care Professionals III-84

d. Miscellaneous Health Care Immunities III-84

D. <u>Settlements, Releases, and Satisfaction III-85</u>

E. <u>Nonliability and Defenses to Intentional Torts III-86</u>

1. <u>Consent</u> III-86

2. <u>Privileges and Defenses</u> III-87

a. Self-Defense and Defense of Others III-87

b. Defense of Property III-89

3. <u>Necessity</u> III-89

a. Private Necessity III-89

b. Public Necessity III-89

4. <u>Statutory Privileges</u> III-89

a. School Personnel III-89

b. Peace Officers III-90

F. <u>Election of Remedies III-90</u>

IV. LIMITATIONS ON CONTRIBUTORY NEGLIGENCE AND OTHER SAVINGS PROVISIONS. III-92

A. <u>Limitations on Doctrine of Contributory Negligence</u> III-92

B. <u>Last Clear Chance III-93</u>

C. <u>Rescue Doctrine III-95</u>

D. Willful or Wanton Conduct and Gross Negligence III-95
E. Miscellaneous III-97

V. CONCLUSION III-98

Chapter 3

This chapter presents an overview of specific acts of negligence agency issues as well as the associated defenses that arise from operation of motor vehicles. Of course, it is not an all inclusive presentation. Credit for much of this material should be given to the last group to update these materials;Gary S. Parsons, Patricia P. Kerner, Dayatra T. King, Hannah G. Styron from Bailey &

Dixon, L.L.P. Raleigh, North Carolina

When reviewing negligence resulting from the use of motor vehicles one of the best places to start are the Jury instructions used in North Carolina courtrooms to explain negligence, contributory negligence as well as agency issues. In analyzing any automobile negligence issue, consideration must be given to both general common law principles and the statutory requirements of the "Rules of the Road" contained in Part 10 of Article 3 of Chapter 20 of the General Statutes. When confronted with issues arising out of the statutes, civil lawyers should not forget to consult the criminal cases, which also contain significant treatment of the statutes.

I. NEGLIGENCE IN OPERATION OF MOTOR VEHICLES

In determining the applicability of Chapter 20 of the North Carolina General Statutes to a given set of facts, do not forget to consider G.S. § 20-4.01. This statute defines terms found throughout the chapter, including those set out below:

A. Definitions

1. Negligence

An action for negligence accrues when the bodily injury or damage to property "becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs." G.S. § 1-52(16); Wilson v. McLeod Oil Co., Inc., 327 N.C. 491, 398 S.E.2d 586 (1990), reh'g denied, 328 N.C. 336, 402 S.E.2d 844 (1991). The statute of limitations for a negligence action is three years, and the statute of repose provides that "no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action." G.S. § 1-52(16).

2. Highway

G.S. § 20-4.01(13) defines "Highway" as the entire width between property or right-of-way lines of every way or place of whatever nature, when any part thereof is open to the use of the pubic as a matter of right for the purposes of vehicular traffic. The terms "Highway" and "Street" and their cognates are synonyms.

3. Impairing Substance

G.S. § 20-4.01(14a) defines "Impairing Substance" to include alcohol, controlled substances under G.S. Chapter 90, any other drug or psychoactive substance capable of impairing a person's physical or mental faculties, or any combination thereof.

4. Intersection

G.S. § 20-4.01(16) defines "Intersection" as the area embraced within the prolongation of the lateral curb lines or, if no curb lines exist, then the lateral edge of the roadway lines of two or more highways which join one another at any angle whether or not the two highways actually cross. The statute also provides that where a highway includes two roadways 30 feet or more apart, then every crossing of each roadway of such divided highway shall be a separate intersection.

5. Owner

G.S. § 20-4.01(26) defines "Owner" as the person holding legal title to a vehicle or a person with the immediate right of possession of a vehicle under a chattel mortgage, conditional sale agreement or lease. A person remains the owner of a vehicle until he has transferred title in compliance with the provisions of G.S. § 20-72.

6. Public Vehicular Area

G.S. § 20-4.01(32) defines "Public Vehicular Area" to include any areas within North Carolina that are generally open to and used by the public for vehicular traffic, including drives, driveways, roads, roadways, streets, alleys, and parking lots on the grounds and premises of any public or private hospital, college, university, school, orphanage, church, service station, supermarket, store, restaurant or office building, or any institution, park or facility maintained and supported by the State of North Carolina or any of its subdivisions, or any other business, residential or municipal establishment providing parking space for customers, patrons or the public. Public Vehicular Area also includes property owned by the United States which is subject to the jurisdiction of the State of North Carolina. The statute specifically excludes any private property not generally open to the public.

7. Types of Vehicles

G.S. § 20-4.01 provides a number of definitions for various types of vehicles, including those set out below. These definitions are central to the determination of whether any specific act of negligence will apply to a specific conveyance. See e.g. G.S. §§ 20-129 which sets forth various lighting equipment requirements for Bicycles, Motor Vehicles, Motorcycles and Vehicles.

a. Moped

G.S. § 20-4.01(27)(d)(1) defines "Moped" as a vehicle having two or three wheels and operable pedals and equipped with a motor which does not exceed 50 cubic centimeters piston displacement and which cannot propel the vehicle at a speed greater that 20 miles per hour on a level surface.

b. Motor Vehicle

G.S. § 20-4.01(23) defines "Motor Vehicle" as every vehicle which is self-propelled and every vehicle designed to run upon the highways which is pulled by a self-propelled vehicle. The statute specifically excludes mopeds from this definition.

c. Motorcycle

G.S. § 20-4.01(27)(d) defines "Motorcycle" as vehicles having a saddle for the use of the rider and designed to travel on not more than three wheels, including motor scooters and motor-driven bicycles, but specifically excluding tractors, utility vehicles equipped with an additional form of device designed to transport property, three wheeled vehicles while being used by law enforcement agencies and mopeds.

d. Vehicle

G.S. § 20-4.01(49) defines a "Vehicle" as every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, excepting devices, other than bicycles, moved by human power or used exclusively upon fixed rails. The statute specifically excludes devices designed and intended for transportation of persons with mobility impairments which are suitable for indoor and outdoor use and whose maximum speed does not exceed 12 miles per hour while being operated by a person with a mobility impairment.

8. Operator

G.S. § 20-4.01 (25) defines "Operator," driver and their cognates as a person in actual physical control of a vehicle which is in motion or which has the engine running. Additionally, every person riding an animal or driving any animal drawing a vehicle upon a highway is subject to the provisions of the Article applicable to the driver of a vehicle, except those provisions which by their nature can have no application. G.S. § 20-171. Thus, for example, a person can be convicted of driving while impaired while riding horseback. State v. Dellinger, 73 N.C. App. 685, 327 S.E.2d 609 (1985).

B. Specific Acts of Negligence

1. Reasonable Lookout

The operator of a motor vehicle has a duty to keep a reasonable lookout at all times. Thus, a driver must keep the same lookout that a reasonably careful and prudent person would keep under all circumstances then existing. This duty includes the duty not only to look, but to see what ought to be seen. A violation of the duty is negligence. N.C.P.I. Civil--201.20, Motor Vehicle Volume.

A driver has a duty to keep a lookout in his direction of travel, including the shoulders of the road. Exum v. Boyles, 272 N.C. 567, 158 S.E.2d 845 (1968). Darkness or fog may increase the hazards which a driver may face and require increased caution in order for him to fulfill his duty to maintain a proper lookout. Hines v. Brown, 254 N.C. 447, 119 S.E.2d 182 (1961); Moore v. Town of Plymouth, 249 N.C. 423, 106 S.E.2d 695 (1959). Similarly, a distracted driver may be held negligent. Hogsed v. Ray, 88 N.C. App. 673, 364 S.E.2d 688, disc. rev. denied, 322 N.C. 480, 370 S.E.2d 224 (1988) (driver leaned over to adjust his radio and his truck began to swerve causing his passenger to fall out of the truck).

2. Proper Control

The driver of a motor vehicle has a duty to keep his vehicle under proper control at all times. Thus, the driver is under a duty to operate the vehicle at a speed and in a manner which will allow him to maintain that degree of control which a reasonably careful and prudent person would maintain under same or similar circumstances. When the conditions existing at the scene change to increase the danger which confronts a driver, the driver's duty of care correspondingly increases. A violation of this duty, like that of maintaining a

proper lookout, is negligence. N.C.P.I. Civil--201.30, Motor Vehicle Volume.

The North Carolina Pattern Jury Instructions provide a separate instruction for the duty to maintain proper control where a vehicle has skidded. N.C.P.I. Civil--201.31, Motor Vehicle Volume. Skidding is defined as the slipping sideways of the wheels of a car, resulting in the inability of the driver to control its movement. Clodfelter v. Wells, 212 N.C. 823, 195 S.E. 11 (1938). The instructions also recognize that the fact that a vehicle skidded, standing alone, is not sufficient to submit an issue of negligence to the jury under the doctrine of res ipsa loquitur. Id.; Williams v. Thomas, 219 N.C. 727, 14 S.E.2d 797 (1941). Skidding, may, however, be some evidence of failure to maintain proper control when the skidding results from fault of the operator amounting to negligence. Webb v. Clark, 264 N.C. 474, 141 S.E.2d 880 (1965). For example, a driver may act negligently where he is inattentive to the road, realizes that he is on the pavement's edge and suddenly turns the wheel of his car, Butner v. Whitlow, 201 N.C. 749, 161 S.E. 389 (1931), or when he drives a vehicle with worn tires at an excessive speed, Riddle v. Artis, 243 N.C. 668, 91 S.E.2d 894 (1956), on later appeal, 246 N.C. 629, 99 S.E.2d 857 (1957). Whether a driver acts negligently by turning his steering wheel from side to side after beginning to skid, in order to regain control of the vehicle, is a question for the jury. Waller v. Hipp, 208 N.C. 117, 179 S.E. 428 (1935).

3. Speed Restrictions

a. Reasonable and Prudent Speed

It is unlawful for a person to operate a vehicle on a highway or in a public vehicular area at a speed greater than is reasonable and prudent under the conditions then existing. G.S. § 20-141(a). A violation of this safety statute is negligence in and of itself. N.C.P.I. Civil--202.10, Motor Vehicle Volume. In evaluating the speed of the driver, a jury must consider all the evidence relating to physical features at the scene, the hour of day or night, the weather conditions, traffic, and the width and condition of the roadway. Id.

b. Speed Limits

Pursuant to G.S. § 20-141 (b)(2), it is unlawful to operate a motor vehicle in excess of thirty-five miles per hour inside municipal corporate limits or in excess of fifty-five miles per hour outside municipal corporate limits, except on rural interstate highways where the speed limit has been raised pursuant to G.S. § 20-

141(d)(2), and except for school busses and school activity buses. A violation of this statute is negligence within itself. N.C.P.I. Civil 202.15, Motor Vehicle Volume.

c. Warning Signs as to Speed

Often times, in an effort to aid motorists in their determination as to what is a "reasonable and prudent" speed at which they should be driving under the conditions and circumstances then existing, a municipality will erect "warning signs" indicating to motorists that they should observe a speed limit that is lower than that which is posted. Generally, the purpose of these signs is to "put motorists on notice that there might be conditions ahead, such as traffic in [an] intersection, which require increased caution." Childers v. Seay, 270 N.C. 721, 724, 155 S.E.2d 259, 261 (1967). Because ***notice*** of potentially dangerous conditions is the purpose for these signs, our courts have made it clear that such signs are purely advisory in nature and that they do not rise to the level of mandatory speed limits. Id.; see also Maye v. Gottlieb, 125 N.C. App. 728, 482 S.E.2d 750 (1997).

d. Authority to Alter Statutory Speed Limits

While warnings signs indicate speed limits which are advisory in nature, the North Carolina Department of Transportation does have the authority to perform engineering and traffic investigations on any part of a highway system, and to set mandatory speed limits that are lower than the speed limits set forth in G.S. § 20-141(b), if they determine that the statutory speed limits are greater than is reasonably safe under the conditions found. G.S. § 20-141(d)(1). In that same vein, if the Department of Transportation determines, based on engineering and traffic investigations, that a higher maximum speed limit than that contained in G.S. § 20-141(b) is reasonable and safe under the conditions found, then it may increase the speed limit up to a maximum of 70 miles per hour, so long as it does not violate federal law. G.S. § 20-141(d)(2). Similarly, local authorities may set speed limits for highways, not a part of the interstate highway system or other controlled access highways, based on engineering and traffic investigations, so long as the speed set does no exceed fifty five miles per hour. G.S. § 20-141(e) and (f).

e. Driving at Slow Speeds

G.S. § 20-141(c) provides that, except when towing another vehicle, or when an advisory safe-speed sign indicates a slower speed, or as otherwise

provided by law, it is unlawful to drive a passenger vehicle upon any interstate or primary highway at a speed less that forty miles per hour in a fifty-five mile per hour zone and forty-five miles per hour in a speed zone of sixty miles per hour or more. To be effective, however, the minimum speeds must be posted.

Despite the provisions of §20-141(c), G.S. § 20-141(h) forbids a driver from operating a motor vehicle on a highway at such a slow speed as to impede the normal and reasonable movement of traffic, unless necessary for safe operation or in compliance with law. This provision does not apply to farm tractors or other motor vehicles operating at speeds reasonable for vehicles of that nature and type. Id. When, however, a vehicle is traveling at less that the legal maximum speed limit it must be driven in the right hand lane or as close to the right had curb or highway edge as possible. G.S. § 20-146(b).

f. Duty to Decrease Speed

G.S. § 20-141(m) provides that the fact that a vehicle is being operated at a speed less than the maximum speed limit does not relieve the operator of the vehicle from the duty to decrease his speed so as to avoid a collision with any person, vehicle or other conveyance entering the highway and to thereby avoid injury to person or property. The key determination is whether a reasonable and prudent person under same or similar circumstances would have decreased his speed. N.C.P.I. Civil--202.20a, Motor Vehicle Volume.

g. Failure to Stop Within Headlights

G.S. § 20-141(n) provides, notwithstanding any other provision of G.S. § 20-141, that failure of a motorist to stop his vehicle within the radius of his headlights or within the range of his vision is not negligence per se or contributory negligence per se. Such failure, however, may be evidence of negligence to be considered with all other circumstances of the case. Troy v. Todd, 68 N.C. App. 63, 313 S.E.2d 896 (1984) (failure to see motorist upon roadway before striking him constitutes some evidence of negligence); Duke v. Tankard, 3 N.C. App. 563, 165 S.E.2d 524 (1969) (citing former G.S. § 20-141(e) which specifically provided that facts relating to failure to stop within headlights or range of vision could be considered with other facts in determining negligence and contributory negligence).

h. Bridges, Causeways and Viaducts

G.S. § 20-144 allows the Department of Transportation to determine and post the maximum safe speed for bridges, causeways, or viaducts. The speed limit must be posted at a distance of 100 feet from the bridge, causeway or viaduct and violation of the posted limit constitutes negligence within itself. N.C.P.I. Civil--202.60, Motor Vehicle Volume.

i. School and Nonprofit Buses

G.S. § 20-218(b) makes it unlawful to operate a school bus loaded with children at a speed greater than thirty-five miles per hour or a school activity bus loaded with children over fifty-five miles per hour. See also, N.C.P.I. Civil--202.40, Motor Vehicle Volume. It is also unlawful to drive an activity bus owned by a nonprofit organization which is transporting persons in connection with nonprofit activities in excess of fifty-five miles per hour. G.S. § 20-218.2.

j. School Zones

G.S. § 20-141.1 authorizes the Board of Transportation and local authorities, within their respective jurisdictions, to lower the speed limit at areas adjacent to or near a public, private or parochial school. The lowered speed limit must be posted, must indicate the days and hours the speed limit is effective, and may only be enforced on days school is in session. In no event may the speed limit be set below twenty miles per hour.

k. Emergency Vehicles

G.S. § 20-145 provides that the speed limitations set forth in Article 3 of G.S. Chapter 20 do not apply to: (1) vehicles operated with due regard for safety under direction of the police in the chase or apprehension of violators of the law or of persons charged with or suspected of any such violation; (2) fire department or fire patrol vehicles responding to a fire alarm; (3) public or private ambulances and rescue squad emergency service vehicles when traveling to emergencies; or (4) vehicles operated by county fire marshals and civil preparedness coordinators when traveling in the performance of their duties. This exemption does not, however, protect the driver of any such vehicles from the consequences of reckless disregard for the safety of others. Id.

After some confusion in early case law[1], our Supreme Court has

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1 See . Goddard v. Williams, 251 N.C. 128, 110 S.E.2d 820 (1959); see also Bullins v. Schmidt, 322 N.C. 580, 369 S.E.2d 601 (1988) (holding that different rules applied to guide determination of pursuing officer's liability, depending upon whether officer's vehicle collided with another vehicle).

unequivocally held that this statute establishes one standard of care to be applied in all cases involving claims against officers arising out of vehicular pursuit of a law violator—gross negligence. Young v. Woodall, 343 N.C. 459, 471 S.E.2d 357 (1996). To be liable, the officer must have acted with reckless disregard of the safety of others. Id. The fleeing suspect's state of mind or knowledge is irrelevant. Parish v. Hill, 350 N.C. 231, 513 S.E.2d 547 (1999). Expert opinion testimony that the officer was grossly negligent in conducting a high speed chase is merely a legal conclusion drawn from the evidence, and should be excluded on summary judgment or at trial, because it invades the province of the Court in instructing the jury on the law and because the expert is in no better position to conclude whether a legal standard has been met than a jury properly instructed on the standard. Norris v. Zambito, 135 N.C. App. 288, 520 S.E.2d 113 (1999).

l. Speed Competition

G.S. § 20-141.3 makes it unlawful for any person to willfully engage in a speed competition, prearranged or spontaneous, on any street or highway. G.S. § 20-141.3(a) and (b). Violation of this law is negligence per se and constitutes willful or wanton conduct. Lewis v. Brunston, 78 N.C. App. 678, 338 S.E.2d 595 (1986). If two or more persons, while engaged in speed competition injure another, they are individually liable for the damages incurred, even if only one of the vehicles comes into contact with the injured person. Boykin v. Bennett, 253 N.C. 725, 118 S.E.2d 12 (1961). Where, however, a participant abandons the speed competition before the accident and injury, to the knowledge of the other participants, he may not be held liable. See N.C.P.I. Civil-213.10, Motor Vehicle Volume (citing Boykin, supra).

4. Reckless Driving

G.S. § 20-140(a) provides that any person who drives any vehicle upon a highway or any public vehicular area carelessly and heedlessly, in willful or wanton disregard of the rights or safety of others is guilty of reckless driving. Similarly, G.S. § 20-140(b) provides that any person who drives any vehicle upon a highway or any public vehicular area without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger persons or property is also guilty of reckless driving. Violation of either provision is negligence within itself. N.C.P.I. Civil--207.10, Motor Vehicle Volume.

Violation of a traffic rule, standing alone, does not constitute reckless driving, even if the violation was intentional. Ingle v. Roy Stone Transfer Corp., 271 N.C. 276, 156 S.E.2d 265 (1967). To plead reckless driving, a party must allege facts showing a violation of specific rules of the road in a criminally negligent manner. Roberts v. Pilot Freight Carriers, Inc., 273 N.C. 600, 160 S.E.2d 712 (1968); see Strong's North Carolina Index 4th, Automobiles and Other Vehicles, Vol. 3, §783 (listing specific examples of reckless conduct). Thus, mere allegations of reckless driving couched in the words of G.S. § 20-140, without more, will not justify an instruction on reckless driving. Roberts, supra. Moreover, if the evidence does not rise to the level of willful or wanton conduct, it is error for the court to instruct on gross negligence. Id.; Ford v. Jones, 6 N.C. App. 722, 171 S.E.2d 103 (1969).

Our Court of Appeals has found evidence of the defendant's guilty plea to a violation of G.S. § 20-140, along with other evidence of reckless disregard for the safety of others, sufficient to justify the submission of the issue of punitive damages to the jury. Marsh v. Trotman, 96 N.C. App. 578, 386 S.E.2d 447 (1989), disc. rev. denied, 326 N.C. 483, 392 S.E.2d 91 (1990).

5. Right-of-Way Between Motor Vehicles

Right-of-way, as it relates to motor vehicles, means the right of a vehicle to proceed without interruption in a lawful manner in the direction in which it is already moving in preference to another vehicle approaching from a different direction and into its path. Bennet v. Stephenson, 237 N.C. 377, 75 S.E.2d 147 (1953). Having the right-of-way does not, however, relieve a motorist from his obligation to exercise that degree of care which a reasonably careful and prudent person would use under same or similar circumstances. Dawson v. Jennette, 278 N.C. 438, 180 S.E.2d 121 (1971). Thus, a motorist with the right-of-way must drive at a speed no greater than is reasonable and prudent under the circumstances, keep his vehicle under proper control, keep a reasonably careful lookout, and take such other actions as a reasonably careful and prudent person would take to avoid a collision with persons or vehicles on the highway. See N.C.P.I. Civil--203.20, Motor Vehicle Volume.

a. Uncontrolled Intersections

Where two vehicles approach or enter an intersection from different highways at approximately the same time, the driver of the vehicle on the left must yield the right-of-way to the vehicle on the right. G.S. § 20-155(a). However,

if the driver of the vehicle on the left reaches the intersection and finds no one approaching at such a close distance as to indicate danger of collision, he may pass without stopping or waiting. Carr v. Stewart, 252 N.C. 118, 113 S.E.2d 18 (1960).

This statute does not apply where motorists are proceeding in opposite directions and meeting at an intersection. Fleming v. Drye, 253 N.C. 545, 117 S.E.2d 416 (1960). Similarly, the rule has no application where by reason of traffic lights, stop or caution signs, etc., one street is made dominant and another servient. White v. Phelps, 260 N.C. 445, 132 S.E.2d 902 (1963); accord, Todd v. Shipman, 12 N.C. App. 650, 184 S.E.2d 403 (1971).

b. Vehicles Turning Left

A driver of a vehicle intending to turn left within an intersection or into an alley, private road, or driveway shall yield the right-of-way to any vehicle approaching from the opposite direction which is within the intersection or so close as to constitute an immediate hazard. G.S. § 20-155(b). Violation of this statute is negligence within itself. N.C.P.I.--Civil 203.07 and 203.08, Motor Vehicle Volume. The driver of the vehicle turning left must ascertain that the movement can be made safely and warn other approaching vehicles by appropriate signal. G.S. § 20-154(a) and (b). However, failure to see that a movement can be made with safety or to give an appropriate signal is not negligence per se. G.S. § 20-154(d). It must, however, be considered along with all other facts and circumstances as evidence of the driver's negligence. Blankley v. Martin, 101 N.C. App. 175, 398 S.E.2d 606 (1990).

c. Traffic Circles

G.S. § 20-155(d) requires the driver of any vehicle approaching but not having entered a traffic circle, to yield the right-of-way to a vehicle already within the traffic circle. Violation of this statute is negligence within itself. N.C.P.I. Civil--203.05, Motor Vehicle Volume.

d. Entry Onto or Crossing of Highway From Private Property

The driver of a vehicle which is about to enter or cross a highway from an alley, building entrance, private road, or driveway shall yield the right-of-way to all vehicles approaching on the highway to be entered. G.S. § 20-156 (a). To

comply with the requirements of this law, a driver is only required to look for vehicles approaching on the highway, to see what ought to be seen, and to delay entry onto the highway until he has used reasonable care to determine that entry can be safely made. N.C.P.I. Civil--203-29, Motor Vehicle Volume. There is no requirement that the driver entering from the private property stop, as long as he yields the right-of-way. See Penland v. Greene, 289 N.C. 281, 221 S.E.2d 365 (1976). Violation of this statute is negligence within itself. N.C.P.I. Civil--203-29, Motor Vehicle Volume.

e. Stop Signs

G.S. § 20-158(b)(1) requires a driver of any vehicle which faces a stop sign at an intersection to stop and yield the right-of-way to vehicles operating on the main-traveled or through highway. G.S. § 20-158(b)(5) further provides that a driver facing a stop sign must stop at an appropriately marked stop line, or if none, before entering a marked crosswalk. If neither a stop line nor marked crosswalk are present, the driver must stop before entering the intersection at the point nearest the intersecting street where the driver is able to see approaching traffic. Id. Thus, the statute does not require that the motorist stop where the sign is located, but only that he bring his vehicle to a complete stop before entering the intersection so that he can yield the right-of-way to vehicles operating on the highway. Howard v. Melvin, 262 N.C. 569, 138 S.E.2d 238 (1964). Failure to stop at a stop sign is not negligence per se, but the facts relating to such failure to stop may be considered with all other facts in determining negligence or contributory negligence. G.S. § 20-158(d).

The driver of a vehicle operating on a main-traveled or through highway and approaching an intersection controlled by a stop sign may assume that a driver on the servient highway will stop for the stop sign. Lewis v. Brunston,78 N.C. App. 678, 338 S.E.2d 595 (1986). However, the driver on the dominant highway must still exercise reasonable care under the circumstances. Thus, he must drive at a speed no greater than reasonable and prudent under the circumstances, keep his vehicle under proper control, keep a reasonably careful lookout, and take such other action as a reasonably careful and prudent person would take to avoid collision with persons or vehicles upon the highway. N.C.P.I. Civil--203.20, Motor Vehicle Volume.

Similarly, when the driver of a vehicle on a servient highway brings his vehicle to a complete stop and then proceeds into the intersection, before a vehicle approaching on the dominant highway is near enough to constitute an immediate

hazard, the driver on the servient highway has the right-of-way. N.C.P.I. Civil--203.25, Motor Vehicle Volume.

f. Yield Signs

Both the Department of Transportation and cities and towns are authorized to designate main-traveled or through highways and streets, in their respective jurisdictions, by erecting yield signs. G.S. § 20-158.1. It is unlawful for a driver to enter or cross a main-traveled or through highway without slowing down and yielding the right-of-way to any vehicle moving on the main-traveled or through highway. Id. Thus, a driver on the servient highway must stop and yield the right-of-way unless the driver on the dominant highway is a sufficient distance from the intersection to warrant the assumption that the servient driver can cross in safety before the dominant driver reaches the intersection. Yost v. Hall, 233 N.C. 463, 64 S.E.2d 554 (1951). As with the failure to stop at duly erected stop signs, the failure to yield the right-of-way in accord with this statute is not negligence per se, but the facts relating to such failure may be considered with all other facts in determining negligence. G.S. § 20-158.1.

As a practical matter, the practitioner should keep in mind that if a client is cited with a traffic ticket for a failure to yield violation, stop sign violation, or one of the speeding violations previously discussed, the traffic citation will be admissible in court if the client pled guilty to the offense. If the citation was dismissed by the District Attorney or the Court, or if your client pled not guilty and was found guilty by the Court, then no evidence of his receipt of the ticket, or the fact that he was found guilty after pleading not guilty, will be admissible. As the attorney, you should be prepared to file a motion in limine to exclude the admittance of any such evidence at trial. See Beanblossom v. Thomas, 266 N.C. 181, 146 S.E.2d 36 (1966).

g. Traffic Lights at Intersections

G.S. §§ 20-158.1(b)(2)-(5) delineate the duties of a driver approaching a traffic light at an intersection. Vehicles facing a traffic signal emitting a steady red light must stop as long as the signal is emitting a red light. G.S. § 20-158(b)(2). However, in the absence of a sign forbidding such movement, a motorist facing a traffic signal emitting a steady red light may, after bringing his vehicle to a complete stop, make a right turn. Id. Once the traffic light turns green, the motorist may proceed after he ascertains that he can move with safety in compliance with G.S. §

h. Traffic Lights Other Than at Intersections

G.S. § 20-158(c)(2), (3) and (4) provides substantially the same rules, which govern signals at intersections, for a driver facing traffic signals located at a place other than an intersection.

6. Stopping or Parking on the Highway

a. Parking on a Paved Highway or Highway Bridge

G.S. § 20-161(a) prohibits anyone from parking or leaving standing any vehicle, regardless of whether attended, upon the paved or main-traveled portion of any highway or highway bridge outside municipal corporate limits unless the vehicle is disabled to such an extent that it is impossible to avoid stopping or temporarily leaving the vehicle there. Violation of this statue is negligence within itself. N.C.P.I. Civil--203.65, Motor Vehicle Volume.

The word "Park" has been defined to mean permitting a vehicle to remain standing on a public highway or street while the vehicle is not in use. State v. Carter, 205 N.C. 761, 172 S.E. 415 (1934). Parking is something more that a temporary or momentary stoppage on the road for a necessary purpose. Stallings v. Buchan Transport Co., 210 N.C. 201, 185 S.E. 643 (1936). It does not include a momentary stoppage where there is no intent to break the continuity of travel. Faison v. T & S Trucking Co., 266 N.C. 383, 146 S.E.2d 450 (1966). For example, a deputy sheriff did not park his car in violation of this statute when he stopped on the right side of the highway to speak with an intoxicated person. Skinner v. Evans, 243 N.C. 760, 92 S.E.2d 209 (1956). Similarly, a bus driver did not violate this statute by stopping to pick up a passenger. Peoples v. Fulk, 220 N.C. 635, 18 S.E.2d 147 (1942).

The word "impossible" does not mean physical, absolute impossibility, but rather that parking on the highway was not reasonably avoidable under the circumstances. N.C.P.I. Civil--203.65, Motor Vehicle Volume. However, the fact that a vehicle has a flat tire, standing alone, does not excuse parking on the highway. See Lambert v. Caronna, 206 N.C. 616, 175 S.E. 303 (1934) (citing predecessor code). The impossibility exception is usually a question for the jury, See, Smithwick v. Colonial Pine Co., 200 N.C. 519, 157 S.E. 612 (1931) (citing predecessor code), and the burden of proof is on the driver of the stopped vehicle. N.C.P.I. Civil--203.65, Motor Vehicle Volume.

Even if the evidence shows that a vehicle is stopped on a highway temporarily, without intention to break continuity of travel, the driver of the vehicle is still bound by a common-law duty to exercise reasonable care. See Smith v. Pass, 95 N.C. App. 243, 382 S.E.2d 781 (1989). In Smith, the driver of a garbage truck stopped his truck partially in the traveled portion of the highway facing on-coming traffic. The evidence also showed that an approaching motorist was blinded by the sun, that the driver had picked up garbage at the scene in the past, that the driver knew the sun would face on-coming traffic, and that alternate methods of picking up the trash were available and had been previously used. Under these facts, the Court affirmed the lower court's decision to submit the issue of common law negligence to the jury. Id.

Finally, whenever a driver upon a highway or public vehicular area intends to stop his vehicle, he must first ascertain that the stop may be made in safety and if any pedestrian or vehicle is affected, must give an appropriate signal. G.S. § 20-154(a). Violation of this rule is not negligence per se. G.S. § 20-154(d).

b. Parking on Shoulder of Highway

G.S. § 20-161(b) prohibits any person from parking or leaving standing any vehicle upon the shoulder of a public highway outside municipal corporate limits unless the vehicle can be clearly seen by approaching drivers form a distance of 200 feet in both directions and does not obstruct the normal movement of traffic. The pattern jury instruction for this section, N.C.P.I. Civil-203.60, Motor Vehicle Volume, recognizes that this statute, unlike G.S. § 20-161(a), does not make a specific exception for disabled vehicles. Nevertheless, an argument can be made that the two sections should be construed together, or alternatively, that the court should instruct on sudden emergency or sudden mechanical failure. Either should give the jury an opportunity to consider whether the driver could have conformed with the statute by exercising reasonable care. Violation of G.S.§ 20-161(b) is negligence within itself. N.C.P.I. Civil--203.60, Motor Vehicle Volume.

c. Disabled Trucks, Truck Tractors, Trailers, and Semitrailers on a Highway

The driver of any truck, truck tractor, trailer or semitrailer which becomes disabled upon any portion of the highway must display warning devices, as required by the Rules and Regulations of the United States Department of Transportation as adopted by the Division of Motor Vehicles, for as long as his

vehicle is disabled. G.S. § 20-161(c). A truck tractor is a vehicle designed and used primarily for drawing other vehicles and not constructed so as to allow it to carry any load independent of the vehicle drawn. G.S. § 20-4.01(48). This statute does not apply to passenger vehicles. Exum v. Boyles, 272 N.C. 567, 158 S.E.2d 845 (1968).

The Division of Motor Vehicles, pursuant to G.S. § 20-384, is authorized to adopt highway safety rules for all for-hire motor carrier vehicles and all private carrier vehicles engaged in interstate and intrastate commerce in North Carolina, whether they be common carriers, contract carriers, exempt carriers or private carriers. According to the pattern jury instructions, the Division of Motor Vehicles adopted, in full, the rules and regulations found at C.F.R. 49, Parts 170-178 and 390-397. N.C.P.I. Civil--203.66, Motor Vehicle Volume. Exceptions to those rules and regulations are found in a pamphlet which may be obtained from the Division of Motor Vehicles, Motor Carrier Safety Unit.

d. Required Lighting

Pursuant to G.S. § 20-134, a vehicle parked or stopped upon a highway, whether attended or unattended, must display one or more lamps projecting a white or amber light visible under normal atmospheric conditions from a distance of 500 feet to the front of the vehicle and projecting a red light visible in like conditions from a distance of 500 feet to the rear, at all times mentioned in G.S. § 20-129. The relevant times mentioned in G.S. § 20-129 are (1) during the period between sunset and sunrise; (2) any time there is insufficient light to render a person on the highway at a distance of 400 feet clearly discernible; or (3) at any time when the vehicle's windshield wipers are in use as a result of smoke, fog, rain, sleet, snow, (provided the wipers are not being used intermittently in misting rain, sleet or snow) or when inclement weather or environmental factors severely reduce the ability to clearly discern persons or vehicles on the road at a distance of 500 feet. G.S. § 20-134 does not apply where local authorities have provided, by ordinance, for parking without lights where there is sufficient light to reveal any person at a distance of 200 feet. Violation of G.S. § 20-134 is negligence within itself. N.C.P.I. Civil-- 20-203.70, Motor Vehicle Volume.

In addition, G.S. § 20-161.1 prohibits any person from parking or leaving standing at night a vehicle, which has its bright lights burning in the face of oncoming traffic, on a highway or on a side road entering a highway. A violation of this statute is negligence per se. N.C.P.I Civil--203.71, Motor Vehicle Volume.

e. Unattended Motor Vehicle on Highway

Before any person driving or in charge of a motor vehicle, leaves his vehicle unattended on a public highway or public vehicular area, he must first stop the vehicle's engine, set the vehicle's brake, and when the vehicle is left standing upon a grade, turn the front wheels to the curb or side of the highway. Violation of this statute is negligence within itself. G.S. § 20-163; McCall v. Dixie Cartage & Warehousing, Inc., 272 N.C. 190, 158 S.E.2d 72 (1967); N.C.P.I. -- Civil 20-203.75, Motor Vehicle Volume. A violation of this statute may be inferred where an automobile rolls down a street immediately after it was parked. Watts v. Watts, 252 N.C. 352, 113 S.E.2d 720 (1960).

7. Proper Lane

a. Duty to Drive on the Right

As a general rule, a vehicle must be driven upon the right side of a highway, if the highway is of sufficient width. G.S. § 20-146(a); See also G.S. § 20-147 and N.C.P.I.--Civil 204.17, Motor Vehicle Volume (driver must travel on right side of highway when crossing an intersection of highways or the intersection of a highway by a railroad right-of-way, unless the right side is obstructed and impassable.). Where the highway is not wide enough to accommodate two vehicles traveling in opposite directions, the right-of-way belongs to the vehicle which enters before the other approaches. Brown v. Southern Paper Prod. Co., 222 N.C. 626, 24 S.E. 334 (1943). Where, however, the highway is of sufficient width to accommodate two vehicles driving in opposite directions, a driver may drive left of center: (1) when overtaking and passing another vehicle driving in the same direction under the rules governing passing; G.S. § 20-146(a)(1); (2) when an obstruction makes it necessary to drive left of center provided that the driver yields the right-of-way to on-coming traffic close enough to constitute an immediate hazard; G.S. § 20-146(a)(2); (3) on highways divided into three marked lanes for traffic under the rules applicable thereon; G.S. § 20-146(a)(3); and (4) upon a highway designated and sign-posted for one-way traffic. G.S. § 20-146(a)(4). A violation of this statute is negligence within itself. N.C.P.I. -- Civil 204.15, Motor Vehicle Volume.

A plaintiff may make a prima facie case of negligence by presenting evidence that the defendant operated his vehicle left of center. Lassiter v. Williams, 272 N.C. 473, 158 S.E.2d 593 (1968). However, a defendant may escape liability by showing that he drove left of center for reasons other than his

negligence. Nationwide Mut. Ins. Co. v. Chantos, 298 N.C. 246, 258 S.E.2d 334 (1979). Moreover, the doctrine of sudden emergency overrides the mandatory standard of G.S. § 20-146(a)(2). N.C.P.I.--Civil 204.15, Motor Vehicle Volume. The burden of proof to show negligence, is, of course, on the plaintiff. Id.

G.S. § 20-146(b) also requires that a driver operating a vehicle at less than the legal maximum speed limit, must drive in the right hand lane then available for through traffic or as close as practicable to the right hand curb or edge of the highway, except when passing. A violation of this rule is negligence within itself. N.C.P.I.--Civil 204.20, Motor Vehicle Volume.

Whenever a highway has four or more lanes for traffic and provides for two-way traffic, a driver may not operate a vehicle left of the centerline of the highway absent traffic-control devices directing him to do so or an obstruction in the roadway. G.S. § 20-146(c). Violation of this law is negligence per se. N.C.P.I.--Civil 204.10, Motor Vehicle Volume.

b. Duty to Drive Within Demarcated Lanes

Whenever a street has been divided into two or more clearly marked traffic lanes, a vehicle must be driven as nearly as practicable entirely within a single lane and may not be moved from the lane until the driver ascertains that he may make such movement with safety. G.S. § 20-146(d)(1). When a street is divided into three or more lanes and provides for two-way movement of traffic, a driver may not drive in the center lane unless: (1) he is overtaking and passing another vehicle traveling in the same direction and the center lane is clear of traffic within a safe distance; (2) he is preparing to make a left turn; or (3) the center lane is allocated exclusively for traffic moving in the same direction of the driver and the allocation is designated by an official traffic-control device. G.S. § 20-146(d)(2). A violation of these rules is negligence per se. N.C.P.I.--Civil 20-204.09, Motor Vehicle Volume.

c. Traffic Control-Devices

Official traffic-control devices may be erected to direct specified traffic to use a designated lane or to designate those lanes to be used by traffic moving in a particular direction, regardless of the center of the road. G.S.§ 20-146(d)(3). Traffic control devices may also prohibit changing of lanes on a given section of a street, G.S. § 20-146(d)(4), or prohibit a driver from operating a vehicle in the inside lane next to a median of a dual-lane highway at a speed less than the posted

speed limit, if he impedes traffic and is not preparing for a left turn. G.S. § 20-146 (e).

d. Hills and Curves

G.S. § 20-150(d) prohibits a driver from operating a vehicle to the left of a centerline of a highway upon the crest of a grade or upon a curve where the centerline has been placed by the Department of Transportation and is visible. A violation of this statute is negligence per se. N.C.P.I.--Civil 204.25, Motor Vehicle Volume. Where, however, there is no centerline, a driver may overtake and pass another vehicle traveling in the same direction upon a grade or curve, if his view of the highway is not obstructed for 500 feet. G.S. § 20-150(b); Walker v. American Bakeries Co., 234 N.C. 440, 67 S.E.2d 459 (1951).

e One-way Traffic

The Department of Transportation and local authorities are authorized to designate any highway or roadway under their jurisdiction for one-way traffic. G.S. §§ 20-165.1 and 20-169. It is negligence per se to willfully travel in the wrong direction where signs have been erected advising of the correct course of travel. N.C.P.I.--Civil 204.80, Motor Vehicle Volume.

f. Motorcycles

Motorcycles are entitled to full use of a lane and no vehicle may be driven in a manner to deprive any motorcycle of full use of a lane. G.S. § 20-146.1(a). However, motorcycles may be operated two abreast in a single lane. G.S. § 20-146.1(b). Violation of either rule is negligence per se. N.C.P.I.--Civil 204.51 and 204.52, Motor Vehicle Volume.

8. Following Too Closely

G.S. § 20-152(a) prohibits the driver of a motor vehicle from following another vehicle more closely than is reasonable and prudent, having due regard for the speed of the vehicle and the traffic upon and the condition of the highway. There is no set distance at which a vehicle may lawfully follow another. Instead, what is reasonable and prudent depends on the facts and circumstances, and the driver of a vehicle must take into account factors such as road and weather conditions, other traffic, the characteristics of the vehicle being driven as well as of the vehicle ahead, the relative speed of the vehicles, and the ability of the driver

to control and stop his vehicle should an emergency require it. N.C.P.I.--Civil 205.30, Motor Vehicle Volume. The space left between two vehicles should be sufficient to enable the driver of the trailing vehicle to avoid danger in case of a sudden stop or decrease in speed by the vehicle ahead, under circumstances which should reasonably be anticipated by the driver of the trailing vehicle. Id.; Beanblossom v. Thomas, 266 N.C. 181, 146 S.E.2d 36 (1966) (elaborating on duty of the trailing motorist).

Generally, absent negligence by the lead vehicle or a sudden emergency, the courts view the fact of a collision with the vehicle ahead as some evidence that the trailing motorist was not keeping a proper lookout or that he was following too closely. Id.; Burnett v. Corbett, 264 N.C. 341, 141 S.E.2d 468 (1965). However, the trailing driver is not an insurer against rear end collisions. Even when he follows at a reasonable distance the space may be too small for all eventualities. Beanblossom, supra. Thus, a collision standing alone does not compel a finding of negligence, but merely creates a factual question for the jury. Ratliff v. Duke Power Co., 268 N.C. 605, 151 S.E.2d 641 (1966).

G.S. § 20-152(b) supplements the preceding section by providing that a driver of a motor vehicle upon a highway outside a business or residential district and following another motor vehicle must, whenever conditions permit, leave sufficient space so that an overtaking vehicle may enter and occupy the space without danger. However, this rule does not prevent the driver of the trailing vehicle from overtaking and passing the vehicle in front of him. Id. It also does not apply to funeral processions. Id. A violation of this rule is negligence within itself. N.C.P.I.--Civil 205.32, Motor Vehicle Volume.

9. Passing

a. Vehicles Traveling in Opposite Directions

G.S. § 20-148 requires drivers of vehicles proceeding in opposite directions to pass each other to the right and allow the other driver at least one half the main-traveled portion of the highway. Violation of this section is negligence per se. Anderson v. Webb, 267 N.C. 745, 148 S.E.2d 846 (1966); N.C.P.I.--Civil 205.10, Motor Vehicle Volume. This section may not apply to three lane highways. State v. Duncan, 264 N.C. 123, 141 S.E.2d 23 (1965).

Ordinarily, a driver has the right to assume that an approaching vehicle will pass to his left. Lucas v. White, 248 N.C. 38, 102 S.E.2d 387 (1958). However,

that right is not absolute, and if circumstances give notice to the contrary, the driver must exercise ordinary care under the circumstances then existing. Redden v. Bynum, 256 N.C. 351, 123 S.E.2d 734 (1962).

Finally, a vehicle traveling on the highway is required to dim its lights when meeting another vehicle so as not to project a glaring or dazzling light to persons within 500 feet in front of the vehicle. G.S. § 20-131(a). A violation of this statute is negligence per se. N.C.P.I.--Civil 205.80, Motor Vehicle Volume.

b. Vehicles Traveling in the Same Direction

G.S. § 20-149(a) requires all drivers overtaking another vehicle proceeding in the same direction to pass at least two feet to the left of the overtaken vehicle, and not drive again on the right side of the highway until safely clear of the overtaken vehicle. This section does not apply when a vehicle is passing on the right, pursuant to G.S. § 20-150.1. The manner in which a driver may pass a vehicle traveling in the same direction is also limited by G.S. § 20-150. That statute provides that a driver of a passing vehicle may not drive on the left side of the highway unless it is clearly visible and is free of oncoming traffic for a sufficient distance to permit him to pass. G.S. § 20-150(a). A driver is also prohibited from passing another vehicle traveling in the same direction upon the crest of a grade or upon a curve where the driver's view of the highway is obstructed within 500 feet. G.S. § 20-150(b). Nor may a driver pass another vehicle traveling in the same direction at a railway grade crossing or at any intersection unless permitted by a traffic or police officer. G.S. § 20-150(c) (Note: for purposes of this statute, "intersection of highway' is defined and limited to intersections designated and marked by the Department of Transportation by appropriate signs, and street intersections in cities and towns). Similarly, a driver may not overtake and pass another vehicle on the crest of a grade or upon a curve where the Department of Transportation has clearly marked a center line or on any portion of the highway where the Department of Transportation has indicated by signs or markings that no passing is allowed. G.S. §§ 20-150(d),(e).

A vehicle being overtaken, pursuant to G.S. § 20-149(b), must give way to the right in favor of the overtaking vehicle while being lawfully overtaken. It may not increase its speed until completely passed by the overtaking vehicle. Id.

c. Passing on the Right

G.S. § 20-150.1 provides four situations in which a driver may overtake and

pass another vehicle on its right hand side. A driver may pass another vehicle on the right if the vehicle overtaken is in a left hand turn lane or the approaching driver is in a lane designating a right turn on a red traffic signal. G.S. §§ 20-150.1 (1), (4). A driver may also pass on the right if he is driving on a highway with unobstructed pavement of sufficient width which has been marked for two or more lanes of moving vehicles in each direction, which lanes are not occupied by parked vehicles. G.S. § 20-150.1(2). Finally a driver may pass on the right on a one-way street or highway in which traffic is restricted to one direction of movement, is wide enough, and is marked for two or more lanes of traffic which are not occupied by parked vehicles. G.S. § 20-150.1(3). If a driver passes on the right, when not authorized by this section, he is guilty of negligence per se. Teachey v. Woolard, 16 N.C. App. 249, 191 S.E.2d 903, disc. rev. denied, 282 N.C. 430, 192 S.E.2d 840 (1972).

d. Common-law Duty to Sound Horn

Although G.S. § 20-149(b) requires a vehicle being overtaken to yield to a passing vehicle which sounds its horn, no statute, to this writer's knowledge, requires the driver of a passing vehicle to sound his horn while passing. See N.C. Sess. Laws C. 1330, s. 15 (1973) (removing statutory duty to sound horn when passing). Nevertheless, the common-law requires a passing driver to use reasonable care to avoid injury to others, including the overtaken vehicle's occupants. Thus, there remains a common law obligation to timely sound a horn when passing, if a reasonable person under like circumstances and conditions would have done so. Lowe v. Futrell, 271 N.C. 550, 157 S.E.2d 92 (1967).

e. Passing Horses or Other Draft Animals

G.S. § 20-216 requires any person operating a motor vehicle to use reasonable care when approaching or passing a horse or other draft animal, whether ridden or otherwise under control.

10. Backing of Vehicles

G.S. § 20-154(a) requires the driver of a vehicle upon a highway or public vehicular area to ascertain that he can back his vehicle in safety and without interfering with traffic. Id.; N.C.P.I.--Civil 205.90, Motor Vehicle Volume. A driver who backs his vehicle must use that degree of care which a reasonably careful and

prudent person would use under all the circumstances then existing. N.C.P.I.--Civil 205.90, Motor Vehicle Volume. He must not only look, but keep a reasonably careful lookout in the direction of travel, Gentile v. Wilson, 242 N.C. 704, 89 S.E.2d 403 (1955), and give timely warning of his intention to back when reasonably necessary. Harris v. Wright, 268 N.C. 654, 151 S.E.2d 563 (1966).

11. Turning

a. Turn Signals

If the act of turning could affect another vehicle or a pedestrian, G.S. § 20-154(a) requires that a turn signal be given. Clarke v. Holman, 1 N.C. App. 176, 160 S.E.2d 552, aff'd, 274 N.C. 425, 163 S.E.2d 783 (1968) (no signal required if others not affected by turn); N.C.P.I. -- Civil 206.10, Motor Vehicle Volume. If a pedestrian may be affected, the driver must sound his horn. Where a driver looks front and back before turning into a driveway and observes no approaching vehicles, the statute does not require him to give a signal, Stovall v. Ragland, 211 N.C. 536, 190 S.E. 899 (1937), and where an oncoming vehicle has not yet appeared on the horizon, no signal is required, Clarke v. Holman, 274 N.C. 425, 163 S.E.2d 783 (1968).

The signal, if required, must be given continuously for 100 feet prior to the turn where the speed limit is less than 45 m.p.h.; otherwise, the signal must be given for 200 feet. A violation of the signaling requirement is not, however, negligence per se. G.S. § 20-154(d).

A driver approaching an oncoming vehicle may presume that the driver of the approaching vehicle will comply with G.S. § 20-154 before making a left turn across his path. Petree v. Johnson, 2 N.C. App. 336, 163 S.E.2d 87 (1968). Further, when a driver gives an appropriate signal, another motorist may assume that the turning driver will delay his turn until it is safe to do so. Brown v. Brown, 38 N.C. App. 607, 248 S.E.2d 397 (1978).

b. Duty to Comply with Traffic Control Devices

Where the Department of Transportation or local authorities have erected signs or other instructions regarding turns, it is unlawful to fail to follow those instructions. G.S. § 20-153. A failure to follow these signs is negligence per se. See N.C.P.I. -- Civil 209.20, Motor Vehicle Volume.

c. Duty to See that Movement can be Made in Safety

G.S. § 20-154 also requires that a driver intending to make a turn first see that the movement can be made in safety. This does not require that the turn be absolutely free from danger. Sass v. Thomas, 90 N.C. App. 719, 370 S.E.2d 73 (1988). In determining whether the turn should be made, the driver must exercise the degree of care which a reasonably prudent person would exercise under all of the circumstances. Cooley v. Baker, 231 N.C. 533, 58 S.E.2d 115 (1950); N.C.P.I. -- Civil 206.10, Motor Vehicle Volume. Under appropriate circumstances, a turn may require that the driver provide for the stopping of traffic. See Ratliff v. Duke Power Co., 268 N.C. 605, 151 S.E.2d 641 (1966) (driver of vehicle pulling 40 foot pole may be required to place person in intersection to stop traffic before making turn).

d. Right Turns at Intersections

A right turn must be made as close as practicable to the right curb or edge of the roadway. G.S. § 20-153. A violation of this statute is negligence per se. Tarrant v. Pepsi Cola Bottling Co., 221 N.C. 390, 20 S.E.2d 565 (1942).

A motorist intending to turn right on red must come to a stop and yield the right-of-way to pedestrians. See N.C.P.I. -- Civil 211.46, Motor Vehicle Volume. A motorist making a right turn at a green light must yield the right-of-way to a pedestrian crossing with the light, Duke v. Meisky, 12 N.C. App. 329, 183 S.E.2d 292 (1971), but the failure to do so is not negligence per se. N.C.P.I. -- Civil 211.46, Motor Vehicle Volume. The failure to yield the right-of-way to a pedestrian crossing in accordance with a pedestrian-control device, however, is negligence per se.

e. Left Turns at Intersections

The path of a left turn must be to the left of the center of the intersection so that approaching vehicles making left turns would not go around each other. G.S. § 20-153. The turning vehicle must approach the intersection in the left-most lane, where one is available. G.S. § 20-153. This latter provision does not require the driver to travel on the left side of the lane, however. Gay v. Walter, 58 N.C. App. 813, 294 S.E.2d 769 (1982). A violation of this statute is negligence per se. See N.C.P.I. -- Civil 209.15, Motor Vehicle Volume.

12. Alcohol and Impairing Substances

a. Driving While Impaired

A violation of G.S. § 20-138.1, pertaining to Driving While Impaired, is negligence per se. See N.C.P.I. -- Civil 208.10, Motor Vehicle Volume. The law of Driving While Impaired is complex and is often changed, or clarified, by evolving case law. Thus, the practitioner is well advised to consult the statutes, recent cases, and any current authorities on the subject. Nevertheless, some generalities can be set forth which are of some significance to civil cases.

A motorist is guilty of driving while impaired if he drives under the influence of an impairing substance or if he has an alcohol concentration of .08 or more. G.S. § 20-138.1; see also G.S. § 20-138.3 (unlawful for person less than twenty-one to drive with any alcohol content); G.S. § 20-138.2 (regarding commercial vehicles, defined at G.S. § 20-4.01(3d); relevant alcohol level is .04). (Prior to October 1, 1993, the relevant level for DWI was .10.) The driving must occur on a highway, street or public vehicular area. See State v. Snyder, 343 N.C. 61, 468 S.E.2d 221 (1996) (holding no error in trial court's peremptory instruction that private club's parking lot constituted public vehicular area within meaning of statute). Also, for there to be a violation, the vehicle must be in motion, State v. Carter, 15 N.C. App. 391, 190 S.E.2d 241 (1972), and thus placing one's foot on the brake pedal does not constitute driving, State v. Hatcher, 210 N.C. 55, 185 S.E. 435 (1936).

Practically speaking, the first step that should be taken in any case involving an impaired driver is to obtain a complete copy of the criminal file pertaining to the driving while impaired (DWI) charge, if one exists. This should include the lab report on the blood alcohol concentration, as well as the alcohol incident report (AIR) form, if for some reason it has been placed in the court file. More often than not, however, these reports will have to be obtained directly from the investigating officer. In addition, you should interview the officer to see how bleak a picture he will paint of your client's behavior at the scene.

Additionally, if a client was injured in the accident, you, as the practitioner, should immediately get an authorization for release of medical records and obtain a complete copy of the ER and lab reports from the treating hospital. If the blood alcohol content (BAC) level at the hospital is significantly more favorable, then this would obviously be a very vital piece of information for use at trial. Even if it

is not, however, it would still be helpful for you to know just how bad your client's condition was immediately after the accident. In this regard, the physical examination report should also be carefully reviewed, inasmuch as it may suggest, even in the absence of a separate BAC level drawn by the hospital, that perhaps the toxicology work done by the SBI lab was inaccurate. If this can be potentially established, it at least gives you a triable issue with the jury, especially if you have a client who is adamant that he or she was not impaired and who is truly credible.

Of course, even if your client is adamant about not being impaired, he may still be found guilty of driving under the influence of an impairing substance if it is determined that he consumed a sufficient amount to cause him to lose normal control of his bodily or mental faculties or both, to such an extent that there was an appreciable impairment to either or both of those faculties. State v. Ellis, 261 N.C. 606, 135 S.E.2d 584 (1964). An odor of alcohol is evidence that a person has been drinking, but it is insufficient to show that he is under the influence of an intoxicant; similarly, evidence that one has had a drink is insufficient. Atkins v. Moye, 277 N.C. 179, 176 S.E.2d 789 (1970). This evidence of drinking, however, when combined with evidence of faulty driving or other conduct indicating impairment, is sufficient to show a violation. Id.

The same rationale applies when determining liability in civil cases because a motorist is not liable to a plaintiff injured as a result of the motorist's driving merely because the motorist was intoxicated; rather, the motorist is liable if his impairment caused him to violate some other rule of the road which was a proximate cause of the collision or accident. Id. Thus, whether a motorist was impaired is a significant, but not a dispositive factor in determining whether he violated a standard of care owed to the injured plaintiff.

Similarly, whether a injured plaintiff was impaired at the time of the collision or accident may be relevant to whether he violated a standard of care owed to the defendant motorist such that evidence of his blood alcohol level may serve to bar him from recovering from the defendant motorist because of his own contributory negligence. Accordingly, in Green v. Rouse, 116 N.C. App. 647, 448 S.E.2d 846 (1994), cert. denied, 340 N.C. 260, 456 S.E.2d 829 (1995), the Court of Appeals held that the issue of a plaintiff's contributory negligence was sufficient to be submitted to the jury where the evidence tended to show that the plaintiff's blood alcohol level was .18 percent shortly after the subject collision. In such a case, the Court concluded, a jury could properly consider evidence of the plaintiff's blood alcohol level for purposes of ascertaining whether plaintiff's condition caused her to operate her vehicle in a manner which was a proximate

cause of the collision, and whether plaintiff was capable of copying with highway and weather conditions in the manner of a reasonably prudent person. Id.

Finally, as with the issue of liability, allegations of intoxication are insufficient, when standing alone, to permit the issue of punitive damages to be submitted to a jury. Howard v. Parker, 95 N.C. App. 361, 382 S.E.2d 808 (1989).

b. Blood and Intoxilyzer Tests

A chemical analysis is admissible to establish the defendant's blood alcohol content. Vance Trucking Co., Inc. v. Phillips, 51 N.C. App. 85, 275 S.E.2d 497, disc. review denied, 303 N.C. 320, 281 S.E.2d 659 (1981) (error to exclude breathalyzer results and testimony of experts as to what defendant's blood alcohol content would have been at time of accident). The requirements for the admissibility of the analysis have not been clearly set forth. Presumably, the ordinary rules of evidence apply. Of special import would be the rules pertaining to expert testimony.

One case which pre-dates our current rules of evidence indicates that one seeking to introduce the results of blood alcohol tests must meet strict criteria. Robinson v. Life & Cas. Ins. Co. of Tenn., 255 N.C. 669, 122 S.E.2d 801 (1961) (action on insurance policy; one seeking to introduce test results must lay foundation; evidence properly excluded because expert did not know whether he was present when the blood was taken and because there was no evidence of who took the blood or whether it was taken before embalming fluid was injected into the deceased). A recent case, however, under our current rules of evidence, has cited to Robinson as authority in this area. Bare v. Barrington, 97 N.C. App. 282, 388 S.E.2d 166, disc. rev. denied, 326 N.C. 594, 393 S.E.2d 873 (1990) (exclusion of blood alcohol test results proper under Robinson where no proper foundation).

In a criminal prosecution for driving while impaired, there are specific statutory and regulatory guidelines regarding the admissibility of a test determining blood alcohol content. A chemical analysis is admissible "[i]n any implied-consent offense under G.S. § 20-16.2." G.S. § 20-139.1. Presumably, the provisions of this statute apply to criminal proceedings, or other criminal-like proceedings (such as a hearing before the DMV), and are not applicable to a civil action. Nevertheless, they may be given some weight by a court in determining the admissibility of blood alcohol content tests. See Ivey v. Rose, 94 N.C. App. 773, 381 S.E.2d 476 (1989) (defendant's breathalyzer result of .18 was admitted in civil action; court noted that this reading was the lower of the two readings taken,

which lower reading is only admissible under G.S. § 20-139.1).

To be admissible in a criminal proceeding, the analysis must meet several criteria under G.S. § 20-139.1. It must be performed according to the methods approved by the Commission for Health Services. The person administering the test must possess a valid permit issued by the Department of Human Resources. Where the defendant shows that the required preventive maintenance procedure for the instrument had not been performed within the time limit specified by the applicable regulation, the results are inadmissible. Two readings must be taken, they may not differ by more than .02, and the lower reading only is admissible. G.S. § 20-139.1(b3).

Ordinarily, an affidavit would constitute inadmissible hearsay, but in District Court the chemical analyst may testify by affidavit as to his qualifications, the maintenance records of the analyzing machine, the procedures used in the test, and the subject's alcohol concentration. G.S. § 20-139.1(e1). This particular provision applies to "any hearing or trial in the District Court Division" and is not expressly limited to criminal actions. As noted earlier, however, this statute seems to be implicitly limited to criminal actions. A refusal to take the intoxilyzer is admissible in any "criminal action." G.S. § 20-139.1(f).

Blood test results conducted at a hospital should be obtainable through G.S. § 8-53, pertaining to the production of hospital records.

c. Aiders and Abettors

Under criminal law, anyone who participates in another's impaired driving is guilty as a principal. Thus, when an owner places his motor vehicle in the hands of an intoxicated driver, sits by the intoxicated driver's side, and permits the driver to operate the vehicle, the owner is as guilty as the intoxicated driver. State v. Gibbs, 227 N.C. 677, 44 S.E.2d 201 (1947).

d. Liability for Providing Another with Alcohol

An individual has a duty to those people who travel on the public highways to not serve alcohol to an intoxicated individual who was known to be driving. Hart v. Ivey, 332 N.C. 299, 420 S.E.2d 174 (1992). The standard for a social host is whether he knew, or should have known, that the guest was intoxicated. Camalier v. Jeffries, 340 N.C. 699, 460 S.E.2d 133 (1995) (summary judgment for defendant proper where numerous persons testified that the driver did not seem

impaired, notwithstanding evidence that driver consumed three or four alcoholic beverages at party and had blood alcohol content of .19 less than two hours after leaving party). See N.C.P.I. -- Civil 102.83, Motor Vehicle Volume.

Under G.S. § 18B-305, it is unlawful for a "permittee," as opposed to a social host, to sell or give alcoholic beverages to an intoxicated person, and a violation of this statute is negligence per se. Hutchens v. Hankens, 63 N.C. App. 1, 303 S.E.2d 584, disc. review denied, 309 N.C. 191, 305 S.E.2d 734 (1983); see also N.C.P.I. -- Civil 102.81, Motor Vehicle Volume.

e. Liability for Providing Underage Person with Alcohol

G.S. § 18B-302 provides that it is unlawful to sell or give malt beverages, wine, spirituous liquor, or mixed beverages to anyone under the age of twenty-one; however, our Supreme Court has concluded that, unlike a violation of G.S. § 18B-305, a violation of this statute is not negligence per se. Hart v. Ivey, 332 N.C. 299, 420 S.E.2d 174 (1992); see also N.C.P.I. -- Civil 102.70, Motor Vehicle Volume. In Hart, the Court reversed the Court of Appeals and held that a violation of G.S. § 18B-302 could not provide a basis for a negligence per se claim because the purpose of the statute was not to impose a duty for the protection of the public; rather, the Court concluded, the legislature promulgated the statute as a means of restricting minors' consumption of alcohol. Hart, 332 N.C. at 303-04, 420 S.E.2d at 177.

Although the sale of alcohol to an under-aged person does not provide a basis for a negligence per se claim under G.S. § 18B-302, commercial vendors are still subject to liability for the negligent sale of alcohol to a minor pursuant to G.S.§ 18B-120-129, North Carolina's Dram Shop Act. Under the Act, a "permittee" is liable to an "aggrieved party," where the permittee negligently sold or furnished an alcoholic beverage to an underage person, the consumption of the alcoholic beverage that was sold or furnished to an underage person caused or contributed to, in whole or in part, an underage driver's being subject to an impairing substance within the meaning of G.S. § 20-138.1 at the time of the injury, and the injury that resulted was proximately caused by the underage driver's negligent operation of a vehicle while so impaired. G.S. § 18B-121. Significantly, the Act's definition of an "aggrieved party" does not include the underage driver or his estate. Id.; see also Clark v. Inn West, 324 N.C. 415, 379 S.E.2d 23 (1989).

In addition to the imposition of liability pursuant to North Carolina's Dram

Shop Act, common law principles of negligence may be invoked to impose liability upon a commercial vendor who negligently sells alcohol to a minor. Hart v. Ivey, 332 N.C. 299, 420 S.E.2d 174 (1992). Where a plaintiff seeks to maintain such a common law cause of action, however, the North Carolina Supreme Court has made it consistently clear that "established negligence principles" apply and that as such, a plaintiff must present sufficient evidence to satisfy all the elements of a common law negligence suit, that is, duty, breach of duty, proximate cause, and damages. Id.; Camalier v. Jeffries, 340 N.C. 699, 460 S.E.2d 133 (1995); see also Estate of Mullis v. Monroe Oil Co., Inc., 349 N.C. 196, 505 S.E.2d 131 (1998).

Finally, a plaintiff may be barred by his contributory negligence if he aided or abetted in the sale to the underage person. G.S. § 18B-120(1); see N.C.P.I. -- Civil 102.75, Motor Vehicle Volume.

13. Emergency Vehicles

a. General Considerations

A police officer in pursuit of a suspect is exempt from speed laws, but he must nevertheless driving in a grossly negligent manner. G.S. § 20-145; Young v. Woodall, 343 N.C. 459, 471 S.E.2d 357 (1996). Where a person is injured as a result of a high-speed chase, the standard of care is one of gross negligence. See Parish v. Hill, 350 N.C. 231, 513 S.E.2d 547 (1999); see also Ford v. Peaches Entm't Corp., 83 N.C. App. 155, 349 S.E.2d 82 (1986), disc. rev. denied, 318 N.C. 694, 351 S.E.2d 746 (1987) (individual setting off false alarm not liable for collision between fire truck and third party because collision is not reasonably foreseeable).

b. Not Subject to Right-of Way Rules

G.S. § 20-156(b) states:

> When appropriate warning signals are being given, as provided in this subsection, an emergency vehicle may proceed through an intersection or other place when the emergency vehicle is facing a stop sign, a yield sign, or a traffic light which is emitting a flashing strobe signal or a beam of steady or flashing red light.

The warnings must be "by appropriate light and by bell, siren or exhaust

whistle audible under normal conditions from a distance not less than 1,000 feet." An issue as to the adequacy of the warning generally must be resolved by the jury. Williams v. Sossoman's Funeral Home, Inc., 248 N.C. 524, 103 S.E.2d 714 (1958).

The statute applies to police vehicles, ambulances, fire trucks, and rescue squad emergency vehicles. For the statute to apply, the vehicle must be involved in an emergency. Campbell v. O'Sullivan, 4 N.C. App. 581, 167 S.E.2d 450 (1969).

When an emergency vehicle gives an appropriate warning, other traffic must yield the right-of-way to the emergency vehicle. The emergency vehicle has the right-of-way at such time as the non-emergency motorist hears and comprehends, or should hear and comprehend, the warning. McEwen Funeral Serv., Inc. v. Charlotte City Coach Lines, Inc., 248 N.C. 146, 102 S.E.2d 816 (1958). The driver of the emergency vehicle may assume, if he has given the appropriate signal, that other drivers will yield the right of way. Williams v. Sossoman's Funeral Home, Inc., 248 N.C. 524, 103 S.E.2d 714 (1958).

In addition to yielding the right-of-way to emergency vehicles, it should be mentioned that it is unlawful, and constitutes negligence per se, to follow a fire department vehicle which is responding to a call at a distance of closer than one block, or to park within one block of the vehicle. G.S. § 20-157. Outside of corporate limits, the applicable distance is 400 feet. Further, it is unlawful to park within 100 feet of police or fire department vehicles which are investigating an accident or rendering assistance. Id.

14. Pedestrians

a. Pedestrian Control Signals

Pedestrians are subject to pedestrian-control devices erected by the Board of Transportation or local authorities. G.S. § 20-172. A pedestrian facing a "WALK" signal may cross the highway toward the signal and has the right-of-way over motorists. (The statute does not expressly address pedestrian-control devices which project images instead of the verbal messages of "WALK" or "DON'T WALK"; presumably, the statute would apply to those signals as well.) The failure to yield to a pedestrian with the right-of-way is negligence per se.

If the signal changes to "DON'T WALK" before the pedestrian crosses, he still has the right-of-way, and a motorist must yield the right of way to the

pedestrian until he clears the roadway or reaches a safety island. The motorist's failure to yield the right of way under these circumstances is negligence per se. N.C.P.I. -- Civil 211.01, Motor Vehicle Volume.

The pedestrian may not start to cross the highway when the signal says "DON'T WALK." A violation of this is negligence per se. See N.C.P.I. -- Civil 211.30, Motor Vehicle Volume.

b. Traffic-Control Signals Only

Pedestrians are subject to traffic-control signals when there are no pedestrian-control signals. G.S. § 20-172(c). Thus, a pedestrian facing a green light may cross the highway in the direction of the light. G.S. § 20-158. Pedestrians may not begin to cross if the signal is yellow or red.

A pedestrian must stop at a red flashing light and yield the right-of-way to vehicles, but the pedestrian may cross when it can be done with reasonable assurance of safety. The reasonableness of crossing depends on the proximity and speed of oncoming vehicles. A pedestrian facing a flashing yellow light may cross the intersection when it is safe to do so, and there is no absolute requirement that the pedestrian come to a stop.

Different rules apply to a traffic control signals which are not at an intersection. When the traffic has a steady or flashing red light, pedestrians may cross. If the signal has a steady green or yellow light, however, pedestrians may not begin to cross the street. If the signal is flashing yellow, the pedestrian may cross when, in the exercise of reasonable care and prudence, he can make the crossing with reasonable assurance of safety to himself and others considering the proximity and speed of oncoming vehicles.

A violation of these duties does not constitute negligence per se. The test is whether a reasonably careful and prudent person would have obeyed the traffic signal under the same or similar circumstances. See N.C.P.I. -- Civil 211.36, Motor Vehicle Volume.

c. Crosswalks

A motorist in a business or residential district must yield the right-of-way to pedestrians crossing the highway in a clearly marked crosswalk, except at intersections where the movement of traffic is regulated by traffic control devices

or traffic officers. G.S. § 20-155. Also, the motorist must yield the right-of-way "at any regular pedestrian crossing included in the prolongation of the lateral boundary lines of the adjacent sidewalk at the end of the block, except at intersections where the movement of traffic is being regulated by traffic officers or traffic direction devices." See Anderson v. Carter, 272 N.C. 426, 158 S.E.2d 607 (1968) (where there is no sidewalk, there is no unmarked crosswalk).

Further, a motorist must yield the right-of-way, which includes slowing or stopping, to pedestrians crossing the roadway within any marked crosswalk or within any unmarked crosswalk at or near an intersection. G.S. § 20-173(a); Griffin v. Pancoast, 257 N.C. 52, 125 S.E.2d 310 (1962).

When a vehicle is stopped at a crosswalk to permit a pedestrian to cross the roadway, drivers approaching from the rear may not overtake and pass the stopped vehicle. G.S. § 20-173(b).

A violation of G.S. § 20-155 or G.S. § 20-173 is negligence per se. See N.C.P.I. -- Civil 211.10, Motor Vehicle Volume.

d. Other Crossings

At points other than marked crosswalks or unmarked crosswalks at intersections, pedestrians must yield the right-of-way to all vehicles. G.S. § 20-174(a); Anderson v. Carter, 272 N.C. 426, 158 S.E.2d 607 (1968). Where there is a pedestrian tunnel or overhead crossing, the pedestrian must yield the right-of-way to all vehicles on the roadway. G.S. § 20-174(b). Where there are adjacent intersections with traffic-control signals, it is illegal to cross at any place in-between except at marked crosswalk. G.S. § 20-174(c); State v. Call, 236 N.C. 333, 72 S.E.2d 752 (1952). A violation of G.S. § 20-174 is not negligence per se, but is merely evidence of negligence. Wanner v. Alsup, 265 N.C. 308, 144 S.E.2d 18 (1965); Meadows v. Lawrence, 75 N.C. App. 86, 330 S.E.2d 47, aff'd per curiam, 315 N.C. 383, 337 S.E.2d 851 (1986); compare Blake v. Mallard, 262 N.C. 62, 136 S.E.2d 214 (1964) (violation of right-of-way by pedestrian, in addition to other circumstances, may show contributory negligence as a matter of law). This statute does not apply to a public vehicular area, not a "roadway," and thus is inapplicable in a parking lot. Corns v. Hall, 112 N.C. App. 232, 435 S.E.2d 88 (1993).

G.S. § 20-174 further provides that notwithstanding the right-of-way rules, a motorist must use due care to avoid colliding with any pedestrian on a highway.

See Gamble v. Sears, 252 N.C. 706, 114 S.E.2d 677 (1960). The driver may, however, assume the pedestrian will obey the right-of-way laws, absent evidence to the contrary. Jenkins v. Thomas, 260 N.C. 768, 133 S.E.2d 694 (1963); State v. Moore, 107 N.C. App. 388, 420 S.E.2d 691, disc. review denied, 332 N.C. 670, 424 S.E.2d 414 (1992), overruled on other grounds by, State v. Hayes, 350 N.C. 79, 511 S.E.2d 302 (1999). Further, the driver need not yield the right-of-way unless it appears that the pedestrian is not aware of the approaching danger and for that reason will continue to expose himself to that danger. Jenkins, supra.

e. Duty to Walk on the Left

A pedestrian may not walk on the roadway where sidewalks are provided adjacent to the roadway. G.S. § 20-174(d). A pedestrian walking on the roadway must walk on the extreme left of the roadway, facing approaching traffic. Id. The pedestrian must yield the right-of-way to approaching traffic. A violation of this statute is not negligence per se. Lewis v. Watson, 229 N.C. 20, 47 S.E.2d 484 (1948). Whitley v. Owens, 86 N.C. App. 180, 356 S.E.2d 815 (1987) (doctrine not applicable to garbage man walking alongside truck to re-enter it because his attention was not diverted by his job at that time).

f. Pedestrian's Duty of Lookout

Pedestrians are required to use ordinary care for their safety, and thus they must keep a reasonable lookout. Hodgin v. Guilford Tractor & Implement Co., 247 N.C. 578, 101 S.E.2d 323 (1958); Dendy v. Watkins, 288 N.C. 447, 219 S.E.2d 214 (1975) (requiring "constant[]" watch). A pedestrian has a duty to see all that should be seen and could be seen if he were to look. Whitley v. Owen, 86 N.C. App. 180, 356 S.E.2d 815 (1987).

In the absence of evidence to the contrary, however, a pedestrian may assume that drivers will obey the law and yield the right-of-way when required to do so. Bowen v. Gardner, 275 N.C. 363, 168 S.E.2d 47 (1969). A pedestrian may be guilty of negligence if he was, or should have been, on notice that the driver might fail to yield the right-of-way and the pedestrian failed to use that degree of care for their own safety that a reasonably careful and prudent person would have exercised under similar circumstances. See N.C.P.I. -- Civil 211.75 and 211.76, Motor Vehicle Volume.

g. Miscellaneous Provisions Relating to Pedestrians

i. Obstructing Traffic

It is unlawful to willfully stand, sit, or lie upon a roadway in a manner which impedes the regular flow of traffic. G.S. § 20-174.1. Further, it is unlawful to run or walk on a highway in a manner which impedes traffic. State v. Spencer, 276 N.C. 535, 173 S.E.2d 765 (1970). A violation of this law is negligence per se. See N.C.P.I. -- Civil 211.50, Motor Vehicle Volume.

ii. Hitchhikers

A person soliciting a ride from the driver of a motor vehicle must remain on the shoulder of a state highway, and cannot stand in any portion of a state highway. G.S. § 20-175(a); see N.C.P.I. -- Civil 211.55, Motor Vehicle Volume.

iii. Solicitation

It is unlawful to stand or loiter in the main traveled portion of a roadway, including the shoulders and median, but not sidewalks, or to stop any motor vehicle for the purpose of soliciting employment, business, or contributions from the driver or occupant when that activity impedes the normal movement of traffic on the roadway. G.S. § 20-175(b). A violation of this statute is negligence per se. See N.C.P.I. -- Civil 211.56, Motor Vehicle Volume.

h. Special Duties Owed by Motorists to Certain Pedestrians

i. Children

It is the duty of a motorist who sees or, by the exercise of due care, should see, a child on or near the traveled portion of a street or highway, to use proper care with respect to speed and control of his vehicle, maintain a vigilant lookout, and give timely warning to avoid injury, recognizing the likelihood of the child's running into the street in obedience to childish impulse. Gupton v. McCombs, 74 N.C. App. 547, 328 S.E.2d 886, disc. rev. denied, 314 N.C 329, 333 S.E.2d 486 (1985). The presence of children at or near the edge of a highway is a danger signal to approaching motorists. Waycaster v. Sparks, 267 N.C. 87, 147 S.E.2d 535 (1966). A driver has a duty to keep his car under proper control and to travel at a reasonable speed; thus, a driver not maintaining proper control or driving at a safe speed may be liable notwithstanding the negligence of a child if the driver could have avoided the accident but for his negligence in speed or lack of control. Ennis v. Dupree, 258 N.C. 141, 128 S.E.2d 231 (1962).

The degree of care varies with the situation, but it includes the age of the child and whether the child is attended. Rodgers v. Carter, 266 N.C. 564, 146 S.E.2d 806 (1966). A driver must be attentive to children waiting for a bus or waiting to cross the roadway after exiting a bus, and such a driver must take proper precautions to avoid hitting the child. Hughes v. Thayer, 229 N.C. 773, 51 S.E.2d 488 (1949). Where a child who is apparently attentive to traffic darts in front of a vehicle without giving any notice to the driver, the driver is not liable. Brinson v. Mabry, 251 N.C. 435, 111 S.E.2d 540 (1959).

Where the sole cause of the child's injury is his act of darting in front of a motorist from a place of concealment, the motorist is not liable. Dixon v. Lilly, 257 N.C. 228, 125 S.E.2d 426 (1962); Dorsey v. Buchanan, 52 N.C. App. 597, 279 S.E.2d 92 (1981). There may, however, be genuine issues of material fact determined by such factors as how the child got into the street, how long the child was there, what part of the car struck the child, the speed of the car, the speed limit, and the driver's actions. Moore v. Wilson, 91 N.C. App. 279, 371 S.E.2d 300 (1988).

ii. Workmen

A motorist is generally held to a higher standard of care when approaching a workman than when approaching a pedestrian. When a workman is working an area clearly marked to oncoming vehicles, an approaching motorist has a duty to warn the workman of his approach by blowing his horn if the workman is apparently oblivious to the danger. Kellogg v. Thomas, 244 N.C. 722, 94 S.E.2d 903 (1956). As a result, a workman is not required to exercise the same vigilance as an ordinary pedestrian while engaged in the performance of his duties, which require the diversion of his attention. Id.; see also Sizemore v. Raxter, 73 N.C. App. 531, 327 S.E.2d 258, aff'd per curiam, 314 N.C. 527, 334 S.E.2d 391 (1985) (applying rule to traffic director working during race).

15. Stopping at the Scene of an Accident

A driver who knows or reasonably should know that his vehicle is involved in an accident or collision resulting in injury or death to any person must immediately stop the vehicle at the scene of the accident or collision. G.S. § 20-166; State v. Glover, 270 N.C. 319, 154 S.E.2d 305 (1967) (motorist under no duty to stop if he does not know his vehicle involved in accident); State v. Fearing, 304 N.C. 471, 284 S.E.2d 487 (1981) (motorist under no duty to stop unless he knew

someone was killed or physically injured). The requirement that the motorist stop is independent of fault. State v. Smith, 264 N.C. 575, 142 S.E.2d 149 (1965).

The stopping driver must render reasonable assistance to any person injured in the accident, which may include transporting an injured person to a physician or surgeon. G.S. § 20-166. Absent wanton or intentional wrongdoing, the assisting driver will not be liable for his acts or omissions.

A driver's duty to stop becomes relevant in automobile accident cases when the failure to stop or render assistance results in unnecessary pain and suffering or aggravates the injuries. N.C.P.I. -- Civil 217.10, Motor Vehicle Volume. A violation of the statute is negligence per se.

A driver's leaving the scene is evidence of conscious wrong and is admissible to show negligence. Edwards v. Cross, 233 N.C. 354, 64 S.E.2d 6 (1951).

16. Required Equipment

a. Lighting

Every vehicle operated on a highway during the period from sunset to sunrise, when the driver is using the windshield wipers except intermittently for mist, and at any other time when there is not sufficient light to render clearly discernable any person on the highway at a distance of four hundred feet ahead, must be equipped with lighted headlamps and rear lamps. G.S. § 20-129(a). Ordinary motor vehicles must be equipped with at least two headlights in good operating condition on each side of the front of the vehicle. G.S. § 20-129(b). The taillights must be in good working order and exhibit a red light plainly visible under normal atmospheric conditions from a distance of five hundred feet to the rear of the vehicle. G.S. § 20-129(d).; N.C.P.I. -- Civil 215.10, Motor Vehicle Volume. The vehicle must also have a red or amber stop lamp located at the rear which is visible from one hundred feet. G.S. § 20-129(g); see generally N.C.P.I. -- Civil 215.11, Motor Vehicle Volume.

Motorcycles must have one or two headlights, which must be lighted, along with the rear lamps, at all times when the motorcycle is in operation on highways or public vehicular areas. G.S. § 20-129(c); see Bigelow v. Johnson, 303 N.C. 126, 277 S.E.2d 347 (1981) (motorcyclist negligent as a matter of law by using flashlight taped to handlebars as substitute for headlight; this negligence, however,

was not a proximate cause of his injuries). The lamps must meet the same specifications as those for other motor vehicles. See generally N.C.P.I. -- Civil 215.15, Motor Vehicle Volume.

A bicycle, when used at night, must be equipped with a lighted lamp on the front visible from three hundred feet and a reflex mirror or lamp on the rear, exhibiting a red light visible from two hundred feet from the rear. See N.C.P.I. -- Civil 215.20, Motor Vehicle Volume.

A violation of the provisions regarding lighting at night is negligence per se. White v. Mote, 270 N.C. 544, 155 S.E.2d 75 (1967); Oxendine v. Lowry, 260 N.C. 709, 133 S.E.2d 687 (1963). A motorist has the right to assume, until he sees or should see to the contrary, that another vehicle will not approach him along the highway at night without lights. White v. Lacey, 245 N.C. 364, 96 S.E.2d 1 (1957). Whether a driver should have seen an unlighted vehicle is generally a question for the jury. Frye v. Anderson, 86 N.C. App. 94, 356 S.E.2d 370, disc. rev. denied, 320 N.C. 791, 361 S.E.2d 74 (1987).

b. Windshield and Window Requirements

A driver may not knowingly operate a motor vehicle on a public street or highway which contains "glass in" windows or windows which are not equip with safety glass. G.S. § 20-135. This does not apply to vehicles previously registered in another state by the owner while the owner was a bona fide resident of that state. A vehicle equipped with a permanent windshield must have windshield wipers in good working order. G.S. § 20-127(a). A violation of this statute is negligence per se. N.C.P.I. -- Civil 215.30, Motor Vehicle Volume.

The windshield may not have tinting except along the top. G.S. § 20-127(b). Other windows may have tinting if the total light transmission, as measured by a light meter approved by the Commissioner of Motor Vehicles, is at least thirty-five percent and the light reflectance is twenty percent or less. G.S. § 20-127(b). The tinting requirements do not apply to certain vehicles, such as limousines, ambulances, common carriers of passengers, and motor homes. G.S. § 20-127(c).

A violation of any of these provisions is negligence per se. See N.C.P.I. -- Civil 215.31, Motor Vehicle Volume.

c. Mirrors

A vehicle must have an inside rearview mirror of a type approved by the Commissioner of Motor Vehicles, which provides the driver with a clear, undistorted and reasonably unobstructed view of the highway to the rear of the vehicle. G.S. § 20-126(a). Where the vehicle is so constructed or loaded as to make the inside rearview mirror ineffective, the vehicle may be operated if equipped with a mirror located so as to reflect to the driver a view of the highway to the rear of the vehicle. A violation of this statute is not negligence per se, G.S. § 20-126(a), but it may be considered as evidence of negligence. N.C.P.I. -- Civil 215.35 and 215.37, Motor Vehicle Volume. Motorcycles have similar requirements regarding a rear view mirror providing clear view for two hundred feet to the rear of the motorcycle. G.S. § 20-126(c); see N.C.P.I. -- Civil 215.38, Motor Vehicle Volume.

Further, for vehicles manufactured after 1965, there must be an outside rearview mirror on the driver's side of the vehicle, in addition to the inside rearview mirror. G.S. § 20-126(b). A violation of this statute is negligence per se. G.S. § 20-126(b).

If a pickup truck is equipped with an outside mirror, it need not have an inside mirror. G.S. § 20-126(a). If the truck has neither mirror, the operator is guilty of negligence per se. If the truck has only one mirror which does not provide a clear, undistorted and reasonably unobstructed view to the rear, the operator may be guilty of negligence depending on the circumstances. N.C.P.I. -- Civil 215.36, Motor Vehicle Volume.

d. Brakes

Every vehicle operating upon a highway must be equipped with brakes adequate to stop and control the movement of the vehicle. G.S. § 20-124. The brakes must be in good working order, and there must be two separate means of braking the vehicle which are independent so that the failure of one part will not disable the brakes.

If the brake failure was sudden and unexpected and not the result of his failure to reasonably inspect the vehicle, there is no violation. Wilcox v. Glover Motors, Inc., 269 N.C. 473, 153 S.E.2d 76 (1967); Mann v. Knight, 83 N.C. App. 331, 350 S.E.2d 122 (1986); Massengill v. Starling, 87 N.C. App. 233, 360 S.E.2d 512 (1987), disc. rev. denied, 321 N.C. 474, 364 S.E.2d 923 (1988). Where there is a violation of this statute, however, such violation is negligence per se. N.C.P.I. -- Civil 215.80, Motor Vehicle Volume.

Operators of trucks and tractor-trailers are bound to these same rules, but G.S. § 20-124(e) provides that the brakes must be capable of stopping on a dry, hard, near-level highway free from loose gravel within thirty feet when both hand and service brakes are applied simultaneously at a speed of twenty miles per hour. Further, the vehicle must be able to stop within fifty feet when either brake is applied. These vehicles must have brakes on all wheels, except on the front wheels when there are three or more axles. G.S. § 20-124(e)(1). See N.C.P.I. -- Civil 215.82, Motor Vehicle Volume; see also G.S. § 20-124(e) (semitrailer of two tons and all house trailers of 1000 pounds must be equipped with brakes controlled by driver of towing vehicle); N.C.P.I. -- Civil 215.83, Motor Vehicle Volume.

e. Tires

Every motor vehicle subject to safety equipment inspection in this State must be equipped with tires which are safe for the operation of the motor vehicle and which do not expose the public to needless hazard. G.S. § 20-122.1. Tires are unsafe if they are cut, cracked, or worn so as to expose tire cord, or if there is visible tread separation or chunking, or if the tire has less than two thirty-seconds inch tread depth.

An operator must use that care which a reasonably careful and prudent person would use to see that each tire is in a safe and proper condition. Scott v. Clark, 261 N.C. 102, 134 S.E.2d 181 (1964). A failure of the tires to meet one or more of the requirements in not negligence per se, but it is to be considered as evidence of negligence. N.C.P.I. -- Civil 215.40, Motor Vehicle Volume.

f. Seatbelts and Child Restraints

The driver and any front seat occupant, other than occupants less than twelve years old, must wear a seatbelt. G.S. § 20-135.2A (1987). Evidence of failure to wear a seatbelt, however, is not admissible "except in an action based on a violation of [G.S. § 20-135.2A]" or to show the justification for the stopping and detention of a vehicle. G.S. § 20-135.2A(d). Further, failure to use one's seatbelt is not contributory negligence, and it is not a breach of the duty to minimize damages. Hagwood v. Odom, 88 N.C. App. 513, 364 S.E.2d 190 (1988). One could conceive of a civil action "based on a violation of" the seatbelt law, such as an action by a passenger against a driver in violation of the statute who would have retained control of the vehicle after an incident but for his failure to wear a seatbelt. The legislative intent, however, seems to have been to limit the

admissibility of a violation to criminal actions; nevertheless, the statute's application may be subject to dispute.

A driver transporting a child less than twelve must have the child secured in a child restraint system meeting the federal standards at the time of its manufacture. G.S. § 20-137.1. Children four years or older, however, satisfy the statute when they wear a seat belt. G.S. § 20-137.1. The failure to use such a system, however, is not negligence or evidence of negligence. G.S. § 20-137.1(d); State Farm Mut. Ins. Co. v. Holland, 324 N.C. 466, 380 S.E.2d 100 (1989) (action for contribution against parent).

g. Overloaded or Overcrowded Vehicles

It is unlawful to operate a motor vehicle which is so loaded or crowded with passengers as to obstruct the operator's view of the roadway, or so as to otherwise impair or restrict the proper operation of the vehicle. G.S. § 20-140.2. A violation of this law is negligence within itself. See N.C.P.I. -- Civil 215.50, Motor Vehicle Volume.

h. Motorcycles

An operator of a motorcycle must wear a helmet. G.S. § 20-140.4 The number of persons on the motorcycle must not exceed the number of persons for which the motorcycle was designed. A violation of this statute is not negligence per se, but it is evidence of negligence. See N.C.P.I. -- Civil 215.55, Motor Vehicle Volume.

i. Steering Mechanism

The steering mechanism must be in good working order and sufficient to enable the operator to control the vehicle's movements and to maneuver it safely. G.S. § 20-123.1.

The existence of a defect unknown to the driver, not reasonably discoverable upon proper inspection and not resulting from his failure to exercise reasonable care in the use or maintenance of the mechanism, is not a violation of the statute. See Stilley v. Automobile Enterprises of High Point, Inc. , 55 N.C. App. 33, 284 S.E.2d 684, disc. review denied, 305 N.C. 307, 290 S.E.2d 708 (1982) (owner of car may be liable to driver of car to whom owner lent the car when the owner had received complaints about the steering and did not inspect the

car).

A violation of this statute is negligence per se. See N.C.P.I. -- Civil 215.75, Motor Vehicle Volume.

j. Securing Loads

It is unlawful to operate or to have operated, on any public highway, an open flat truck with a load piled on the truck without having the load securely fastened. G.S. § 20-120. This requires that the load be secured such that it will remain in place under any ordinary traffic or road conditions. A violation of this law is negligence per se. N.C.P.I. -- Civil 215.60, Motor Vehicle Volume.

Any vehicle driven or moved on the highway must be so constructed or loaded as to prevent any of its load from dropping, sifting, leaking or otherwise escaping. G.S. § 20-116(g). A vehicle loaded with rock, gravel, stones or other substances which could escape from the vehicle may not be driven or moved on the highway unless the height of the load against all four walls does not extend above a horizontal line six inches below their tops, the load is securely covered, or the vehicle is otherwise constructed so as to prevent the load from escaping.

A vehicle carrying a load which extends more than four feet behind the vehicle must display a twelve-inch by twelve-inch red flag at the rear of the load. G.S. § 20-117; see Ratliff v. Duke Power Co., 268 N.C. 605, 151 S.E.2d 641 (1966). Further, between sunset and sunrise, there must be a red light visible from two hundred feet displayed on the end of the load. G.S. § 20-117. A violation of the statute is negligence per se. See generally N.C.P.I. -- Civil 215.25, Motor Vehicle Volume.

k. Towed Vehicles

Where one automobile tows another on the highway, the operator of each vehicle is under a duty to exercise more than ordinary alertness and caution. Scarlette v. Grindstaff, 258 N.C. 159, 128 S.E.2d 221 (1962); see also G.S. § 20-123(b) (towed vehicle must be firmly attached to towing vehicle and towed vehicle must travel in the path of towing vehicle). The operator of the towing vehicle is not liable where the injury is caused by a defect unknown to him, not reasonably discoverable upon reasonable inspection. Miller v. Lucas, 267 N.C. 1,

147 S.E.2d 537 (1966). The operator of a wrecker towing another vehicle at night is responsible for having the lights required by statute on the back of the towed vehicle. Punch v. Landis, 258 N.C. 114, 128 S.E.2d 224 (1962); see generally N.C.P.I. -- Civil 215.65, Motor Vehicle Volume.

l. School Buses

The driver of any vehicle approaching a school bus on the same street or highway must bring his vehicle to a full stop while the bus is displaying its mechanical stop sign and is stopped for the purpose of receiving or discharging passengers. G.S. § 20-217. The vehicle must remain stopped until the mechanical stop signal has been withdrawn or until the bus has moved on. The statute is applicable only if the school bus bears the words "school bus" in eight inch or greater letters and is not applicable where there is a median or physical barrier dividing the roadway. A violation of this statute is negligence per se. See N.C.P.I. -- Civil 218.10 and 218.50, Motor Vehicle Volume.

17. Operating Vehicle Without a License

It is unlawful to drive without a license. G.S. § 20-7. Also, it is unlawful for a person to knowingly permit a motor vehicle owned by him or under his control to be driven by any person who has no legal right to do so. G.S. § 20-34.

A violation of these statutes is negligence per se. Beaman v. Duncan, 228 N.C. 600, 46 S.E.2d 707 (1948). This negligence, however, is material only if it is a cause of the accident. Id. at 603, 46 S.E.2d at 709; see also Hoke v. Atlantic Greyhound Corp., 226 N.C. 692, 40 S.E.2d 345 (1946) (owner not liable unless unlicensed driver to whom car was entrusted was negligent). See N.C.P.I. -- Civil 220.10, 220.20, 220.21, Motor Vehicle Volume.

18. Interstate and State-System Controlled-Access Highway Violation

G.S. § 20-140.3 states:

On those sections of highways which are or become a part of the National System of Interstate and Defense Highways and other controlled-access highways, it shall be unlawful for any person:

(1) To drive a vehicle over, upon, or across any curb,

central dividing section or other separation or dividing line on said highways.

(2) To make a left turn or a semicircular or U-turn except through an opening provided for that purpose in the dividing curb, separation section, or line on said highways.

(3) To drive any vehicle except in the proper lane provided for that purpose and in the proper direction and to the right of the central dividing curb, separation section, or line on said highways.

(4) To drive a vehicle onto or from any controlled-access highway except at such entrances and exits as are established by public authority.

(5) To stop, park, or leave standing any vehicle, whether attended or unattended, on any part or portion of the right-of-way of said highways, except in the case of an emergency or as directed by a peace officer, or at designated parking areas.

(6) To fail to yield the right-of-way when entering the highway to any vehicle already travelling on the highway.

(7) Notwithstanding any other subdivision of this section, a member of the State Highway Patrol may cross the median of a divided highway when he has reasonable grounds to believe that a felony is being or has been committed, has personal knowledge that a vehicle is being operated at a speed or in a manner which is likely to endanger persons or property, or the patrol member has reasonable grounds to believe that his presence is immediately required at a location which would necessitate his crossing a median of a divided highway for this purpose.

A violation of any of these provisions is negligence per se. See N.C.P.I. --

Civil 221.10 - 221.35, Motor Vehicle Volume.

19. Miscellaneous Acts of Negligence

a. Television Sets

It is unlawful to drive any motor vehicle equipped with a television which is located in the motor vehicle at any point forward of the back of the driver's seat, or which is visible to the driver while operating the motor vehicle. G.S. § 20-136.1. A violation of this statute is negligence per se. See N.C.P.I. -- Civil 225.10, Motor Vehicle Volume.

b. Coasting

It previously was unlawful to coast upon a downgrade with one's gears or transmission in neutral or with the clutch disengaged. However, G.S. § 20-165 was repealed in 1995. Under Dillon v. City of Winston-Salem, 221 N.C. 512, 20 S.E.2d 845 (1942), a violation of this statute was negligence per se. See N.C.P.I. -- Civil 225.20, Motor Vehicle Volume. However, with the repeal of the statute, coasting may be considered negligence.

c. Safety Zone

It is unlawful to drive through a safety zone, which is defined as a traffic island or other space officially set aside within a highway for the exclusive use of pedestrians and which is so plainly marked or indicated by proper signs as to be plainly visible at all times while set apart as a safety zone. G.S. § 20-160(a). A violation of this statute is negligence per se. See N.C.P.I. -- Civil 225.22, Motor Vehicle Volume.

d. Driving on Sidewalks

It is unlawful to drive any motor vehicle upon a sidewalk or sidewalk area except upon a permanent or temporary driveway. G.S. § 20-160(b). A violation of this law in negligence per se. See N.C.P.I. -- Civil 225.23, Motor Vehicle Volume.

e. Persons Riding Animals and Animal-Drawn Vehicles

A person riding an animal or driving any animal-drawn vehicle upon a highway is subject to the motor vehicle laws. G.S. § 20-171; see Watson v. Stallings, 270 N.C.187, 154 S.E.2d 308 (1967) (holding that person riding animal

entering public highway from private road must yield right-of-way to vehicles on highway).

A motorist, of course, is also subject to the motor vehicle laws when encountering a person riding an animal or driving an animal-drawn vehicle on the highway, in that the motorist, as with other motor vehicles, must exercise due care when approaching them. See Wilburn v. Honeycutt, 135 N.C. App. 373, 519 S.E.2d 774 (1999)(holding that trial court improperly granted truck driver's motion for directed verdict as to issues of plaintiff-horseback rider's contributory negligence and truck driver's willful and wanton conduct where evidence tending to show that although defendant's truck was at least 150 yards away when plaintiff first saw him, plaintiff did not have time to move out of truck driver's way and that the truck driver either intentionally or with reckless indifference failed to slow down, willfully running into plaintiff).

II. AGENCY AND VICARIOUS LIABILITY

A. Use of Agent's Own Vehicle

A principal is liable for his agent's negligence in the operation of the agent's own motor vehicle if it was being used in the course and scope of the agent's authority or employment and the principal knew, or should have known, that the agent was so using it. This is true even through the principal had no right of control over the agent's vehicle, and even though the principal was not reasonable for its condition, upkeep or operation. Ellis v. Service Co., 240 N.C. 453 (1954).

B. Respondeat Superior

Vicarious liability in tort is often associated with the imputation of liability to an employer for the acts of its employee. The doctrine of *respondeat superior* recognizes that the employer should be held accountable for the employee's actions since the employer has the right to direct and control the employee's actions. The right to direct and control the employee's actions, rather that actual control, is dispositive. North Carolina has recognized three general contexts in which the employer may be held derivatively liable for actions of the employee:
(1) when the employee's actions are expressly authorized by the employer; (2) when the employee's actions are committed within the scope of his employment and in furtherance of the employer's business; and (3) when the employee's actions are ratified by the employer.

The mere fact that the servant was employed at the time of the alleged negligence is not enough to hold the employer responsible based on the doctrine of *respondeat superior*. Weaver v. Bennett, 259 N.C. 16, 129 S.E.2d 610 (1963). The actions of the employee must have arisen within the scope of the employment and in furtherance of the employer's business generally. Carawan v. Tate, 53 N.C. App. 161, 280 S.E.2d 528, modified by 304 N.C. 696, 286 S.E.2d 99 (1981).

An employer will not be held liable for the conduct of an employee who embarks on a personal mission or a deviation from employment. See Wegner v. Delly-Land Delicatessen, Inc., 270 N.C. 62, 66-67, 153 S.E.2d 804, 808 (1967) (recognizing employer liability for actions within scope of employment and distinguishing employee "frolic"); Overton v. Henderson, 28 N.C. App. 699, 222 S.E.2d 724, disc. rev. denied, 290 N.C. 95, 225 S.E.2d 324 (1976).

The employer may be held liable not only for the negligent conduct of an employee but may also be held liable for the intentional acts of an employee. See e.g. Gillis v. Great Atlantic & Pacific Tea Co., 223 N.C. 470, 27 S.E.2d 283 (1943) (slander action against employee and employer).

In order to hold an employer liable for the actions of the employee that are intentional or illegal, the evidence must demonstrate that the action was taken within the scope of the employee's employment, was authorized before commission or was ratified. O'Connor v. Corbett Lumber Corp., 84 N.C. App. 178, 352 S.E.2d 267 (1987).

The employer's liability cannot exceed that of the employee. Azzolino v. Dingfelder, 71 N.C. App. 289, 322 S.E.2d 567, aff'd in part, rev. in part, 315 N.C. 103, 337 S.E.2d 528, cert. denied, 479 U.S. 835, 107 S.Ct. 131, 93 L.Ed.2d 75 (1984); Morrison v. Concord Kiwanis Club, 52 N.C. App. 454, 279 S.E.2d 96, rev. denied, 304 N.C. 196, 285 S.E.2d 100 (1981).

In automobile cases, North Carolina General Statute § 20-71 provides a rebuttable presumption of agency. The presumption provided by G.S. §20-71.1 applies only in cases in which an agency relationship is alleged. If plaintiff relies solely on the presumption and defendant presents positive contradicting evidence which, if believed, establishes the absence of an agency relationship between the driver and owner, defendant is entitled to a peremptory instruction on the agency issue. See e.g. DeArmon v. B. Mears Corp., 67 N.C. App. 640, 314 S.E.2d 124 (1984) rev'd in part, 312 N.C. 749, 325 S.E.2d 223 (1985); Roberts v. Hill, 240

N.C. 373, 82 S.E.2d 373 (1954); Whiteside v. McCarson, 250 N.C. 673, 110 S.E.2d 295 (1959). Section 20-71.1 does not apply to cases involving the family purpose doctrine. Fox v. Albea, 250 N.C. 445, 109 S.E.2d 197 (1959).

1. Negligent Hiring

Respondeat superior liability should be distinguished from employer liability for negligence in the hiring or supervision of an employee, although these legal theories often appear together. While *respondeat superior* invokes a form of derivative liability based on principles of agency, negligent hiring, retention and supervision claims are based on the active negligence of the employer. Waddle v. Sparks, 100 N.C. App. 129, 394 S.E.2d 683, aff'd in part and rev'd in part on other grounds, 331 N.C. 73, 414 S.E.2d 22 (1990) (employer impliedly ratified supervisor's behavior).

> North Carolina recognizes a claim for negligent employment or retention when the plaintiff proves:
>
> > (1)the specific negligent act on which the action is founded . . . (2) incompetency, by inherent unfitness or previous specific acts of negligence, from which incompetency may be inferred; and (3) *either actual notice to the master of such unfitness or bad habits, or constructive notice, by showing that the master could have known the facts had he used ordinary care in 'oversight and supervision,'* . . .; and (4) that the injury complained of resulted from the incompetency proved.

Medlin v. Bass, 327 N.C. 587, 590-91, 398 S.E.2d 460 (1990) (citing Walters v. Durham Lumber Co., 163 N.C. 536, 541, 80 S.E. 49, 51 (1913); see also Pleasants v. Barnes, 221 N.C. 173, 19 S.E.2d 627 (1942) (actual or constructive knowledge of employee's incompetence necessary).

C. Independent Contractors

In North Carolina the familiar rule that an independent contractor's negligence is not imputed to the one hiring the contractor is still firmly established. Hayes v. Board of Tr. of Elon Coll., 224 N.C. 11, 29 S.E.2d 137 (1944). The basic factors demonstrating independent contractor status include the following:

(a) Is the person performing the work engaged in an independent business?
(b) Does the person performing the work have independent use of his special skill, knowledge or training in the execution of the work?
(c) Is the person performing the work doing a specified piece of work at a fixed price or upon a quantitative basis?
(d) Is the person performing the work subject to discharge because he adopts one method of doing work rather than another?
(e) Is the person performing the work in the regular employ of the other contracting party?
(f) Is the person performing the work free to use such assistants as he may think proper?
(g) Does the person performing the work have full control over assistants?
(h) Does the person performing the work select his own time?

Postell v. B&D Constr. Co., 105 N.C. App. 1, 10, 411 S.E.2d 413 (1992)0 (citing Doud v. K & G Janitorial Serv., 69 N.C. App. 205, 316 S.E.2d 664, disc. rev. denied, 312 N.C. 492, 322 S.E.2d 554 (1984) (quoting Hayes v. Board of Tr. of Elon Coll., 224 N.C. 11, 29 S.E.2d 137 (1944)).

The critical issue is whether the contractor has the right to carry out the details of the task without interference by the employer. See Britt v. American Hoist & Derrick Co., 97 N.C. App. 442, 388 S.E.2d 613 (1990); see also Millard v. Hoffman, Butler & Assoc., 29 N.C. App. 327, 224 S.E.2d 237, cert. denied, 290 N.C. 551, 226 S.E.2d 510 (1976) (surveyor who conducted work free of interference on independent contractor); Kientz v. Carlton, 245 N.C. 236, 96 S.E.2d 14 (1956) (when the equipment necessary to do the work is supplied by the party who retains the worker, an employer-employee relationship in indicated).

1. Inherently Dangerous Work/Nondelegable Duty

One exception to the general rule pertaining to independent contractors applies when the nature of the work is inordinately dangerous. A party may not escape liability for injury to a third person by employing an independent contractor to perform an inherently dangerous or ultrahazardous activity.

In Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991), the court

recently noted the familiar rule that one who employs an independent contractor to perform an inherently dangerous activity may not delegate to the independent contractor the duty to provide a safe work place. The North Carolina Supreme Court held that the plaintiff had forecast sufficient evidence to present a jury issue as to whether the trenching activity involved in that case was inherently dangerous. The court distinguished between ultra-hazardous activities, which result in strict liability, and inherently dangerous activities, which are "susceptible to effective risk control through the use of adequate safety precautions." Id. at 351.

The test to determine whether or not an activity is inherently dangerous, thereby imputing liability to the employer under principles of vicarious liability, is not completely clear. Certain activities, like blasting, have long been considered ultrahazardous. See e.g., Luttrell v. Carolina Mineral Co., 220 N.C. 782, 18 S.E.2d 412 (1942). Aside from blasting, the courts generally scrutinize the work, or instrumentality, for "an appreciable and foreseeable danger to the workers employed or to the public generally:"

2. Borrowed Servants

Issues of control are often determinative in connection with whether a particular employee is the servant of one or more employers. The test is which employer retains control over the servant for the manner in which performance is carried out. Weaver v. Bennett, 259 N.C. 16, 129 S.E.2d 610 (1963); Moody v. Kersey, 270 N.C. 614, 155 S.E.2d 215 (1967) (operator of crane remained employee of lessor). Actual control, not exercise of actual control, is determinative. Moody, 270 N.C. at 621, 155 S.E.2d 215.

In Beatty v. Owsley & Sons, Inc., 53 N.C. App. 178, 280 S.E.2d 484, cert. denied, 304 S.E.2d 192, 285 S.E.2d 95 (1981) the court invoked instructive comments from the Restatement (Second) of Agency § 227:

> [A] continuation of the general employment is indicated by the fact that the general employer can properly substitute another servant at any time, that the time of the new employment is short, and that the lent servant has the skill of a specialist.
>
> A continuance of the general employment is also indicated in the operation of a machine where the general employer rents the machine and a servant to operate it, particularly if the instrumentality is of

> considerable value . . . . [T]he fact that the general employer is in the business of renting machines and men is relevant, since in such case there is more likely to be an intent to retain control over the instrumentality.

Id. at 183, 280 S.E.2d at 487.

Some courts have been reluctant to find dual employment even where the "special employer" exercises considerable control over the servant:

> A servant of one employer does not become the servant of another from whom the work is performed merely because the latter points out to the servant the work to be done, or supervises the performance thereof, or designates the place and time for such performance, or gives the servant signals calling him into activity, or gives him directions as to the details of the work *and the manner of doing it.*

Id. at 182, 280 S.E.2d at 487 (citing Weaver v. Bennett, 259 N.C. 16,25, 129 S.E.2d 610,616 (1963); see generally 8 *Strong's North Carolina Index, 3d*, Master & Servant § 7.

3. Bailments

Generally, a bailor is not liable for the negligence of the bailee. In Sink v. Sechrest, 225 N.C. 232, 34 S.E.2d 2 (1945), a minor son left his automobile with his parents to "use the car to keep the battery from running down." Plaintiffs instituted an action for personal injuries received when defendant-bailee's wife attempted to start the vehicle. The court rejected plaintiffs' argument that defendants were agents of their son:

> [I]t appears the relation existing between the defendant and his stepmother in respect of the Ford coupe at the time of the injuries was that of bailor and bailee, rather than principal and agent.
>
> The cases are in accord that generally a third party may not recover of the bailor for the negligent use by the bailee of the bailed chattel, in the absence of some control exercised by the bailor at the time, or of negligence on his part which proximately contributed to the injury. The doctrine of *respondeat superior* ordinarily is inapplicable to the relationship of bailor and bailee, unless made so by statute.

Id., 34 S.E.2d at 3.

In Williamson v. Varner, 252 N.C. 446, 114 S.E.2d 92 (1960), the court held that when plaintiff alleged that the defendant driver was the agent of the defendant owner, and when the owner admits ownership, plaintiff enjoys a presumption of agency pursuant to G.S. § 20-71.1. Evidence introduced at trial by defendants tending to show a bailment makes the relationship between the parties a jury issue. Id. at 450, 114 S.E.2d at 94; see also Davis v. Jessup, 257 N.C. 215, 125 S.E.2d 440 (1962) (legal right to control vehicle distinguished from mere bailment).

D. Family Purpose Doctrine

The "family purpose doctrine" is a creation of judicial fiat imposed on owners of motor vehicles in North Carolina:

> The family purpose doctrine imposes liability upon the owner or person with ultimate control of a motor vehicle for its negligent operation by another when it is shown (1) that the operator was a member of his family or household and was living in his home, (2) that the vehicle was owned, provided and maintained for the general use, pleasure and convenience of his family, and (3) that the vehicle was being so used by a member of his family at the time of the accident with his express or implied consent. In this State the doctrine is a rule of law adopted by the Court as an extension of the principle of *respondeat superior*.

Williams v. Wachovia Bank & Trust Co., 292 N.C. 416, 419-20, 233 S.E.2d 589, 592 (1977).

As with common law concepts of agency, the issue is one of control. In Camp v. Camp, 89 N.C. App. 347, 365 S.E.2d 675 (1988), the plaintiff-mother sued her daughter for injuries the mother received in an automobile collision resulting from the daughter's negligence. The mother also sued her husband based on the family purpose doctrine. The court dismissed the claim against the daughter under the then-remaining vestige of "child immunity" but refused to dismiss the action against the father. The court explained the term "control" for purposes of extending liability under the family purpose doctrine:

> While the term control may seem nebulous in some circumstances,

> there are certain factors that are used in determining what party has control of the vehicle. Ownership, while not conclusive, is an element to be considered. The use of the automobile, i.e., the purpose for which the car was purchased, is also a factor. However, the most important question to be asked is who maintains or provides the automobile for the use by the family. That person is the party in "control" of the vehicle. Maintenance includes such acts as buying the fuel and oil for the car, paying for repairs and listing and paying taxes on the car.

Id. at 349, 365 S.E.2d at 677.

The family purpose doctrine has also been applied when one member of the family, while riding in the family automobile, allows a non-family member to operate the vehicle. Rector v. Roberts, 264 N.C. 324, 141 S.E.2d 482 (1965) (family purpose and agency admitted in the pleadings); Jones v. Allred, 52 N.C. App. 38, 278 S.E.2d 521, aff'd, 304 N.C. 387, 283 S.E.2d 517 (1981); see generally 3 *Strong's North Carolina Index, 4th*, Automobiles and Other Vehicles §§ 452-455 (2001). Lack of consent is an appropriate defense in this context. Chappell v. Dean, 258 N.C. 412, 128 S.E.2d 830 (1963).

E. Negligent Entrustment

Negligent entrustment, unlike the family purpose doctrine, is based on the active negligence of the owner. In Plummer v. Henry, 7 N.C. App. 84, 171 S.E.2d 330 (1969), the North Carolina Court of Appeals explained the difference between the "family purpose doctrine" and negligent entrustment:

> Under the negligent entrustment theory the owner is held liable, not for any imputed negligence, but by reason of his own independent and wrongful breach of duty in entrusting his automobile to one he knows or should know is likely to cause injury; proof of negligence of the driver merely furnishes the causal connection between the primary negligence of the owner and the injury or damage.

Id. at 86, 171 S.E.2d at 332.

The theory of negligent entrustment was applied to a case involving a $3,500,000 punitive damages award. Boyd v. L.G. DeWitt Trucking Co., 103 N.C. App. 396, 405 S.E.2d 914, rev. denied, 330 N.C. 193, 412 S.E.2d 53 (1991) (citing

Heath v. Kirkman, 240 N.C. 303, 82 S.E.2d 104 (1954) (liability of owner predicated on independent negligence in entrusting motor vehicle to incompetent operator).

F. Parent's Liability for Actions of Child

1. Intentional/Malicious Acts

North Carolina General Statute § 1-538.1 imposes a form of strict vicarious liability on parents for the malicious or willful actions of minor children. This section was implemented to enforce the social policy that parents are responsible for the behavior of their minor children. The section is an anomalous effort by the General Assembly to deter juvenile delinquency. General Ins. Co. of Am. v. Faulkner, 259 N.C. 317, 130 S.E.2d 645 (1963). The statute provides:

> Any person or other legal entity shall be entitled to recover actual damages suffered in an amount not to exceed a total of one thousand dollars ($1,000) from the parent or parents of any minor who shall maliciously or willfully injure such person or destroy the real or personal property of such person. Parents whose custody and control have been removed by court order or by contract prior to the act complained of shall not be liable under this act. This act shall not preclude or limit recovery of damages from parents under common law remedies available in this State.

G.S. § 1-538.1 (2002).

This limited statutory form of vicarious liability has been considered ineffective in its stated purpose and, by its own terms, does not provide the exclusive remedy for a person injured by the negligence or willful conduct of a minor.

2. Negligent Acts

The North Carolina Supreme Court has recently clarified the circumstances under which a parent may be held liable for the independent actions of a minor child. The court rejected the application of vicarious liability to a parent for a child's actions:

> In North Carolina and in all other jurisdictions applying common law

> principles, it is a well-established doctrine that the mere fact of parenthood does not make individuals liable for the wrongful acts of their unemancipated minor children. But while relationship alone does not make a parent liable for the wrongful acts of an unemancipated minor child, a parent who knows or should know of dangerous propensities of his child may be held liable for failing to exercise reasonable control over the child so as to prevent injury to others caused by these dangerous propensities.

Moore v. Crumpton, 306 N.C. 618, 295 S.E.2d 436 (1982); see also Vinson v. McManus, 68 N.C. App. 763, 316 S.E.2d 98(1984).

> The correct rule is that the parent of an unemancipated child may be held liable in damages for failing to exercise reasonable control over the child's behavior if the parent had the ability and the opportunity to control the child and knew or should have known of the necessity for exercising such control.

McManus, 68 N.C. App. at 765, 316 S.E.2d at 99 (citing Moore v. Crumpton, 306 N.C. 618, 295 S.E.2d 436 (1982)); see also McMillan v. Mahoney, 99 N.C. App. 448, 393 S.E.2d 298 (1990) (negligent supervision of two minor defendants with air guns).

G. Joint Tortfeasors

1. Traditional Concepts

The North Carolina Supreme Court has explained traditional concepts of joint tortfeasors liability to distinguish liability based on *respondeat superior*:

> In the case of joint tort-feasors, although there is a single damage done, there are several wrongdoers. The act inflicting injury may be single, but back of that and essential to liability, lies some wrong done by each tort-feasor contributing in some way to the wrong complained of. It is said in White v. Keller, 242 N.C. 97, 86 S.E.2d 795 (1955): "Joint tort-feasors are those who act together in committing a wrong, or whose acts, if independent of each other, unite in causing a single injury." Although the principal is responsible for the tort of his agent under the doctrine of *respondeat superior*, there was nothing in the present situation fairly comparable

to that of joint tort-feasors.

Bowen v. Iowa Nat'l Mut. Ins. Co., 270 N.C. 486, 155 S.E.2d 238 (1967); see also Wooten v. Holleman, 171 N.C. 461, 88 S.E. 480 (1916); Simpson v. Plyler, 258 N.C. 390, 128 S.E.2d 843 (1963); Yandell v. National Fireproofing Corp., 239 N.C. 1, 79 S.E.2d 223 (1953) (negligent inspection of defective rail car).

2. Concert of Action

The North Carolina Court of Appeals recently addressed the liability of two tortfeasors acting in concert. In McMillan v. Mahoney, 99 N.C. App. 448, 393 S.E.2d 298 (1990), plaintiff alleged that one of two defendants fired an air rifle at him, resulting in personal injuries. The North Carolina Court of Appeals reversed dismissal of plaintiff's claim in a case of first impression:

> Although our research discloses no prior North Carolina cases addressing the issue of liability for the negligent acts of multiple defendants where the plaintiff's injury is the result of only one act but the plaintiff is unable to prove whose act, plaintiffs' complaint in our judgment is sufficient to state a cause of action for concurrent negligence against the minor defendants.

Id. at 451, 393 S.E.2d at 300.

The court held that plaintiffs stated a claim for relief despite the fact that they did not use the term "acting in concert" to allege a claim against the two minor defendants. Id. at 453, 393 S.E.2d at 301. The court also reversed dismissal of the claim against the minor defendants' parents for their independent negligence. Id. at 455-56, 393 S.E.2d at 303.

The result in Mahoney was forecast in previous decisions in which the actions of more than one person resulted in injury. See e.g. Garrett v. Garrett, 228 N.C. 530, 46 S.E.2d 302 (1948).

3. Joint Venturers

A joint venture exists when two or more persons are engaged in an activity for their mutual benefit and each enjoys the mutual right to direct the actions of the venture. A joint venture does not require any formal agreement. It is a doctrine which is applied when the relationship constitutes a de facto partnership.

In Slaughter v. Slaughter, 93 N.C. App. 717, 379 S.E.2d 98, rev. granted, 325 N.C. 273, 384 S.E.2d 519, rev. dismissed, 326 N.C. 479, 389 S.E.2d 803 (1989), plaintiff was entitled to recover from two defendants engaged in a joint venture. One defendant was operating a backhoe at the time of the injury. The other defendant who supplied the backhoe was not at the site when plaintiff was injured and did not direct the backhoe operator's actions:

> A joint enterprise is an alliance between two or more people in pursuit of a common purpose such that negligence of one participant may be imputed to another. Parties may be said to be engaged in a joint enterprise where there is a community of interest in the objects or purposes of the undertaking, and an equal right to direct the movement of each other with respect thereto.
>
> * * *
>
> The control required for imputing negligence under a joint enterprise theory is not actual physical control, but the legal right to control the conduct of the other with respect to the prosecution of the common purpose.

Id. at 720-21, 379 S.E.2d at 101.

Previously, in Kilpatrick v. University Mall Shopping Ctr., 68 N.C. App. 629, 315 S.E.2d 786, rev. denied, 311 N.C. 758, 321 S.E.2d 136 (1984), the court had rejected the joint venture theory based on a lack of control by one of the alleged joint venturers. The distinction between Kilpatrick and Slaughter was based on the right to control the activity. Significantly, in Slaughter one of the two joint venturers was not only unable to operate the machinery, but was absent when the injury occurred.

H. Contribution And Indemnity

In cases involving joint tortfeasors or vicarious liability, principles of contribution and indemnity always lurk. Recent guidance by the North Carolina courts is instructive.

In Menard v. Johnson, 105 N.C. App. 70, 411 S.E.2d 825 (1992), plaintiff Menard was a passenger in a vehicle driven by defendant, Johnson, Jr. and owned

by Johnson, Sr. The vehicle driven by Johnson, Jr. was involved in a collision with another vehicle driven by defendant, Parks. Plaintiff- passenger, Menard, filed suit against Johnson, Jr. and Parks alleging personal injuries as a result their joint and concurring negligence. Parks crossclaimed against Johnson, Jr. for contribution and also asserted a third party claim for contribution against Johnson, Sr., the owner of the vehicle driven by Johnson, Jr. Johnson, Jr. asserted a crossclaim against Parks for contribution and recovery for his own personal injuries. Johnson, Sr. asserted a counterclaim against Parks for property damage to his vehicle. Id. at 71, 411 S.E.2d at 826.

Plaintiff Menard settled his claim against Johnson, Jr. and released both Johnsons from all liability. Subsequently, the Johnsons filed supplemental pleadings alleging the settlement and consent judgment in bar of Parks' contribution claims pursuant to G.S. § 1B-4. Parks also filed supplemental pleadings alleging that the Johnsons ratified the settlement, had elected a remedy and judicially admitted that they were joint tort-feasors proximately causing the accident. Id. at 71-72, 411 S.E.2d at 826.

On cross motions for summary judgment, the trial court granted the Johnsons' motion dismissing Parks' contribution claims and Parks' motion dismissing the Johnsons' claims against him. The North Carolina Court of Appeals reversed, holding that the party who settles with a plaintiff and invokes G.S. §1B-4 as a bar to contribution from a co-defendant does not extinguish his right to pursue his individual cross claim or counterclaim against the same co-defendant for damages allegedly caused by the co-defendant. Id. at 72, 411 S.E.2d at 827.

The court distinguished the line of cases which hold that a plaintiff who institutes an action after settling with the insurance carrier and then pleads the settlement in bar of defendant's counterclaim ratifies the settlement and is barred from further recovery. See e.g. Keith v. Glenn, 262 N.C. 284, 136 S.E.2d 665 (1964); Smithwick v. Crutchfield, 87 N.C. App. 374, 361 S.E.2d 111 (1987); Johnson v. Alston, 29 N.C. App. 415, 224 S.E.2d 293, cert. denied, 290 N.C. 308, 225 S.E.2d 829 (1976).

The court also rejected Parks' claim that the Johnsons admitted liability by entering the settlement agreement with Menard:

> The plain language of G.S. §1B-4 does not address cross claims or counterclaims for personal injury or property damage. The statute

> only addresses the statutory right to contribution. Statutes must be construed as written. Where "the language of a statute is clear and unambiguous judicial construction is not necessary. Its plain and definite meaning controls. Here, the statute clearly does not address personal injury or property damage claims. For this reason, the assignment is overruled.

Id.

In Yates v. New South Pizza, Ltd., 330 N.C. 790, 412 S.E.2d 666 (1992), plaintiff was injured in an automobile collision with an employee of defendant New South Pizza, Ltd. Plaintiff settled with the individual driver for the individual driver's policy limits. In exchange for the settlement, plaintiff executed a covenant not to sue the driver or his insurance company and expressly reserved all rights to proceed against the driver's employer. Defendant moved for summary judgment, arguing that the settlement between plaintiff and the driver operated to release defendant from liability as a matter of law, and the trial court granted the motion. On petition for discretionary review, the North Carolina Supreme Court reversed:

> The question of whether N.C.G.S. § 1B-4 applies to vicarious liability in the master-servant context is one of first impression for this Court. Other courts, as noted by the Court of Appeals have not been uniform in interpreting this provision of the Uniform Contribution Act. We agree with those courts which have held that this provision does apply to liability that has been vicariously derived...We hold, therefore, that Section 1B-4 applies to master-servant vicarious liability and that on the facts of this case, the covenant not to sue the employee does not release defendant-employer from liability.

Id. (citations omitted) The court further held that the Uniform Contribution Act broadens the definition of "tortfeasor" to encompass the vicariously liable master.

I. Liability Of Governmental Agency

Traditional notions of governmental immunity have been challenged in several recent North Carolina cases. When governmental agencies waive immunity by purchasing liability insurance, or engage in proprietary functions, the agency may be held liable for the negligence of an employee. See Pulliam v. City

of Greensboro, 103 N.C. App. 748, 407 S.E.2d 567, rev. denied, 330 N.C. 197, 412 S.E.2d 59 (1991) (maintenance of sewer system a proprietary function for which agency may be liable); Lonon v. Talbert, 103 N.C. App. 686, 407 S.E.2d 276 (1991) (the city's failure to comply with an ordinance it had adopted relating to compliance with standards for the regulation of traffic was some evidence of negligence).

The North Carolina Court of Appeals distinguished between those cases in which a municipality has discretionary authority to regulate traffic but chooses not to exercise that authority and the failure of the municipality to comply with its non-mandatory ordinance. Lonon, 103 N.C App. at 691, 407 S.E.2d at 280. In Lonon, the city failed to abide by its own ordinance. But see Cooper v. Town of Southern Pines, 58 N.C. App. 170, 293 S.E.2d 235 (1982) (authority to control traffic does not require city to exercise authority or be liable for negligence).

In Combs v. Town of Bellhaven, 106 N.C. App. 71, 415 S.E.2d 91 (1992), the North Carolina Court of Appeals reaffirmed the common law principle that a municipality may not be held liable for the torts committed by its employees in their performance of a governmental function. Since immunity may be waived only through the purchase of liability insurance, the court concluded that the defendant had not waived its immunity because plaintiff's claims were not covered under the terms of the applicable policy. The policy at issue contained an exclusion that the court found dispositive:

> Coverage B specifically excludes claims against an employee or official other than a Law Enforcement Employee for '...loss, damage to or destruction of any tangible property or the loss of use thereof by reason of the foregoing [and] ...for injury arising from: ...wrongful entry or eviction or other invasion of the right of private occupancy.' These contractual provisions clearly exclude coverage for the claims set forth by plaintiff.

Id. at 73, 415 S.E.2d at 92.

The court concluded:

> When the terms of a contract are clear and unambiguous, a court may interpret that contract as a matter of law. We

> hold that the declaration page of this insurance policy, along with the definitions set out above, conclusively establishes that the contracting parties did not intend to include every town employee who might be called upon to perform an action authorized or dictated by a municipal ordinance within the definition of "Law Enforcement Employee."

Id. at 74, 415 S.E.2d at 92-93 (citations omitted).

Finally, governmental agencies are subject to certain nondelegable duties. In Medley v. North Carolina Dept. of Corr., 330 N.C. 837, 412 S.E.2d 654 (1992), the State was held to have a nondelegable duty to provide medical care to inmates. A physician who was hired to provide contract medical services to inmates was held to be an agent of the State for purposes of providing medical care. The North Carolina Supreme Court explained the nature of the State's nondelegable duty at length:

> A nondelegable duty may arise from circumstances recognized at common law and statute, and in 'situations wherein the Law use a person's duty as so important and so peremptory that it will be treated as nondelegable. Defendants who are under such a duty "cannot, by employing a contractor, get rid of their own duty to other people, whatever that duty may be." It is difficult to suggest any criterion by which the nondelegable characters of such duties may be determined, other than the conclusion of the courts that the responsibility is so important to the community that the employer should not be permitted to transfer it to another. The nondelegable duty theory is an exception to the rule of nonliability by a principal for the work of independent contractors. The exception reflects the policy judgment that certain obligations are of such importance that employers should not be able to escape liability merely by hiring others to perform them.

Id. at 841, 412 S.E.2d at 657.

The court found further support for its position that provision of medical services to the inmates is a nondelegable duty from N.C.G.S. § 148-19, which codifies the duty to provide necessary medical care to inmates. The court also noted that the North Carolina and United States Constitutions require adequate

medical care for inmates.

III. CONTRIBUTORY NEGLIGENCE AND OTHER DEFENSES

The following defenses allow a defendant to escape liability even though a prima facie case of negligence has been established against her. These defenses are affirmative defenses such that the burden of pleading and proving them is generally on the defendant.

A. Contributory Negligence

1. General Principles

Contributory negligence is a complete defense, which prohibits a plaintiff from recovering damages, if his own negligence was a proximate cause of the injuries for which he seeks recovery. North Carolina is one of fewer than five states which maintain contributory, rather than comparative negligence. Corns v. Hall, 112 N.C. App. 232, 435 S.E.2d 88 (1993). Under a comparative negligence theory, the plaintiff's own negligence merely limits the extent of his recovery, rather than acting as a complete bar. Charles E. Daye & Mark W. Morris, North Carolina Law of Torts, § 19.21.1 (1991) [hereinafter Daye & Morris].

Our Supreme Court has succinctly and thoroughly set forth the definition of contributory negligence:

> Contributory negligence, such as will defeat a recovery in a case like the one at bar, is the negligent act of the plaintiff, which, concurring and cooperating with the negligent act of the defendant, thereby becomes the real, efficient, and proximate cause of the injury, or the cause without which the injury would not have occurred. Negligence is doing other than, or failing to do, what a reasonably prudent man would have done under the same or similar circumstances. In short, it is a want of due care; and there is really no distinction or essential difference between negligence in the plaintiff and negligence in the defendant, except the plaintiff's negligence is called contributory negligence. The same rule of due care, which the defendant is bound to observe, applies equally to the plaintiff; and due care means commensurate care, under the circumstances, when tested by the standard of reasonable prudence and foresight. The law recognizes that contributory negligence may be due either to acts of omission or

> acts of commission. . . . The test is: Did the plaintiff fail to exercise that degree of care which an ordinarily prudent man would have exercised or employed, under the same or similar circumstances, and was his failure to do so the proximate cause of his injury? If this be answered in the affirmative, the plaintiff cannot recover.

Moore v. Chicago Bridge & Iron Works, 183 N.C. 438, 439-440, 111 S.E. 776, 777 (1922). Thus, the specific attributes of the ordinarily prudent person and the law's expectations of such a person as they relate to the question of contributory negligence, are the same as with negligence. Daye & Morris, § 19.21.1.

The standards for negligence and contributory negligence are the same. N.C.P.I. Civil.--104.10, Motor Vehicle Volume. Thus, acts of a plaintiff that would constitute negligence if committed by a defendant, constitute contributory negligence. Contributory negligence is an absolute bar to a plaintiff's recovery and must be affirmatively pled. Id.; G.S. § 1A-1, Rule 8(c).

Although generally, contributory negligence is an affirmative defense which may be waived if not properly plead, the issue may be tried by implied consent. Nationwide Mut. Ins. Co. v. Edwards, 67 N.C. App. 1, 312 S.E.2d 656 (1984); Alston v. Monk, 92 N.C. App. 59, 62, 373 S.E.2d 463, 465 (1988), disc. rev. denied, 324 N.C. 246, 378 S.E.2d 420 (1989) (tried by consent where no objection when court submitted issue to jury). However, the issue is not submitted to the jury where defendant's evidence is insufficient to permit the jury to find that the plaintiff was contributorily negligent. Enns v. Zayre Corp., 116 N.C. App. 687, 449 S.E.2d 478 (1994), aff'd, 342 N.C. 406, 464 S.E.2d 298, 1995.

The burden of proving contributory negligence, that is, to show by the greater weight of the evidence that plaintiff's negligence was one of the proximate causes of his own injury, rests with the defendant. N.C.P.I. Civil.--104.50, Motor Vehicle Volume. An issue of contributory negligence is properly submitted to the jury when the evidence, viewed in the light most favorable to the defendant, tends to establish contributory negligence. Green v. Rouse, 116 N.C. App. 647, 448 S.E.2d 846 (1994), cert. denied, 340 N.C. 260, 456 S.E.2d 829 (1995). "If there is more than a scintilla of evidence, contributory negligence is for the jury." Id. (citations omitted).

a. Minors

A minor plaintiff may also be barred from recovery by her own contributory

negligence. The test for determining the contributory negligence of a child is the same as the foregoing principles, with the standard of care being that of a child of like age, capacity, discretion, knowledge and experience under the same or similar circumstances. Adams v. State Bd. of Educ., 248 N.C. 506, 103 S.E.2d 854 (1958); Daye & Morris, § 19.21.2. However, children less than seven years old are incapable of contributory negligence as a matter of law. Hoots v. Beeson, 272 N.C. 644, 647, 159 S.E.2d 16, 19 (1968). There is a rebuttable presumption that children between the ages of seven and fourteen are incapable of contributory negligence, with the burden of overcoming the presumption on the defendant. Sharpe v. Quality Educ., Inc., 59 N.C. App. 304, 296 S.E.2d 661 (1982). Children above the age of fourteen are presumed capable of contributory negligence and are held to the adult standard of care, although the child's capacity may be rebutted if the plaintiff can show the child lacked the ability, capacity, or intelligence of an ordinary child of the same age. Welch v. Jenkins, 271 N.C. 138, 155 S.E.2d 763 (1967).

b. Passengers

A guest passenger in an automobile may assume that the driver will exercise proper care and caution, unless the driver's fault or incompetence is so obvious as to demand that the passenger try to avoid danger. N.C.P.I. Civil --104.20, Motor Vehicle Volume. Thus, a guest passenger in an automobile is required to exercise that degree of care for his own safety which a reasonable prudent person would use under the same or similar circumstances. Bogen v. Bogen, 220 N.C. 648, 18 S.E.2d 162 (1942).

Contributory negligence by a passenger arises when a passenger sees, or in the exercise of reasonable care should see, that the driver is acting negligently, and the passenger fails to warn or caution the driver or to attempt to dissuade the driver to stop his negligent conduct, and the passenger's failure to act proximately causes or contributes to his injury. N.C.P.I. Civil--104.20, Motor Vehicle Volume. The test is whether a reasonably careful and prudent person, under all the circumstances then existing, would have warned, cautioned, or attempted to so persuade the driver. Id. Similarly, a passenger may be contributorily negligent if after warning or cautioning the driver, the driver continues his negligent conduct and the passenger fails to ask that he be let out of the car. Id. There must, of course, be opportunity for the passenger to remonstrate. Parker v. Williams, 34 N.C. App. 563, 239 S.E.2d 270 (1977), on reh'g, 35 N.C. App. 275, 241 S.E.2d 86 (1978).

A passenger on a motorcycle has been held contributorily negligent for suggesting that the driver use a flashlight because the motorcycle's headlamp was not operational. Bigelow v. Johnson, 303 N.C. 126, 277 S.E.2d 347 (1981). Similarly, a passenger's conduct in distracting a driver by, inter alia, kissing him as he attempted to negotiate a curve, raised the issue of contributory negligence. Westmoreland v. Gregory, 255 N.C. 172, 120 S.E.2d 523 (1961). A passenger who actively participates in a speed competition is contributorily negligent and his actions may rise to the level of willful or wanton misconduct. Harrington v. Collins, 40 N.C. App. 530, 253 S.E.2d 288, aff'd, 298 N.C. 535, 259 S.E.2d 275 (1979).

2. Assumption of the Risk

Assumption of the risk is a common law defense limited in North Carolina to cases in which there is a contractual relationship between the plaintiff and defendant. McWilliams v. Parham, 269 N.C. 162, 152 S.E.2d 117 (1967). The plaintiff is barred from recovery if she knew of the risk and knowingly placed herself in a position to be injured by it. Deaton v. Board of Trustees of Elon College, 226 N.C. 433, 438, 38 S.E.2d 561, 565 (1946). The risk must be such an obvious and imminent danger that it would require an ordinarily prudent person to refrain from participating in it. Bruce v. O'Neal Flying Serv., Inc., 231 N.C. 181, 187, 56 S.E.2d 560, 564 (1949). Furthermore, assumption of the risk is inapplicable if the plaintiff was not aware of the specific risk to which she was exposed. Swaney v. Peden Steel Co., 259 N.C. 531, 131 S.E.2d 601 (1963) (assumption of risk not applicable where plaintiff had no way of knowing steel truss could not support his weight); Daye & Morris, § 19.22.

Most conduct that would give rise to the defense of assumption of the risk can also be characterized as contributory negligence and has not been extensively addressed in recent appellate decisions. Daye & Morris, § 19.22. While the doctrine of assumption of the risk is based in contract, contributory negligence is exclusively a matter of conduct, and where a plaintiff's decision to assume the risk is unreasonable, that choice may also be characterized as contributory negligence. Id. Many assumption of the risk cases involved actions against employers by injured employees and actions against landlords by injured tenants. Statutes such as the Workers' Compensation Act and Residential Rental Agreement Act have served to eliminate many of these cases. Id.

3. The "Seat Belt Defense"

Perhaps the most profound thing that may be said about this "defense" is that it does not exist. Evidence of the failure to wear a seat belt is not admissible in a civil action for damages. Hagwood v. Odom, 88 N.C. App. 513, 364 S.E.2d 190 (1988).

4. The Avoidable Consequences Rule

This rule reduces the amount of a plaintiff's recovery to the extent an injured plaintiff unreasonably fails to use reasonable care to avoid or limit the consequences of his wrongful conduct, or to mitigate his damages. Miller v. Miller, 273 N.C. 228, 160 S.E.2d 65 (1968); Daye & Morris, § 19.24. Unlike contributory negligence, this rule looks to the plaintiff's post-incident conduct. Daye & Morris, § 19.24. This issue is most often left to the decision of a jury. Snead v. Holloman, 101 N.C. App. 462, 400 S.E.2d 91 (1991) (error to refuse to instruct jury on plaintiff's duty to mitigate when he failed to perform exercise regimen prescribed by doctor).

B. Time Based Defenses: Statutes of Limitation and Repose

1. Distinction

North Carolina has both statutes of limitation and of repose. Statutes of limitation impose an outer time period within which an action must be commenced, and the time begins to run when the cause of action accrues. Actions brought thereafter are barred. Trustees of Rowan Technical Coll. v. J. Hyatt Hammond Assoc., Inc., 313 N.C. 230, 328 S.E.2d 274 (1985); Daye & Morris, § 19.31. Statutes of repose establish a time period beyond which an action may not be commenced, regardless of whether or not the action has accrued, and the time is usually measured from some specific, identifiable event, not related to the accrual of the cause of action.

Unlike statutes of limitation, which operate as procedural bars to actions for personal injury, statutes of repose are substantive rules which serve as a "condition to the legal cognizability of the claim" and can bar to a cause of action even before the injury has occurred. Lamb v. Wedgewood South Corp., 308 N.C. 419, 302 S.E.2d 868 (1983); Daye & Morris, § 19.31. Note that under the common law doctrine of *nullum tempus occurrit regi*, neither statutes of limitation or repose apply against the State or its political subdivisions, unless otherwise provided by statute, in cases where they are engaged in governmental rather than proprietary functions. Rowan County Bd. of Educ. v. U.S. Gypsum Co., 332 N.C. 1, 418

S.E.2d 648 (1992).

2. Specific Applications

Statutes of limitations begin to run when the cause of action accrues. G.S. § 1-15(a); Daye & Morris, § 19.32. Generally, a cause of action accrues at the time the plaintiff has a right to bring an action. If the defendant's conduct by itself is not actionable, the cause of action accrues at the time actual damage ensues. Shearin v. Lloyd, 246 N.C. 363, 98 S.E.2d 508 (1957); Pierce v. Buyher, 330 N.C. 182, 409 S.E.2d 903 (1991).

3. Disabilities

a. Tolling Statutes of Limitations

In general, the statute of limitations does not begin to run against a minor or a person under a disability, such as insanity, until the minor reaches majority or until the disability is removed. Daye & Morris, §19.34; G.S. § 1-17(a). However, the statute is not tolled if the minor or insane person is represented by a guardian at the time of accrual of the cause of action. Id.; Rowland v. Beauchamp, 253 N.C. 231, 116 S.E.2d 720 (1960). Also, in a wrongful death action, when the beneficiaries of the decedent's estate are minors, the limitation period is not tolled if an administratrix, rather than the minors, is the plaintiff. Boomer v. Caraway, 116 N.C. App. 723, 449 S.E.2d 215 (1994), aff'd, 342 N.C. 186 463 S.E.2d 230 (1995). Actions for professional malpractice on behalf of minors are governed by G.S. § 1-17(b), which provides that such claims are subject to the same time limitations that govern professional malpractice generally, unless those limitations expire before the minor is nineteen.

Also note that, in what appears to be a case of first impression, the North Carolina Court of Appeals held that filing a personal injury action in federal court tolled the statute of limitations while that action was pending in District Court. Clark v. Velsicol Chem. Corp., 110 N.C. App. 803, 431 S.E.2d 227 (1993), aff'd, 336 N.C. 599, 444 S.E.2d 223 (1994); Daye & Morris, § 19.37. The opinion also suggested that the statute would be tolled during any appeals as of right, but not while the parties waited for a ruling on a writ of certiorari to the United States Supreme Court. Id.

b. Tolling Statutes of Repose

In the context of the statute of repose for products liability actions, the Court of Appeals has held as a matter of first impression that the repose period was tolled until the minor reached majority or until a guardian ad litem was appointed, whichever occurred first. Bryant v. Adams, 116 N.C. App. 448, 448 S.E.2d 832 (1994), disc. rev. denied, 339 N.C. 736, 454 S.E.2d 647 (1995); Daye & Morris, § 19.34.2. Although the holding in Bryant applies specifically to the product liability repose statute, the fundamental reasons underlying the decision would appear to be applicable to statutes of repose in general. Daye & Morris, § 19.34.2

C. Immunities

The immunity defenses hold that a defendant may not be held liable, not because a tort did not occur, but rather because of the defendant's status. These rules are based upon the policy consideration that in certain situations, despite the defendant's wrongful conduct and the plaintiff's injury, it is preferable to shield the defendant from liability. Daye & Morris, § 19.40.

1. Family Immunities

a. Actions Between Husband and Wife

The doctrine of spousal immunity has been abolished, and pursuant to G.S. § 52-5, spouses have a cause of action against each other to recover damages sustained to their person or property. First Union Nat'l Bank v. Hackney, 266 N.C. 17, 145 S.E.2d 352 (1965), aff'd, 270 N.C. 437, 154 S.E.2d 512 (1967). Where both spouses are domiciled in North Carolina, the action can be brought in North Carolina courts even though the acts giving rise to the injury occurred in another state, and even where that other state retains interspousal immunity. G.S. § 52-5.1; Daye & Morris, § 19.41.1. Furthermore, a non-resident spouse may maintain an action in North Carolina if the cause of action arose here, even if the jurisdiction where plaintiff is domiciled retains spousal immunity. Id.; Henry v. Henry, 291 N.C. 156, 229 S.E.2d 158 (1976).

b. Actions Between Parent and Child

i. Child v. Parent

In general, an unemancipated minor cannot maintain a tort action against her parents for personal injuries negligently inflicted. Morgan v. Johnson, 24 N.C.

App. 307, 210 S.E.2d 503 (1974); Daye & Morris, § 19.41.21. This immunity extends to stepparents standing in loco parentis. Id.; Liner v. Brown, 117 N.C. App. 44, 449 S.E.2d 905 (1994), disc. rev. denied, 340 N.C. 113, 456 S.E.2d 315 (1995) (no parental immunity for paternal aunt and uncle).

The following are exceptions to the rule of parental immunity: (1) where suit is authorized by statute G.S. § 1-539.21, (2) where liability is based on willful or malicious act of the parents, (3) where the child is emancipated, or (4) where the action involves contract or property rights of the child. Lee v. Mowett Sales Co., Inc., 316 N.C. 489, 342 S.E.2d 882 (1986).

G.S. § 1-539.21 provides that the parent-child relationship does not bar an action by a person or his estate against his parent or child for wrongful death, personal injury, or property damage arising out of the operation of a motor vehicle owned or operated by the parent or child. These cases usually involve a child injured while riding in a car driven by a parent or struck by a car driven by a parent. Daye & Morris, § 19.41.21.1. This statute has been extended to injuries sustained by a child who was struck by another car after his mother let him out of her car to go trick-or-treating. Snow v. Nixon, 52 N.C. App. 131, 277 S.E.2d 850 (1981) (defendant could seek contribution from mother because the "operation" of a motor vehicle includes duty to unload passengers in safe place). "Motorized vehicle" does not include a riding lawn mower. Mowett, supra.

In Doe By and Through Connolly v. Holt, 332 N.C. 90, 418 S.E.2d 511 (1992), the Supreme Court for the first time directly addressed the issue of parental immunity for intentional torts, holding that such immunity was inapplicable to actions by unemancipated minors to recover for injuries caused by the willful and malicious acts of their parents. In that case the minors sued their father for damages resulting from repeated sexual molestation and rape. Id.

Because parental immunity does not apply to actions based on contract or property rights, a parent may be liable to her child for conversion or for damages to the child's property caused by the parent's negligence. Small v. Morrison, 185 N.C. 577, 118 S.E. 12 (1923).

ii. Parent v. Child

Ordinarily a parent cannot bring an action against his unemancipated child based in tort. Gilliken, supra.; Daye & Morris, §19.41.22. A complete, but not partial, emancipation of the child removes the bar. Id. The parent must relinquish

all control and responsibility over the child. Id.

G.S. §1-539.21 also permits a parent to sue a child for personal injury, death, or damage to property arising out of the operation of a motor vehicle owned or operated by the child.

c. Actions Between Siblings

Although not directly addressed, our Supreme Court has alluded that North Carolina Courts would permit this type of action. Watson v. Nichols, 270 N.C. 733, 735, 155 S.E.2d 154, 156 (1967) ("courts which have passed on the question have generally held that the action may be maintained").

2. Sovereign Immunity

In North Carolina the state is immune from liability for negligence or tortious conduct, except to the extent that immunity has been waived by statute. Great Am. Ins. Co. v. Gold, 254 N.C. 168, 118 S.E.2d 792 (1961); Daye & Morris, § 19.42.

a. Actions Against the State or its Agencies

The North Carolina Tort Claims Act allows tort claims against state agencies in certain circumstances. G.S. § 143-291. The Act designates the North Carolina Industrial Commission as the Court with exclusive jurisdiction of actions in tort against the state, its departments and agencies. Jones v. Pitt County Mem. Hosp., 104 N.C. App. 613, 410 S.E.2d 513 (1991). The Commission may award damages where: (1) there was negligence by a state officer, employee, or agent while acting within the scope of his office; (2) employment or agency; (3) the negligence was the proximate cause of the claimant's injuries; and (4) the claimant was not contributorily negligent. A claimant may sue for personal injury, property damage or wrongful death, and the state is liable if under the circumstances, a private person would be liable. Cogburn v. North Carolina State Highway Comm., 14 N.C. App. 544, 188 S.E.2d 553 (1972). Recovery on account of injuries or damage to any one person is limited to a cumulative total of $150,000. G.S. § 143-291; Daye & Morris, § 19.42.11.

The state may be joined in an action in court under G.S. § 1A-1, Rule 14(c) as a third-party or third-party defendant for contribution or indemnity, although the provisions of the Tort Claims Act regarding liability and limitation on damages

still apply. Teachy v. Coble Dairies, Inc., 306 N.C. 324, 293 S.E.2d 182 (1982). A co-defendant may also assert a cross-claim for contribution and indemnity against the state. Selective Ins. Co. of Southeast v. NCNB Nat'l Bank, 324 N.C. 560, 380 S.E.2d 521 (1989).

Immunity still protects the state from liability for tortious conduct falling outside the scope of the statute. Because the statute speaks only of negligence, an action cannot be maintained against the state for intentional torts, Davis v. North Carolina State Highway Comm., 271 N.C. 405, 156 S.E.2d 685 (1967), willful or wanton conduct, Givens v. Sellars, 273 N.C. 44, 159 S.E.2d 530 (1968), or torts such as fraud or defamation, where malice is alleged. Mazzucco v. North Carolina State Bd. of Med. Examiners, 31 N.C. App. 47, 228 S.E.2d 529, appeal dismissed, 291 N.C. 323, 230 S.E.2d 676 (1976); Daye & Morris, § 19.42.11.2.

State agencies may also be liable for the torts of independent contractors performing non-delegable duties, engaging in inherently dangerous activities, or based on the state's negligence in choosing the contractor. Hendricks v. Leslie Fay, Inc., 273 N.C. 59, 159 S.E.2d 362 (1968); Dockery v. World of Mirth Shows, Inc., 264 N.C. 406, 142 S.E.2d 29 (1965); Page v. Sloan, 12 N.C. App. 433, 183 S.E.2d 813 (1971), aff'd, 281 N.C. 697, 190 S.E.2d 189 (1972); Daye & Morris, § 19.42.11.4. If the negligence causing the claimant's injury exceeds the scope of employment, immunity will not protect the individual, who may be held personally liable in an action at common law. Mazzucco v. North Carolina State Bd. of Med. Examiners, 31 N.C. App. 47, 228 S.E.2d 529 (1976).

b. Actions Against Cities and Counties

The doctrine of sovereign immunity shields a city or county from liability for injuries arising from governmental activities, unless immunity has been waived. Moffit v. City of Asheville, 103 N.C. 237, 9 S.E. 695 (1889). A city or county remains liable for injuries caused by employees or agents acting within the scope of their employment in carrying out proprietary functions. Blackwelder v. City of Winston-Salem, 332 N.C. 319, 420 S.E.2d 432 (1992). The only manner in which a city may waive its immunity is through the purchase of liability insurance, in which case it is exposed to liability to the extent of its coverage. G.S. § 160A-485; Daye & Morris, § 19.42.31. The plaintiff must allege in his complaint that the municipality has waived its liability through the purchase of insurance, or the complaint fails to state a claim against the municipality or its agents in their official capacity. Gunter v. Anders, 115 N.C. App. 331, 444 S.E.2d 685 (1994), disc. rev. denied, 339 N.C. 612, 454 S.E.2d 250 (1995).

i. The Public Duty Doctrine

The public duty doctrine provides that a municipality is not liable for the failure to furnish police protection to specific individuals, unless one of two exceptions is met. Braswell v. Braswell, 330 N.C. 363, 410 S.E.2d 897 (1991), reh'g denied, 330 N.C. 854, 413 S.E.2d 550 (1992); Daye & Morris, § 19.42.32.2. Those exceptions arise when (1) a special relationship exists between the public officer and the injured party, or (2) a public officer creates a special duty by promising protection to a particular individual, fails to do so, and the person suffers injury in reliance. Id.; Prevette v. Forsyth County, 110 N.C. App. 754, 431 S.E.2d 216, disc. rev. denied, 334 N.C. 622, 435 S.E.2d 338 (1993) (no liability based on allegations that animal control officers negligently failed to protect decedent from dangerous dogs; policing animal control in neighborhood not sufficient to meet exception; Clark v. Red Bird Cab, Inc., 114 N.C. App. 400, 442 S.E.2d 75, disc. rev. denied, 336 N.C. 603, 447 S.E.2d 387 (1994) (no liability for failing to properly investigate credentials of taxicab operator).

ii. Governmental/Proprietary Distinction

As stated above, if the activity is categorized as governmental, the plaintiff's cause of action is barred by sovereign immunity; but, if the activity is deemed proprietary, the municipality can be held liable just as a private party. Daye & Morris, § 19.42.32; Rich v. City of Goldsboro, 282 N.C. 383, 192 S.E.2d 824 (1972); Dale v. City of Morganton, 270 N.C. 567, 155 S.E.2d 136 (1967). This distinction arises out of the dual nature of municipal corporations, which possess characteristics of both state government and private corporations. Daye & Morris, § 19.42.32.

In a frequently cited decision, our Supreme Court has attempted to explain the distinction:

> Any activity of the municipality which is discretionary, political, legislative or public in nature and performed for the public good in behalf of the State, rather than for itself, comes within the class of governmental functions. When, however, the activity is commercial or chiefly for the private advantage of the compact community, it is private or proprietary.

Millar v. Town of Wilson, 222 N.C. 340, 341, 23 S.E.2d 42, 44 (1942).

In drawing the distinction, some courts focus on the authority exercised such that where the activity involves the exercise of police power, or judicial, discretionary or legislative authority, it is governmental. Hamilton v. Town of Hamlet, 238 N.C. 741, 78 S.E.2d 770 (1953).

Another approach concludes that an activity is governmental if it is the type that only a governmental agency could perform, or has historically been performed by the government, and similarly, that it is proprietary where a private corporation or individual could carry out the same function. Sides v. Cabarrus Mem. Hosp., 287 N.C. 14, 213 S.E.2d 297 (1975); Daye & Morris, § 19.42.32.1. Whether profit motivates the activity is not determinative, but where revenue is significant, the activity is more likely to be proprietary. Id.; Koontz. v. City of Winston-Salem, 280 N.C. 513, 186 S.E.2d 897, reh'g denied, 281 N.C. 516 (1972). Additionally, certain phases of an activity may be determined to be governmental while others are proprietary, in which case liability must be determined by the aspect of the activity caused plaintiff's injury. Bowling v. City of Oxford, 267 N.C. 552, 148 S.E.2d 624 (1966).

It should also be noted that, while in most cases the same conclusions are reached in drawing the distinction between governmental and proprietary functions for counties, in a few situations the classifications may vary depending on whether the defendant is a city or county. For example, the North Carolina Supreme Court concluded that erecting and maintaining a jail by the county was a governmental function despite the fact that cities have been held liable for negligence while engaged in the same activity. State ex rel. Hayes v. Billings, 240 N.C. 78, 81 S.E.2d 150 (1954); see also McNeill v. Durham County ABC Bd., 87 N.C. App. 50, 359 S.E.2d 500 (1987), modified, 322 N.C. 425, 368 S.E.2d 619 (1988), cert. denied, 322 N.C. 838, 371 S.E.2d 278 (1988) (operating ABC store by county considered governmental despite fact that city run ABC store deemed proprietary); Daye & Morris, § 19.42.38.

iii. Waiver Through Purchase of Insurance

Cities and counties waive their sovereign immunity in tort through the purchase of liability insurance. G.S. §§ 160A-485 & 153A-435. The city's liability is limited to the extent of the coverage. Id. The city is free to determine whether and how much coverage to purchase, and other than the purchase itself, no further action is required to make the waiver effective. Id.; Daye & Morris, § 19.42.33.1; see Blackwelder v. City of Winston-Salem, 332 N.C. 319, 420 S.E.2d 432 (1992)

(organization of a corporation to handle claims less than $1,000,000 without insurance purchase did not operate as waiver of immunity); Taylor v. Ashburn, 112 N.C. App. 604, 436 S.E.2d 276 (1993), disc. rev. denied, 336 N.C. 77, 445 S.E.2d 46 (1994) (creation of risk acceptance management corporation does not waive city's immunity).

The only claims for which the city would be immune without the purchase of insurance are those arising out of governmental activities, because the city was always liable for injuries resulting out of proprietary activities. Therefore, a plaintiff may still obtain a judgment beyond the city's policy limits if the activity through which he was injured was proprietary. G.S. § 160A-485; Daye & Morris, § 19.42.33.1.

iv. Bases of Liability

A municipality may be held liable for its negligence, intentional torts or for any other wrongful conduct of its employees committed within the scope of their employment. Bowling v. City of Oxford, 267 N.C. 552, 148 S.E.2d 624 (1966) (contributory negligence will bar claim); Edwards v. Akion, 304 N.C. 585, 284 S.E.2d 518 (1981) (action for battery). Recovery from a municipality is also permitted for wrongful death. Rhodes v. City of Asheville, 230 N.C. 134, 52 S.E.2d 371, reh'g denied, 230 N.C. 759, 53 S.E.2d 313 (1949). The same principles of *respondeat superior* apply to municipalities as to private corporations, including the rules regarding independent contractors. Horne v. City of Charlotte, 41 N.C. App. 491, 255 S.E.2d 290 (1979). A municipality is not liable for punitive damages unless expressly authorized by statute. Long v. City of Charlotte, 306 N.C. 187, 293 S.E.2d 101 (1982).

v. City's Failure to Maintain Public Streets

G.S. 160A-296 imposes upon municipalities the duty to keep public streets, sidewalks, alleys and bridges in proper repair, open for travel and free from unnecessary obstruction. Therefore, although these activities have "governmental" aspects, cities are not immune from liability for negligence in this area. Daye & Morris, § 19.42.37. A municipality's duty is to use due care and to prevent foreseeable occurrences that may cause injury. Mosseller v. City of Asheville, 267 N.C. 104, 147 S.E.2d 558 (1966). Although there is a duty to provide reasonable and continuing supervision over the streets, the city is not an insurer of absolute safety. Id.; McClellan v. City of Concord, 16 N.C. App. 136, 191 S.E.2d 430 (1972).

To recover a plaintiff must demonstrate that (1) she sustained injuries, (2) the proximate cause was a defect in the condition of the street, (3) the defect was of such a nature and extent that a reasonable person, knowing of its existence, should have foreseen that if it continued, some person using the street in a proper manner would most likely be injured, and (4) the city had actual or constructive notice of the existence of the condition for a sufficient time prior to plaintiff's injury to cure the defect. Cook v. County of Burke, 272 N.C. 94, 157 S.E.2d 611 (1967); Daye & Morris, § 19.42.37; Nicholson v. County of Onslow, 116 N.C. App. 439, 448 S.E.2d 140 (1994) (plaintiff who fell on twig on sidewalk could not prove that city had notice of defect).

A pedestrian's failure to keep a proper lookout constitutes contributory negligence which bars the action. McClellan v. City of Concord, 16 N.C. App. 136, 191 S.E.2d 430 (1972). A municipality is not responsible for maintaining streets which are under the authority and control of the State Board of Transportation. G.S. § 160A-297; Colombo v. Dorrity, 115 N.C. App. 81, 443 S.E.2d 752, disc. rev. denied, 337 N.C. 689, 449 S.E.2d 517 (1994).

Although no recent cases have applied this concept, the practitioner should be aware of the "original plan doctrine." This is a judicially created exception to holding municipalities liable for street defects, and provides that municipal corporations are not liable for injuries resulting from their adoption of an improper plan when the defects in the plan are due to mere error of judgment. Martin v. City of Greensboro, 193 N.C. 573, 137 S.E. 666 (1927) (not liable for choosing general plan for street improvement or sidewalk construction). The continuing vitality of the doctrine is dubious. No cases have been decided on this basis in many years, and the doctrine is easily avoided by alleging that the injuries were the result of negligence in carrying out the plan rather than from the plan itself. Id.; Blackwelder v. City of Concord, 205 N.C. 792, 172 S.E. 392 (1934); Daye & Morris, § 19.42.37.1.

c. Immunity of Government Officers and Employees

This issue addresses the attempt to balance the freedom of government officers and employees to perform their duties without fear of personal liability, with the right of injured parties to seek compensation. Pangburn v. Saad, 73 N.C. App. 336, 326 S.E.2d 365 (1985); Daye & Morris, § 19.42.4. In these cases, the plaintiff is suing the defendants in their individual capacity, whereas an action against a city employee in his official capacity is treated as a suit against the city

itself. Taylor v. Ashburn, 112 N.C. App. 604, 436 S.E.2d 276 (1993), disc. rev. denied, 336 N.C. 77, 445 S.E.2d 46 (1994).

The individual is immune from liability where he is (1) a public official engaged in the performance of governmental duties involving the exercise of discretion, (2) acting within the scope of his official authority, and (3) not for a corrupt or malicious purpose. Slade v. Vernon, 110 N.C. App. 422, 429 S.E.2d 744 (1993). Even where the duty is ministerial, as opposed to discretionary, public officials are immune if the duty is "public in nature, imposed entirely for the public benefit," unless the applicable statute provides for liability. Robinson v. Nash County, 43 N.C. App. 33, 38, 257 S.E.2d 679 (1979).

Government employees, as opposed to officials, are usually liable for negligence committed in the performance of their duties, as the policy that justifies immunity for officials typically is not applicable in the cases arising out of negligence by government employees. Givens v. Sellars, 273 N.C. 44, 159 S.E.2d 530 (1968); Coleman v. Cooper, 102 N.C. App. 650, 403 S.E.2d 577, disc. rev. denied, 329 N.C. 786, 408 S.E.2d 517 (1991).

There is a rebuttable presumption that public officials will discharge their duties in good faith and exercise their powers in accord with the spirit and purpose of the law. Jones v. Nash County Gen. Hosp., 1 N.C. App. 33, 159 S.E.2d 252 (1968). The plaintiff must plead and prove malice, but the officer must demonstrate that he was acting within the scope of his authority. Lewis v. White, 287 N.C. 625, 216 S.E.2d 134 (1975).

In determining whether an individual is a public officer or merely an employee or agent, courts look to a number of factors including, whether the office is created by legislation; whether the person is required to take an oath of office; whether the functions of the office are delegated powers of the sovereign; whether the duties of the office are prescribed by law; whether the duties imposed are fixed and in the public interest, and whether the office is invested with a measure of discretion. Pigott v. City of Wilmington, 50 N.C. App. 401, 403-4, 273 S.E.2d 752, 754, disc. rev. denied, 303 N.C. 181, 280 S.E.2d 453 (1981); Daye & Morris, § 19.42.42. Lack of those factors, the fact that the position is created solely by the contract of employment; that the duties of the office are not fixed, permanent, or governmental in nature; that the duties are ministerial rather than discretionary; and that the person acts at the discretion of others all tend to indicate that the individual is an employee. Id.

"Discretion" denotes the power of free decision, undirected choice or the authority to choose between alternative courses of action. Burton v. City of Reidsville, 243 N.C. 405, 90 S.E.2d 700 (1956). Our Supreme Court has adopted the Black's Law Dictionary definition of ministerial duties:

> A ministerial act is 'one which a person performs in a prescribed manner in obedience to the mandate of legal authority, without regard to the exercise of his own judgment upon the propriety of the act being done.' . . . Indeed 'a ministerial duty . . . is one in respect to which nothing is left to discretion; it is a simple, definite duty arising under circumstances admitted or proved to exist and imposed by law.'

Langley v. Taylor, 245 N.C. 59, 62, 95 S.E.2d 115, 117 (1956).

As stated previously, one of the requirements for granting individual immunity for government officials is that his act was not for a malicious or corrupt purpose. An official acts with malice when he wantonly does that which a man of reasonable intelligence would know was contrary to his duty, and by which he intends to prejudice or injure another. Grad v. Kaasa, 312 N.C. 310, 321 S.E.2d 888 (1984); Daye & Morris, § 19.42.44. Corruption however, is more nearly analogous to malignancy, hatred, ill-will, or spite, and flows from improper motives. Betts v. Jones, 208 N.C. 410, 181 S.E. 334 (1935). Mere negligence, or honest but erroneous errors of judgment do not constitute malice. Mazzucco v. North Carolina State Bd. of Med. Examiners, 31 N.C. App. 47, 228 S.E.2d 529 (1976). Therefore, even where the immunity of an official protects him in his official capacity, he may nevertheless be sued individually if the claim asserts that the official's actions were corrupt, malicious, or outside the scope of his duties. Epps v. Duke Univ., Inc., 116 N.C. App. 305, 447 S.E.2d 444 (1994) (doctor who was involved in autopsy went beyond scope of official duties as county medical examiner).

Similarly, public officials and employees are rarely immune from liability for intentional torts. Pangburn v. Saad, 73 N.C. App. 336, 326 S.E.2d 365 (1985); Bailey v. McGill, 247 N.C. 286, 100 S.E.2d 860 (1956) (exception to this rule is "absolute privilege" for communications made by judges, prosecutors and witnesses during judicial proceedings, including defamatory statements). For example, where members of the Parole Commission deliberately disregarded a statutory mandate to parole an inmate, they may face personal liability for false imprisonment. Harwood v. Johnson, 326 N.C. 231, 388 S.E.2d 439, reh'g denied, 326 N.C. 488, 392 S.E.2d 90 (1990). Note also that some public servants, such as

police officers, are protected by the law of privilege, rather than immunity, to commit acts that would otherwise constitute intentional torts, where the officer uses reasonable force. Daye & Morris, § 19.42.46.

Judges and judicial officers have absolute immunity for their official acts even where it is alleged that they acted corruptly and maliciously. Gillikin v. United States Fid. & Guar. Co., 254 N.C. 247, 118 S.E.2d 606 (1961). District attorneys acting in their official capacity are also absolutely immune, State ex rel. Jacobs v. Sherard, 36 N.C. App. 60, 243 S.E.2d 184, disc. rev. denied, 295 N.C. 466, 246 S.E.2d 9 (1978), as are administrative officials in the performance of judicial and quasi-judicial duties. Mazzucco v. North Carolina State Bd. of Med. Examiners, 31 N.C. App. 47, 228 S.E.2d 529 (1976). Legislators and legislative officials are similarly absolutely privileged for acts and communications made in the performance of their official duties, and in North Carolina, legislators are statutorily immune from impeachment or question in any court or place outside the General Assembly for words spoken in the General Assembly. R.H. Bouligny, Inc. v. United Steelworkers of Am. AFL-CIO, 270 N.C. 160, 154 S.E.2d 344 (1967); Daye & Morris, § 19.42.46; G.S. § 120-9.

Although police and other law enforcement officers are public officials, they are nevertheless often held personally liable for their torts. Shuping v. Barber, 89 N.C. App. 242, 365 S.E.2d 712 (1988). For example, law enforcement officers are liable for their intentional torts. Gallimore v. Sink, 27 N.C. App. 65, 218 S.E.2d 181 (1975). Also, police officers do not enjoy special immunity in the negligent operation of motor vehicles, although their official duties and circumstances at the time of the accident are taken into account when determining the standard of care. Bullins v. Schmidt, 322 N.C. 580, 369 S.E.2d 601 (1988).

Several cases have held a sheriff liable for negligence in performing the duties of his office. See e.g., Helmly v. Bebber, 77 N.C. App. 275, 335 S.E.2d 182 (1985) (reasonable precautions must be taken to prevent a prisoner's suicide when foreseeable). As all public officials, law enforcement officers are not immune if they act beyond the scope of their official authority or corruptly or maliciously. Mullins v. Friend, 116 N.C. App. 676, 449 S.E.2d 227 (1994) (officer protected by qualified immunity where he at all times acted under good faith belief that plaintiff had concealed merchandise under her clothes).

3. Charitable Immunity

N.C.G.S. § 1-539.9 provides that, "the common-law defense of charitable

immunity is abolished and shall not constitute a valid defense to any cause of action arising subsequent to September 1, 1967." However, there are still some limited exceptions to this rule.

a. Qualified Immunity for Volunteers

Volunteers for charitable organizations are protected form personal liability in tort pursuant to a statutory grant of qualified immunity. G.S. § 1-539.10. A volunteer is defined as an individual who did not receive compensation or anything of value in lieu thereof, other than reimbursement for actual expenses. G.S. § 1-539.11(2). Limitations on this immunity require that the act be made in good faith and be reasonable under the circumstances, the conduct not amount to gross negligence or wrongdoing, the injury not arise from the operation of a motor vehicle, and the services rendered may not be professional. G.S. § 1-539.10(a) & (c); Daye & Morris, § 19.43.2.

The statute defines a charitable organization as one that is tax-exempt and operates without expectation of profit and primarily for humane and philanthropic objectives. G.S. § 1-539.11(1). To the extent that a charitable organization or volunteer has purchased liability insurance, they are deemed to have waived qualified immunity to the extent of indemnification by insurance for the negligence of any volunteer. G.S. § 1-539.10(b).

b. Good Samaritan Statutes

N.C.G.S. § 20-166(d) grants a qualified immunity to any person rendering first aid or emergency assistance to any injured persons at the scene of a motor vehicle accident, by ordering that they are not be liable in civil damages for their acts and omissions unless they amount to wanton conduct or intentional wrongdoing. Daye & Morris, § 19.44.

A similar statute protects any person who renders first aid or emergency health care treatment to a person who is unconscious, ill or injured, under certain circumstances, unless the injuries were caused by gross negligence, wanton conduct or intentional wrongdoing. G.S. § 90-21.14(a).; Id. The statute applies to certain uncompensated volunteer medical professionals and members of a rescue squad. Id. Although the statute does not apply to health care personnel acting in the ordinary course of a business or profession, if they happen upon an accident and render emergency assistance, the statute will apply. Id.; 46 N.C. Op. Att'y Gen.

42 (1976).

c. Mental Health Care Professionals

N.C.G.S. § 122C-210.1 grants a qualified immunity to employees of mental health and substance abuse facilities:

> No facility or any of its officials, staff, or employees, or any physician or other individual who is responsible for the examination, management, supervision, treatment or release of a client and who follows accepted professional judgment, practice, and standards is civilly liable, personally or otherwise, for actions arising from these responsibilities or for actions of the client.

The immunity is not available as protection for malicious or reckless conduct. Pangburn v. Saad, 73 N.C. App. 336, 326 S.E.2d 365 (1985); Daye & Morris, § 19.46.

d. Miscellaneous Health Care Immunities

There is qualified immunity for medical examiners or regional pathologists who remove corneal tissue. G.S. § 130A-391. Medical contractors who treat inmates receive immunity under certain circumstances. G.S. § 143-300.7. Members of medical review committees are entitled to qualified immunity. G.S. § 131E-95, § 131E-107, §90-14(e), § 90-171.47, & § 90-48.8. The state will indemnify health department sanitarians for liability from acts or omissions that occur while enforcing the rules of the Commission for Health Services. G.S. § 143-300.8. Physicians may be immune from reporting medical conditions as required by law. G.S. §130A-142(communicable diseases) & § 130A-211(cancer).

D. Settlements, Releases, and Satisfaction

Under the Uniform Contribution Among Joint Tort-Feasors Act, only the actual party given a release, covenant not to sue, or covenant not to enforce a judgment is discharged, and that party is discharged only from claims within the specific language of the release. G.S. § 1B; Greer v. Parsons, 103 N.C. App. 463, 405 S.E.2d 921 (1991), aff'd, 331 N.C. 368, 416 S.E.2d 174 (1992) (release effective only as to parents' personal claims and did not bar subsequent wrongful death action brought on behalf of unborn child killed in accident). Unless the terms of the agreement provide otherwise, the liability of any other tort-feasor is

not affected, although the amount of the claim is reduced. G.S. § 1B-4; Yates v. New South Pizza Ltd., 330 N.C. 790, 412 S.E.2d 666, reh'g denied, 331 N.C. 292, 417 S.E.2d 73 (1992) (plaintiff allowed to proceed against employer after settling with employee and giving covenant not to sue).

A tort-feasor who receives a release or covenant is also released from liability for contribution to the other tort-feasors, so long as the settlement is made in good faith. Daye & Morris, § 22.90; G.S. § 1B-4. However, a defendant who settles with a plaintiff does not surrender his right to pursue a claim for damages allegedly inflicted upon him by codefendants. Menard By and Through Menard v. Johnson, 105 N.C. App. 70, 411 S.E.2d 825 (1992).

One caveat to note is that when liability is derivative, and the party from whom liability is derived is given a general release, a party whose liability is only derivative will also be released. Spivey v. Lowery, 116 N.C. App. 124, 446 S.E.2d 835, disc. rev. denied, 338 N.C. 312, 452 S.E.2d 312 (1994). In that case where plaintiff, a passenger injured in an automobile accident, settled with the tort-feasor/driver of the other vehicle for the limit of his insurance coverage and signed a general release, the release also released the carrier of underinsured motorist coverage on the car in which plaintiff was a passenger. Id. The Court reasoned that the underinsured carrier's liability was derivative from the liability of the released tort-feasor. Id.

A satisfaction occurs when a claimant accepts full compensation for his injury, and he is entitled to only one satisfaction. Daye & Morris, § 22.90; G.S. § 1B-3(e); Ipock v. Gilmore, 73 N.C. App. 182, 326 S.E.2d 271, disc. rev. denied, 314 N.C. 116, 332 S.E.2d 481 (1985), appeal after remand, 85 N.C. App. 70, 354 S.E.2d 315, cert. denied, 320 N.C. 169, 358 S.E.2d 51 (1987). Full payment of one judgment extinguishes any other judgment arising out of the same injury. Bowen v. Iowa Nat'l Mut. Ins. Co., 270 N.C. 486, 155 S.E.2d 238 (1967); see also, Severance v. Ford Motor Co., 105 N.C. App. 98, 411 S.E.2d 618 (1992), rev. denied, 331 N.C. 286, 417 S.E.2d 255 (1992) (relief from a judgment does not cancel a satisfaction of judgment).

Things to note with respect to satisfaction include the fact that the rule appears to apply even if the judgment satisfied is for a lesser amount that the one unsatisfied. Simpson v. Plyler, 258 N.C. 390, 128 S.E.2d 843 (1963). Our Supreme Court has also held that the satisfaction of a consent judgment against the original tort-feasor in an action for wrongful death discharged the physician who negligently treated the deceased after the accident. Bell v. Hankins, 249 N.C.

199, 105 S.E.2d 642 (1958). That holding was not based on the fact that the original tort-feasor and physician were joint tort-feasors, but rather because the original tort-feasor was liable for all the injuries proximately caused by his negligence, including the aggravation of injuries caused by the physician. Therefore, plaintiff's cause of action was single and indivisible, and a satisfaction of one claim barred further recovery. Id. Note also that partial satisfaction of a claim must be credited to the other tort-feasors. G.S. § 1B-4; Ryder v. Benfield, 43 N.C. App. 278, 258 S.E.2d 849 (1979).

E. Nonliability and Defenses to Intentional Torts

1. Consent

The doctrine of consent negates an essential element needed to maintain an action for intentional tort. Daye & Morris, § 15.20 (scant authority exists in North Carolina case law for many of the issues involving consent in civil actions). Consent is not a defense to a negligence action. MacClements v. LaFone, 104 N.C. App. 179, 408 S.E.2d 878 (1991), disc. rev. denied, 330 N.C. 613, 412 S.E.2d 87 (1992) (malpractice action against psychologist who engaged in sexual relations with patient was based in negligence and consent no defense). By consenting, the party destroys the alleged wrongfulness of the conduct as between the consenting parties. Daye & Morris, § 15.20. Consent may be actual, or inferred from manifestation of consent or from custom and usage. Id. If the actor reasonably understood under the circumstances that consent to the conduct was being displayed, the consent bars any subsequent action based on that conduct. Id.

Consent is not a defense if the party giving it was under some disability such as infancy, intoxication, or mental incompetence, and thereby incapable of consenting. Daye & Morris, § 15.21. Consent is also invalid where the person consenting is unable to understand the nature, extent and probable consequences of the conduct to which he consented. Id. Similarly, consent that is the result of a substantial mistake concerning the nature of the invasion or the extent of harm to be expected is not effective if the actor knows of or induces the mistake. Id. Finally, consent is not effective where it is given under duress or coercion. Id.

The law in North Carolina provides that consent to a matter that is unlawful is invalid. Daye & Morris, § 15.22; Lail v. Woods, 36 N.C. App. 590, 244 S.E.2d 500, disc. rev. denied, 295 N.C. 550, 248 S.E.2d 727 (1978). Thus, despite the consent of a party to the conduct which caused her injury, the commission of an

illegal act will still provide a basis for the appropriate tort action. Id.

N.C.G.S. § 90-21.13 governs the standard for determining whether consent to medical treatment was informed in a non-emergency situation. Daye & Morris, § 15.23. Where there is a medical emergency an actor may be privileged to cause a contact or other interference with the person's interests without incurring liability for what would otherwise be tortious. Id. The conduct must be necessary or reasonably appear to be necessary to prevent harm such that the actor has no reason to believe that the person would not consent if he had the opportunity. Id. A patient may validly consent before the need for treatment is known. Ipock v. Gilmore, 73 N.C. App. 182, 326 S.E.2d 271, disc. rev. denied, 314 N.C. 116, 332 S.E.2d 481 (1985) (patient signed form allowing procedures determined by physician to be necessary during course of surgery).

2. Privileges and Defenses

a. Self-Defense and Defense of Others

Self defense and the defense of others apply to civil as well as criminal actions. The facts supporting these defenses are the same for both kinds of actions; therefore, the case law interchangeably relies on criminal and civil cases when discussing these principles. Young v. Warren, 95 N.C. App. 585, 383 S.E.2d 381 (1989); Daye & Morris, § 15.31. To meet this defense, the defendant must demonstrate that (1) he believed that he (or another) was about to be harmed and that using some amount of force was necessary to prevent the harm, and (2) a reasonable belief that the amount of force employed was necessary to accomplish that end. State v. Ellerbe, 223 N.C. 770, 28 S.E.2d 519 (1944)(self defense); State v. Robinson, 213 N.C. 273, 195 S.E. 824 (1938) (defense of others).

The self-defense privilege arises not only from actual danger but also from apparent danger where the actor's perception of the danger is reasonable in light of the surrounding circumstances. Harris v. Hodges, 57 N.C. App. 360, 291 S.E.2d 346, disc. rev. denied, 306 N.C. 384, 294 S.E.2d 205 (1982). The defendant must also show that the danger and necessity of the defensive conduct were immediate. Young v. Warren, 95 N.C. App. 585, 383 S.E.2d 381 (1989). Past attacks or threats of future harm are not sufficient. Id. Additionally, once the threat of harm is no longer immediate, the privilege ends. Lail v. Woods, 36 N.C. App. 590, 244 S.E.2d 500, disc. rev. denied, 295 N.C. 550, 248 S.E.2d 727 (1978). A person may also not instigate an altercation and then assert self-defense to bar a claim brought by the person he attacked, unless he has first clearly withdrawn and was then

subsequently attacked. Juarez-Martinez v. Deans, 108 N.C. App. 486, 424 S.E.2d 154, disc. rev. denied, 333 N.C. 539, 429 S.E.2d 558 (1993).

Self defense is an affirmative defense, and the burden of pleading and proof is therefore on the defendant. Young, supra. In defending others, the party defended must not have been the aggressor or someone who did not have the right of self-defense. Roberson v. Stokes, 181 N.C. 59, 106 S.E.2d 151 (1921); Daye & Morris, § 15.31.2. Provocation by the plaintiff does not justify the use of force although it is a mitigating factor in damage assessment. Hall v. Coplon, 85 N.C. App. 505, 355 S.E.2d 195 (1987); Daye & Morris, § 15.31.3.

An assault victim has a duty to retreat before resorting to deadly force in self-defense. State v. Stevenson, 81 N.C. App. 409, 344 S.E.2d 334 (1986). Exceptions to this rule arise when (1) there is no reasonable avenue of retreat or (2) where defendant is in her home or business at the time of the attack (known as the "castle doctrine"). State v. Glenn, 198 N.C. 79, 150 S.E. 663 (1929); Stevensen, supra. The second exception applies even where the attacker is another resident of the household. State v. Hearn, 89 N.C. App. 103, 365 S.E.2d 206 (1988). Courts have applied the castle doctrine even where the defendant was a guest. Stevenson, supra (defendant staying at friend's apartment "for a week or so" could invoke the exception); but see State v. Harrison, 56 N.C. App. 368, 289 S.E.2d 50, disc. rev. denied, 306 N.C. 388, 294 S.E.2d 214 (1982) (defendant visiting friend not excused from duty to retreat).

Even where the duty to retreat is inapplicable, a defendant may still not use excessive force and cannot have been the first aggressor. State v. McCombs, 297 N.C. 151, 253 S.E.2d 906 (1979); State v. Lilley, 318 N.C. 390, 348 S.E.2d 788 (1986).

b. Defense of Property

In general, an owner or his agent may use reasonably necessary force in seeking to protect or recapture his property. Bailey v. Ferguson, 209 N.C. 264, 183 S.E. 275 (1936); Daye & Morris, § 15.32. That force may not inflict death, endanger human life or cause great bodily harm, or liability will arise. State v. Scott, 142 N.C. 582, 55 S.E. 69 (1906). However, an exception arises where a trespasser is attempting forcible entry into one's home and a reasonable person would conclude that the trespasser intended to commit a felony or cause great bodily harm to those in the house. Edwards v. Johnson, 269 N.C. 30, 152 S.E.2d 122 (1967).

3. Necessity

a. Private Necessity

Where a defendant is threatened by force and commits what would otherwise be an intentional tort in order to protect himself or his property, he may assert that he acted out of private necessity. Daye & Morris, § 15.33 & § 15.33.1. The defendant must have a reasonable belief in the existence of the necessity. Id. However, because the defendant is nevertheless liable for any damages caused, the privilege is a qualified one and merely negates the technical aspects of the resulting tort. Id.

b. Public Necessity

Where a defendant acts for the purpose of preventing a generalized public harm and in doing so harms or destroys plaintiff's property, the doctrine of public necessity provides that defendant is not liable to plaintiff. Daye & Morris, § 15.33.2. To fall within this absolute defense, the defendant must have a reasonable belief that his action is necessary to prevent imminent public harm, and he must exercise the privilege in a reasonable manner under the circumstances. Id.

4. Statutory Privileges

a. School Personnel

Pursuant to G.S. § 115C-390, public school personnel "may use reasonable force in the exercise of lawful authority to restrain or correct pupils and maintain order." Local school boards can regulate the manner in which corporal punishment is administered, although they cannot limit the use of force granted by the statute. G.S. § 115C-390; Kurtz v. Winston-Salem/Forsyth County Bd. of Educ., 39 N.C. App. 412, 250 S.E.2d 718 (1979). The educator must exercise any force without malice, to further an educational goal and must not inflict foreseeable serious, permanent, or long-lasting injury. Gaspersohn v. Harnett County. Bd. of Educ., 75 N.C. App. 23, 330 S.E.2d 489 (1985).

b. Peace Officers

N.C.G.S. § 15A-401(d)-(f) permit police and other peace officers to use reasonable force in discharging their duties. The amount of force to be used is in

the officer's discretion, judged in light of the reasonable belief of the officer making the arrest, and subject to statutory limits. G.S. § 15A-401(d)-(f); Daye & Morris, § 15.34.2. However, an officer may not use deadly physical force except to (1) defend himself or another from the use or imminent use of deadly physical force, (2) arrest or prevent escape from custody a person attempting to escape by means of a deadly weapon or who indicates that he presents an imminent threat of death or serious physical injury to others unless apprehended without delay, or (3) to prevent the escape of a person from custody imposed as the result of a felony conviction. G.S. § 15A-401(d)(2); Daye & Morris, § 15.34.2.

F. Election of Remedies

Under North Carolina law:

> Where by law or by contract, there is a choice of two remedies which proceed upon opposite and irreconcilable claims of right, the one taken must exclude and bar the prosecution of the other. A party cannot, either in the course of litigation, or in dealing *in pais*, occupy inconsistent positions.

Douglas v. Parks, 68 N.C. App. 496, 497-98, 315 S.E.2d 84, disc. rev. denied, 311 N.C. 754, 321 S.E.2d 131 (1984). The purpose of the doctrine of election of remedies is to prevent double recovery for a single wrong. Swain v. Leahy, 111 N.C. App. 884, 433 S.E.2d 460, disc. rev. denied, 335 N.C. 242, 439 S.E.2d 162 (1993) (doctrine of election of remedies not applicable to automobile passenger's legal malpractice action for failure to file timely suit against driver of other vehicle, even though passenger
settled claim against driver and owner of automobile in which she was passenger; passenger has cumulative, not inconsistent remedies against drivers and owner). One is held to have made an "election of remedies" when he chooses, with knowledge of the facts, between two inconsistent remedial rights. Lamb v. Lamb, 92 N.C. App. 680, 375 S.E.2d 685 (1989). An election of remedies is not ordinarily deemed to have occurred until there is an entry of some final judgment. Id.

Inconsistent claims occur when settlement of or judgment on a second action would be a continuation of the relief sought in the first action. Swain, supra. Remedies are also inconsistent where one remedy must necessarily repudiate or be repugnant to another. United Lab., Inc. v. Kuykendall, 335 N.C. 183, 437 S.E.2d 374 (1993) (recovering attorney fees and punitive damages not inconsistent). The

Court of Appeals has held that it is error to require the plaintiff to elect between tort and contract remedies prior to submitting the case to the jury. Ace Chem. Corp. v. DSI, Transps., Inc., 115 N.C. App. 237, 446 S.E.2d 100 (1994).

Plaintiffs who elect to rescind a contract cannot later sue for damages arising form its breach, unless they allege fraud and plead special damages. Canady v. Mann, 107 N.C. App. 252, 419 S.E.2d 597 (1992), rev. dismissed as improv. allowed, 333 N.C. 569, 429 S.E.2d 348 (1993). Settlement of a prior declaratory judgment action brought by an executor to construe a will was held not to be an election of remedies, such that the executor could later sue the attorney for legal malpractice based on negligence in drafting the will. McCabe v. Dawkins, 97 N.C. App. 447, 388 S.E.2d 571, disc. rev. denied, 326 N.C. 597, 393 S.E.2d 880 (1990). However, a wife claiming that the negligence of her attorney caused her to lose her claim for permanent alimony from her husband in a settlement agreement, lost her right to make a negligence claim against the attorney by retaining a second attorney, pursuing her claim for alimony against her husband, and obtaining recission of the original agreement and substitution of a second alimony agreement. Stewart v. Herring, 80 N.C. App. 529, 342 S.E.2d 566 (1986).

Election of remedies is an affirmative defense which must be pleaded by the party relying on it. North Carolina Fed. Sav. and Loan Ass'n. v. Ray, 95 N.C. App. 317, 382 S.E.2d 851 (1989); G.S. § 1A-1, Rule 8.

IV. LIMITATIONS ON CONTRIBUTORY NEGLIGENCE AND OTHER SAVINGS PROVISIONS

A. Limitations on Doctrine of Contributory Negligence

To act as a bar to a plaintiff's recovery, his contributory negligence must have been a proximate cause of his injury, such that the plaintiff's conduct was a factual cause of his injuries, and the risk of harm to the plaintiff was foreseeable. Daye & Morris, § 19.21.31.

Contributory negligence is similarly not a defense to plaintiff's "gross negligence," whether it is equated with, or defined as something less than "wanton or willful." Morgan v. Cavalier Acquisition Corp., 111 N.C. App. 520, 535-38, 432 S.E.2d 915, 924-25, disc. rev. denied, 335 N.C. 238, 439 S.E.2d 149 (1993); Daye & Morris, §19.21.32.

Contributory negligence is rarely decided as a matter of law. Taylor v. Walker, 320 N.C. 729, 734, 360 S.E.2d 796, 799 (1987)(because application of prudent person test is generally for jury; therefore, actions asserting contributory negligence are ordinarily not susceptible of summary adjudication); but see Coleman v. Hines, 133 N.C. App. 147, 515 S.E.2d 57, disc. rev. denied, 350 N.C. 826 (1999) (denial of summary judgment reversed where evidence clear that decedent knew or should have known of driver's intoxication and drank with defendant driver throughout course of evening); Goodman v. Conner, 117 N.C. App. 113, 450 S.E.2d 5, disc. rev. denied, 338 N.C. 668, 453 S.E.2d 177 (1994) (summary judgment for defendant proper when evidence showed that defendant was intoxicated and plaintiff knew or should have known of the intoxication and such evidence not refuted by plaintiff); Meachum v. Faw, 112 N.C. App. 489, 436 S.E.2d 141 (1993) (defendant allowed 16 year old girl to use his car knowing she had no driver's license and that she was intoxicated and had history of impulsive and erratic driving behavior; however, wrongful death claim brought by executors barred by decedent's contributory negligence, as matter of law).

When a flashing red light has been erected or installed at an intersection, approaching vehicles must stop and yield the right-of-way to vehicles in or approaching the intersection. G.S. § 20-158(b)(3). The vehicle facing the flashing light may then proceed in accordance with the rules governing stop signs. Id. When a driver encounters a flashing yellow light at an intersection, he may proceed through the intersection with caution, yielding the right-of-way to vehicles in or approaching the intersection. G.S. § 20-158(b)(4).

A traffic signal emitting a steady yellow light warns drivers that the related green light is about to end or that a red light is immediately forthcoming. G.S. § 20-158(b)(2).

When a driver faces a steady green light, he may proceed with due care through the intersection subject to the rights of pedestrians and other vehicles. Id. Due care requires a motorist to maintain a proper lookout, to keep his vehicle under reasonable control and to operate it at a speed and in a manner so as not to endanger or be likely to endanger others upon the highway. Stathopoulos v. Shook, 251 N.C. 33, 110 S.E.2d 452 (1959). Thus, a driver facing a green light may only enter the intersection if a reasonably careful and prudent driver would enter the intersection. N.C.P.I. Civil--203.30, Motor Vehicle Volume. In the absence of anything to put him on notice to the contrary, however, a driver may assume that drivers facing the adjacent red light will stop. Id; see Cicogna v. Holder, 345 N.C. 488, 480 S.E.2d 636 (1997); see also Curry v. Baker, 130 N.C. App. 182, 502

S.E.2d 667, disc. rev. denied, 349 N.C. 355, 517 S.E.2d 890 (1998). In Cicogna, for example, the Court held that the issue of contributory negligence should not have been submitted to the jury where the plaintiff entered an intersection pursuant to a green light, and there was nothing to put the plaintiff on notice that the defendant would not obey the red traffic light governing his direction of travel. Cicogna, 345 N.C. at 490, 480 S.E.2d at 637. Likewise, in Curry, the Court held that even if the trial court had erred by failing to give the defendant's requested instruction on the plaintiff's duty to reduce his speed so as to avoid a collision, the plaintiff was not contributorily negligent because "there [was] no evidence in the record of anything which would have put plaintiff on notice that the truck was going to enter the intersection contrary to the red light governing its direction of travel." Curry, 130 N.C. App. at 194, 502 S.E.2d at 676.

Whenever a driver approaches a traffic signal which requires him to stop, he must stop at the appropriately marked stop line, or if none, before entering a marked crosswalk. G.S. § 20-158(b)(5). If there is neither a stop line or marked crosswalk, the driver must stop at the point nearest the intersecting street where he has a view of approaching traffic on the intersecting street. Id.

B. Last Clear Chance

The last clear chance doctrine only applies if the defendant is found negligent and the plaintiff contributorily negligent. N.C.P.I. Civil--105.15, Motor Vehicle Volume. Under the doctrine, a plaintiff's contributory negligence is excused or not regarded as a proximate cause of his injuries, thus allowing the plaintiff to recover. Id.

G.S. § 1A-1, Rule 7 provides that if an answer alleges contributory negligence, a party may serve a reply alleging last clear chance. Although the better practice is for last clear chance to be affirmatively pled, it is not the exclusive pleading alternative. Vernon v. Crist, 291 N.C. 646, 231 S.E.2d 591 (1977). A party may also rely on facts alleged in the complaint, if they are sufficient to invoke the doctrine. Meadows v. Lawrence, 75 N.C. App. 86, 330 S.E.2d 47 (1985), aff'd per curiam, 315 N.C. 383, 337 S.E.2d 851 (1986).

Where the issue of contributory negligence is determined against the plaintiff, the judge or jury may consider whether defendant had the last clear chance to avoid the accident. Although our courts have recognized that there is great difficulty in extracting from the cases any clear and distinct principle or formula for the doctrine, a party wishing to establish the doctrine must show: (1) plaintiff, by his own negligence, placed himself in a position of peril from which

he could not escape; (2) defendant saw, or by the exercise of reasonable care should have seen and understood, the perilous position of the plaintiff; (3) defendant had the time and the means to avoid the accident if the defendant had seen or discovered plaintiff's perilous position; (4) defendant failed or refused to use every reasonable means at his command to avoid impending injury to plaintiff; and (5) plaintiff was injured as a result of defendant's failure or refusal to avoid impending injury. Williams v. Lee Brick & Tile, 88 N.C. App. 725, 728, 364 S.E.2d 720, 721 (1988); Daye & Morris, § 19.21.35. Wray v. Hughes, 44 N.C. App. 678, 262 S.E.2d 307, disc. rev. denied, 300 N.C. 203, 269 S.E.2d 628 (1980).

The plaintiff's conduct must place him in a position of peril from which he is unable to extricate himself through ordinary care, or of which he is unaware. Williams v. Odell, 90 N.C. App. 699, 370 S.E.2d 62, disc. rev. denied, 323 N.C. 370, 373 S.E.2d 557 (1988); Daye & Morris, § 19.21.35.1 The doctrine is not applicable when the plaintiff is aware of a threat to his safety and is fully capable, through the exercise of ordinary care, of removing himself from it. Daye & Morris, § 19.21.35.1. Actual awareness of the plaintiff's peril is not required if the defendant, in the exercise of reasonable care, should have known of it. Reber v. Booth, 335 N.C. 170, 435 S.E.2d 769 (1993). The defendant's ability to have avoided the injury to plaintiff is frequently a jury question. Griffith v. McCall, 114 N.C. App. 190, 441 S.E.2d 570 (1994) (instruction on last clear chance proper where plaintiff struck from rear by automobile driven by defendant while plaintiff pushing disabled vehicle to pull-off area). The last clear chance does not mean the last possible chance but rather requires the defendant to exercise

ordinary care under the circumstances. The defendant's duty has been said to include "every reasonable means." Hales v. Thompson, 111 N.C. App. 350, 357, 432 S.E.2d 388 (1993).

In order to submit an issue of last clear chance to the jury, the evidence must tend to show that: (1) plaintiff, by his own negligence, placed himself in a position of peril (or a position of peril to which he was inadvertent); (2) the defendant saw, or by the exercise of reasonable care, should have seen and appreciated the perilous position of the plaintiff; (3) the defendant should have discovered plaintiff's perilous position in time to avoid injuring him; (4) that despite such notice, defendant failed or refused to use every reasonable means at his command to avoid the impending injury; and (5) that as a result of such failure or refusal plaintiff was injured.

Last clear chance does not mean the last possible chance to avoid a collision. Williams v. Lee Brick & Tile, Inc., 88 N.C. App. 725, 364 S.E.2d 720 (1988). Rather, a defendant must have both the time and means available to avoid the collision by the exercise of reasonable care after he discovered or should have discovered plaintiff's perilous position. Vancamp v. Burgner, 328 N.C. 495, 402 S.E.2d 375, reh'g denied, 329 N.C. 277, 407 S.E.2d 854 (1991). The time for defendant's opportunity to react begins only after the plaintiff has positioned himself in a state of peril and the defendant either recognized or should have recognized plaintiff's position in the exercise of due care. N.C.P.I. Civil--105.15, Motor Vehicle Volume.

C. Rescue Doctrine

The doctrine of rescue may also apply to preclude a finding of contributory negligence. The doctrine applies when a person attempts to rescue another person from a peril resulting from the actions of a third person, and thereby negligently places himself in peril and is injured. Britt v. Mangum, 261 N.C. 250, 134 S.E.2d 235 (1964).

D. Willful or Wanton Conduct and Gross Negligence

A plaintiff may recover from a defendant whose willful and wanton conduct or gross negligence is the proximate cause of his injuries, despite his own contributory negligence. King v. Allred, 76 N.C. App. 427, 333 S.E.2d 758, rev. denied, 315 N.C. 184, 337 S.E.2d 857 (1985). An act is done willfully if the defendant intentionally fails to carry out some duty imposed by law or contract which is necessary to protect the safety of the person or property to which it is owed. N.C.P.I. Civil--102.86. An act is wanton if the defendant acts in conscious or reckless disregard for the rights and safety of others. Id.

Even if admitted, the contributory negligence of a plaintiff is no defense to a defendant's willful and wanton impairment. Pearce v. Barham, 271 N.C. 285, 156 S.E.2d 290 (1967). Thus, upon allegations of a defendant's willful and wanton impaired driving, a plaintiff who is contributorily negligent may still make out a claim for punitive damages. See Huff v. Chrismon, 68 N.C. App. 525, 315 S.E.2d 711, disc. review denied, 311 N.C. 756, 321 S.E.2d 134 (1984) (driving while impaired is "outrageous conduct" so as to allow punitive damages); see also Howard v. Parker, 95 N.C. App. 361, 382 S.E.2d 808 (1989) (explaining Huff as being decided on defendant's Rule 12(b)(6) motion).

The plaintiff's evidence of willful and wanton conduct is sufficient where the impaired driver admits that she was aware of her substantial intoxication at the time she drove her vehicle. King v. Allred, 76 N.C. App. 427, 333 S.E.2d 758, disc. review denied, 315 N.C. 184, 337 S.E.2d 857 (1985) (plaintiff's evidence sufficient where driver testified she could tell that she was drunk and that alcohol had effect on her walking and her operation of vehicle); Berrier v. Thrift, 107 N.C. App. 356, 420 S.E.2d 206, disc. review denied, 333 N.C. 254, 424 S.E.2d 918 (1993) (plaintiff's evidence sufficient where defendant admitted drinking ten cans of beer within three hours and was aware that he posed a risk to others in driving). Also, the plaintiff's evidence may be sufficient based on the blood alcohol content of the driver and his conduct in driving. Ivey v. Rose, 94 N.C. App. 773, 381 S.E.2d 476 (1989) (plaintiff's evidence was sufficient where driver's breathalyzer reading was .18, driver failed four field sobriety tests, and driver struck plaintiff's vehicle from behind at 45 m.p.h.). The fact that the driver had consumed some alcohol, however, in the absence of evidence that the driver was aware of his impairment, is insufficient to raise an issue as to willful and wanton conduct. Howard v. Parker, 95 N.C. App. 361, 382 S.E.2d 808 (1989) (plaintiff's evidence insufficient where driver testified he consumed thirty-six ounces of beer a few hours earlier in the day and pled guilty to DWI).

Willful or wanton conduct or gross negligence on the part of the passenger will bar his claim notwithstanding the driver's willful and wanton conduct. Coleman, supra. Accordingly, in Coleman, the Court of Appeals held that even though the defendant-driver was willfully and wantonly negligent in operating a motor vehicle while under the influence of intoxicating liquor, the passenger, who was killed in the motor vehicle accident, was also willfully and wantonly negligent where the evidence tended to show that she was with the driver when he purchased and consumed alcohol; that she knew in advance that she and the driver planned to consume alcohol; and that despite knowing that that the driver intended to drive home after drinking alcohol, she did not accept her employer’s offer to driver her home, regardless of the hour. Id.; see also N.C.P.I. -- Civil 102.87 & 102.86, Motor Vehicle Volume; see also Harrington v. Collins, 40 N.C. App. 530, 253 S.E.2d 288, aff'd, 298 N.C. 535, 259 S.E.2d 295 (1979) (driver who participated in pre-arranged, illegal auto racing found guilty of willful and wanton conduct; passenger not willful and wanton as a matter of law where he did not know of race until one minute beforehand and plaintiff would have had to leave vehicle at rural crossroads on a cold Christmas eve night).

Sorrels v. M.Y.B. Hospitality Ventures of Asheville, 332 N.C. 645, 423 S.E.2d 72 (1992) (plaintiff's decedent's decision to drive while intoxicated arose to

same level of negligence as defendant, who served plaintiff alcohol knowing plaintiff was intoxicated and that he would be driving); accord, Coleman v. Hines, 133 N.C. App. 147, 515 S.E.2d 57, disc. rev. denied, 350 N.C. 826, 539 S.E.2d 281 (1999).

E. Miscellaneous

Finally, a there is an example of single case that covers all of the elements of negligence, contributory negligence, gross negligence, gross contributory negligence and last clear chance. Trantham v. Estate of Sorrell, 121 N.C. App 611; 468 S.E.2d 401(1996). In Trantham, the passenger was injured when a car driven recklessly by the decedent crashed into a tree. The trial court awarded the passenger damages from the estate for decedent's negligence and the court affirmed. The court found no error in the submission of the issue of last clear chance to the jury. The jury found that the passenger was contributorily negligent and grossly contributorily negligent for continuing to ride with the decedent after she was given the opportunity to exit the car safely. However, the court found that immediately before the accident, there was no action that the passenger could have taken to reduce or eliminate her chance of injury. Therefore, she was in helpless peril. The court also found that the decedent knew or should have known of the passenger's peril caused by his driving.

V. CONCLUSION

While this chapter includes negligence claims and defenses available to tort cases, keep in mind that changes in the law occur frequently and without notice. This chapter is meant to include all theories of liability and defenses, but not all North Carolina case law is included. Use this chapter as your starting point, and then continue to check for new Court of Appeals and Supreme Court cases.