NCBA 2014 Annual Review

Personal Injury Update

Isaac Thorp

Thorp Law

Raleigh, North Carolina

919-833-6408

thorplaw.com

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E. Coli – NC State Fair Petting Zoo Negligent? Premises Liability

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E. Coli – Premises Liability

Rolan v. NC Dep't of Agriculture, 756 S.E.2d 788 (NC Ct. App. 2014)

Class action – Negligent failure to keep premises safe

- Kids allowed to enter pen to feed
- Fecal matter on floor
- Kids on floor
- Animals licking hands

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E. Coli – Premises Liability

Plaintiffs:

- Negligently exposed children to dangerous condition
- Signs insufficient to warn of danger

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E. Coli – Premises Liability

Alternatives:

- Barricades
- Holding parents' hands
- Explicit warnings

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Barriers

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No Barriers

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E. Coli – What Was Reasonable in 2004?

Commission – No negligence

Ct. of Appeals – Affirmed

- E. Coli – "Emerging public health issue"
- Most fairs - Intermingling allowed

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What Was Reasonable in 2004?

- No Fed. laws against intermingling
- Only one state law - petting zoo/disease
- No E. Coli at NC fair petting zoo in previous 3 years

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E. Coli – NC State Fair Petting Zoo

Def. took reasonable steps to reduce risks

- Conducted “pre-risk assessment”
- Hand washing stations
- Signs

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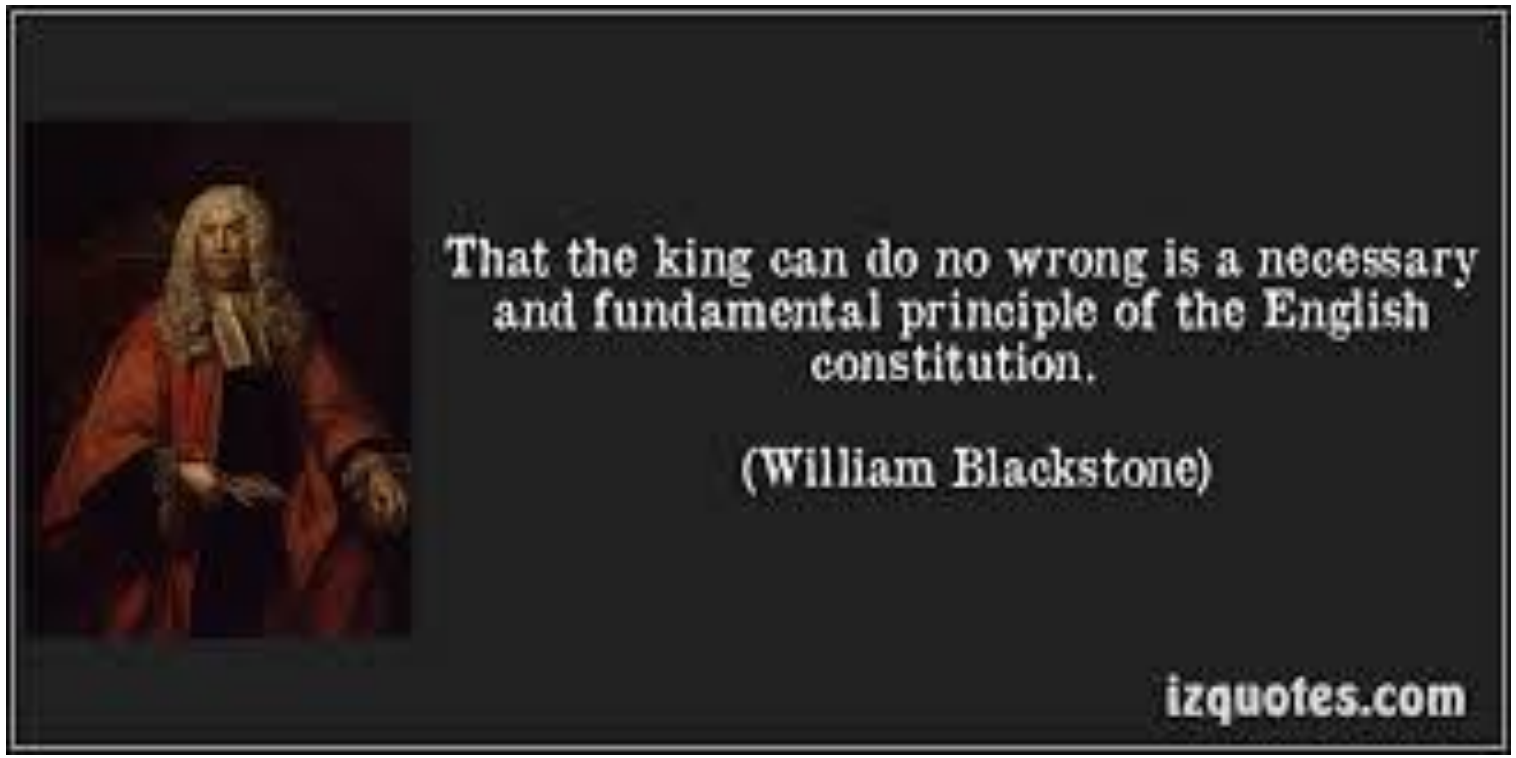
County Building
Premises Liability/Sovereign Immunity



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County Building - Sovereign Immunity

Bynum v. Wilson County, 758 S.E.2d 643 (N.C. 2014), *rehearing denied*, 761 S.E.2d 904 (2014)

Bynum paid water bill

Fell on steps of county building

Negligent failure to keep premises reasonably safe

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County Building - Sovereign Immunity

Sovereign Immunity

- Counties can’t be sued unless consent or waiver

- Doesn’t apply if gov’t activity = proprietary function

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County Building Slip - Sovereign Immunity

D’s Summary Judgment Motion

- Sovereign immunity applies
- Operation of county office building is governmental function

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County Building - Sovereign Immunity

Plaintiff: Immunity doesn’t apply

- Operation of water system proprietary (precedent)
- Paying water bill when injured

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County Building - Sovereign Immunity

Trial court denied county's SJ motion

Court of Appeals Affirmed

- Immunity doesn't apply

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County Building - Sovereign Immunity

Test for governmental v. proprietary

- Nature of P's involvement with gov't unit and reason for presence at facility

  NOT

- Underlying tasks gov't performed in negligent manner (maintenance and repair)

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County Building - Sovereign Immunity

NC Supreme Court Precedent

- Municipal corporation selling water for private consumption = proprietary function

- Liable as if privately owned water company

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County Building - Sovereign Immunity

NC Supreme Court reversed

- Court of Appeals erred by shifting focus of test "and inappropriately injecting Mr. Bynum's actions and subjective intentions into its analysis."

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County Building - Sovereign Immunity

Analysis must focus on:

- Nature of negligent governmental act or service

NOT

- Nature of P's involvement with gov't unit and reason for presence at facility

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Premises Liability/Sovereign Immunity

- Statute requires County to inspect and maintain county buildings

- Dispositive – Legislature has designated inspection and repair as governmental functions

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Premises Liability/Sovereign Immunity

Concurrence by Justices Martin, Edmunds and Beasley

- Majority opinion turns on fact that legislature obligates county to maintain and repair county property

- Could bar *all* premises liability claims against counties for harms on government property

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Premises Liability/Sovereign Immunity

- Proper focus: Whether County's operation of building is governmental or proprietary

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Premises Liability/Sovereign Immunity

Multi-use building

- County commissioners
- County manager
- Water, planning, geographic information systems, finances, inspections

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Premises Liability/Sovereign Immunity

Based on *these facts:*

- Multi-use government office building serves governmental, not proprietary, function

- Accordingly, immunity bars negligence claims

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Dog Bite Claim Against Landlord
Premises Liability

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Dog Bite Claim Against Landlord
Premises Liability

Stephens v. Covington, 754 S.E.2d 253 (N.C. Ct. App. 2014)

- 8 year old goes to neighbor's house to play with friend
- Go into backyard to feed Rottweiler
- Dog bites child several times, serious injury
- Jury verdict against dog owner - 500K

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Dog Bite Claim Against Landlord
Premises Liability

Claim Against Landlord – P must prove

- L knew or should have known dog was dangerous
- L had sufficient control to remove danger

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Dog Bite - Premises Liability

Trial Ct grants Def. landlord's SJ motion
- Failed to prove:

- L knew or should have known dog was dangerous
- L had sufficient control to remove danger dog posed
- L's previous contact with Animal Control about this dog indicated knowledge of danger

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Dog Bite Claim Against Landlord
Premises Liability

No Evidence “Rocky” was Dangerous Before Bite

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Dog Bite Claim Against Landlord
Premises Liability

No Evidence “Rocky” Breed Had Dangerous Propensities

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Dog Bite Claim Against Landlord
Premises Liability

Only evidence about general breed propensities came from AC officer

- Rottweilers not necessarily aggressive by nature

- Socialization more important

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Dog Bite Claim - Premises Liability

Distinguished *Holcomb v. Colonial Assocs. LLC*, 358 NC 501, 597 SE2d 710 (2004)

- L knew of other aggressive incidents
- P presented evidence of general breed propensities
- Lease authorized L to remove any nuisance pet

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Dog Bite Claim Against Landlord
Premises Liability

In conclusion…

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Premises Liability – Police & Slippery Steps

Fox v. PGML, LLC, 744 S.E.2d 483 (N.C. Ct. App. 2013)

Plaintiff police officer climbed up wet fire escape steps while investigating crime

Slipped when descending, causing injury

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Premises Liability – Police & Slippery Steps

Plaintiff’s expert: Unreasonably slippery staircase that did not meet minimum building code requirements

Defendants’ expert: staircase complied with all codes

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Premises Liability – Police & Slippery Steps

Fox v. PGML, LLC

Trial court granted D's SJ motion on negligence and contributory negligence

Court of Appeals reversed

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Premises Liability – Police & Slippery Steps

Violation of building code has “some probative value as to whether or not defendant failed to keep his [premises] in a reasonably safe condition.”

Expert testimony established conflicting evidence about whether defendants breached standard of care

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Premises Liability – Police & Slippery Steps

Conflicting evidence on defendants' maintenance of stairway (building code requirements) created genuine issues of material fact "directly relevant" to issues of defendant's negligence

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Premises Liability – Police & Slippery Steps

Contributory negligence – D's allegations:

- P should have known steps slippery because she already walked up before walking down

- P didn't see wet stairs or take special precautions

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Premises Liability – Police & Slippery Steps

Held: Evidence does not conclusively establish

P’s failure to recognize condition of stairs was unreasonable

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Premises Liability – Sawmill Not Liable for Logging Accident

Burnham v. S & L Sawmill, Inc. 749 S.E.2d 75, *review denied*, 752 S.E.2d 474 (N.C. 2013)

P driver transported logs to sawmill

Released strap, log fell

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Premises Liability – Sawmill Not Liable for Logging Accident

Uneven terrain may have contributed

Unloaded logs several times before

Plaintiff sues sawmill for negligence

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Premises Liability – Sawmill Not Liable for Logging Accident

P alleges D breached duty to:

- Warn of hazardous condition (uneven ground)
- Require safety equipment on truck
- Provide safe work environment - inherently dangerous work

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Premises Liability – Sawmill Not Liable for Logging Accident

Trial Court granted Ds' SJ motion

Ds' had no duty to P under these facts

P contrib as a matter of law

Court of Appeals: Affirmed

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Premises Liability – Sawmill Not Liable for Logging Accident

Court uses premises liability analysis (P did not clearly state duty owed)

- Duty to exercise ordinary care to keep reasonably safe

- No duty to warn of open and obvious conditions

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Premises Liability – Sawmill Not Liable for Logging Accident

No indication injury resulted from condition on property

- If uneven terrain played role, condition as apparent to P as to sawmill

- P chose exact unloading location

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Premises Liability – Sawmill Not Liable Contributory Negligence

Reliance on *Cook v. Leaf Export* misplaced:

- D knew elevator broken
- Told P it was fixed
- Ordered P to do task that required use of elevator

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Premises Liability – Sawmill Not Liable Contributory Negligence

"…conduct which otherwise might be …contributory negligence as a matter of law is deprived of its character as such **if done at the direction or order of defendant."**

Cook v. Leaf Export, 50 NC App. 89, 96, 272 SE2d 883, 888 (1980)

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Premises Liability – Sawmill Not Liable Contributory Negligence

In this case:

- No evidence Ds ordered dangerous conduct
- P chose unloading spot
- Knew truck was leaning toward where standing
- Other unloading alternatives available

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Runaway Chair Cases

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Negligence Claim Against Eye Doctor

Sims v. Graystone Ophthalmology, 757 S.E.2d 925 (NC Ct. App. 2014)

Eye exam of 86 year old patient – Instructions:

- Sit in armless rolling chair
- Move up to table

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Negligence Claim Against Eye Doctor

- Leaned over to place purse on another chair
- Chair began to roll
- Patient fell, severe permanent injuries

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Negligence Claim Against Eye Doctor

P alleges D negligent:

- Chair was a dangerous condition – wheels, no arms
- Placed P in rolling chair with instructions

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Negligence Claim Against Eye Doctor

Trial court grants D's SJ motion

- Not negligent
- P contrib – chair's dangerous condition open and obvious

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Negligence Claim Against Eye Doctor

Court of Appeals reverses

- CEO knew of prior incident
- No evidence Tech followed usual practice
- Didn’t see patient fall, back was turned

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Negligence Claim Against Eye Doctor

Evidence of contributory negligence insufficient

- Patient knew chair was on wheels
- Unaware of how dangerous it could be
- Never a problem in previous ten years

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Wheelchair – Auto Insurance Coverage

Integon v. Helping Hands Specialized Transport, Inc., 753 S.E.2d 388 (NC Ct. App. 2014)

Hospital discharged elderly patient

Van driver takes patient home

Driver told ramp would be needed

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Wheelchair – Auto Insurance Coverage

Pulls patient up steps in wheelchair

Starts to slide out

Driver grabs patient, keeps pulling

Gash on leg, dies two days later

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Wheelchair Fall – Auto Insurance Coverage

Helping Hands auto policy: Coverage for accidents resulting from -

“ownership, maintenance or use of a covered auto”

DJ action – Did accident result from use of covered auto?

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Wheelchair – Auto Insurance Coverage

Trial court grants P's SJ motion

Court of Appeals affirms

NCGS 20-279.21 requires coverage for accidents "arising out of the…use of" a covered vehicle

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Wheelchair – Auto Insurance Coverage

“Arising out of ” must be broadly interpreted:

“Incident to” or “having connection with” the use of a vehicle

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Wheelchair – Auto Insurance Coverage

Previous cases found coverage where:

- Child hit crossing road to store after getting out of insured vehicle parked across street

- Coverage applied because driver “purposefully using” vehicle to make trip; sufficient causal connection (Nationwide v. Davis)

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Wheelchair – Auto Insurance Coverage

- Insured and passenger returned to truck after hunting; insured removed rifle from back seat, accidentally discharged

- Court found vehicle customarily used to transport firearms to hunting club; auto policy applied

(State Capital Ins. v. Nationwide)

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Wheelchair – Auto Insurance Coverage

- Child and customer walking to car repair shop office
- Child injured by different vehicle
- Driver used vehicle to drive to repair shop so it could be repaired; coverage applied (Integon v. Ward)

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Wheelchair – Auto Insurance Coverage

- Here, vehicle intended for use to transport patient from hospital to residence
- Because she couldn’t walk, use of van included transport *into* residence as part of transport service
- Sufficient causal connection between use of vehicle and injury; coverage applies

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Underinsured Motorist (UIM) Coverage

Slippery Insurers Beware!

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Underinsured Motorist (UIM) Coverage

North Carolina Farm Bureau Mut. Ins. Co., Inc. v. Paschal, 752 S.E.2d 775 (N.C. Ct. App. 2014), *review allowed*, 755 S.E.2d 54 (2014)

Passenger, a minor, was injured when cousin drove pick-up truck into ditch

Passenger filed UIM claim against grandfather's insurer, Farm Bureau (FB)

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Underinsured Motorist (UIM) Coverage

FB policy: Coverage for household family members

Trial court grants FB's SJ motion

- Granddaughter not a member of grandfather’s household

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Underinsured Motorist (UIM) Coverage

Court of Appeals reverses

Granddaughter entitled to UIM coverage as family member and resident of grandfather's household

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Underinsured Motorist (UIM) Coverage

- Granddaughter lived in house grandfather owned

- Grandfather rarely stayed there (stayed mostly with girlfriend nearby)

BUT

- Paid all utilities, replaced appliances as needed

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Underinsured Motorist (UIM) Coverage

- Had key, kept clothes there, got mail, came and went
- Paid for most of granddaughter's expenses, including food and clothing
- Previous guardian ad litem, when father in prison, mother absent

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Underinsured Motorist (UIM) Coverage

Rules of construction underlying public policy:

Construe undefined policy term in favor of coverage when reasonably possible

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Underinsured Motorist (UIM) Coverage

When insurer's policy "uses a 'slippery' word to …designate those who are insured…it is not the function of the court to sprinkle sand upon the ice by strict construction of the term."

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Underinsured Motorist (UIM) Coverage

"If…the limits of coverage slide across the slippery area and the company falls into a coverage somewhat more extensive than it contemplated, the fault lies in its own selection of the words by which it chose to be bound."

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Parents Not Liable for Adult Son's Criminal Acts

Bridges v. Parrish, 731 S.E.2d 262 (N.C. Ct. App. 2012), *certiorari denied*, 738 S.E.2d 398 (2013), *affirmed*, 742 S.E.2d 794 (2013)

52 year old son (Bernie) lives with parents

Shoots girlfriend with parents' gun

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Parents Not Liable for Adult Son's Criminal Acts

Stormy relationship with girlfriend (GF)

Parents assure GF – Bernie "not a threat"

Afterward, Bernie shoots GF

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Parents Not Liable for Adult Son's Criminal Acts

GF sues parents

- Active course of conduct: knew of violent hx, downplayed behavior, failed to secure guns
- Negligent storage of guns
- Negligently entrusted guns to Bernie

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Parents Not Liable for Adult Son's Criminal Acts

Trial court grants parents' SJ Motion

Ct. App. affirms – Facts didn't establish that parents had duty to girlfriend

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Parents Not Liable for Adult Son's Criminal Acts

Active course of conduct by parents

- Harm not foreseeable result of Ds' conduct

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Parents Not Liable for Adult Son's Criminal Acts

Defendants did not negligently store their guns

- No general common law duty to secure firearms
- Facts here don't give rise to duty (Son 52 years old)

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Parents Not Liable for Adult Son's Criminal Acts

Defendants did not negligently entrust gun to B

- Entrustment requires implied or express consent from D for 3d party to use instrumentality
- No evidence of consent
- Harm not foreseeable

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Parents Not Liable for Adult Son's Criminal Acts

Dissent by Judge Geer

Sufficient facts to support claim of negligent storage of firearm

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Parents Not Liable for Adult Son's Criminal Acts

Supreme Court affirms 366 N.C. 539, 742 S.E.2d 794 (2013)

- General Rule - No duty to prevent criminal acts of 3d party
- Exception where D has special relationship with victim

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Parents Not Liable for Adult Son's Criminal Acts

Special relationship giving rise to duty may include:

Landowner may have "duty to safeguard his business invitees from the criminal acts of third persons" where criminal acts are foreseeable

Foster v. Winston-Salem Joint Venture, 303 N.C. 636, 281 S.E.2d 36 (1981)

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Parents Not Liable for Adult Son's Criminal Acts

Parent of unemancipated child may be . . . liable . . . if parent had ability and opportunity to control child and knew or should have known of necessity for exercising such control

Moore v. Crumpton, 306 N.C. 618, 295 S.E.2d 436 (1982)

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Parents Not Liable for Adult Son's Criminal Acts

Cases requires highest duty of care in handling dangerous instrumentalities e.g. firearms

But do not mandate home storage requirement

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Parents Not Liable for Adult Son's Criminal Acts

As long as firearms kept in accordance with statutory regulations, law does not impose civil liability under these facts

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Parents Not Liable for Adult Son’s Criminal Acts

Dicta:

Under plaintiff's theory, negligence claim would exist against homeowner virtually any time gun was stolen from home and used to commit violent crime

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Camp Not Liable for Alleged Sexual Assault

Nowlin v. Moravian Church in America, 745 S.E.2d 51 (N.C. Ct. App. 2013)

- Camp organized “Capture the flag” type game at night
- Required sneaking through woods to ring bell
- Restricted to senior campers
- Partners required for safety purposes

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Camp Not Liable for Sexual Assault on Camper

Nowlin v. Moravian Church

- P, 16 year old female camper and partner/camper in woods
- Partner and another counselor leave
- P and counselor alone, P alleges rape

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Camp Not Liable for Sexual Assault on Camper

Nowlin v. Moravian Church in America

- P did not report for several months
- Counselor at first denied, then claimed consent

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Camp Not Liable for Sexual Assault on Camper

P sues camp

- Negligent hiring, training, and supervision of counselor
- Failure to maintain a safe environment during the game

Trial Court grants Ds' SJ motion

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Camp Not Liable for Sexual Assault on Camper

Court of Appeals

- No NC cases address duty owed by camp to campers
- Other cases involving supervision of minors – day care, neighbors' pool party

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Camp Not Liable for Sexual Assault on Camper

- Camp's duty of care is relative to camper's maturity
- Foreseeability of harm to camper is relevant test that defines duty to safeguard campers from dangerous acts of others

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Camp Not Liable for Sexual Assault on Camper

No breach in holding game

- Restricted to senior campers with safety partners
- Adult counselors and staff supervised and participated
- Reasonable supervision given maturity level

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Camp Not Liable for Sexual Assault on Camper

No breach in hiring or supervision

- Counselors instructed sex with campers prohibited
- Counselor's disclosure form: no prior convictions, firings, sex abuse or harassment complaints

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Camp Not Liable for Sexual Assault on Camper

- Camp checked National Sex Offender Registry
- Good employment history at same camp during previous summer
- Favorable recommendation

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Camp Not Liable for Sexual Assault on Camper

Court of Appeals affirms trial court's grant of SJ

Substantial evidence defendants adhered to standard of care required for camp supervisors safeguarding campers from danger

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Discovery – Production of Non-Party Medical Records

Brewer ex rel. Leach v. Hunter, 2014 WL 4290590, ___ N.C. App. ___, ___S.E.2d ___ (Sept. 2, 2014)

- Plaintiff paralyzed after back surgery
- Confined to a wheelchair

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Discovery – Production of Non-Party Medical Records

Brewer ex rel. Leach v. Hunter

- D's deposition: I created list of 44 thoracic laminectomies and complications following those procedures

- RPD: Produce list

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Discovery – Production of Non-Party Medical Records

- Subsequent RPD: Produce operative notes and discharge summaries

- Necessary to assess D's credibility

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Discovery – Production of Non-Party Medical Records

Brewer ex rel. Leach v. Hunter

Trial Court granted motion as to all surgeries performed between 2005 and 2011, but not before 2005

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Discovery – Production of Non-Party Medical Records

Court of Appeals affirms trial court's order

- Interlocutory appeal granted where order affects substantial right

- D claims records immune from discovery due to HIPAA privilege per N.C. Gen. Stat. § 8-53

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Discovery – Production of Non-Party Medical Records

- N.C. Gen. Stat. § 8-53 allows discovery of *all* patient records where trial court believes disclosure is "necessary to a proper administration of justice"

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Discovery – Production of Non-Party Medical Records

Court rejects argument that non-party records should be produced only in exceptional circumstances

- GA could have imposed greater restrictions on production, but did not

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Discovery – Production of Non-Party Medical Records

- “Court lacks the authority to judicially create . . . a new standard applicable to the production of medical records” where legislature has spoken

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Discovery – Production of Non-Party Medical Records

Held: No abuse of discretion

Trial court “carefully” considered the matter:

- Required only 25 of 44 patient records requested

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Discovery – Production of Non-Party Medical Records

- Mandated redaction of information that might identify patients

- Any portion of records that might require redaction subject to *in camera* inspection by court

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Railroad Crossing

Frazier v. Carolina Coastal Ry., Inc. 750 S.E.2d 576 (NC Ct. App. 2013)

- P hit by train when driving across tracks
- Warning signs, cross-buck signs, advance railroad warning disk, pavement warnings for traffic

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Railroad Crossing

- Mid-day, clear visibility

BUT

- No active signals (lights or gates)

- Train didn’t blow whistle

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Railroad Crossing

Plaintiff in this case:

- Had unobstructed view (roughly 462 ft.) of the westbound tracks

- Failed to stop at the “white stop line clearly marked for northbound motorists”

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Railroad Crossing

- Remained on tracks for 20-30 seconds without looking in either direction for train (waiting to turn left)
- Had space to cross to other side of intersection safely
- Used crossing “hundreds of times”

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Railroad Crossing

Court of Appeals affirms grant of SJ

- Failure to look in both directions from effective vantage point until safely across is CN

- Failure to blow whistle doesn't relieve P of duty

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Railroad Crossing

No gross negligence

- Failure to install gates and lights not negligent unless crossing “peculiarly and unusually hazardous”

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Railroad Crossing

- A “peculiarly and unusually hazardous” crossing cannot be safely traversed by reasonably prudent driver who stops, looks and listens

- Here, undisputed sight distance of 462 feet provided safe effective vantage point

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Cases

Premises Liability

Rolan v. NC Dep't of Agriculture and Consumer Services, 756 S.E.2d 788 (N.C. Ct. App. 2014)

Bynum v. Wilson County, 758 S.E.2d 643 (N.C. 2014), *rehearing denied*, 761 S.E.2d 904 (2014)

Stephens v. Covington, 754 S.E.2d 253 (N.C. Ct. App. 2014)

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Burnham v. S & L Sawmill, Inc., 749 S.E.2d 75 (N.C. Ct. App. 2013), *review denied*, 752 S.E.2d 474 (2013)

Runaway Chair Cases

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Integon v. Helping Hands Transport, Inc., 758 S.E.2d 27 (N.C. 2014)

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UIM Coverage

North Carolina Farm Bureau Mut. Ins. Co., Inc. v. Paschal, 752 S.E.2d 775 (N.C. Ct. App. 2014), *review allowed*, 755 S.E.2d 54 (2014)

Integon v. Ward, 184 N.C. App. 532, 646 S.E.2d 395 (2007)

Nationwide Mut. Ins. Co. v. Davis, 118 N.C. App. 494, 455 S.E.2d 892, *disc. review denied*, *461 S.E.2d 759 (1995)*

Civil Liability for Criminal Acts of Third Party

Bridges v. Parrish, 731 S.E.2d 262 (N.C. Ct. App. 2012), *certiorari denied*, 738 S.E.2d 398 (2013), *affirmed*, 742 S.E.2d 794 (2013)

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