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Farm Law for Operators and Landowners

Land Ownership, Liability and the Law



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This Lawyer's Background

- Member of the Virginia State Bar (1992) and North Carolina State Bar (2003)
- Non-profit work in agriculture
 - American Farmland Trust
 - NC Farm Transition Network
- Private (Farm) Law Practice (2010 - 2018)
- NCSU Agricultural and Resource Economics (2018)
 - 50% Extension appointment
 - 50% Teaching (Environmental and Agriculture Law)

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<https://farmlaw.ces.ncsu.edu/>

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This Lawyer's Observations

- Try not to give heirs undivided interests in land
- Estate Tax exemptions still high
- All land dispositions must be in writing
- Careful of PUV when dividing land
- Legacy planning is a process, not event
- **Be mindful of leaving obligations behind**

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Real Property 101: Ownership Interests and “the bundle of sticks”

- Right to quiet enjoyment
 - Basis for nuisance civil action
- Rights to water (riparian)
- Rights to timber
- Rights to subdivide
 - Subject to zoning
 - Subject to soil capacity to support septic
- Rights to...



2+ owner bundle of sticks are shared concurrently
Each stick is voluntarily **severable**

Extension Publication: [An Explanation of Ownership Rights in Property](#)

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Preventing Partition

- Tenant in common has right of partition land
 - Actual Division (§46-1 *et seq*)
 - Sale in Lieu of Partition (NCGS §46-22)
 - Life tenant may partition timber (NCGS §46-25)
- LLC Operating Agreement restricts partition
- Tenant in Common Agreement (template coming)
- Beneficiary of Trust
 - Limited to action against Trustee or Trust
- Rights of First Refusal – maximum 30 years
 - requirement to deal before partition
 - Specific requirements (record Memorandum!)

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Liability 101: Concept of Negligence

- Injuries do not trigger *strict liability*
 - except if “ultrahazardous activity” can be established
 - e.g. operating a pit mine with blasting near a neighborhood
- If someone is injured, that person must prove landowner’s responsibility in court (a jury determines liability based on the facts)
 - fact A + fact B + fact C = liability?
- Basic Process:
 - landowner notified by injured person
 - landowner notifies insurance company, contractually obligated to respond to lawsuit (generally does not want landowner speaking to injured person, danger of admissions: “yeah, I’d been meaning to cap that old well for years...”
 - injured person must prove
 - a) invitee status
 - b) landowner’s negligence
- Extension Publication: [Liability for Injury of Farm Visitors](#)

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Tree Fall Liability

- “*cuius est solum, eius est usque ad coelum et ad inferos*” [Latin: whoever owns land it is theirs up to the heavens and down to hell]
- Can I cut my neighbors tree limbs hanging over my property?
 - May be prohibited by municipal ordinance
- May I cut down my neighbor’s dead tree hanging over my garage?
 - cannot enter upon their land
- Is my neighbor liable if their dead tree falls on my garage?
 - Depends: a matter of negligence (foreseeability), a jury must decide based on evidence that the owner was negligent in allowing a dangerous condition that caused you injury
 - Insurance generally covers damage as natural occurrence
 - but may fall on property in an “insurance gap” (e.g. a boat, an RV)
- What to do?
 - Ask permission to cut down
 - Ask to split, if no, offer to pay for it
 - Hire arborist to provide assessment of tree health, send to neighbor “for their files”
 - Document document document

Farm Law Article: [Tree Fall Liability: Who is Responsible for Damage?](#)

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Insurance Policy Covers What it Says it Covers

- Excludes specifically what it does not
- Farm policies (land and commercial) typically do not automatically cover "non-farm" businesses
- Do not add "customer facing" or "on farm activity" (agritourism) without discussion with insurance company
 - Risk goes up, insurer must charge more for risk increase
- Homeowner's policy cover RVs? Boats? Outbuildings?

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Basic Farm Owner Policy (ISO FL00201H Form)

- <http://www.egggroup.com/Pdf/FL00201H.pdf>
- Covers "property damage" and "bodily injury" from "occurrences"
- Long list of exclusions
 - Pollution (will not cover pesticide drift unless amended)
 - "Business pursuits"
 - with notable exception of "farming"
 - Rental of property
 - With notable exception of "farming"

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Civil v. Criminal Trespass

- Common Law cause of action: Invasion of another's "right to sole possession"
- Actionable in criminal law [if reasonably posted \(§ 14-159.13\)](#)
 - your right to sole possession is publicly enforced if you comply with statute that triggers a criminal penalty for trespass
- Civil law tort of Trespass requires proof of damages to landowner
 - Timber trespass damages supported by statute
- Gives rise to issues of liability for the offended landowner
 - Common law rule: landowner owes no duty to not injury others upon his/her land
 - North Carolina: two classes of "other" on your land, invitee and trespassers (per *Nelson v. Freeland*, 349 N.C. 615, 507 S.E.2d 882 (1998))

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Liability Protection: Invitee (Agritourism)

- Duty to your customers (invitees) to eliminate risk and make property safe (fencing off that bull, filling in that old well)
- Property Insurer (e.g. Farm Bureau) must know the scope of what they are insuring
 - Policy "rider" (e.g. people are picking strawberries on your farm)
- NC Statutory Agritourism Liability Limitation ([NCGS 99E-30](#))
 - Post two signs that read:

WARNING! Under North Carolina law, there is no liability for an injury to or death of a participant in an agritourism activity conducted at this agritourism location if such injury or death results from the inherent risks of the agritourism activity. **Inherent risks** of agritourism activities include, among others, risks of injury inherent to land, equipment, and animals, as well as the potential for you to act in a negligent manner that may contribute to your injury or death. You are assuming the risk of participating in this agritourism activity.

- Will not protect you from wanton negligence
 - Has not been tested in NC appeals courts
- Extension Publication: [Liability for Injury of Farm Visitors](#)

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Common Trespasses

- Timber overcut
- Hunting (a matter of tradition)
- River access (canoeing, swimming, cliff diving)
- Pond fishing
- ATV and horseback riding

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Trespass

§ 14-128. Injury to trees, crops, lands, etc., of another.

Any person, not being on his own lands, who shall without the consent of the owner thereof, willfully commit any damage, injury, or spoliation to or upon any tree, wood, underwood, timber, garden, crops, vegetables, plants, lands, springs, or any other matter or thing growing or being thereon, or who cuts, breaks, injures, or removes any tree, plant, or flower, shall be guilty of a Class 1 misdemeanor: Provided, however, that this section shall not apply to the officers, agents, and employees of the Department of Transportation while in the discharge of their duties within the right-of-way or easement of the Department of Transportation. (Ex. Sess. 1924, c. 54; 1957, c. 65, s. 11, c. 754; 1965, c. 300, s. 1; 1969, c. 22, s. 1; 1973, c. 507, s. 5; 1977, c. 464, s. 34; 1993, c. 539, s. 68; 1994, Ex. Sess., c. 24, s. 14(c).)

§ 14-159.3. Trespass to land on motorized all-terrain vehicle.

- (a) No person shall operate any motorized all-terrain vehicle:
- (1) On any private property not owned by the operator, without the **written consent** of the owner;
 - or
 - (2) Within the banks of any stream or waterway, but excluding a sound or the Atlantic Ocean, the adjacent lands of which are not owned by the operator, without the consent of the owner or outside the restrictions imposed by the owner.
- (a1) A landowner who gives a person **written consent to operate an all-terrain vehicle** on the landowner's property owes the person the **same duty of care that the landowner owes a trespasser**.
- (b) A "motorized all-terrain vehicle", as used in this section, is a two or more wheeled vehicle designed for recreational off-road use.
- (c) A violation of this section shall be a Class 2 misdemeanor. (1997-456, s. 56.8; 1997-487, s. 1; 2014-103, s. 11(a); 2015-26, s. 2.1; 2017-102, s. 4.)

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Trespass – No Duty of Care

- Liability is always **"Evidence Based"**: The plaintiff (injured party) must **prove** 4 elements:
 - You **owned them a duty** to not cause injury (or allow injury to occur)
 - You **breached that duty**, acted in an unreasonable manner
 - Your breach *caused* their injury
 - They sustained **quantifiable damage** (medical bills, pain and suffering, loss of income)
- **§38B-2. General rule.** A possessor of land, including an owner, lessee, or other occupant, does not owe a duty of care to a trespasser and is not subject to liability for any injury to a trespasser.
- **§38B-3. Exceptions**
 - (1) Intentional harm = "willful or wanton"
 - The Common Law "Spring Gun Trap"
 - Example: thin wire across field entrance (to repel ATV)?
 - May use reasonable force to repel a crime
 - (2) Harm to Children (<14) (attractive nuisance doctrine)

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Attractive Nuisance Doctrine

- **N.C.G.S. § 38B-3 (2)**
 - Plaintiff must prove 5 elements:
 - Landowner had reason to know that children were likely to trespass **and**
 - Landowner knew of unreasonable risk of serious bodily injury or death **and**
 - The injured child did not appreciate the risk **and**
 - the utility to the possessor of maintaining the condition and the burden of eliminating the danger were slight as compared with the risk discover the condition or realize the risk involved (a "balancing test") **and**
 - Landowner/possessor failed to exercise reasonable care to eliminate the danger or otherwise protect the injured child.
 - Only attaches liability to person in control of the land
 - *Lampkin v. Housing Management Resources, Inc* 725. SE2d 432 (N.C.App. 2012)
- A matter of evidence
 - A well worn path entering property
 - An unrepaired hole in the fence
 - Litter (mountain dew bottles, candy wrappers)
 - General community knowledge
 - No action on part of landowner
- Cases
 - *Brannon v. Sprinkle*, 207 N.C. 398 (1934): Attractive nuisance found
 - *Gurley v. Southern Power Co.*, 172 N.C. 690 (1916)
 - "a **pond** or reservoir is not a dangerous instrumentality or an **attractive nuisance.**"
 - *Matheny v. Stonecutter Mills Corp.*, 249 N.C. 575 (1957)
 - [Landowner] is not bound to make a **trespass** by or injury to children impossible.

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Trail Use

§ 143B-135.118. Trail use liability.

(a) Any person, as an owner, lessee, occupant, or otherwise in control of land, who allows without compensation another person to use the land for **designated trail or other public trail** purposes or to construct, maintain, or cause to be constructed or maintained a designated trail or other public trail **owes the person the same duty of care he owes a trespasser.**

Private lands “designated trail” defined [143B-135.98](#)

(b) Any person who without compensation has constructed, maintained, or caused to be constructed or maintained a designated trail or other public trail pursuant to a written agreement with any person who is an owner, lessee, occupant, or otherwise in control of land on which a trail is located shall owe a person using the trail the same duty of care owed a trespasser.

Recreational Use Statutes

§ 38A-4. Limitation of liability.

(a) Except as specifically recognized by or provided for in this Chapter, an owner of land who either **directly or indirectly invites or permits without charge** any person to use such land for educational or recreational purposes owes the person the same duty of care that he owes a trespasser, except nothing in this Chapter shall be construed to limit or nullify the doctrine of **attractive nuisance** and the owner shall inform direct invitees of artificial or unusual hazards of which the owner has actual knowledge. This section does not apply to an owner who invites or permits any person to use land for a purpose for which the land is regularly used and for which a price or fee is usually charged even if it is not charged in that instance, or to an owner whose purpose in extending an invitation or granting permission is to promote a commercial enterprise.

(b) Nothing in this section shall be construed to conflict with or render ineffectual a **liability release**, indemnification, assumption, or acknowledgment of risk agreement between the landowner and a person who uses the land for educational or recreational purposes.

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Liability Waivers Generally

- Premise: **Assumption of the Risk**
- A warning of danger “inherent” in activity upon land, only effective against “inherent” dangers
 - May not be effective against dangers caused or exacerbated (i.e. negligence) by party requiring waiver
 - May not be effective against unusual dangers not disclosed by party requiring waiver
 - E.g. an unmarked abandoned mine on property
- NC Case Law
 - *Thackurdeen v. Duke University* (unplanned beach trip part of program activity)
 - *Palacino v. Beech Mountain Resort, Inc.* (waiver only applied to snow sports)
 - *Strawbridge v. Sugar Mountain Resort, Inc.* (waiver only applied to equipment rental, not conditions on mountain)

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Timber Injury and Trespass

- [N.C.G.S. §14-128](#). Wilfull injury to trees is Class 1 Misdemeanor
 - NCDOT gets pass in RW
 - Recent case: value of ornamentals may be considered in removal damages ([Farmlaw article](#))
- [NCGS §1-539.1](#)
 - Injured landowner entitled to ~~double~~ triple stumpage value of timber cut (cutting and burning)
 - Need a good boundary survey (mark boundary trees)
 - Timber harvester entitled to reimbursement from landowner who misrepresents property lines
 - Claim of damages *may* depend on documentation of line (good survey)

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Avoid Timber Trespass/Theft

- Clearly post your property (conform to or exceed the legal requirements)
- Be diligent with boundary line maintenance
- Repaint as needed to ensure high visibility in all seasons
- Clearly identify property corners
- Post signage that indicates the property is under surveillance by such a group or insurer
- Encourage ag and hunting lease holders to monitor and report any suspicious activity on the property

Extension Fact Sheet: [Prevent Timber Trespass and Theft](#)

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Hunting Lease Overview

- Description of Property
 - PIN, common name
 - Acreage
 - Exhibit aerial photo of 'no hunting' zones
- Term
 - (e.g. April 1 through March 31)
 - Avoid auto renewal
 - No statutory right to renewal
- Deer blinds and structures
- Requirement of Liability Insurance

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Hunting Lease for Hunting Clubs

- Problem of internal policing
 - Require attachment of Club rules as a referenced exhibit to lease
 - Violation of club policy becomes a default under the lease
 - E.g. improper weaponry, blind construction, violation of member guest policy
- Sample prohibitions:
 - Allow construction of temporary **sighting range**, but prohibit semi-auto (“assault”) rifle and handgun use
 - No guide hunting, no “conceal carry” or “tactical” training
 - All blinds removable (no nailing of wooden platforms to trees)

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Hunting Lease Exhibit



The map displays a complex land layout with several distinct areas outlined in yellow and orange. A legend in the bottom-left corner identifies the following features:

- Yellow outline: Lease boundary
- Orange outline: Club boundary
- Blue outline: Water body
- Green outline: Forest
- Red outline: Road
- Grey outline: Power line

 The map shows a mix of open fields, wooded areas, and water features, with the lease and club boundaries following the terrain and existing infrastructure.

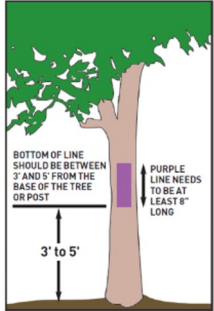
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Landowner Protection Act


- Prior to 2011, WRC had to get warrant to arrest trespasser
- NCGS §14-159.6 (outlines proof of permission)
 - Class 2 Misdemeanor for “willful” trespass
 - Class 1 Misdemeanor for pine straw trespass
 - Must produce written permission when confronted by Wildlife Resources Commission officer or sheriff/deputy sheriff
 - Hunt Club provision
 - Must produce hunt club membership card, **and**
 - **Written permission**
- NCGS §14-159.7 (marking)
 - Signs not less than 120 square inches
 - Not more than 200 yards apart
 - May paint Purple Mark
 - Vertical line 8 inches long
 - 3 feet above ground
 - 100 yards apart



Source: NC WRC




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Wallet Size Card





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Gates on Easements

- Basic Terminology
 - Parcel that benefits from easement = dominant estate
 - Parcel which easement crosses = servient estate
- Standard: Servient estate may make reasonable use of the land over which easement crosses (i.e. they own it)
- NC Standard for Gate erected by Servient Estate:
 - [1] “when necessary to the reasonable enjoyment of his estate” and
 - [2] gate does not materially impair or unreasonably interfere with the use of the lane as a private way for the purposes for which it has theretofore been used (i.e. by dominant estate)
 - *Chesson v. Jordan*, 224 N.C. 289, 29 S.E.2d 906 (1944)
- May not create a gate when creation instrument (i.e. deed) declares that easement must remain “open”
 - (earlier *Hiatt* case, [article here](#))

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Recent Gate Case: *Taylor v. Hiatt*, 2021-NCCOA-503 (September 21, 2021)

- *Taylor v. Hiatt*, 2021-NCCOA-503 (September 21, 2021)
 - Taylors own horses, put up gate as part of fencing system across an easement benefiting another tract
 - Legal standard: a gate is considered **reasonable** for containing grazing animals (i.e. use and enjoyment) (*Chesson*)
 - *However*, “unreasonable interference” facts:
 - The key boxes, where a code had to be entered to open the gate, were located well off the road, requiring Defendants to get out of their car to enter the code.
 - Plaintiffs refused to provide Defendants a remote control.
 - The keypads were temperamental in that a single mistype of the code sometimes locked Defendants out from trying again.
 - The gates would sometimes not function in the cold weather.
 - Plaintiffs’ horses sometimes congregated around the gates, making it difficult for Defendants to open the gates while keeping the horses from escaping.

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NC Agricultural Mediation Program – Farm Bill expansion

- Created under Agricultural Credit Act of 1987 (born of 80's farm crisis)
- Mediation: dispute resolution by 3d party neutral
 - Collaborative agreement, not focused on winning
- Program reauthorized under Farm Bill, provides grant funding for ag mediation as free service
 - Run in NC by NC Agricultural Mediation Program (housed at Western Carolina University)
- Existing: adverse letter rulings, wetlands determinations, conservation program compliance
- 2018 Farm Bill expanded list of "issues" a farm mediation program may mediate, now includes
 - Landowner/farmer disputes (leases)
 - Equipment leases
 - "farm transition" (including partition)
 - Organic certification loss
 - Right to Farm (neighbor disputes)
 - "Other" as state agriculture department determines
 - Examples: Easements, water rights, environmental compliance, etc.

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