805.00 TRESPASS TO REAL PROPERTY.

NOTE WELL: A subsequent landowner who purchases a subject property after the encroaching structure has already been built may still meet the first element of a trespass claim, requiring possession of the property when the alleged trespass was committed, because the maintenance of the encroaching structure is itself a trespass that continues each day the encroachment exists.[1]

The (*state number*) issue reads:

"Did the defendant trespass on the property of the plaintiff?"

On this issue the burden of proof is on the plaintiff. This means that the plaintiff must prove, by the greater weight of the evidence, three things:[2]

First, that the plaintiff was in possession of the property at the time of the alleged trespass.[3] A person is in possession of the property when he [physically occupies it] [exercises acts of dominion over it] [has title to it with the right to immediate actual possession].[4]

Second, that the defendant intentionally[5] [entered][6] [caused entry][7] [remained present][8] upon the plaintiff's property. [Entry] [Continued presence] is intentional when it is [made] [continued] purposefully or with the intent to do so, even if mistaken or unaccompanied by bad or wrongful intent.[9]

And third, that the defendant's [entry] [continued presence] was unauthorized. [Entry upon the property of another is unauthorized when it occurs without the consent of the owner or possessor, whether express or implied.[10]] [A person's continued presence is unauthorized when *he* refuses to leave after being asked to do so,[11] or when *his* conduct exceeds that which has been authorized.[12]]

Finally, as to the (*state number*) issue on which the plaintiff has the

burden of proof, if you find, by the greater weight of the evidence, that the defendant trespassed on the property of the plaintiff, then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

If, on the other hand, you fail to so find, then it would be your duty to answer this issue "No" in favor of the defendant.

---

1 *Graham v. Deutsche Bank Nat. Trust Co*., ___ N.C. App. ___, ___, 768 S.E.2d 614, 616–17 (2015) (*citing Caveness v. Charlotte, Raleigh & S. R.R. Co.,* 172 N.C. 305, 309, 90 S.E. 244, 246 (1916) (internal quotations omitted): "A subsequent purchaser cannot recover for a completed act of injury to the land, as, for instance, the unlawful cutting down of trees; but if the trespasser unlawfully remains upon the land after the sale, or returns and carries away the trees, he becomes liable to the then owner, in the first case for a continuing trespass, and in the latter for a fresh injury.")

2 *See* C. E. Daye & M. W. Morris, *North Carolina Law of Torts* § 6.20, 49–50 (1999) ("Trespass to land is any unauthorized entry onto land in the actual or constructive possession of the plaintiff." (citations omitted)); *Miller v. Brooks*, 123 N.C. App. 20, 27, 472 S.E.2d 350, 355 (1996) ("To prove trespass, a plaintiff must show that the defendants intentionally, . . . and without authorization entered real property actually or constructively possessed by him at the time of the entry." (citations omitted)); *but cf. Keyzer v. Amerlink, Ltd.*, 173 N.C. App. 284, 289, 618 S.E.2d 768, 772 (2005), *aff'd per curiam*, 360 N.C. 397, 627 S.E.2d 462 (2006) ("The elements of trespass to real property are: (1) possession of the property by the plaintiff when the alleged trespass was committed; (2) an unauthorized entry by the defendant; and (3) damage to the plaintiff from the trespass." (citations and internal quotations omitted)).

> *NOTE WELL*: *The Conference of Superior Court Judges Pattern Jury Instruction Civil Subcommittee, after careful consideration, has concluded that "damage" to the plaintiff does not constitute an element of the tort of trespass to real property. It is, therefore, not included in N.C.P.I.- Civil 805.00 ("Trespass to Real Property").*

In 1983, the North Carolina Court of Appeals first appears to have set out the elements of a trespass to real property claim as "1. Possession by the plaintiff [of the property] when the [alleged] trespass was committed, 2. An unauthorized entry by the defendant, and 3. Damage to the plaintiff from the trespass." *Kuykendall v. Turner*, 61 N.C. App. 638, 642, 301 S.E.2d 715, 718 (1983) (citation omitted). This formulation, specifically including the third element, has been reiterated without discussion in several cases. *See*, *e.g., Keyzer,* 173 N.C. App. at 289, 618 S.E.2d at 772; *Woodring v. Swieter*, 180 N.C. App. 362, 376, 637 S.E.2d 269, 280 (2006); *Broughton v. McClatchy Newspapers, Inc.*, 161 N.C. App. 20, 32, 588 S.E.2d 20, 29 (2003).

In *Kuykendall*, the Court cites *Matthews v. Forrest*, 235 N.C. 281, 283, 69 S.E.2d 553, 555 (1952) as authority for the formulation. *Matthews* states that the allegation "[t]hat the plaintiff suffered damage by reason of the matter alleged as an invasion of his rights of

possession" constitutes an "ingredient" of "[a] complaint stat[ing] a good cause of action for trespass to specific realty[,]" *Id*. at 283, 69 S.E.2d at 555 (citation omitted). Nonetheless, the *Matthews* Court continues,

> "[A] complaint states a cause of action for the recovery of nominal damages for a properly pleaded trespass to realty even if it contains no allegations setting forth the character and amount of damages. This is true because an unauthorized entry upon the possession of another entitles him to nominal damages at least. It is otherwise, however, with respect to compensatory and punitive damages. If a plaintiff would recover compensatory damages . . . , he must allege facts showing actual damage; and if he would recover punitive damages for such a trespass, he must allege circumstances of aggravation authorizing punitive damages.

Matthews, 235 N.C. at 283, 69 S.E.2d at 555 (citations omitted).

The foregoing language from *Matthews* certainly indicates that the trial judge must carefully consider both the pleadings and the evidence so as to instruct the jury properly regarding damages in a trespass to real property claim. *See*, *e.g., Hutton & Bourbonnais, Inc. v. Cook*, 173 N.C. 496, 499, 92 S.E. 355, 356 (1917) ("As upon all the uncontradicted evidence there had been a trespass on the land, the recovery of nominal damages followed as a matter of course. There was evidence here of substantial damages, but plaintiffs have not claimed them."). However, the Civil Subcommittee does not believe that *Matthews* holds that a trespass to land claim includes the element of damage to the plaintiff, but rather that at least nominal damages to the plaintiff, even without evidence of actual damage, are inherent in proof of a trespass upon the land claim.

The only appellate decision that references the issue, *Hawkins v. Hawkins*, 101 N.C. App. 529, 533, 400 S.E.2d 472, 475 (1991), notes in dicta that "trespass to land" is one of the torts which "do[es] not include actual damage as an essential element" (citation omitted). *See also Keziah v. Seaboard A.L.R. Co.*, 272 N.C. 299, 311, 158 S.E.2d 539, 548 (1968) ("Any unauthorized entry on land in the actual or constructive possession of another constitutes a trespass, irrespective of degree of force used or whether actual damage is done."); Daye & Morris, *supra*, at 49-50 ("Trespass to land can be found regardless of whether the entrant used force, regardless of the instrumentality employed in making the entry, and regardless of the amount of actual damage, if any, inflicted by the entrant." (citations omitted)); D. Dobbs, *The Law of Torts* § 50, 95-96 (2001) ("The gist of the tort is intentional interference with rights of exclusive possession; no other harm is required."); *id.* at 97 ("The modern tort claim originated in [the old writ of Trespass used in the earlier common law.] Under its rules the plaintiff is not required to prove actual harm to the land or to the persons or things on it; interference with possession is itself an injury for which the plaintiff can recover at least nominal damages. These rules still hold." (citations omitted)).

3 *Keyzer*, 173 N.C. App. at 289, 618 S.E.2d at 772.

4 "Actual possession of land consists in exercising acts of dominion over it, and in making the ordinary use of it to which it is adapted, and in taking the profits of which it is susceptible. Constructive possession is that theoretical possession which exists in contemplation of law in instances where there is no possession in fact. When land is not in the actual enjoyment or occupation of anybody, the law declares it to be in the constructive possession of the person whose title gives him the right to assume its immediate actual possession."

Matthews, 235 N.C. at 284, 69 S.E.2d at 556 (citation omitted).

5 *See York Indus. Ctr., Inc. v. Mich. Mut. Liab. Co.*, 271 N.C. 158, 163, 155 S.E.2d 501, 506 (1967) ("[T]respass to land requires an intentional entry thereon." (citing *Schloss v. Hallman,* 255 N.C. 686, 122 S.E.2d 513 (1961))). *See Dobbs*, *supra* note 1, § 50, at 98–99 ("The intent required to show a trespass to land is the intent to enter or to commit the equivalent of an entry. . . . Since intent to enter is sufficient the plaintiff need not show an intent to cause harm or even to invade the plaintiff's possessory rights."). For an instruction on intent, *see* N.C.P.I.-Civil 101.46 ("Definition of [Intent] [Intentionally]").

6 "At common law, every man's land was deemed to be inclosed. . . . Any entry on land in the peaceable possession of another is deemed a trespass, without regard to the amount of force used, and . . . the form of the instrumentality by which the close is broken . . . is [im]material . . . . [W]hether the defendant acted intentionally is immaterial; trespass lies whether the injury to the plaintiff's possession is willful or not."

Letterman v. English Mica Co., 249 N.C. 769, 771, 107 S.E.2d 753, 755 (1959) (citation omitted).

7 Our appellate courts have repeatedly held defendants liable in trespass for entry through objects, substances or forces. *See, e.g., Wilson v. McLeod Oil Co.*, 327 N.C. 491, 398 S.E.2d 586 (1990), *reh'g denied*, 328 N.C. 336, 402 S.E.2d 844 (1991) (gasoline seeping from underground storage tanks); *Guilford Realty & Ins. Co. v. Blythe Bros. Co.*, 260 N.C. 69, 131 S.E.2d 900 (1963) (blasting); *Hall v. DeWeld Mica Corp.*, 244 N.C. 182, 93 S.E.2d 56 (1956) (dust); *Pegg v. Gray*, 240 N.C. 548, 82 S.E.2d 757 (1954) (foxhounds); *Forrest City Cotton Co. v. Mills*, 218 N.C. 294, 10 S.E.2d 806 (1940) (ponding of water); *McGhee v. Norfolk & Southern Railway Co.*, 147 N.C. 142, 60 S.E. 912 (1908) (bullets); *Frisbee v. Town of Marshall*, 122 N.C. 760, 30 S.E. 21 (1898) (flooding by water); *Academy of Dance Arts, Inc. v. Bates*, 1 N.C. App. 333, 161 S.E.2d 762 (1968) (construction rubble and debris). *See also The Shadow Group, LLC v. Heather Hills Home Owners Ass'n*, 156 N.C. App. 197, 201, 579 S.E.2d 285, 287–88 (2003) ("[E}very subsequent incidence[] of water flowing onto the property . . . could constitute a trespass in and of itself.").

8 [E]ven if the entry is peaceable, or by the express or implied invitation of the occupant, still if after coming upon the premises the defendant uses violent and abusive language and does acts which are calculated to produce a breach of the peace . . . , he is guilty of forceable [*sic*] trespass, because although not a trespasser in the beginning, he becomes a trespasser as soon as he puts himself in open opposition to the occupant of the premises.

Suggs v. Carroll, 76 N.C. App. 420, 424, 333 S.E.2d 510, 513 (1985) (quoting *Anthony v. Protective Union*, 206 N.C. 7, 11, 173 S.E. 6, 8 (1934)).

9 *See York*, 271 N.C. at 163, 155 S.E.2d at 506 (holding that "an action for trespass lies even though the entry was made under a bona fide belief by the defendant that he was the owner of the land and entitled to its possession or was otherwise entitled to go upon the property"). *See also Rainey v. St. Lawrence Homes, Inc.*, 174 N.C. App. 611, 614-615, 621 S.E.2d 217, 220 (2005) ("[T]hough the defendant's entry must be intentional, the defendant need not have contemplated any damage to the plaintiff to incur liability." (citing *Lee v. Stewart*, 218 N.C. 287, 289, 10 S.E.2d 804, 805 (1940))).

For an instruction on intent, N.C.P.I.-Civil 101.46 (Definition of [Intent] [Intentionally]).

---

10 "A trespasser is a person who enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise." . . . The consent of the person in possession of the land to such entry may be implied. An apparent consent is sufficient if brought about by acts of the possessor. It need not be an invitation to enter, which carries with it the idea of a desire on the part of the one in possession that such entry be made. It is sufficient that his conduct be such as to indicate that he consents to the entry, if the other person desires to come upon the land. . . . In determining whether one who enters upon the land of another could reasonably have concluded from the conduct of the landowner that he had permission to do so, regard is to be had to customs prevailing in the community." *Smith v. Von Cannon*, 283 N.C. 656, 660–62, 197 S.E.2d 524, 528-29 (1973) (citations omitted).

11 *See Suggs*, 76 N.C. App. at 424, 333 S.E.2d at 513 ("Although defendants' initial entry was peaceful, they became trespassers when they refused to leave after plaintiff specifically requested they do so."); *Von Cannon*, 283 N.C. at 661, 197 S.E.2d at 528 ("We perceive no basis for a distinction between an involuntary intrusion upon the land of another and an involuntary exceeding of the landowner's assent to the original entry.").

12 *See supra* note 7; *Miller*, 123 N.C. App. at 27–28, 472 S.E.2d at 355 ("Even an authorized entry can be a trespass if a wrongful act is done in excess of and in abuse of authorized entry." (citation omitted)).