

STATUS OF PARTY--LAWFUL VISITOR OR TRESPASSER.¹

NOTE WELL: Use this instruction only when there is an issue concerning the legal status (lawful visitor or trespasser) of the plaintiff. Where there is no issue as to the status of the plaintiff when injured on the defendant's premises, this issue is not applicable. The best practice is to obtain the parties' stipulation as to the plaintiff's status as part of the pretrial procedure.

The (state number) issue reads:

"Was the plaintiff a lawful visitor at the time and place of his alleged [injury] [damage]?"²

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, that the plaintiff was a lawful visitor at the time and place of his alleged [injury] [damage].

¹The North Carolina Supreme Court has eliminated the distinction between invitees and licensees in premises liability cases. *Nelson v. Freeland*, 349 N.C. 615, 507 S.E.2d 882 (1998). Owners and occupiers of land owe a duty "to exercise reasonable care in the maintenance of their premises for the protection of lawful visitors." *Id.*, 349 N.C. at 632; 507 S.E.2d at 892. The separate classification for trespassers has been retained. *Id.* The change in the common law rule, moreover, is retroactive as well as prospective. *Id.*

²In most every case, the plaintiff will have alleged that he was a lawful visitor.

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A lawful visitor is one who goes upon the premises in response to an express or implied invitation by the [owner] [person in possession] and for the mutual benefit of himself and the [owner] [person in possession]. Also a lawful visitor is one who goes upon the premises solely for his own interest, convenience or gratification but with the consent of the [owner] [person in possession]. The consent or permission of the [owner] [person in possession] may be implied where [the plaintiff has] [others have] repeatedly made similar use of the premises with the knowledge of the [owner] [person in possession], and where the [owner] [person in possession] has not acted to stop such use. By contrast, a trespasser is one who goes on the premises without the consent or permission, express or implied, of the [owner] [person in possession] and has no right to be there.³

Finally, as to this issue on which the plaintiff has the burden of proof, if you find, by the greater weight of the

³See *Bell v. Page*, 271 N.C. 396, 156 S.E.2d 711 (1967) (plaintiff child, without express or implied permission of defendant to enter pool area, held to be a trespasser); *Dean v. Construction Co.*, 251 N.C. 581, 111 S.E.2d 827 (1960) (plaintiff child held to be a trespasser upon entering construction site without express or implied permission of owners); *Hood v. Coach Co.*, 249 N.C. 534, 107 S.E.2d 154 (1959) (plaintiff who purchased tickets for future use at bus station held to be an invitee); *Jessup v. R.R.*, 244 N.C. 242, 93 S.E.2d 84 (1956) (children entering freight yard without invitation or inducement equivalent to an invitation held to be trespassers).

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evidence, that the plaintiff was a lawful visitor at the time and place of his alleged [injury] [damage], 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.

