

**NORTH CAROLINA BAR ASSOCIATION
YOUNG LAWYERS DIVISION, DISASTER LEGAL SERVICES COMMITTEE**

DISASTER LEGAL SERVICES MANUAL

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I. NATURAL DISASTERS

A. Introduction

This Manual explains the role of the Disaster Legal Services Committee within the network of groups that provide assistance to disaster victims and provides an overview of the legal and practical issues faced by disaster victims, with suggestions on how to address those issues.

B. Overview of the Role of the Volunteer Attorney in Providing Legal Assistance to Those Affected by Natural Disasters

The Disaster Legal Services Committee operates pursuant to an agreement between the Young Lawyers Division of the American Bar Association and the Federal Emergency Management Agency (FEMA). The Young Lawyers' Division of the North Carolina Bar Association has agreed to act as the North Carolina arm of the ABA's program designed to provide legal assistance to persons affected by natural disasters. This legal assistance will be provided through telephone "hotlines" operated by the North Carolina Bar Association. In providing these services, the Bar Association relies, to the extent possible, upon volunteer attorneys in the local area where the damage has occurred. Of course, when disasters have extensive effects, we will also rely on lawyers throughout the state.

The Committee also has an agreement to assist the North Carolina Division of Emergency Management when it responds to a natural disaster, even when no federal disaster has been declared. In such an event, the Committee and its volunteers likely will be asked to assist victims through a telephone hotline or through other service.

The role of a Volunteer Attorney is to provide pro bono legal advice to those affected by the disaster. It is **not** the attorney's role to undertake litigation or bankruptcy matters or to draft legal instruments, and the attorney is **absolutely prohibited** from accepting any fee generating matter from any person referred to you through the Disaster Legal Services Committee. Rather, the role of the volunteer attorney is to listen to the circumstances confronting the individual(s) and to provide guidance to them as to how they should proceed (*e.g.*, whether they should pursue filing a claim with their insurer or how they should deal with their landlord or adjacent property owners). The attorney's role may involve reviewing insurance policies or other documents. If the matter is more complex than the attorney is willing to handle on a pro bono basis, involves an unfamiliar area of the law, or is a fee generating case, the attorney should refer those individuals to the lawyer referral service offered by the North Carolina Bar Association, **919-677-8574 or 800-662-7660**.

This Manual draws from and refers to the ABA/YLD Disaster Legal Assistance Training Materials. These materials should be available from the Chairperson of the Disaster Legal Services Committee and you are advised to contact that person if you need information from these materials.

C. Step-by-Step Summary of the Disaster Assistance Process

Although each disaster is unique, the usual sequence of events is as follows:

1. The N.C. Division of Emergency Management (DEM) or the FEMA Regional Director contacts the North Carolina YLD Chairman of the Disaster Legal Services Committee and requests that the local Disaster Legal Services Volunteers be organized.
2. The members of the Disaster Legal Services Committee will contact the Volunteer Attorneys – friends and colleagues who have agreed to help field questions from disaster victims – to alert them that calls will be coming shortly. Just as a note, experience has shown that the bulk of the legal questions do not begin to arise until about ten (10) days after a disaster has struck.
3. The North Carolina Bar Association (NCBA) will establish a toll-free number that disaster victims can call to provide basic information about the victim's situation. An NCBA staff person will take the calls, or an answering machine will answer calls which an NCBA staff person will process. The basic information about the victim and the victim's questions then will be routed to the Disaster Legal Services Committee. The Disaster Legal Services Committee members will then contact a Volunteer Attorney for the Volunteer Attorney to return victims' calls.
4. The availability of free legal services to disaster victims is publicized, via television, radio, and/or local newspapers several days after the disaster has been declared. The publicity is ordinarily coordinated by FEMA, the North Carolina Bar Association, or DEM.
5. If the problem is relatively complex, concerns an area of law with which the Volunteer Attorney is unfamiliar, or is a fee generating matter, the attorney may suggest that the individual contact a private attorney and may refer the individual to the lawyer referral service offered by the North Carolina Bar Association, **919-677-8574 or 800-662-7660** or www.barlinc.org. In some instances, such referrals will be necessary. It will be for the Volunteer Attorney's best judgment, or the Volunteer Attorney can contact a Committee Member for further advice.
6. When consulted, the Volunteer Attorney needs to keep careful notes regarding the intake, recommendations, and disposition in each case, for his/her own benefit and the benefit of any lawyer who may subsequently handle the case. In some instances, Volunteer Attorneys may need to forward this information to the Committee. If this need arises, the Committee will inform you.
7. For statistical and public information purposes, each Volunteer Attorney should keep a record of total number of hours volunteered for forwarding to the Committee or his or her Local Judicial District Representative for the YLD.

The disaster victim may be subject to great personal trauma. The Volunteer Attorney should, therefore, be sensitive to the feelings and behavior of the victim as well as be responsive to his/her legal needs.

D. Legal Questions Most Often Asked by Disaster Victims

What follows is a series of short questions and answers designed to prepare the Volunteer Attorney for the types of advice that he/she may be asked to give. The questions are based on actual victim interviews. Specific questions about Federal or State assistance programs, taxation, or other similar issues are not covered here. Those questions should be directed to representatives of those agencies.¹ We have tried to answer questions with the most updated North Carolina law. Nonetheless, the Volunteer Attorney should make certain that the law referenced herein is still accurate. In some cases, the answers provided here are based on general statements of the law or are based on law in other jurisdictions due to a lack of clarity in North Carolina case law. Citations to American Jurisprudence 2d (AM. JUR. 2D) are provided as a starting point for further research.

It is hoped that this brief primer will assist the Volunteer Attorney in providing effective legal assistance to disaster victims, regardless of the Volunteer Attorney's legal background or specialty.

1. QUESTION: Must I continue paying rent even though my apartment or office has been completely destroyed or severely damaged?(See N.C. Gen. Stat. § 42.12.)

ANSWER: Under N.C. Gen. Stat. § 42-12 a tenant has the right to terminate his/her rental payment obligation under a lease only if all of the following four (4) conditions are met: (1) the rental property is destroyed in an amount exceeding one year's rental, and (2) the damage was not caused by the negligence of the tenant or the tenant's agents or employees; and (3) the lease does not contain a provision covering the situation; and (4) use of the property damaged was the tenant's principal reason for renting the property. For more details, see § C.2.a and C.2.b, below.

2. QUESTION: What can the tenant do if the landlord locks the tenant out of the house, terminates the water service, terminates the power service, otherwise excludes the tenant from the use of the home, or confiscates some or all of the tenant's personal property?

ANSWER: Under N.C. Gen. Stat. §§ 42-25.6 et seq., the landlord has no right of self-help eviction or confiscation of the tenant's personal property. This is true even if the lease purports to allow it because such provisions are contrary to public policy, as established by the statute. Where the landlord has illegally locked out the tenant or taken the tenant's personal property, the landlord's actions are generally a breach of the implied covenant of quiet enjoyment (for which the duty to pay rent abates under Andrews & Knowles Produce Co. v. Currin, 243 N.C. 131

¹ The Committee has some resources on hand for these problems, but the first step should be to contact the relevant agency to let it know an attorney is involved. You can contact the Committee to obtain contact information, or you can try locating the information on the Internet.

(1955)) as well as trespass, conversion, and unfair and deceptive trade practices. See Stanley v. Moore, 339 N.C. 225, 454 S.E.2d 225 (1995); Love v. Pressley, 34 N.C. App. 503, 239 S.E.2d 574 (1977). If the landlord has made a wrongful demand for the tenant to surrender possession of the premises and the tenant has moved out, that constitutes a constructive eviction (total breach of quiet enjoyment). Dobbins v. Paul, 321 S.E.2d 537 (N.C. App. 1984). If the landlord has wrongfully demanded that the tenant leave and the tenant wants to regain possession, the tenant may do so unless the landlord's obtaining a final judgment for summary ejectment against the tenant. The tenant is entitled to declare a wrongful, forcible eviction as illegal, even after the physical fact of wrongful exclusion. See Spinks v. Taylor, 303 N.C. 256, 278 S.E.2d 501 (1981).

3. QUESTION: Is my landlord liable to me for injuries I suffered in my apartment or office during the disaster?

ANSWER: Where the injury results from the disaster itself and not from defects in the demised premises which the landlord may be obligated to repair, the landlord is not liable for such injuries. There is no implied promise by the landlord that no harm will come to the tenant from a flood, earthquake, tornado, or the like while on the premises. See 49 AM. JUR. 2D *Landlord and Tenant* § 767.

4. QUESTION: Is the damage to my home covered under my insurance policy?

ANSWER: The answer to this question is governed by the terms of the policy. However, some general observations apply. Hazard insurance (*i.e.*, homeowners' policies or other fire and extended coverage policies) from the private sector generally does not cover flood damage. It may cover water damage inside the home, but damage from floods or surface water may be specifically excluded. Windstorm insurance will normally be limited to greater-than-normal wind conditions.

The Federal government provides coverage for flooding under the National Flood Insurance Program (NFIP). Homeowners can buy policies from any local agency if their community is participating in the NFIP, and both those inside and outside the special designated flood-hazard areas can buy the insurance.

Even if a hazard policy extends coverage to the type of disaster damage that occurred, a policy may limit coverage to losses directly resulting from the disaster. Courts have generally found coverage if the covered risk was the efficient cause, if not the only cause, of the loss, even if the other concurrent causes are otherwise expressly excluded from coverage. See 43 AM. JUR. 2D *Insurance* §§ 468-473.

5. QUESTION: Is the person from whom I bought my home liable to me for not telling me about the possibility of flooding?

ANSWER: Generally, when purchasing a home, the buyer must be aware of the rule of law known as caveat emptor, which means, roughly, **let the buyer beware**. "Before purchasing property, it is incumbent upon buyers to take reasonable steps to protect their own interest." Clouse v. Gordon, 115 N.C. App. 500, 509, 445 S.E.2d 428, 433 (1994). In other words, it is the primary responsibility of the buyer to determine whether the home may be situated in a special

flood hazard area. Sellers generally do not have an affirmative duty to disclose defects or hazards to prospective home buyers. Therefore, if the buyer fails to inquire or otherwise determine whether the property is located in a flood hazard area, the seller will not be liable for failure to disclose this information to the buyer as long as (1) the seller did not make any misrepresentations to the buyer and (2) the seller was not otherwise under a duty to disclose the hazard to the buyer.

Emphasizing the duty of buyers to use diligence and care in investigating potential home purchases, the North Carolina Supreme Court stated in Calloway v. Wyatt, 246 N.C. 129, 97 S.E.2d 881, (1957), that:

The right to rely on representations is inseparably connected with the correlative . . . duty . . . to use diligence in respect of representations made to him. The policy of the courts is, on the one hand, to suppress fraud and, on the other, not to encourage negligence and inattention to one's own interest.

246 N.C. at 134-35, 97 S.E.2d at 886.

However, there are situations in which the seller may be liable for failing to disclose to the buyer the possibility of flooding. It is a well-established rule of law that *caveat emptor* does not apply in cases of fraud.” Guy v. Bank, 205 N.C. 357, 171 S.E. 341 (1933). The seller must be truthful and disclose those facts known to the seller in response to inquiries from the buyer. Furthermore,

Where a material defect is known to the seller, and he knows that the buyer is unaware of the defect and that it is not discoverable in the exercise of the buyer's diligent attention or observation, the seller has a duty to disclose the existence of the defect to the buyer.

Brooks v. Ervin Constr. Co., 253 N.C. 214, 217, 116 S.E. 2d 454, 457 (1960) (quoting Brooks Equip. & Mfg. Co. v. Taylor, 230 N.C. 680, 55 S.E. 2d 311 (1949)). Liability might also arise if the seller makes an affirmative misrepresentation to the buyer or actively conceals from the buyer evidence that would indicate prior damage from flooding.

From a practical standpoint, however, this question should rarely arise, due to a number of factors. Often, residential real estate purchases are preceded by inspections of the property which should uncover evidence, if any, of prior flood damage. Furthermore, federally regulated lenders and any lenders who sell mortgage loans to the Federal National Mortgage Association (Fannie Mae) or the Federal Home Loan Mortgage Corporation (Freddie Mac) are required by federal law under the Flood Disaster Protection Act to (1) determine whether the structure securing the mortgage loan is or will be located in a special flood hazard area, (2) document the determination, (3) require flood insurance for properties located within a special flood hazard area and (4) ensure that flood insurance is maintained. In cases in which a lender subject to the Act fails to perform its duties under the Act, that lender may be subject to liability.

6. QUESTION: Does my automobile insurance cover the damage to my car resulting from the disaster?

ANSWER: Normally, this type of damage will be covered under comprehensive policy coverage, although the particular **language and exclusions of the policy** will control. Even if an exclusion from comprehensive coverage exists for damage caused by flood, wind, etc., coverage may exist under a collision policy if the disaster and event causing the damage could be construed as a collision. Courts have reached mixed results on this issue. See Allison v. Iowa Mut. Ins. Co., 43 N.C. App. 200 (1979) (finding that the damage to the plaintiff's vehicle was not due to collision when damage was caused as a result of a bridge that collapsed); 7 AM. JUR. 2D *Automobile Insurance*, §§ 167-171, 176-182.

7. QUESTION: Is my neighbor whose property ran into or fell on my property during the disaster liable to me for damages?

ANSWER: North Carolina follows the general rule that a landowner is not liable for injuries or damages caused to another by a disaster or "Act of God" if that landowner committed no act of negligence. See, e.g., Safeguard Ins. Co. v. Wilmington Cold Storage Co., 267 N.C. 679, 149 S.E.2d 27 (1966), citing 1 AM. JUR. 2D *Act of God* §§ 11, 15; 57 AM. JUR. 2D *Negligence*, § 181. However, the landowner can be held liable if the landowner committed a negligent act in concurrence with an act of God. Id. (defendant may be liable if its negligence concurs with an act of God); see also Jenkins v. Helgren, 217 S.E.2d 120 (NC Ct. App. 1975); Bennett v. Southern Railroad Company, 96 S.E.2d 31 (NC 1957).

8. QUESTION: What can I do with the property of my neighbor which the disaster carried over onto my land?

ANSWER: A landowner has the right to remove property of others which has, without the landowner's consent, been left on the land, provided the landowner uses due care not to damage the property upon its removal. See 1 AM. JUR. 2D *Abandoned, Lost, Etc. Property* § 24-27. If the true owner never comes forward, the landowner, as an involuntary bailee, has the right to possession and control of the property against all others, save the true owner. Cf. Taha v. Thompson, 120 N.C. App. 697, 463 S.E.2d 553, (1995), *rev. den.* 344 N.C. 443, 476 S.E.2d 130; Reinertsen v. Porter, 250 S.E.2d 475, 242 Ga. 624 (1978) (owner of parking lot had the right, under the common law, to remove a vehicle from that property upon the non-payment of parking fees).

9. QUESTION: Can I retrieve property of mine that has been carried away onto another's land?

ANSWER: When personal property is carried away, such as by wind or flood, and comes to rest on the land of another, the property still remains the property of the original owner. The original owner has the right to retrieve the property, but should seek permission from the landowner before doing so if possible. The problem with simply entering another's land to retrieve property without the landowner's permission is that this might be viewed as a trespass to real property under certain circumstances. Even if a person caused no actual damage in entering the land of another, the landowner may still be entitled to sue for recovery of nominal damages. Matthews v. Forrest, 235 N.C. 281 69 S.E.2d 553, (1952). On the other hand, if the landowner unreasonably refuses entry onto the land to retrieve the property, the landowner may be liable for

trespass to chattels. Trespass to chattels is the intentional, unauthorized dispossession of or intermeddling with another's personal property. Fordham v. Eason, 351 N.C. 151, 521 S.E.2d 701, (1999); McDowell v. Davis, 33 N.C. App. 529, 235 S.E.2d 896, *rev. den.* 293 N.C. App. 360, 237 S.E.2d 48 (1977). A landowner's refusal to either allow entry upon the land to retrieve the item or refusal to deliver the item upon request can constitute an intentional dispossession of or intermeddling with that chattel. Ideally, then, permission should be sought to retrieve property that has been carried away. If the landowner is not home or is otherwise not available, care should be taken not to damage any part of the landowner's land in retrieving the property so as to avoid any claim by the landowner for actual damages arising from trespass to real property. Nonetheless, be aware that the landowner may still have a claim for nominal damages.

10. QUESTION: Is my neighbor who put up a dike or levee that caused more water to flow onto my land liable to me for damages?

ANSWER: Generally, a landowner is entitled to make reasonable use of his or her land, even if that reasonable use alters the flow of surface water and causes some harm to others. However, if the landowner's harmful interference with the flow of surface waters is unreasonable and causes substantial damage, then the landowner may be liable for damages. *See Pendergrast v. Aiken*, 293 N.C. 201, 236 S.E.2d 787 (1977); *see also* 50 AM. JUR. 2D *Levees and Flood Control* §§ 14, 17.

11. QUESTION: Is the local government liable to me for damages caused by the disaster?

ANSWER: Under circumstances in which damages caused by a natural disaster may be considered the product of negligence, there may be a question as to whether a municipality or other local governmental entity may be held liable. This brings into question whether there is an exception to the general rule of sovereign immunity for governmental entities which would permit recovery.

Whether a governmental body will be held liable in tort for negligence depends upon the nature of the acts or omissions constituting negligence. There are two categories of governmental functions: "governmental" and "proprietary". Sides v. Hospital, 287 N.C. 14, 213 S.E. 2d 297 (1975); Koontz v. City of Winston-Salem, 280 N.C. 513, 186 S.E. 2d 897 (1972), *pet. for reh. denied*, 281 N.C. 516 (1972); and Casey v. Wake County, 45 N.C. App. 522, 263 S.E. 2d 360 (1980), *pet. for discr. rev. denied*, 300 N.C. 371, 267 S.E. 2d 673 (1980). A municipality would enjoy sovereign immunity for "governmental" functions, but not for "proprietary" ones. Governmental functions, also known as discretionary functions, are generally those undertakings which government chose to make for the benefit of the public, such as the decision to provide services like sewage or fire protection or education. Proprietary functions that are more commercial or ministerial in nature, such as the operation of an electric utility or the manner in which roads or sewage systems are maintained after they are built. Where a municipality or other local governmental entity has assumed control and management a the sewage and drainage system, for example, it may be held liable for failure to maintain those systems adequately. Howell v. City of Lumberton, 548 S.E.2d 835 (NC Ct. App. 2001) For more discussion, see §D.2.a.1.B., below.

(See further discussion infra § 2.a.1)B)).

12. QUESTION: Can I file a workers' compensation claim for an injury I received on the job which resulted from the disaster?

ANSWER: Workers' compensation claims are governed by the Workers' Compensation Act (the WCA), N.C. Gen. Stat. §§ 97-1 et seq. The Industrial Commission, also established under this act, governs the administration of the WCA.

To recover benefits under WCA, the employee must prove the injury is "compensable." To prove compensability, employee must prove three elements: 1) that he or she suffered an injury by accident, 2) that the injury arose out of employment, and 3) that the injury was sustained in the course of employment. N.C. Gen. Stat. § 97-2(6). The determination as to whether these elements have been met depends largely on the facts of each individual case. *See Harden v. Thomasville Furniture Co.*, 199 N.C. 733, 155 S.E.2d 728 (1930).

In the specific context of a natural disaster, two cases, albeit old ones, both held that injuries a worker suffered during a tornado that struck while the individuals were working were **not** compensable injuries. *See Marsh v. Bennett College for Women*, 212 N.C. 662, 194 S.E. 303 (1937); *Walker v. Wilkins*, 212 N.C. 627, 194 S.E. 89 (1937). In *Walker*, the court found that there was no causal relation between the employment and the accident by which the plaintiff was injured. Accordingly, the court stated that the accident did **not** arise out of the employment.

Nonetheless, it could be found that the employee's work peculiarly placed the employee at risk for the injuries he or she sustained during the course of the natural disaster or that the employee's work created a greater risk of injury than what the "average" individual would face. *See Pope v. Goodson*, 249 N.C. 690, 107 S.E.2d 524 (1959) (sustaining an award of compensation because the deceased worker was wearing an apron full of nails around his waist when he was struck by lightning thus exposing him to a greater risk of injury during a thunder storm than others in the community faced).

Because some aspect of a disaster victim's employment might have exposed him or her to greater risks than those that the "average" disaster victim has faced, the worker who has sustained an injury during a disaster in the course of employment still should file for workers' compensation.

To "file" for workers' compensation, the employee or his or her representative should immediately, or as soon after the injury as possible, give notice to the employer. N.C. Gen. Stat. § 97-22. To this end, an employee should submit a "Form 18" (a form provided by the Industrial Commission and available on the Commission Website).

Because the determination is fact-specific, a Volunteer Attorney should advise a worker/disaster victim to notify the employer of the injury. If the employer denies liability or otherwise resist compensation under the statute, the employee should contact both an attorney who specializes in workers' compensation matters and the North Carolina Industrial Commission. To find an attorney, the employee/disaster victim can contact the Lawyer Referral service of the N.C. Bar Association at **919-677-8574 or 800-662-7660**. To contact the North

Carolina Industrial Commission, the disaster victim should call **919-807-2500**. The Commission is typically very helpful to injured workers.

13. QUESTION: What can I do about lost records or other legal documents?

ANSWER: See N.C. Gen. Stat. Chapter 98. For North Carolina birth, death, marriage and divorce certificates and records, contact:

Department of Environment, Health & Natural Resources
Division of Epidemiology
Vital Records Section
225 N. McDowell Street
P.O. Box 27687
Raleigh, NC 27611-7687
919-733-3526
Note that fees apply.

Further information on records is available in the ABA/YLD Disaster Legal Assistance Training Materials. Copies of these materials are available from the Committee Chair.

14. QUESTION: What rights and responsibilities do I have concerning repairing/replacing my home and paying my debts?

ANSWER: Important issues to consider are: unfair and deceptive trade practices, truth in lending, retail installment sales, home solicitation contract, debt collection problems, and garnishment. These issues are governed by a variety of laws including specific North Carolina statutes and federal statutes and regulations. If the disaster victim is having troubles in these areas, further research will be necessary to determine the victim's rights and obligations. See, e.g., N.C. Gen. Stat. §§ 75-50 et seq.

Further information is available in the ABA/YLD Disaster Legal Assistance Training Materials. Copies of these materials are available from the Committee Chair.

15. QUESTION: How can I get public benefits and/or other emergency financial assistance from the government?

ANSWER: These benefits are typically limited to the poor in society. Disasters often exacerbate the crisis situations in which most benefit recipients usually operate.

The typical sources of help are the Aid to Families With Dependent Children (AFDC), Food Stamps, Supplemental Security Income (SSI), and Medicaid. Note that participation in these programs is subject to various categorical, financial, conduct-related, and procedural eligibility requirements. Some of these programs do have emergency programs designed to help in situations like disasters.

Note that some of the emergency programs are run through state agencies. To learn more about this, contact Health and Human Services in Washington, D.C.

In negotiating for disaster victims in connection with any issue, use caution in obtaining “lump sum” payments. Lump sum payments may render a victim ineligible for government assistance for many months.

Further information is available in the ABA/YLD Disaster Legal Assistance Training Materials. Copies of these materials are available from the Committee Chair.

C. Rights and Responsibilities of Tenants in North Carolina Upon Damage or Destruction of a Rental Dwelling

Other common questions of natural disaster victims involve the rights and responsibilities of tenants upon damage or destruction to a rental dwelling. The following discusses basic North Carolina law on this subject.

1. Responsibilities of the Tenant

a. Duty to Landlord

Under common law, a tenant is not permitted to commit voluntary waste (intentional or negligent destructive acts). The tenant is required to refrain from permissive waste (allowing the property to be damaged by wind, water, or other elements). But, unless the lease so provides, the tenant has no obligation to make substantial repairs to the property. The tenant is therefore only responsible for repairing damage which the tenant caused or to which the tenant contributed. Consequently, where rental property has been damaged by a natural disaster or other similar occurrence, the tenant, absent a lease provision to the contrary, has no duty to repair the property but should consider taking such reasonable actions (i.e., which do not subject the tenant to danger or as may be otherwise limited by the condition of the premises) necessary to prevent further damage to the premises (*e.g.*, covering broken windows with plastic).

Normally a tenant is not accountable for the accidental destruction of a rental dwelling, but the North Carolina statute which addresses the tenant’s responsibility establishes certain exception. N.C. Gen. Stat. § 42-10 provides that:

A tenant for life, or years, or for a less term shall not be liable for damage occurring on the demised premises accidentally, and notwithstanding reasonable diligence on his part unless he so contracts.

This statute specifically excludes situations where (1) the tenant’s negligence causes the damage or destruction (*see* Dixie Fire & Cas. Co. v. Esso Std. Oil Co., 265 N.C. 121, 143 S.E.2d 279 (1965)) or (2) the tenant assumes responsibility for the damage in the lease agreement. The North Carolina Residential Rental Agreements Act (N.C. Gen. Stat. § 42-38 *et seq.*, the “NCRRAA”) further provides that, while a tenant is normally responsible for “damage, defacement or removal of any property inside a rental dwelling unit in his exclusive control,” the tenant is not responsible for damage caused by “natural forces.” N.C. Gen. Stat. § 42-43(a)(6).

The NCRRAA, however, has expanded tenant obligations to lessors. *See generally*, Webster, *Real Estate Law in North Carolina*, § 68 (3d ed. 1988). This Act, in pertinent part, requires the tenant to: (1) keep the portion of the dwelling which [the tenant] occupies or controls as clean and *safe as the conditions of the premises permit*; (2) dispose of ashes, rubbish, garbage, and other waste in a clean and safe manner; (3) refrain from *deliberately or negligently* destroying, defacing, damaging, or removing any part of the premises or *knowingly* permitting another to do so; and (4) complying with all obligations imposed by applicable housing or building codes. (N.C. Gen. Stat. § 42-43). Any breach of the above obligations may be enforced by the landlord through a civil action or other legal or equitable remedy.

b. Duty to Third Parties

A tenant's duty to third parties, as stated in Corpus Juris Secundum, is determined by the tenant's "control and possession of the premises and [the tenant's] power to prevent the injury". *See generally*, C.J.S., *Landlord and Tenant* § 434 (1968). This treatise states:

As a general rule, where the tenant has control [of the rental premises], [the tenant] has the duty toward persons lawfully using the premises to exercise the care of an ordinarily prudent person to keep the premises in a reasonable safe condition, and will be liable for injuries arising as a breach of such duty.

Id. Control of the premises is thus a determinative factor in evaluating the tenant's duty to third persons. Where the tenant has "control" of the premises, the tenant's duty to third parties is similar to that of a property owner. With regard to trespassers, if the tenant discovers or has reason to know of the presence of trespassers on the property, the tenant has the duty to use ordinary care in warning the trespassers of any *concealed, unsafe, artificial* conditions which involve a risk of serious injury.

Note that the North Carolina Supreme Court has eliminated the distinction between licensees (those who enter the property with the express or implied consent of the tenant for their own purposes rather than the benefit of the tenant - *e.g.*, social guests) and invitees (someone who has entered upon the property at the express or implied invitation of the tenant to perform some service for the tenant - *e.g.*, employees, customers or delivery persons) with respect to liability of the owner or occupier of land for injuries to those lawfully on the land. The rule now imposes a standard of reasonable care toward all lawful visitors. The issue for a jury is now whether the landowner (or occupier) acted as a reasonable person would under the circumstances. The Court expressly held that owners and occupiers of land are not insurers of their premises. The Court also noted that was only imposing the duty to exercise reasonable care in the maintenance of premises for the protection of lawful visitors. Nelson v. Freeland, 349 N.C.615, 631-32, 507 S.E.2d 882, 892 (1998). Therefore, tenants should endeavor to take all reasonable measures that might minimize the risk to third parties posed by the property.

2. Rights of the Tenant

a. Right to Cease Paying Rent

Several North Carolina statutes address the rights of a residential tenant upon damage or destruction of a rental property. Under N.C. Gen. Stat. § 42-12 a tenant has the right to terminate a lease agreement if the conditions contained in the statute are satisfied. Under this statute the tenant may terminate his/her rental payment obligation under a lease if:

- 1) the rental property is destroyed in an amount exceeding one year's rental; and
- 2) the damage was not caused by the negligence of the tenant or the tenant's agents or employees; and
- 3) **the lease does not contain a provision covering the situation; and**
- 4) use of the property damaged was the tenant's principal reason for renting the property.

In order to terminate the lease, the tenant must:

- 1) notify the landlord of the tenant's intent to terminate the lease; and
- 2) this notice must be written and must be delivered to the landlord within ten days from the date of the damage or destruction; and
- 3) pay the landlord all rent due, including any rent owed in arrears, up to the date of the damage or destruction.

Upon complying with the above requirements, the tenant will be relieved of paying further rent owed under the lease but shall remain bound by other provisions contained in the lease.

If the tenant was not aware of his/her right under N.C. Gen. Stat. § 42-12 to give the notice within ten (10) days of the damage to the premises, the tenant still may have a right to rescind the lease pursuant to the implied warranty of habitability provided in the NCRRAA. N.C. Gen. Stat. § 42-38, *et seq.* Under the NCRRAA, the landlord has the affirmative duty to put and keep the dwelling in fit and habitable condition and comply with all applicable housing and building codes. N.C. Gen. Stat. § 42-42(a). The landlord cannot be relieved of that responsibility even if the lease purports to do so or the tenant unwittingly agrees to do so. N.C. Gen. Stat. § 42-42(b).

The landlord's duty to keep the premises in fit condition would arise within a reasonable time of the landlord's having actual or constructive notice of the damage or destruction of the premises. Although the tenant is not required to give written notice of damage or destruction, it would be prudent to do so following any verbal notice to the landlord. The tenant may propose a rescission of the lease to the landlord by mutual assent. However, if the landlord does not want to allow rescission and wants the tenant to continue to pay rent, the landlord would have to repair the premises within a reasonable time after having notice of the damage. Once the reasonable time to repair expired, the tenant's duty to pay rent for the unfit premises would abate under the

act. See Miller v. C.W. Myers Trading Post, Inc., 85 N.C. App. 362, 355 S.E.2d 189 (1987); Surratt v. Newton, 99 N.C. App. 396, 393 S.E.2d 554 (1990). Where the landlord fails to restore the premises to a condition that could be inhabited at all, the premises would have no fair rental value, and the tenant would be entitled to rescind the lease and deny any further liability. It would be best for the tenant to declare such a rescission in writing and return the key with the letter.

If the landlord has notice of the damage, refuses to repair the damage, and continues to demand rent for the unfit premises, the landlord would not only be violating the implied warranty of habitability but would also be committing an unfair and deceptive trade practice. Allen v. Simmons, 392 S.E.2d 478 (N.C. App. 1990). Furthermore, if the landlord knew of the damage, attempted to make repairs, but those repairs were actually unsuccessful, the landlord's continuing to demand rent would also be an unfair and deceptive trade practice. Creekside Apartments v. Poteat, 446 S.E.2d 826 (N.C. App. 1994). The tenant could claim treble damages for any rents wrongfully collected and declare the lease rescinded.

Where the damage is substantial but the landlord is willing to make repairs and the tenant is interested in returning to the premises, the tenant should try to negotiate a reasonable timetable to allow for the repairs and resumption of possession. The tenant's duty to pay rent would resume once the landlord had made sufficient repairs for the tenant to regain occupancy. The tenant may not have to pay the full contract rent until all of the repairs are finished, however. The tenant's obligation to pay rent would still be only the fair market rent of the premises in the condition provided by the landlord, on a weekly or monthly basis. Miller v. C.W. Myers Trading Post, Inc., 85 N.C. App. 362, 355 S.E.2d 189 (1987).

N.C. Gen. Stat. § 42-12 does *not* apply (except to the extent the warranty of habitability is implicated) when the lease agreement designates the rights of the parties relative to damage or destruction of the property if the tenant fails to provide the required notice to the property owner or otherwise fails to meet the requirements of the statute.

Where N.C. Gen. Stat. § 42-12 is not applicable, North Carolina common law rules apply. At common law, the damage or destruction of rental property does not, absent an express provision of the lease, relieve the tenant of his rental payment obligation under the lease. See generally, C.J.S., "Landlord and Tenant", § 486 (1968). However, an exception to the above rule exists "where the destruction of the premises is on the entire subject matter of the lease, so that nothing remains capable of being held or enjoyed, as where a room or a building or apartment leased without land is destroyed." *Id.* Therefore, in such cases, the tenant's rental payment obligation would cease since the tenant can no longer derive any use or enjoyment from the premises. Note, however, that this exception would not apply where the property that was destroyed constituted only a portion of the demised premises, *e.g.*, where a house or other building on a farm is destroyed but the farmland is still useable.

b. Damage But Not Destruction of Leased Property

Where the property is damaged but not destroyed, the common law provides that if the damage to the property renders the property untenable, the tenant may vacate the property if:

(1) the landlord covenanted to keep the premises in good repair and (2) after notice by the tenant, the landlord has failed to put the property in tenable condition within a reasonable time. *Id.* at § 366. Therefore, if the landlord did not agree to keep the premises in good repair, and the property is subsequently damaged through no fault of the landlord then, under common law, the landlord is not obligated to repair the premises and the tenant's rental obligation continues. C.J.S., Landlord and Tenant, § 487 (1968). Where the lease required the landlord to make necessary repairs and the landlord failed to make such repairs after being so requested by the tenant, at least one North Carolina court has found the landlord liable for the reasonable cost of repairs performed by the tenant. *See Cato Ladies Modes, Inc., v. Pope*, 21 N.C. App. 133, 203 S.E.2d 405 (1974). *See generally*, 40 A.L.R. 3d 1369.

The NCRRAA expands the scope of a landlord's duty to keep the premises in good repair. Section 42-42 of the NCRRAA requires the landlord, in part, to (1) comply with local building and housing codes, and (2) make all repairs necessary to put and keep the premises and common areas in a "fit and habitable" condition. Section 42-41 of the NCRRAA also provides that a tenant's obligation to pay rent is "mutually dependent" upon the landlord's obligations under § 42-42 to keep the premises in a habitable condition. From this provision it might be argued that a tenant could withhold rental payments until the damaged premises are made habitable by the landlord. *However*, § 42-44 specifically provides that a violation of the Act can be enforced only by civil action or other legal or equitable remedies, and *specifically forbids the tenant from withholding rental payments prior to a judicial determination of the issue*. In discussing this issue, Webster points out that if the tenant defaults on the lease by not making rental payments, the landlord's breach of his/her duty under N.C. Gen. Stat. § 42-43 might be used as a defense or setoff in any summary eviction action brought by the landlord. *See Webster, Real Estate Law in North Carolina*, § 69, 3d Ed. (1988)). Thus, under the above statute, tenants are not granted the right to withhold their rental payments while the property is being repaired even though the property's fair rental value in a damaged condition may be less than it would otherwise be. Rather the tenant must pay the rent as it becomes due and proceed in a civil action against the landlord. In this civil action, the tenant may seek a rent abatement for the difference between the normal fair rental value of the property and the rental value of the property in its damaged condition. The tenant may make such repairs him/herself, and later file an action for restitution of the repair costs. The tenant may also file an action in court based upon the landlord's obligations set forth in the lease or in an implied warranty of habitability. *See Cotton v. Stanley*, 86 N.C. App. 534, 358 S.E.2d 692, *cert. denied*, 321 NC. 296, 362 S.E.2d 779 (1987); *Miller v. C. W. Myers Trading Post, Inc.*, 85 N.C. App. 362, 355 S.E.2d 189 (1987). Such actions will be governed by the three-year statute of limitations contained in N.C. Gen. Stat. § 1-52(1) and (2).

Of course, pursuing these legal remedies may be problematic for tenants in several respects. Some courts may not find that minor damages make a rental unit uninhabitable, or may find that some of the damage is attributable to the tenant. In addition, legal actions cost money and time and may not be justified for minor repair expenditures. To ensure that they do not incur repair expenses which are not reimbursed by the landlord, tenants should make every attempt to secure such repairs from the landlord.

c. Security Deposits

The North Carolina Tenant Security Deposit Act (NCTSDA) limits the use to which security deposits can be put and establishes a procedure for reimbursement of the security deposit upon abandonment of a destroyed or damaged rental unit. N.C. Gen. Stat. § 42-50 et seq. The NCTSDA permits the use of security deposits for:

- (1) payment of unpaid rent during the lease term or for payment of rents after abandonment of the rental unit before the expiration of the lease term;
- (2) repair of damages which are not due to
 - (a) ordinary wear and tear,
 - (b) the acts of the landlord or his agents,
 - (c) defective products supplied or repairs authorized by the landlord,
 - (d) acts of third parties not the invitees of the tenant, or
 - (e) natural forces;
- (3) any unpaid bills for utilities or services which become a lien attached to the unit because the tenant failed to pay those bills;
- (4) cost of re-renting the premises after a breach of the rental agreement; and
- (5) costs of removing and storing the tenant's belongings after a summary ejectment proceeding.

Within thirty days of termination of the tenancy and delivery of possession of the unit back to the landlord, which may occur because of the expiration of the lease term or because a natural disaster has made the rental unit uninhabitable, the landlord must itemize the application of the security deposit to the above uses and must refund the remainder of the deposit.

As noted above, tenants have the right, under N.C. Gen. Stat. § 42-12, to surrender possession of damaged or destroyed property. However, this right is a statutory right and is only available if the requirements set forth in the statute have been satisfied. Thus, to ensure prompt reimbursement of a security deposit after abandoning a destroyed or damaged residential rental unit, when the tenant notifies the landlord of his intention to abandon the property, the tenant should pay any rent in arrears and the pro-rated rent for the time between the last payment and the disaster.

No practical solution exists for the problem of allocating responsibility for damages between the disaster and the tenant. The tenant should not cause any additional damage to the unit after it has been destroyed or damaged, and where the tenant is able to take some affirmative action which will prevent further, substantial damage to the abandoned premises, the tenant should take such action. Damage that occurs as the result of the tenant's failure to take such action could be attributed to the tenant.

The NCTSDA allows landlords to charge a reasonable, non-refundable fee for pets kept by the tenant on the premises, and does not provide for reimbursement of such fees in case of the termination of the lease because of the destruction or damage of the leased premises. The statute which allows a tenant to surrender possession of a damaged or destroyed rental property releases the tenant only from the obligation to pay rent. The tenant is not released from any other obligation of the lease. Therefore, unless the lease specifically provides for the reimbursement of the pet fee in cases of abandonment of the rental property because of naturally-caused destruction or damage to rental property, the tenant should not anticipate reimbursement of that fee.

2. Conclusion

In conclusion, the rights and responsibilities of tenants upon destruction or damage to rental property have been significantly expanded by the North Carolina Residential Rental Agreements Act and other related provisions contained in Chapter 42 of the North Carolina General Statutes. Although these statutes impose significant new responsibilities on both landlords and tenants, many of these statutes are, by their own terms, subject to the terms of the lease agreement between the parties. The terms of the lease therefore should be scrutinized very carefully. Moreover, statutes such as N.C. Gen. Stat. § 42-12 are only applicable when the tenant fulfills the requirements outlined in the statute. In any event, the tenant should seek to always “act reasonably under the circumstances” to minimize harm to the property or to others and should not try to withhold rental payments unilaterally.

D. Rights and Responsibilities of Owners of Real and Personal Property Damaged by Falling Trees or Storm Debris Belonging to Others

Another common subject of legal problems for disaster victims involves rights and responsibilities relating to fallen trees and other storm debris. This summary explain basic North Carolina law on these issues.

1. Summary

The owner of trees or storm debris that cause damage to another’s property may be liable in negligence if the following circumstances are met:

- (1) *The owner of the trees or debris owes a **duty of care** to the person who was injured or whose property was damaged.* A property owner owes a duty of care to maintain man-made structures, cultivated trees, and other pieces of human-cultivated landscaping, and naturally occurring objects which he/she knows are in an unreasonably dangerous condition. The duty generally extends to lawful visitors, drivers on neighboring public roads, and adjoining property owners, so long as the landowner had actual or constructive knowledge of the dangerous condition. Under current interpretation of the Tort Claims Act, the State Highway Commission is not liable for negligent failure to maintain natural and possibly man-made, objects;

- (2) *the property owner **breached** the duty of care owed.* The property owner is required to take reasonable precautions against damage to neighboring property caused by a storm or other natural disaster. The extent of precautions necessary depends upon (1) the likelihood and probably severity of the disaster and (2) the efficacy and cost of precautions. *Failure to take advance precautions against an unforeseeable disaster is not negligent if the damage was caused solely by an act of God; and*
- (3) *the property owner's negligence was a **proximate cause** of the damage or injury.* Assuming that the property owner has been negligent in some manner, the property owner may escape liability of the damage would have occurred even in the absence of the property owner's negligence. However, if the property owner's negligence concurred in causing the disaster, then the property owner can be held liable. If the disaster is so unexpected as to be deemed unforeseeable, then the disaster is a superceding cause, relieving the property owner of liability.

2. Discussion

a. Action in Negligence

The owner of property that has been damaged by trees or storm debris may have an action in negligence against the owner of the trees or storm debris. To establish actionable negligence under North Carolina law, the plaintiff must show that (1) the defendant owed a duty of care to the plaintiff under the circumstances, (2) the defendant failed to exercise the degree of care what would be exercised by a reasonably prudent person under similar circumstances, (3) the defendant's negligence was a proximate cause of damage; and (4) the plaintiff suffered actual loss or damage. See Bolkhir v. N.C. State Univ., 321 N.C. 706, 709 (1988), McMurray v. Surely Federal Savings & Loan Ass'n., 82 N.C. App. 729, 731, *cert. denied* 318 N.C. 694 (1987); Keeton, *Prosser and Keeton on the Law of Torts*, § 30 (5th ed, 1981); Hester v. Miller, 41 N.C. App. 509, 512 (1979), *cert. denied*, 298 N.C. 296.

1) Duty of Care in the Disaster Context

A) Private Property Owners

North Carolina law imposes a duty or ordinary care upon every person who engages in an active course of conduct. Toone v. Adams, 262 N.C. 403, 409 (1964). A property owner owes a duty of care to maintain man-made structures, cultivated trees, and other pieces of human-cultivated landscaping, and naturally occurring objects which he/she knows are in an unreasonably dangerous condition. Matheny v. Stonecutter Mills Corp., 107 S.E.2d 143 (NC 1959). The duty generally applies to lawful visitors but not to trespassers. Nelson v. Freedland, 507 S.E.2d 882, 892 (NC 1998). It extends, however, to drivers on public roads and to neighboring property owners, so long as the property owner had actual or constructive knowledge of the dangerous condition. Gibson v. Hunsberger, 428 S.E.2d 489 (NC Ct. App. 1993) (landowner is liable to drivers on public roads adjacent to land for dangerous conditions of which the owner had actual or constructive notice, but is not obligated to inspect property in

rural, wooded settings); Rowe v. McGee, 168 S.E.2d 77 (NC Ct. App. 1969) (owner who knows its tree is decayed and likely to fall and damage plaintiffs' property has duty to eliminate danger).

The Gibson case held that in a rural, wooded setting, a property owner is not obligated to inspect the property to uncover dangerous conditions of which the owner was not previously aware. This is consistent with the common law rule absolving the landowner of any duty to find or remedy naturally occurring conditions, a rule designed to avoid burdening rural landowners with inspection of large unpopulated woodlands. *See generally* Keeton, *Prosser and Keeton on the Law of Torts*, § 57 (5th ed. 1984). Other jurisdictions have held similarly. *See, e.g., Ivancic v. Olmstead*, 66 N.Y.2d 349, 488 N.E.2d, cert. denied 90 L. Ed 658, 106 S. Ct. 1975 (1985) (a duty to remedy the hazard arises where the landowner has actual or constructive knowledge of it, but landowner has no duty to inspect regularly for non-visible decay of trees). However, the Gibson case did not specifically address the duty of a landowner in a more populated setting. The trend in other jurisdictions has been to impose upon a landowner in an urban or residential setting the duty to inspect the property for defects in trees and other naturally occurring objects. *See, e.g., Mahurin v. Lockhart*, 71 Ill. App. 3d 691, 390 N.E.2d 523 (1979); Barker v. Brown, 236 Pa.Super 75, 340 A.2d 566 (1975). Some jurisdictions have abolished the common law exception for naturally occurring hazards regardless of whether the setting was rural or urban. *See, e.g., Sprecher v. Adamson Cos.*, 30 Ca.3d 358, 636 P.2d 1121 (1981) (tree); Dudley v. Meadowbrook, Inc., 166 A.2d 743 (D.C. Mun. Ct. App. 1960) (same); *see also* Annotation, "Tree of Limb Falls onto Adjoining Private Property: Personal Injury and Property Damage Liability", 54 A.L.R. 4th 530, 541 (1987).

B) Governmental Entities

Every disaster will involve some aspect of governmental activity. Disasters affect the roadways, sewage systems, storm drains, power lines, firefighting activities, and so forth.

Whether a governmental body will be held liable in tort for negligence depends upon the nature of the acts or omissions constituting negligence. There are two categories of governmental functions: "governmental" and "proprietary". Sides v. Hospital, 287 N.C. 14, 213 S.E. 2d 297 (1975); Koontz v. City of Winston-Salem, 280 N.C. 513, 186 S.E. 2d 897 (1972), *pet. for reh. denied*, 281 N.C. 516 (1972); and Casey v. Wake County, 45 N.C. App. 522, 263 S.E. 2d 360 (1980), *pet. for discr. rev. denied*, 300 N.C. 371, 267 S.E. 2d 673 (1980). A municipality would enjoy sovereign immunity for "governmental" functions, but not for "proprietary" ones.

A good definition of the distinction between governmental and proprietary functions is the following:

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.

See generally Kizer v. City of Raleigh, 121 N.C. App. 526, 466 S.E.2d 336 (1996).

Case law in North Carolina has helped clarify what functions are governmental and what are proprietary. For example, firefighting activities of a municipal fire department are generally considered governmental or discretionary functions for which the city is immune. See, e.g., Willis v. Town of Beaufort, 544 S.E.2d 600 (N.C. Ct. App. 2001). That immunity, however, can be waived to the extent of the limits of any insurance the department has obtained. N.C. Gen. Stat. §§ 153A-435 and 160A-485. Volunteer fire departments are immune from civil liability for any conduct in connection with their fire suppression efforts. N.C. Gen. Stat. § 58-82-5(b) (1999); see Spruill v. Lake Phelps Volunteer Fire Department, Inc., 351 N.C. 318, 523 S.E.2d 672 (N.C. 2000).²

Sewage maintenance is generally considered proprietary in nature, thus conferring liability to municipalities for failure to maintain sewage systems, including storm drains. Howell v. City of Lumberton, 548 S.E.2d 835 (N.C. Ct. App. 2001) (“The general rule is that a municipality becomes responsible for maintenance, and liable for injuries resulting from a want of due care in respect to upkeep, of drains and culverts constructed by third persons when, and only when, they are adopted as a part of its drainage system, or the municipality assumes control and management thereof,” quoting Hotels, Inc. v. Raleigh, 268 N.C. 535, 151 S.E.2d 35 (1966)); Pulliam v. City of Greensboro, 103 N.C. App. 748, 754, 407 S.E.2d 567, 567 (1991) (municipality “not immune from tort liability in the operation of its sewer system.”). However, if some other entity besides the municipality assumed control over the sewage system, the municipality may not be liable. See, e.g., Milner Hotels, Inc. v. City of Raleigh, 268 N.C. 535, 151 S.E.2d 35 (1966), *modified on reh’g*, 271 N.C. 224, 155 S.E.2d 543 (1967) (a municipality is responsible for negligent maintenance of drains constructed by third persons only if it adopted them as part of its drainage system or assumed control and management thereof).

As to debris and/or traffic on state highways, the State Highway Commission is immune from suit, except insofar as the right to sue is conferred by the Tort Claims Act. Ayscue v. Highway Comm’n, 270 N.C. 100, 102 (1967). As the Act has been interpreted, the Highway Commission is not liable for negligent omissions of failures to act. *Id.* at 103. Therefore, the owner of a car damaged by a tree that fell in the roadway cannot maintain an action against the highway commission for failure to maintain the tree. Moreover, a plaintiff probably cannot maintain an action for negligent failure to maintain manmade objects such as telephone poles. See *id.* (plaintiff could not maintain an action against the Commission based on the Commission’s negligent failure to removal gravel from a paved intersection, where the gravel had been strewn by cars from a nearby gravel road).

² Also to note, under the public duty doctrine, certain law enforcement agencies may be shielded from liability in connection with an alleged failure to provide protection to specific individuals. Braswell v. Braswell, 330 N.C. 363, 410 S.E.2d 897 (1991); see also Lovelace v. City of Shelby, 351 N.C. 458, 526 S.E.2d 652 (2000). However, this protection is limited and should be analyzed carefully.

2) Breach of the Standard of Care in the Disaster Context

Although a landowner has a duty to take precautions against known dangerous conditions on his/her property, the extent of the precautions necessary in the context of an approaching disaster depends upon (1) the likelihood and probably severity of the disaster and (2) the efficacy and cost of precautions. As of September 2003, no North Carolina cases have been uncovered which directly discuss the degree of precaution necessary in the context of an approaching storm. However, North Carolina gives the judge discretion to decide the issue of the foreseeability as a matter of law:

The issue of foreseeability may be determined as a matter of law. *See Pridgen v. Kress & Co.*, 213 N.C. 541, 196 S.E. 821 (1938). As has been specifically stated: “Foreseeable injury is a requisite of proximate cause, and proximate cause is a requisite for actionable negligence, and actionable negligence is a requisite for recovery in an action for personal injury negligently inflicted.” *Watkins v. Furnishing Co.*, 224 N.C. 674, 676, 31 S.E.2d 917, 918 (1944). We find as a matter of law that the plaintiff’s evidence is insufficient to support a finding of foreseeable injury to the plaintiff by the defendant and does not establish the proximate cause requisite for actionable negligence.

Lyvere v. Ingles Markets, Inc., 244 S.E.2d 437 (N.C. Ct App. 1978).

3) Proximate Cause in the Disaster Context

Even if a landowner was negligent, the landowner will not be liable for damages if the damages would have occurred from an act of God *regardless of that negligence*.

This is said in 1 AM. JUR. 2d, Act of God, §11: “All the authorities without exception agree that a person is not liable for injuries or damages caused by an act which falls within the meaning of the term ‘act of God,’ where there is no fault or negligence on his part. Even where the law imposes liability irrespective of negligence, liability will not be imposed where the injury or damage is solely the result of an act of God.”

Safeguard Ins. Co. v. Wilmington Cold Storage Co., 149 S.E.2d 27 (NC Ct. App. 1966). However, the landowner will be liable if the landowner’s negligence acted in concurrence with an act of God:

“But one may be held liable for his own negligence even through it concurs with an act of God.” To the same effect, *Southern Ry. Co. v. Cohen Weenen & Co.*, 156 Va. 313, 157 S.E. 563. Reducing the principle to the terseness of a maxim, “He whose negligence joins with the act of God in producing injury is liable therefor.” *Kindell v. Franklin Sugar Refining Co.*, 286 Pa. 359, 133 A. 566.

Safeguard Ins., 149 S.E.2d 27 (N.C. Ct. App. 1966); *see also Jenkins v. Helgren*, 217 S.E.2d 120 (N.C. Ct. App.1975) (even if source of spark was an act of God, for which installers of insulation

in return duct connected to furnace could not be responsible, installers could be held liable to homeowners for damage caused by fire if their negligence created the hazardous condition upon which the act operated); Bennett v. Southern Railroad Co., 96 S.E.2d 31 (N.C. Ct. App. 1957) (even when an act of God combines or concurs with the negligence of the defendant to produce the injury or when any other efficient cause so combines or concurs; the defendant is liable if the injury would not have resulted but for his/her own negligent act or omission.); Lawrence v. Yadkin River Power Co., 190 N.C. 664, 130 S.E. 735 (1925); Supervisor & Commissioner of Pickens Co. v. Jennings, 181 N.C. 393, 107 S.E. 312 (1921); Ridge v. Norfolk Southern R.R. Co., 167 N.C. 510, 83 S.E. 762 (1914).

3. Defenses

Under North Carolina law, the defense of contributory negligence can act as an absolute bar if control over the hazardous condition had been given to the plaintiff prior to the incident. For example, in Rowe v. McGee, 168 S.E.2d 77 (N.C. Ct. App. 1969), the court held that even where the landowner knew its tree was decayed and likely to fall and damage plaintiffs' property, the plaintiff could be contributorily negligent if the plaintiff had affirmatively assumed the duty to clear away the rotted tree prior to its falling. Cf. Annotation, "Failure to Exercise Due Care to Prevent all of Tree", 27 AM. JUR. 2d, *Proof of Facts* 639, section 1, at 645 (noting that both owners and occupiers of property have been held liable where the requisite control was found.).

4. Case Studies

Jenkins v. Helgren, 217 S.E.2d 120 (NC Ct. App.1975):

Held: Even if the source of a spark was an act of God, for which installers of insulation in return duct connected to furnace could not be responsible, the installers could be held liable to homeowners for damage caused by fire if their negligence created the hazardous condition upon which the act operated. The court noted as follows:

Thus, in Lawrence v. Power Co., 190 N.C. 664, 130 S.E. 735 (1925), judgment for plaintiff was sustained in a case in which the evidence showed that the fire which damaged plaintiff's property was started when lightning struck defendant's transmission line causing an insulator on a tower to melt and fall upon inflammable matter below, our Supreme Court finding sufficient evidence of actionable negligence on the part of the defendant in its having permitted dry grass to accumulate on its right-of-way beneath the tower. We hold that the evidence in the present case was sufficient to support the jury's verdict finding that defendants' negligence was a direct and proximate cause of the fire which damaged plaintiffs' property, and the original defendants' motions for directed verdict as to plaintiffs' claim against them were properly denied."

Rowe v. McGee, 168 S.E.2d 77 (NC Ct. App. 1969):

Held: Even if the tree grew on and became part of land by natural condition, defendants, who knew that tree on their property was decayed and liable to fall and damage plaintiffs' property, were under duty to eliminate danger and could not with impunity place burden to

remove tree on plaintiffs, though it was not error to submit issue as to contributory negligence under evidence that plaintiffs' predecessor in title had procured permission from defendants to cut and remove tree and was supposed to have cut and removed it before building house, that plaintiffs had received permission from defendant to cut and remove tree and that plaintiffs had, by their conduct, led defendants to believe that tree had been cut and removed and dangerous condition eliminated. The court asked "Under these circumstances, what was the responsibility of the defendants for this tree?" The court then quoted the Restatement of the Law of Torts, § 840, p. 310:

"Where a natural condition of land causes an invasion of another's interest in the use and enjoyment of other land, the possessor of the land containing the natural condition is not liable for such invasion."

The court then found there was nothing to show that the tree in question did not grow on and become a part of the land by natural condition. Pursuant to the Restatement rule, therefore, the defendants were under no obligation and had no responsibility toward the plaintiffs vis-à-vis the tree. The plaintiffs therefore had the entire burden of protecting their house and property from this tree in the event it should fall.

For additional cases on this issue, see Annotation, "Failure to Exercise Due Care to Prevent fall of Tree", 27 AM. JUR. *Proof of Facts* 639, § 6, at 657-59.

E. Insurance Claims and Hiring Contractors³

1. Insurance Issues

Natural disaster victims will often have legal questions related to filing insurance claims for property damage. The following should provide the Volunteer Attorney with a start towards assisting victims with such questions.

An insurance policy is essentially a contract and the rights and responsibilities of the parties are generally governed by the terms of the policy. Note that state and federal laws, including various consumer protection laws may provide additional protection or guarantees outside of the policy's terms.

This summary is intended as a general reference only. The rights of an insured will be determined by the terms of the policy and applicable laws. The insured should always carefully review the terms of the policy, and you may need to review the policy for the victim. Either the insured or the Volunteer Attorney may also contact the North Carolina Insurance Commission if a dispute occurs.

³ The information in this section is taken from *Rebuilding After Disaster Strikes: Tips for Making Insurance Claims and Hiring Contractors*, a pamphlet published by the YLD Disaster Legal Services Committee.

In the event of a natural disaster such as a storm, hurricane, fire, or tornado the insured homeowner has several things to consider. This summary addresses some major items which you may want to review with the victim.

a. Protect the Property.

The homeowner is under a duty to take reasonable steps necessary to protect his property and lessen the likelihood of additional damage. For example, the insured may need to put plastic over a hole in the roof or move furniture away from exposed areas. *However, the insured should not undertake any activity which might place himself or others in danger.* The insurance company should reimburse the homeowner for the cost of such efforts.

b. Notify the Insurance Company.

Identify the insurance company and verify the amount of coverage. Notify the insurance company immediately. This rule applies even if it is not certain the loss will be covered. Let the agent or the company know where to reach the insured if it has been necessary to move from the residence. If the insured cannot locate his or her policy and does not know the name of the company, call the insurance agent. If you still cannot identify the company and the insured owns the home, the bank that holds the insured's mortgage will likely know which company it is. Although a call to the agent may suffice as notice, the company should probably be informed directly. Any verbal communications should be followed up in writing.

Have the victim set a time for the adjuster to inspect the damage as soon as possible. You should recommend that the insured accompany the adjuster during the inspection and the victim should be available to answer any questions the adjuster might have. In dealing with the adjuster, make certain that the insured understands that the company is only going to pay what it is legally obligated to pay under the terms of the insurance policy.

c. Real Property.

The homeowners insurance policy generally provides for the replacement cost of damaged or destroyed real property (house and structures) up to the policy limits. However, if the insurance is less than 80% of the value of the house, the homeowner will be limited to the actual value of the damaged property. For example, if a ten-year-old roof which has a useful life of 20 years is damaged and will cost \$2,500 to replace, and the insurance coverage on the house was at least 80% of the value of the house (not taking into consideration the value of the land or lot), then the entire cost of replacing the roof would be paid. However, if the insurance coverage is less than 80% of the value of the house, then only the value of the roof at the time of the damage would be covered. This value would likely be \$1,250 since half the life of the roof had been used at the time of the damage.

In order to receive replacement value, the homeowner must actually replace or repair the damage. In the above example, if the roof is damaged the homeowner is entitled to the cost of a new roof but only if one is placed on the house. In other words, the homeowner cannot collect the \$2,500 cost for the new roof and then only replace a few damaged shingles. The entire roof

must be replaced. Otherwise, the insurance company may seek to pay only the cost of the repairs actually performed (and possibly some amount for cosmetic damage).

d. Trees.

If a tree falls on an insured house or structure, the insurance company will likely pay for the damage to the structure and the tree removal. However, if the tree falls on a car, fence, awning, or simply blows over, the insurance company may refuse to pay. (Carefully review the terms of the policy!) There is usually coverage for the value of trees and shrubs for their loss due to lightning and fire.

e. Personal Property.

The homeowner's or renter's insurance policy may provide replacement cost coverage for personal property (furniture, china, silver, TV, stereo equipment, etc.). If the policy does not specifically provide for replacement cost coverage, the homeowner is only entitled to the actual value of the property at the time of the loss. If there is replacement coverage, the insured can obtain new items to replace the damaged or destroyed goods. Again, the items must be replaced in order to receive replacement value. For example, if a five-year old TV worth \$200 was destroyed and would cost \$600 to replace, the homeowner must get a new TV of \$600 value in order to get the \$600. Otherwise, the insurance company may seek to pay only the value of the old TV at the time it was destroyed. In addition, the insured may have special enumerated items insured under special provisions of the policy for a greater amount.

f. Certain Items of Personal Property.

There are special limits on the amount the insurance company will pay for cash, securities, gold, jewelry, firearms, and other items. (Carefully review the policy limits!)

g. Automobiles.

Damage to automobiles and other vehicles are excluded from homeowners insurance coverage. However, if the homeowner has comprehensive insurance coverage for the automobile, such a policy may cover the damage. (Carefully review the applicable terms of that policy!) Items of personal property located in the automobile may be covered by the homeowner's or renter's policy. Again, review the terms of the policies.

h. Flood.

Unless the home is located in a special flood hazard area as determined by the Government and special flood insurance has been purchased, flood damage may be excluded from the standard homeowners policy. This exclusive may not apply to flooding caused by broken or damaged pipes or plumbing which may be covered. Again, review the policy!

i. Living Expenses While Home Is Under Repair.

A homeowners policy will generally, up to a specified percentage of the coverage limits, pay for additional living expenses incurred while the house is being repaired. This insurance may be used to cover the cost of a hotel or apartment while the house is being repaired. If there are additional food costs beyond what you would normally incur, these also are covered.

j. Disputes.

The insurance company is under a duty to act in good faith in settling an insurance claim. A dispute between the insured and the insurance company about the cost of repairs or values can generally be resolved by an independent appraisal or estimate. If the insured feels that he/she is not being dealt with fairly, he/she can report the claim to the N.C. Insurance Commissioner and the Better Business Bureau or engage an attorney.

k. Some additional tips for helping a victim deal with insurance claims:

- Update losses in writing as more information becomes available. Provide any receipts, appraisals, or photographs of the property that may be available. (Be sure to keep a copy of all written information provided to the insurance company).
- Take pictures of the damage if possible. (It is also a good idea to take photographs of property before any damage occurs).
- Get estimates for repair and replacement costs.
- Have an adjuster look at the property before making any significant repairs.
- Get receipts for all repairs made and for other living expenses paid out because of the damage or loss.
- If the situation is desperate and the insurance company agrees that there is coverage, ask for an advance. Be careful, however, to ensure that any advance by the insurance company is not provided as “payment in full.” If the check says “Payment in full” in the place for endorsement, do not sign if the advance will not cover the entire amount of the claim.
- The victim should talk with a lawyer before signing any release, waiver, check, or other document provided by the insurance company that may prevent any further claims.

If the insurance company denies coverage for the claims:

- Ask the company to give its reasons in writing.
- Reread the policy carefully to determine if the company’s position makes sense.
- If you do not agree with the company’s reasons for denying coverage or the amount of the company’s settlement offer, talk with a lawyer about the claim.

2. Hiring Contractors

- a. Only hire a **licensed contractor** to rebuild your home. To determine if a “contractor” is truly a licensed General Contractor call the Research Department of the North Carolina Licensing Board for General Contractors at 919-571-4183. You may also “search” out the information on the Board’s website, www.nclbgc.net. The Research Department can also give a short Complaint History about the builder.
- b. It is always advisable to ask family and friends for their recommendations on a good, honest builder. If the insured does not know anyone to get recommendations from, then call a local building supply company and ask for names of some builders who are from the local area. Remember that if the person hired does not have a business, family, or own some real property in the local area, then there is not much to hold him/her in town once he/she has the victim’s money.
- c. North Carolina law requires contractors to present proof that they are licensed before a building permit will be granted. Therefore, if a contractor asks the victim to get the permit, it is advisable to require the contractor to get the building permit.
- d. Never pay the entire construction price up front! A builder should normally accept a 10% down payment in getting started on the project.
- e. Make sure that you have a written contract and that the contractor signs *exactly* as his name appears on his General Contractor’s License Certificate or Certificate of Renewal.
- f. If your insurance can or may cover the cost of repairs, the insurance adjuster may require you to use a certain contractor. Do not, however, allow the insurance adjuster to require you to use an unlicensed contractor to repair your home. The insurance company should not require you to allow an unlicensed contractor illegally to perform repair work that should be done by a licensed contractor.
- g. Above all else, remember that it is your money and the majority of the damage has already been done. There is NO reason to rush into something which could result in more damage in the long run. Take your time and decide what you think is best **after** you have thought about it for a reasonable time.

II. INTERNET SITE REFERENCES

Relief Organizations

The American Red Cross: www.redcross.org

The American Red Cross Disaster Relief Fund: www.disasterrelief.org

The Federal Emergency Management Agency (FEMA): www.fema.gov

Weather Forecasting

National Oceanic and Atmospheric Administration website: www.noaanews.noaa.gov

National Weather Service: www.nws.noaa.gov

National Weather Service, National Hurricane Center: www.nhc.noaa.gov

Rainfall data: <http://www.srh.noaa.gov> (gives rainfall and other data for a particular area, and narrows it down to specific cities.)

Mapping of precipitation: http://www.srh.noaa.gov/lub/wx/precip_freq/precip_index.htm (provides maps which classify rainfall events by time interval -- 30 minute, 1 hour, 2 hour, 3 hour, 6 hour, 12 hour, 24 hour -- and according to severity -- 1 year, 2 year, 5 year, 10 year, 25 year, 50 year and 100 year).

National Climatic Data Center: www.ncdc.noaa.gov

The Weather Channel: www.weather.com

Accuweather.Com: www.accuweather.com

The Weather Network: www.theweathernetwork.com

Weather Underground: www.wunderground.com

Intellicast Weather: www.intellicast.com

Online Meteorology Guide: <http://ww2010.atmos.uiuc.edu>

World Climate: www.worldclimate.com

Automated Weather Service: www.aws.com

The Weather Center/WeatherWatch.Com: www.weatherwatch.com

WeatherNet: <http://cirrus.spri.umich.edu/wxnet>

WeatherConcepts: www.weatherconcepts.com

National Interagency Fire Center: www.nifc.com

Center for Analysis and Prediction of Storms, Univ. Oklahoma: www.caps.ou.edu

Legal Research

Casemaker:

<https://www.barlinc.org/login.asp>

Others:

<http://www.nccourts.org/>

<http://www.aoc.state.nc.us/www/public/html/rules.htm>

<http://www.access.gpo.gov/nara/cfr/index.html>

<http://www.findlaw.com/>

<http://www.supremecourtus.gov/>

http://www.abanet.org/barserv/disaster/response_plans.html

<http://www.abanet.org/yld/affiliate/dec99/efforts.html>
<http://www.vsb.org/sections/yl/emergsvcs.html>
<http://www.abanet.org/yld/desmond.html>
<http://www.abanet.org/yld/affiliate/23-3-3.html>

III. STATE BAR ORGANIZATIONS

Cumberland County Bar Association
157 Gillespie Street
Fayetteville, NC 28301
Phone: (910) 483-1848

Durham County Bar
Julia Borbely Brown, executive director
P.O. Box 593
Durham, NC 27702
Phone: 919-682-2012

Durham County Bar Association and The Fourteenth Judicial Bar
605 Jackson Street
Durham, NC 27701
Phone: 919-682-2012
Fax: 919 -680-0108

Volunteer Lawyers Program of Durham County (919) 688-6396 Located in Durham serving the counties of Durham, Franklin, Granville, Person, Vance and Warren.

Forsyth County Bar
James T. Robinson, Executive Director
2135 New Walkertown Road
Winston-Salem, NC 27101
Phone: 336-760-1235

Forsyth & Iredell County Bar Associations Volunteer Lawyers Program (919) 725-9166
Winston-Salem office serving the counties of Davie, Forsyth, Iredell, Stokes, Surry, and Yadkin.

Gaston County Volunteer Lawyers Program (704) 865-2357

Greensboro Bar Association, Inc.
Carol Ingram, Executive Director
Ms. Garland G. Graham, President (2003-2004)
P.O. Box 1825
Greensboro, NC 27402
Phone: 336-378-0300

Mecklenburg County Bar

Nancy Roberson, Executive Director
438 Queens Road
Charlotte, NC 28207
Phone: 704-375-8624
E-mail: nroberson@meckbar.org

New Hanover County Disaster Prep
20 N. 4th Street
Wilmington, NC 28401
Phone: 910-341-4123

New Hanover County Pro Bono Program, (919) 763-6207, located in Wilmington and serving the counties of Bladen, Brunswick, Columbus, Duplin, New Hanover, Pender, and Onslow.

North Carolina Academy of Trial Lawyers
1312 Annapolis Drive
PO Box 10918
Raleigh, NC 27605
Phone: (800) 688-1413
E-mail: www.ncatl.org

Wake County Bar Association
Alice Roman, Executive Director
P.O. Box 3686
Cary, NC 27519
Phone: 919-677-9903

Blue Ridge Area Volunteer Lawyers Program, (704) 264-5640, 7 counties in northwestern North Carolina: Alleghany, Ashe, Avery, Mitchell, Waterjays, Wilkes, and Yancey.

Catawba Valley Legal Services, Inc., (704) 437-8280, located in Morganton serving the counties of Alexander, Burke, Caldwell, Catawba, Cleveland, Lincoln and McDowell.

East Central Community Legal Services, (919) 934-5027, private Attorney Involvement Project located in Smithfield and serving the counties of Harnett, Johnston and Sampson.

Greensboro Pro Bono Project, (919) 272-0148, Private Bar Involvement Project, (910) 272-0148, located in Greensboro serving the counties of Davidson, Guilford, Montgomery, Randolph, Rockingham, and Rowan. Contact point for programs listed under those counties.

Legal Services of the Coastal Plains, (919) 332-5124, located in Ahoskie and serving the counties of Bertie, Camden, Chowan, Currituck, Dare, Gates, Hertford, Halifax, Northampton, Pasquotank and Perquimans.

Mountain Area Volunteer Lawyers, (704) 253-0406, located in Asheville and serving the counties of Buncombe, Henderson, Madison, Polk, Rutherford, and Transylvania.

North State Legal Services, Inc. Private Attorney Involvement Project, phone: (919) 732-8137, located in Hillsborough and serve the counties of Alamance, Anson, Caswell, Chatham, Moore, Richmond and Orange.

Pamlico Sound Legal Services, (919) 758-0113, located in Greenville and serve the counties of Carteret, Craven, Hyde, Jones, Martin, Pamlico, Pitt, Tyrrell, and Washington.

Volunteer Lawyers Project, (704) 786-4145, located in Concord serving the counties of Cabarrus, Stanly and Union.

Seventh Judicial District Bar Volunteer Lawyers Program, (919) 442-0635, serving the counties of Edgecombe and Nash.

Seventh and Eighth Judicial District Bars, (919) 291-6851

Thirtieth Judicial District Bar, (704) 586-8931 Volunteer Lawyers Program located in Sylva and serving the counties of Cherokee, Clay, Graham, Haywood, Jackson, Macon and Swain.

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