June 2022 Supplement to
North Carolina Pattern Jury Instructions for Civil Cases

This supplement contains a new table of contents for the civil instructions, a number of replacement instructions for civil cases, and a new civil index. Place the instructions in the book in the proper numerical sequence. Old instructions with the same number should be discarded.

Interim Instructions. As the Pattern Jury Instructions Committee considers new or updated instructions, it posts Interim Instructions that are too important to wait until June to distribute as part of the annual hard copy supplements to the School of Government website at sog.unc.edu/programs/ncpji. You may check the site periodically for these instructions or join the Pattern Jury Interim Instructions Listserv to receive notification when instructions are posted to the website.

Instructions with asterisk (*) are new instructions. All others replace existing instructions.

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North Carolina
Conference of Superior Court Judges
Committee on Pattern Jury Instructions

North Carolina PATTERN JURY INSTRUCTIONS for Civil Cases

Volume I

2022 Supplement

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102.15 NEGLIGENCE ISSUE—DOCTRINE OF SUDDEN EMERGENCY.[1]

Persons who, through no negligence of their own, are suddenly and unexpectedly confronted with imminent danger[2] to themselves or to others, whether actual or apparent, are not required to use the same judgment that would be required if there were more time to make a decision. A person's duty is to use that degree of care which a reasonable and prudent person would use under the same or similar circumstances. If, in a moment of sudden emergency, a person makes a decision that a reasonable and prudent person would make under the same or similar circumstances, they do all that the law requires, even if in hindsight some different decision would have been better or safer.[3]

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1. The doctrine of sudden emergency is not applicable to one who by his own negligence has brought about or contributed to the emergency. *See Hairston v. Alexander Tank*, 310 N.C. 227, 239, 311 S.E.2d 559, 568 (1984) ("The sudden emergency must have been brought about by some agency over which he had no control and not by his own negligence or wrongful conduct.") (citing *Foy v. Bremson*, 286 N.C. 108, 209 S.E.2d 439 (1974); *Bumgarner v. Southern R.R.*, 247 N.C. 374, 100 S.E.2d 830 (1957) (explaining the situation of one who attempts to rescue a person placed in peril by another's negligence).

2. Consistently wet road conditions are insufficient for the sudden emergency exception to apply for a car accident. *Allen v. Efird*, 123 N.C. App. 701, 704, 474 S.E.2d 141, 143 (1996) ("The mere fact that defendant lost control under static conditions does not merit a sudden emergency instruction.").

3. "In North Carolina, the sudden emergency doctrine has been applied only to ordinary negligence claims, mostly those arising out of motor vehicle collisions, and has never been used in a medical negligence case." *Wiggins v. E. Carolina Health-Chowan, Inc.*, 234 N.C. App. 759, 766, 760 S.E.2d 323, 325 (2014); *see also McDevitt v. Stacy*, 148 N.C. App. 448, 458, 559 S.E.2d 201, 209 (2002); *Ligon v. Matthew Allen Strickland*, 176 N.C. App. 132, 141, 625 S.E.2d 824, 831 (2006); *Long v. Harris*, 137 N.C. App. 461, 467, 528 S.E.2d 633, 637 (2000).

102.16 NEGLIGENCE ISSUE—SUDDEN EMERGENCY EXCEPTION TO NEGLIGENCE *PER SE*.[1]

If, in a moment of such sudden emergency, an operator uses that degree of care which a reasonable and prudent person would use under the same or similar circumstances, the operator would not be negligent even if violating a standard of conduct established by a safety statute.[2] In other words, an operator's conduct which might otherwise be negligent, in and of itself, would not be negligent if it results from a sudden emergency[3] that is not of that person's own making.

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1. Use this instruction only after N.C.P.I.—Civil 102.15 ("Negligence Issue—Doctrine of Sudden Emergency") and 102.12 ("Negligence Issue – Definition of Negligence in and of Itself (Negligence *Per Se*)) have been read to the jury. This instruction should be used whenever necessary to explain an apparent conflict between the doctrines of sudden emergency and negligence *per se*.

2. *Ingram v. Smoky Mountain Stages, Inc.*, 225 N.C. 444, 450, 35 S.E.2d 337, 341 (1945).

3. Consistently wet road conditions are insufficient for the sudden emergency exception to apply for a car accident. *Allen v. Efird*, 123 N.C. App. 701, 704, 474 S.E.2d 141, 143 (1996) ("The mere fact that defendant lost control under static conditions does not merit a sudden emergency instruction.").

501.01 CONTRACTS—ISSUE OF FORMATION—COMMON LAW.

NOTE WELL: Use N.C.P.I.—Civil—501.01A ("Contracts—Issue of Formation—UCC") for cases in which the Uniform Commercial Code applies.

The (*state number*) issue reads:

"Did the plaintiff and the defendant enter into a contract?"

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, two things:

First, that the plaintiff and the defendant mutually assented to the same material terms[1] for doing or refraining from doing a particular thing.

And Second, that the mutual assent of the parties was supported by an adequate consideration.[2]

NOTE WELL: Not all of the essential elements of a contract are set forth in this instruction.[3]

I will now explain to you the meaning of these two requirements.

With regard to the first requirement, for the parties to have mutually assented, each of them must have agreed to the same material terms for doing or refraining from doing a particular thing.[4]

Select from among the following optional provisions as applicable:

(Offer and Acceptance. An "offer" is an expression of willingness to do or refrain from doing a particular thing. There is no requirement that the offer be made in any particular form. It may be made orally, in writing or by conduct which reasonably indicates the offering party's intention[5] to be bound if the other party accepts.[6] An "acceptance" is an expression of assent to the offer. [If the [offer does not specify] [the circumstances do not indicate] a particular method, manner or form of acceptance, acceptance can be made in any manner and by any medium reasonable under the circumstances.[7] Acceptance

may be oral,[8] in writing[9] or by conduct which reasonably signifies that the accepting party assents to each material term of the offer.] [If the [offer specifies] [circumstances unambiguously indicate] a particular method, manner or form of acceptance, acceptance must be made in the method, manner or form [specified] [indicated].[10]])

(Mutual Assent. Mutual assent occurs when an offer is communicated by one party to the other, and the other party accepts the offer.[11] Mutual assent must be determined from the [written words] [verbal expressions] [conduct] of the parties. Each party's [written words] [verbal expressions] [conduct][12] must have such meaning as a reasonable person would give under the same or similar circumstances.[13] In determining what meaning a reasonable person would give to the parties' [written words] [verbal expressions] [conduct], you should consider the evidence as to all the circumstances existing at the time of the [offer] [acceptance].)

(Intended, But Unexpressed Term. One party may intend for a certain term to have a special or a particular meaning but fails to express that meaning in [written words] [verbal expressions] [conduct]. Under such circumstances, you should not consider such unexpressed special or particular meaning. However, if you find, by the greater weight of the evidence, that (*name party*) knew or should have known what (*name other party*) meant by certain [written words] [verbal expression] [conduct], that meaning is deemed assented to by (*name party*) unless (*name other party*) knew or should have known that (*name party*) gave such [written words] [verbal expressions] [conduct] a different meaning.)[14]

(All Material Terms Agreed. For a contract to be complete, each party must assent to all material terms. A material term is one that is essential to the transaction,[15] that is, a term which, if omitted or modified, would cause one of the parties to withhold assent or to bargain for a substantially different term. However, not every detail of the parties' transaction need be agreed

upon.[16] It is sufficient that there be mutual assent, express or implied, to all of the material terms.[17] What constitutes the material terms essential to a given contract depends on the facts and circumstances of each transaction.[18] In determining the material terms, you may consider the following factors:

- [the subject matter and purpose of the proposed contract]
- [the intentions of the parties]
- [the anticipated scope of performance by each party]
- [the prior dealings of the parties under this or similar contracts]
- [any custom, practice or usage so commonly known to other reasonable persons, in similar situations, that the parties know or should have known of its existence]
- [state other factors supported by the evidence].)

(Supplemental Terms. In some instances, [the parties' course of performance][19] [the parties' course of dealing] [an applicable usage of trade][20] may give particular meaning to and supplement or qualify one or more terms of the parties' contract.

[A course of performance arises out of prior repeated occasions for one party to perform under the contract. When the other party knows about the nature of such prior instances of performance and has an opportunity to object to them but does not, you may consider such course of performance as some evidence of the meaning of the parties' contract.]

[A course of dealing is a sequence of prior conduct between the parties in transactions the same as or similar to the one at issue here which reasonably establishes a basis for their common understanding of a particular meaning of a term in their contract (or which supplements or qualifies a term in their contract).]

[A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will also be observed in the performance of the contract in question.])[21]

(Implied Terms. In some instances, the law supplies a material term that the parties [have failed to include[22]] [have left open].[23] In the matter before you,

[Good Faith. In every contract there is an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement, and each party is deemed to have agreed to act in good faith in [performing] [enforcing] the contract.[24] "Good faith" means honesty in fact in the [performance] [enforcement] of the contract.[25]]

[Time for Performance. Where the parties did not expressly provide a time for the performance of an act or the doing of a thing, the parties are deemed to have agreed that the act may be performed or the thing may be done within a reasonable time.[26] In determining what constitutes a reasonable time,[27] you may consider [the subject matter and purpose of the proposed contract] [the intentions and circumstances of the parties] [the anticipated scope of performance by each party[28]] [the parties' course of performance] [the parties' course of dealing] [any applicable usage of trade] (*state other factors supported by the evidence*).]

[Termination. Where the parties did not expressly provide a duration for their contractual relationship, the parties are deemed to have agreed that either of them may terminate their contract upon reasonable notice to the other.[29] In determining what constitutes reasonable notice, you may consider [the subject matter and purpose of the proposed contract[30]] [the length of time the parties should have reasonably expected their contractual

relationship to last[31]] [the parties' course of performance] [the parties' course of dealing] [any applicable usage of trade] (*state other factors supported by the evidence*).]

[State other applicable instances in which the law supplies omitted material terms][32]).

With regard to the second requirement that the mutual agreement of the parties was supported by an adequate consideration, "consideration" means something of value. Such value may consist of some right, interest, profit or benefit accruing to one party or some forbearance, burden, detriment, loss or responsibility given, suffered or undertaken by the other.[33] (An agreement based upon an exchange of mutual promises is supported by adequate consideration[34] if performance of each of the promises would constitute adequate consideration.[35]) In any event, the benefit to one party or the burden on the other party must result from the bargain which causes the parties to enter into their mutual agreement.[36]

(It is not necessary that the benefit flow to or that the burden fall upon a party to the mutual agreement. [The benefit may flow to a third person for whose benefit one of the parties bargained.[37]] [The burden may likewise fall upon a third person who is to perform for the benefit of one of the parties to the mutual agreement.[38]])

(Consideration is adequate unless it is so grossly inadequate[39] that it shocks the conscience. Consideration does not have to be proportional to the benefit conferred or the burden undertaken, and even slight or trifling consideration is adequate to support a mutual agreement otherwise reached by mutual assent.[40])

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

plaintiff and the defendant entered into a contract, 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.

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1. *Richardson v. Greensboro Warehouse and Storage Co.,* 223 N.C. 344, 26 S.E.2d 897 (1943). Additionally, an agreement to enter into an agreement is a valid contract if all of the material terms are agreed upon. *Podrebarac v. Horack*, 279 N.C. App. 624, 627, 866 S.E.2d 495, 497 (2021) ("Therefore, [to be itself enforceable] a contract to enter into a future contract must specify all its material and essential terms, and leave none to be agreed upon as a result of future negotiations.") (quoting *Boyce v. McMahan*, 285 N.C. 730, 734, 208 S.E.2d 692, 695 (1974)). Where the two parties agree on the material terms and intend to become bound to the contract upon its later formalization, the first agreement which specified the material terms is a valid contract. *Id.*

2. This second element may be irrelevant if the contract is written and the party against whom enforcement is sought signed under seal. "[A] seal gives to an instrument the same validity at law as if there was a consideration. It amounts to and dispenses with the necessity of the proof of a valuable consideration…" *Woodall v. Prevatt*, 45 N.C. 199, 201 (1853). There are limitations on the use of the seal as a substitute for consideration. First, the seal is operative only in actions at law for damages. *Mobil Oil Corp. v. Wolfe*, 297 N.C. 36, 252 S.E.2d 809 (1979); *Honey Properties, Inc. v. City of Gastonia*, 252 N.C. 567, 114 S.E.2d 344 (1960); *Coleman v. Whisnant*, 226 N.C. 258, 37 S.E.2d 693 (1946); *Samonds v. Cloninger*, 189 N.C. 610, 127 S.E. 706 (1925). The seal does not serve as a consideration substitute in equitable proceedings. *Woodall*, 45 N.C. at 201-202; *Craig v. Kessing*, 36 N.C. App. 389, 244 S.E.2d 721 (1978), aff'd, 297 N.C. 32, 253 S.E.2d 264 (1979); *Cruthis v. Steele*, 259 N.C. 701, 131 S.E.2d 344 (1963). Second, the General Assembly has eliminated the seal requirement for deeds, N.C. Gen. Stat. § 39-6.5 (1999).

In cases where a seal does serve as a consideration substitute, the court must decide if the party against whom enforcement is sought signed under seal on the face of the contract without ambiguity. If so, the court must hold that, as a matter of law, the contract is under seal. *Central Sys. v. General Heating and Air Conditioning Co*., 48 N.C. App. 198, 268 S.E.2d 822, cert. *denied*, 301 N.C. 400, 273 S.E.2d 445 (1980). However, if the contract is ambiguous as to whether the party signed under seal, it is a question for the jury. *Id*. Under such circumstances, the court should substitute the following for the second element:

Second, that the defendant signed the (*identify alleged contract*) under seal. Whether the defendant signed the (*identify alleged contract*) under seal is to be determined from all the evidence before you. You may consider whether the word "seal" (or L.S.) appears adjacent to the defendant's signature, whether there is a declaration in the document that the defendant is signing under seal and whether there is any other evidence of the parties' intent to enter into a contract under seal. (The fact that a corporate seal is impressed upon the document, without more, does not mean the document was signed under seal).

Id.; *Currin v. Currin*, 219 N.C. 815, 15 S.E.2d 279 (1941); *First Citizens Bank & Trust Co. v. Martin*, 44 N.C. App. 261, 261 S.E.2d 145 (1979), *cert. denied*, 299 N.C. 741, 267 S.E.2d 661 (1980). *See Square D. Co. v. C. J. Kern Contractors*, 314 N.C. 423, 334 S.E.2d 63 (1985).

3. In addition to mutual assent and a legally adequate consideration, there must be at least two parties to the contract. *McCraw v. Llewellyn*, 256 N.C. 213, 123 S.E.2d 575 (1962); *American Trust Co. v. Life Ins. Co. of Virginia*, 173 N.C. 558, 92 S.E. 706 (1917); *Spruill v.*

Trader & Trader, 50 N.C. 39, 42 (1857); *Avery v. Walker*, 8 N.C. 140, 156 (1820). Whether there are enough parties to form a contract would be a jury issue only rarely, so it is omitted as an element of this instruction.

Also, the party against whom enforcement is sought must have had legal capacity to contract. *Sprinkle v. Wellborn*, 140 N.C. 163, 181, 52 S.E. 666, 672 (1905). Lack of legal capacity in most cases will be an affirmative defense, so it is omitted as an element of this instruction. However, if one of the parties to an alleged contract has been adjudicated incompetent, the burden of proof is on the party seeking enforcement (assuming such party was not privy to the incompetency proceeding) to show restoration of mental competency or that the contract was made during a lucid interval. *Davis v. Davis*, 223 N.C. 36, 25 S.E.2d 181 (1943); *Beard v. Southern Ry. Co*., 143 N.C. 136, 55 S.E. 505 (1906); *Armstrong v. Short*, 8 N.C. 11 (1820). In such instances, a third element will need to be included by modifying N.C.P.I.—Civil 501.05 ("Contracts—Issue of Formation—Defense of Lack of Mental Capacity") and taking into consideration the endnotes therein.

Legal authority for this instruction and additional information regarding capacity to contract may be found in N.C.P.I.—Civil 501.05 ("Contracts—Issue of Formation—Defense of Lack of Mental Capacity") and the endnotes therein.

Finally, the transaction called for by the contract must not be void, illegal or patently contrary to public policy. *See Rose v. Vulcan Materials, Co.*, 282 N.C. 643, 652, 194 S.E.2d 521, 528 (1973) ("Illegality is an affirmative defense and burden of proving illegality is on the party who pleads it.") (citing N.C. R. Civ. P. 8(c)); see also N.C.P.I.—Civil 502.40 ("Contracts—Issue of Breach—Defense of Illegality or Unenforceability") (noting that, where no genuine dispute exists regarding a contract's substance, whether it is an illegal or unenforceable contract is a question of law for the court).

4. *Snyder v. Freeman*, 300 N.C. 204, 266 S.E.2d 593 (1980); *Croom v. Goldsboro Lumber Co*., 182 N.C. 217, 108 S.E. 735 (1921); *Charles Holmes Machine Co. v. Chalkley*, 143 N.C. 181, 55 S.E. 524 (1906).

5. *Unitrac, S.A. v. Southern Funding Corp.*, 75 N.C. App. 142, 330 S.E.2d 44 (1985).

6. *McMichael v. Borough Motors, Inc.*, 14 N.C. App. 441, 188 S.E.2d 721 (1972).

7. N.C.G.S. § 25-2-206(1)(a) which appears to agree with North Carolina common law. *Crook v. Cowan*, 64 N.C. 743 (1870).

8. Certain oral offers and acceptances are not enforceable by reason of the statute of frauds. *See, e.g.*, N.C.G.S. § 1-26 (contracts to pay debt otherwise barred by statute of limitation), § 22-1 (suretyship contracts and contracts by executors and administrators), § 22-2 (contracts involving interests in real property), § 22-4 (contracts to revive debts discharged by bankruptcy), § 22-5 (commercial loan commitments over $50,000) § 25-1-206, § 25-2-201, § 52-10.1 (separation agreements), § 66-99 (business opportunity contracts), § 66-119 (prepaid entertainment contracts) and § 66-132 (discount buying club contracts).

9 "Although the purpose of a signature is to show assent, assent may be shown where the party who failed to sign the writing accepted its terms and acted upon those terms … However, if under the circumstances the parties are merely negotiating while trying to agree on certain terms and the parties are looking to a writing to embody their agreement, no contract is formed until the writing is executed and…the offeree's acceptance is properly communicated to the offeror." *Southeast Caissons, LLC v. Choate Construction Co., et al*., 247 N.C. App. 104, 110, 784 S.E.2d 650, 656 (2016) (quoting John N. Hutson, Jr. & Scott A. Miskimon, *North Carolina Contract Law* § 2-7-1, at 68-69 (2001)).

10. *See MacEachern v. Rockwell Int'l Corp*., 41 N.C. App. 73, 76, 254 S.E.2d 263, 265 (1979) ("It is a fundamental concept of contract law that the offeror is the master of his offer.

He is entitled to require acceptance in precise conformity with his offer before a contract is formed.") (citing *Morrison v. Parks*, 164 N.C. 197, 198, 80 S.E.2d 85, 85 (1913)).

11. *Anderson Chevrolet/Olds, Inc. v. Higgins*, 57 N.C. App. 650, 292 S.E.2d 159 (1982).

12. An implied-in-fact contract may be inferred from the conduct of the parties. *Hall v. Mabe*, 77 N.C. App. 758, 336 S.E.2d 427 (1985); *Ellis Jones, Inc. v. Western Waterproofing Co.*, 66 N.C. App. 641, 312 S.E.2d 215 (1984). An implied-in-fact contract is not the same as a contract implied-in-law. The latter does not require the element of agreement. *Nationwide Mut. Ins. Co. v. Chantos*, 293 N.C. 431, 238 S.E.2d 597 (1977).

13. A contract is not formed where a material term is left indefinite, vague or patently ambiguous. Mutual assent under such circumstances is lacking. Whether a material term is patently ambiguous (*i.e.,* even competent extrinsic evidence cannot explain the term) is a question of law for the Court. *Citrini v. Goodwin*, 68 N.C. App. 391, 315 S.E.2d 354 (1984). Thus, omitted from this instruction is optional language dealing with "void for vagueness" situations. If the Court determines that the ambiguity is latent rather than patent, the issue of meaning becomes one for the jury and is considered in conjunction with the issue of breach. N.C.P.I.—502.00 ("Contracts—Issue of Breach").

14. *Hyde Ins. Agency, Inc. v. Dixie Leasing Corp*., 31 N.C. App. 490, 229 S.E.2d 697 (1976). *But compare Charles Holmes Machine Co.*, 143 N.C. at 184-85, 55 S.E. at 526. There may be instances where both parties advocate that their unexpressed intentions should have been known to the other and, therefore, become part of the agreement. Where this occurs, the Court should give this component twice, with reciprocal party references. Because of the risk of confusing the jury with reciprocating instructions, the Court should also give the competing contentions of the parties.

15. In a contract for services, compensation is an essential element to the agreement. *See Rider v. Hodges*, 255 N.C. App. 82, 85, 804 S.E.2d 242, 246 (2017) (holding that no enforceable contract exists where the price for services was not included in the agreement).

16. *Sides v. Tidwell*, 216 N.C. 480, 5 S.E.2d 316 (1939).

17. *MCB, Ltd. v. McGowan*, 86 N.C. App. 607, 359 S.E.2d 50 (1987); *Braun v. Glade Valley School, Inc.*, 77 N.C. App. 83, 334 S.E.2d 404 (1985).

18. In general, "agreements to agree" which leave one or more material terms open for future assent are void. *Boyce v. McMahan*, 285 N.C. 730, 208 S.E.2d 692 (1974). To be enforceable, an agreement to agree "must specify all its material and essential terms, and leave none to be agreed upon as a result of future negotiations." Croom, 182 N.C. at 220, 108 S.E. at 737. All material terms must be settled or there must be a definite agreement on a method by which the terms may be settled. *McMahan*, 285 N.C. 730, 208 S.E.2d 692.

19. *See Cole v. Industrial Fibre Co.,* 200 N.C. 484, 157 S.E. 857 (1931).

20. *See T.C. May Co. v. Menzies Shoe Co.*, 184 N.C. 150, 113 S.E. 593 (1922); *Cohoun v. Hanell*, 180 N.C. 39, 103 S.E. 906 (1920) and *McKinney v. Matthews*, 166 N.C. 576, 82 S.E. 1036 (1914).

21. A usage of trade is ordinarily an issue of fact for the jury. However, if the usage of trade is embodied in a written code or some similar writing, its interpretation becomes a question of law for the court. *Superior Foods, Inc. v. Harris Teeter Super Markets, Inc*., 288 N.C. 213, 217 S.E.2d 566 (1975).

22. *Kidd v. Early*, 289 N.C. 343, 357-358, 222 S.E.2d 392, 403 (1976). The Court should be careful, however, not to instruct the jury on terms implied-in-law where there is evidence from which the jury could find from the writings, conversations or conduct of the

parties that they actually reached agreement on a material term. See, e.g., Rhyne v. Rhyne, 151 N.C. 400, 66 S.E. 348 (1909); *Lawrence v. Wetherington*, 108 N.C. App. 543, 423 S.E.2d 829 (1993).

23. A contract with an open term will not cause the contract to fail for indefiniteness if there are external, objective commercial standards which supply a reasonably certain basis for enforcing the contract by appropriate remedy. N.C.G.S. § 25-2-204(3). While "open terms" are more readily identified with the Uniform Commercial Code, some North Carolina common law decisions have supplied certain terms left open by the parties. *See North Carolina Comment* to N.C.G.S. § 25-2-204(3).

24. *Bicycle Transit Authority, Inc. v. Bell*, 314 N.C. 219, 228, 333 S.E.2d 299, 305 (1985); *Governor's Club, Inc. v. Governors Club Ltd. P'ship*, 152 N.C. App. 240, 251, 567 S.E.2d 781, 789 (2002), *aff'd per curiam*, 357 N.C. 46, 577 S.E.2d 620 (2003); *Murray v. Nationwide Mut. Ins. Co.*, 123 N.C. App. 1, 19, 472 S.E.2d 358, 368 (1996). *See also Lord of Shatford v. Shelley's Jewelry, Inc.*, 124 F.Supp.2d 779, 787 (W.D.N.C. 2000).

25. *See Blondell v. Ahmed*, 247 N.C. App. 480, 786 S.E.2d 405, 407 (2016) (citing *Weyerhauser Co. v. Godwin Building Supply Co*., 40 N.C. App. 743, 746, 253 S.E.2d 625, 627 (1979) for the basic principle of contract law "that a party who enters into an enforceable contract is required to act in good faith and to make reasonable efforts to perform his obligations under the agreement."). Good faith extends to reasonableness in enforcing agreements as well. *See Jaudon v. Swink*, 51 N.C. App. 433, 435, 276 S.E.2d 511, 513 (1981) ("'Good Faith' means an honest intention to abstain from taking any unconscientious advantage of another, even through technicalities of law…").

26. *International Minerals and Metals Corp. v. Weinstein*, 236 N.C. 558, 73 S.E.2d 472 (1952); *Graves v. O'Connor*, 199 N.C. 231, 154 S.E.37 (1930); *Winders v. Hill*, 141 N.C. 694, 704, 54 S.E. 440, 443 (1906); *Hardee's Food System, Inc. v. Hicks*, 5 N.C. App. 595, 169 S.E.2d 70 (1969).

27. The terminability of certain contracts are legislatively restricted. *See, e.g*., N.C.G.S. § 18B-1205 (wine distribution agreements), § 18B-1305 and § 18B-1306 (beer distributor franchises) and § 20-305(6) (motor vehicle franchises).

28. *Scarborough v. Adams*, 264 N.C. 631, 142 S.E.2d 608 (1965); *Lambeth v. Thomasville*, 179 N.C. 452, 102 S.E. 775 (1920).

29. *Fulghum v. Town of Selma*, 238 N.C. 100, 104, 76 S.E.2d 368, 371 (1953).

30. *City of Gastonia v. Duke Power Co*., 19 N.C. App. 315, 199 S.E.2d 27, *disc. rev. denied*, 284 N.C. 252, 200 S.E.2d 652 (1973).

31. *General Tire and Rubber Co. v. Distributors, Inc*., 253 N.C. 459, 117 S.E.2d 479 (1960), appeal after remand, 256 N.C. 561, 124 S.E.2d 508 (1962); *East Coast Dev. Corp. v. Alderman-250 Corp*., 30 N.C. App. 598, 228 S.E.2d 72 (1976).

32. At common law, see, *e.g*., reasonable time to repay a loan, *Helms v. Prikopa*, 51 N.C. App. 50, 275 S.E.2d 516 (1981), payments to be in cash, *Kidd*, 289 N.C. at 358, 222 S.E.2d at 403, contracts of employment terminable at will, *Rosby v. General Baptist State Convention of North Carolina, Inc*., 91 N.C. App. 77, 370 S.E.2d 605, *disc. rev. denied*, 323 N.C. 626, 374 S.E.2d 590 (1988), and uncompleted blanks left in the contract document, *Rhyne*, 151 N.C. 400, 66 S.E. 348.

33. *Cherokee County v. Meroney*, 173 N.C. 653, 654, 92 S.E. 616, 616-17 (1917).

34. *Penley v. Penley*, 314 N.C. 1, 332 S.E.2d 51 (1985); *American Aluminum Products Inc. v. Pollard*, 97 N.C. App. 541, 389 S.E.2d 589 (1990).

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35. Restatement (Second) of Contracts § 75 (1981).

36. Restatement (Second) of Contracts § 71 and comment b. (1981).

37. *Investment Properties of Asheville, Inc. v. Norburn*, 281 N.C. 191, 188 S.E.2d 342 (1972); *East Carolina Realty. v. Ziegler Bros*., 200 N.C. 396, 157 S.E. 57 (1931); *Exum v. Lynch*, 188 N.C. 392, 125 S.E. 15 (1924); *First Peoples Savings and Loan Assoc. v. Cogdell*, 44 N.C. App. 511, 261 S.E.2d 259 (1980)

38. *See Craig and Wilson v. Stewart and Jones*, 163 N.C. 531, 79 S.E. 1100 (1913); *Brem v. Covington*, 104 N.C. 589, 10 S.E. 706 (1889). *See also* Restatement (Second) of Contracts § 71(4) and comment e (1981).

39. *Williams v. Chaffin*, 13 N.C. 333, 335 (1830).

40. *Young v. Board of Commissioners of Johnston County*, 190 N.C. 52, 57, 128 S.E. 401, 403 (1925); *Gurvin v. Cromartie*, 33 N.C. 174, 178-179 (1850).

PRODUCTS LIABILITY—MILITARY CONTRACTOR DEFENSE.

This instruction was renumbered as 744.19 and moved to Part III Products Liability, Chapter 2.

North Carolina
Conference of Superior Court Judges
Committee on Pattern Jury Instructions

North Carolina PATTERN JURY INSTRUCTIONS for Civil Cases

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> *NOTE WELL: This instruction may be given in a product liability action when the defendant claims as a bar to liability the affirmative "military contractor" defense.[2] As a matter of policy, the "military contractor" defense exists to insulate the military procurement process from the injurious effects of state products liability claims.[3]*

The *(state number)* issue reads:

"Was the defendant acting as a military contractor when *it* supplied [*state name of product or equipment*] to the plaintiff?"

Under certain circumstances, a defendant in a suit brought by a party who claims injury due to the inadequate design or formulation of a product or equipment[4] may avoid liability if the defendant qualifies as a military contractor.[5]

On this issue the burden of proof is on the defendant.[6] This means that the defendant must prove, by the greater weight of the evidence, five things[7]:

First, that the [*state name of product or equipment*] alleged to be the proximate cause of the plaintiff's [injury] [death] was military equipment.[8] "Military equipment" is equipment owned by a branch of the United States Armed Forces.[9]

Second, that the defendant was the manufacturer of the [*state name of product or equipment*].[10] A "manufacturer" is one who designs, assembles, fabricates, produces, constructs or otherwise prepares a product, or component part of a product, prior to its sale.[11]

Third, that the United States Government approved reasonably precise specifications for the *[state name of product or equipment]*.[12] Approval must consist of more than a mere "rubber stamp."[13] This means that [the Government

must have actively participated in the design of the [*state name of product or equipment*]] [the Government provided the design of the [*state name of product or equipment*] to the defendant].[14] Simple approval of a design submitted to the Government by the manufacturer, without other proof of Government participation in the design, is not sufficient.[15]

Fourth, that the [*state name of product or equipment*] conformed to the Government specifications.[16] To "conform" means to satisfy the design requirements or specifications stipulated or approved by the Government.

Fifth, that if the defendant knew of the danger[s] in the use of the *[state name of product or equipment]* that proximately caused the plaintiff's [injury] [death], and the Government was not aware of such danger[s], the defendant must have warned the Government about such dangers.[17]

Finally, as to this *(state number)* issue on which the defendant has the burden of proof, if you find, by the greater weight of the evidence, that the defendant was acting as a military contractor when it furnished [*state name of product or equipment*] to the plaintiff, then it would be your duty to answer this issue "Yes" in favor of the defendant. 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 plaintiff.

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1. N.C.G.S. § 99B-1(3) (describing a "Product liability action" as one that "includes any action brought for or on account of personal injury, death or property damage caused by or resulting from the manufacture, construction, design, formulation, development of standards, preparation, processing, assembly, testing, listing, certifying, warning, instructing, marketing, selling, advertising, packaging, or labeling of any product.").

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2. *See Stilwell v. Gen. Ry. Services,* 167 N.C. App. 291, 295-96, 605 S.E.2d 500, 503 (2004) (citing *Boyle v. United Technologies Corp.,* 487 U.S. 500, 512, 101 L. Ed. 2d. 442, 458 (1988)), *discretionary rev. denied,* 359 N.C. 326, 611 S.E.2d 852 (2005).

3. *See, e.g., Tozer v. LTZ Corp.,* 792 F.2d 403, 405-07 (4th Cir. 1986) ("Permitting recovery for design defects under any theory of liability risks altering the nature of the procurement process . . . . [I]n the absence of the defense, there would be a decrease in contractor participation in design, an increase in the cost of military . . . equipment, and diminished efforts in contractor research and development.").

The "military contractor" defense mandates pre-emption of state law by federal common law. When the elements of the "military contractor" defense are established, "state law . . . present[s] a 'significant conflict' with federal policy and must be displaced." *Boyle*, 487 U.S. at 512, 101 L. Ed. 2d. at 458.

4. *See* N.C.G.S. § 99B-6. Note that the statute does not use the term "equipment." However, the term "product" in the statute seems to include the term "equipment" as employed in the "military contractor" defense.

5. *Stilwell*, 167 N.C. App. at 295-96, 605 S.E.2d at 503 ("This defense was formally recognized in *Boyle . . .* where the Supreme Court . . . held that: '[l]iability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States.'" (quoting *Boyle,* 487 U.S at 512, 101 L.Ed.2d at 458)). "Stripped to its essentials, the military contractor's defense under Boyle is to claim, 'The Government made me do it.'" *In re Joint Eastern and Southern District New York Asbestos Litigation*, 897 F.2d 626, 632 (2nd Cir. 1990).

6. To prevail, the contractor "bears the burden of proving each element of the military contractor defense." *Beaver Valley Power Co. v. National Engineering & Contracting Co.*, 883 F.2d 1210, 1217, n.7 (3rd Cir. 1989).

7. *See Stilwell*, 167 N.C. App. at 295-97, 605 S.E.2d at 503-04.

8. *See id.* (discussing argument that a caboose was an item of military equipment, "as it was owned by the U.S. Army for use . . . even though it was being used [for] a normal commercial [purpose] on the date of the incident."). *Stilwell* notes that "most of the cases since Boyle have involved unique military equipment," but that "there has been a split in the federal circuits over whether the defense is available to all [government] contractors." *Id*. *Boyle* itself refers to the "government contractor defense," although the product at issue was the escape hatch on a military helicopter. *Boyle*, 487 U.S. at 510, 101 L. Ed. 2d at 456. *Stillwell* "reser[ved] any position on this issue." 167 N.C. App. at 297, 605 S.E.2d at 504.

9. *See Stillwell*, 167 N.C. App. at 296, 605 S.E.2d at 504.

10. *See id.*

11. N.C.G.S. § 99B-1. A manufacturer also includes a "seller owned in whole or significant part by the manufacturer or a seller owning the manufacturer in whole or significant part."

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12. *Stilwell*, 167 N.C. App. at 295, 605 S.E.2d at 503. This element assures that "the government, and not the contractor, is exercising discretion in selecting the design." *Stout v. Borg-Warner Corp*., 933 F.2d 331, 334 (5th Cir. 1991); *see also Tate v. Boeing Helicopters*, 55 F.3d 1150, 1154 (6th Cir. 1995) (To determine if this condition is satisfied, courts often will examine whether "the government and the contractor engage[d] in a continuous back and forth review process regarding the design in question"); *Trevino v. General Dynamics Corp.*, 865 F.2d 1474, 1481 (5th Cir. 1989), cert. denied, 493 U.S. 935, 107 L. Ed. 2d 317 (1989) ("The requirement that the specification be precise means that the discretion over significant details and all critical design choices will be exercised by the government. If the government approved imprecise or general guidelines, then discretion over important design choices would be left to the government contractor.").

13. *Tozer,* 792 F.2d at 407-08 ("The defense will be permitted to a participating contractor so long as government approval of design 'consists of more than a mere rubber stamp.'"); *see also Tate*, 55 F.3d at 1153 ("When the government merely accepts, without any substantive review or evaluation, decisions made by a government contractor, then the contractor, not the government, is exercising discretion.").

14. *See Schoenborn v. Boeing*, 769 F.2d 115, 122 (3rd Cir. 1985) (If there is genuine governmental participation in the design, "the defense is available.").

15. *See id.; Tate*, 55 F.3d at 1153. However, some courts have held "that even though the military had not developed or approved the specifications for the component at issue, 'the length and breadth of the [military's] experience with the [component]—and its decision to continue using it—amply establish government approval of the alleged design defects.'" *Ramey v. Martin-Baker Aircraft Co.,* 874 F.2d 946, 950 (4th Cir. 1989).

16. *Stilwell*, 167 N.C. App. at 295, 605 S.E.2d at 503; *see also Miller v. Diamond Shamrock Co.*, 275 F.3d 414, 420 (5th Cir. 2001) ("[a]cceptance and use of an item following its production can establish that the item conformed to its specifications"); *Ramey*, 874 F.2d at 951 (finding that when "[n]othing in the record suggests to us that the Navy found the seat not to conform to specifications . . . [I]t is not [the] province [of the court] . . . to make such a finding in the Navy's behalf.").

By implication, if the product was defectively manufactured in that it did not conform to the design specifications approved by the government, then a design-defect claim would not be immunized by the defense. *See generally* 53 A.L.R.5TH 535 THE GOVERNMENT CONTRACTOR DEFENSE TO STATE PRODUCTS-LIABILITY CLAIMS § 7 (2005) (noting the defense is intended to protect manufacturers only where it is the government, and not the manufacturer, that is responsible for the defect in question).

17. *Id.* This requirement "eliminate[s] any incentive the military contractor defense might create" for contractors to withhold knowledge of risks, since without the requirement conveying knowledge of risks might disrupt the contract but withholding that knowledge would produce no liability. *Stout*, 933 F.2d at 334. However, "a government contractor is only responsible for warning the government of dangers about which it has actual knowledge," *Trevino*, 865 F.2d at 1487, and the "defense does not require a contractor to warn the government of defects about which it only *should have* known," *Kerstetter v. Pacific Sci. Co.*, 210 F.3d 431, 436 (5th Cir. 2000); *see also Boyle*, 487 U.S. at 513, 101 L. Ed. 2d. at 458. (holding that contractors should not be held liable for failure to "identify[y] all design defects.");

800.06 CONSTRUCTIVE FRAUD—REBUTTAL BY PROOF OF OPENNESS, FAIRNESS AND HONESTY.

The (*state number*) issue reads:

"Did the defendant act openly, fairly and honestly in bringing about (identify transaction)?"[1]

(You are to answer this issue only if you have answered the (state number) issue "Yes" in favor of the plaintiff.)

On this issue the burden of proof is on the defendant. This means that the defendant must prove, by the greater weight of the evidence, that, with regard to (identify transaction), the defendant made a full, open disclosure of material facts, that the defendant dealt with the plaintiff fairly, without oppression, imposition or fraud, and that the defendant acted honestly.[2]

Finally, as to the (state number) issue on which the defendant has the burden of proof, if you find by the greater weight of the evidence that the defendant acted openly, fairly and honestly in bringing about (identify transaction), then it would be your duty to answer this issue "Yes" in favor of the defendant.

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 plaintiff.

NOTE WELL: If the jury answers yes to this issue, then it may be appropriate to submit the issue of N.C.P.I.—Civil 800.00 ("Fraud") if the pleadings and evidence support submission of such issue to the jury.[3]

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1. The presumption of constructive fraud may be rebutted by the fiduciary's "showing, for example, that the confidence reposed in him was not abused." *Forbis v. Neal*, 361 N.C. 519, 529, 649 S.E.2d 382, 388 (2007) (citation and internal quotation marks omitted); *see Wachovia Bank & Trust Co. v. Johnston*, 269 N.C. 701, 711, 153 S.E.2d 449, 457 (1967); *McNeill v. McNeill*, 223 N.C. 178, 25 S.E.2d 615 (1943); *In re Will of Sechrest*, 140 N.C. App. 464, 471, 537 S.E.2d 511, 517 (2000), *disc. rev. denied*, 353 N.C. 375, 547 S.E.2d 16 (2001); *Honeycutt v. Farmers & Merchants Bank*, 126 N.C. App. 816, 820, 487 S.E.2d 166, 168 (1997).

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2. *Underwood v. Stafford*, 270 N.C. 700, 702, 155 S.E.2d 211, 212-13 (1967); *Poore v. Swan Quarter Farms, Inc.*, 95 N.C. App. 449, 450, 382 S.E.2d 835, 836 (1989) (observing that it is the fiduciary's burden to establish fairness, openness, and absence of imposition, undue advantage, actual or constructive fraud); *Mountain Top Youth Camp, Inc. v. Lyon*, 20 N.C. App. 694, 697, 202 S.E.2d 498, 500 (1974) (fiduciary must make affirmative showing of full disclosure and fair dealing).

3. *Watts v. Cumberland Cnty. Hosp. Sys., Inc.*, 317 N.C. 110, 116, 343 S.E.2d 879, 884 (1986) ("[O]nce rebutted, the presumption of fraud 'evaporates, and the accusing party must shoulder the burden of producing actual evidence of fraud.'"). *See also*, PJI 101.62 ("Presumptions") subsection IV. *See Chisum v. Campagna*, 376 N.C. 680, 709, 855 S.E.2d 173, 193 (2021) (stating that the former language in this pattern jury instruction did not "include the burden-shifting language that is found in [N.C. Supreme Court] decisions with respect to this issue.").

800.72 INVASION OF PRIVACY—DISCLOSURE OF PRIVATE IMAGES[1]

The (*state number*) issue reads:

"Did the defendant disclose (a) private image(s) 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, five things:[2]

First, that the defendant knowingly disclosed[3] (an) image(s)[4] of the plaintiff with the intent to:

[Coerce, harass, intimidate, demean, humiliate, or cause financial loss to the plaintiff]; [or]

[Cause others to coerce harass, intimidate, demean, humiliate, or cause financial loss to the plaintiff.]

Second, that the plaintiff is identifiable from the disclosed [image itself] [images themselves] or information offered in connection with the image(s).

Third, that the plaintiff's intimate parts[5] are exposed or the plaintiff is engaged in sexual conduct[6] in the disclosed image(s).

Fourth, that the defendant disclosed the image(s) without the affirmative consent of the plaintiff; and

Fifth, that the defendant obtained the image(s) without consent of the plaintiff or under circumstances such that the defendant knew or should have known that the plaintiff expected the image(s) to remain private.[7]

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 disclosed (a) private image(s) 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.

N.C. Gen. Stat. § 14-190.5A

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1. N.C.G.S. § 14-190.5A, a criminal statute regarding the disclosure of private images, and more commonly referred to as North Carolina's "revenge porn" statute, *see Clark v. Clark*, ___ N.C. App. ___, 867 S.E.2d 743 (2021), affords a private right of action for the same conduct. Subsection (g) provides that "[i]n addition to any other remedies at law or in equity, including an order by the court to destroy any image disclosed in violation of this section, any person whose image is disclosed, or used, as described in subsection (b) of this section, has a civil cause of action against any person who discloses or uses the image[.]"

2. These five elements are set forth in N.C.G.S. § 14-190.5A(b). Section 14-190.5A(g) specifically states that any civil action brought pursuant to this statute must meet the elements set forth in subsection (b). \

3. "Disclosed" is defined as [t]ransfer, publish, distribute, or reproduce." N.C.G.S. 14-190.5A(a)(1).

4. "Image" is defined as "[a] photograph, film, videotape, recording, live transmission, digital or computer-generated visual depiction, or any other reproduction that is made by electronic, mechanical, or other means." N.C.G.S. § 14-190.5A(a)(2).

5. "Intimate parts" is defined as "(i) male or female genitals, (ii) male or female pubic area, (iii) male or female anus, or (iv) the nipple of a female over the age of 12." N.C.G.S. § 14-190.5A(a)(3). *See also Clark v. Clark*, ___ N.C. App. ____, 867 S.E.2d 743 (2021) (discussing "intimate parts" definition).

6. "Sexual conduct" includes any of the following: (a) vaginal, anal, or oral intercourse, whether actual or simulated, normal or perverted; (b) masturbation, excretory functions, or lewd exhibition of uncovered genitals; or (c) an act or condition that depicts torture, physical restraint by being fettered or bound, or flagellation of or by a nude person or a person clad in undergarments or in revealing or bizarre costume. N.C.G.S. § 14-190.5A(a)(6).

7. Section 14-190.5A does not apply to (1) images involving voluntary exposure in public or commercial settings; (2) disclosures made in the public interest, including, but not limited to, the reporting of unlawful conduct or the lawful and common practices of law enforcement, criminal reporting, legal proceedings, medical treatment, or scientific or educational activities; or (3) providers of an interactive computer service, as defined in 47 U.S.C. § 230(f), for images provided by another person. If facts supporting any of these exceptions are pled and evidence supporting these exceptions is presented at trial, then there may be an additional issue for the jury as to whether an exception applies.

800.73 INVASION OF PRIVACY—DISCLOSURE OF PRIVATE IMAGES—ACTUAL DAMAGES.

NOTE WELL: This instruction[1] *is designed to be used with N.C.P.I.—Civil 800.72 ("Invasion of Privacy—Disclosure of Private Images") and N.C.P.I.—Civil 800.74 ("Invasion of Privacy—Disclosure of Private Images—Liquidated Damages").*

The (*state number*) issue reads:

"What amount is the plaintiff entitled to recover from the defendant for the disclosure of the private image(s) of the plaintiff?"

If you have answered the (*state number*) issue "Yes" in favor of the plaintiff, then you must determine whether the plaintiff is entitled to recover actual damages. 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, the amount of actual damages caused by the wrongful conduct of the defendant.

(Here give appropriate instructions as to the type of damage claimed if supported by the evidence, e.g.,

N.C.P.I.—Civil—810.04 ("Personal Injury Damages—Medical Expenses"),

N.C.P.I.—Civil—810.06 ("Personal Injury Damages—Loss of Earnings"),

N.C.P.I.—Civil—810.08 ("Personal Injury Damages—Pain and Suffering"), etc.)[1]

I instruct you that if you reach this issue, your decision must be based on the evidence and the rules of law I have given you with respect to the measure of damages. You are not required to accept the amount of damages suggested by the parties or their attorneys. Your award must be fair and just. You should remember that you are not seeking to punish either party, and you are not awarding or withholding anything on the basis of sympathy or pity.

Finally, as to this (*state number*) issue on which the plaintiff has the burden of proof, if you find, by the greater weight of the evidence, the amount of actual damages proximately caused by the wrongful conduct of the defendant, then it would be your duty to write that amount in the blank space provided.

If, on the other hand, you fail to so find, then it would be your duty to write "None" in the blank space provided.

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1. This issue is meant to aid the trial court judge in calculating liquidated damages, as set forth in N.C.G.S. § 14-190.5A(g)(1), in the event that actual damages are less than liquidated damages. Liquidated damages are to be computed at a rate of one thousand dollars ($1,000) per day for each day of the violation or in the amount of ten thousand dollars ($10,000), whichever is higher.

2. N.C.G.S. § 14-190.5A(g)(2) also provides for the possibility of recovery of punitive damages. In the event that an instruction is submitted on punitive damages, there will be separate issues as provided in N.C.P.I.—Civil 810.96 ("Punitive Damages—Liability of Defendant") and N.C.P.I.—Civil 810.98 ("Punitive Damages—Issue of Whether to Make Award and Amount of Award").

800.74 INVASION OF PRIVACY—DISCLOSURE OF PRIVATE IMAGES—NUMBER OF DAYS—LIQUIDATED DAMAGES.

NOTE WELL: This instruction[1] is designed to be used with N.C.P.I.—Civil 800.72 ("Invasion of Privacy – Disclosure of Private Images") and N.C.P.I.—Civil 800.73 ("Invasion of Privacy—Disclosure of Private Images—Actual Damages").

The (*state number*) issue reads:

"For how many days did the defendant disclose the plaintiff's private image?"[2]

If you have answered the (*state number*) issue "Yes" in favor of the plaintiff, then you must determine for how many days the defendant disclosed the plaintiff's private image. 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 the number of days in total the defendant transferred, published, distributed, or reproduced the plaintiff's private image.

Finally, as to this (*state number*) issue on which the plaintiff has the burdn of proof, it would be your duty to write the total number of days that the defendant disclosed the plaintiff's private image in the blank space provided.

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1. This issue is meant to aid the trial court judge in calculating liquidated damages, as set forth in N.C.G.S. § 14-190.5A(g)(1), in the event that actual damages are less than liquidated damages. Liquidated damages are to be computed at a rate of one thousand dollars ($1,000) per day for each day of the violation or in the amount of ten thousand dollars ($10,000), whichever is higher.

2. This instruction may need to be adjusted if the evidence supports that the defendant disclosed more than one private image of the plaintiff.

805.25 PRIVATE NUISANCE.

A nuisance is the substantial and unreasonable interference with the use and enjoyment of another’s property.

The (*state number*) issue reads:

"Did the defendant substantially and unreasonably interfere with the use and enjoyment of the plaintiff’s property?"

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, two things:

First, that the defendant substantially[1] interfered with the plaintiff's use and enjoyment of the plaintiff’s property. Interference is substantial when it results in significant annoyance, material physical discomfort, or injury to a person's health or property.[2] A slight inconvenience or a petty annoyance is not a substantial interference.

Second, that such substantial interference was unreasonable. Substantial interference is unreasonable if a person of ordinary prudence and discretion would consider it excessive or inappropriate after giving due consideration to the interest of the plaintiff, the interest of the defendant and the interest of the community.[3] In determining whether such substantial interference is unreasonable, you may consider

[the surroundings and conditions under which the defendant's interference occurs]

[the character of the location]

[the nature, utility and social value of the defendant's operation]

[the nature, utility and social value of the plaintiff's use and enjoyment that have been invaded]

[the suitability of the location for the defendant's operation]

[the suitability of the location for the plaintiff’s use]

[the extent, nature and frequency of the harm to the plaintiff's interest]

[the priority in time of occupation or conflicting uses between the plaintiff and the defendant][4]

[(*state any other factor arising from the evidence*)].

Finally, as to this issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that the defendant substantially and unreasonably interfered with the plaintiff's use and enjoyment of the plaintiff’s property, 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.

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1. *Morgan v. High Penn Oil Co.*, 238 N.C. 185, 193, 77 S.E.2d 682, 689 (1953). *See also Pendergrast v. Aiken*, 293 N.C. 201, 221, 236 S.E.2d 787, 799 (1977) (citing *Midgett v. Highway Commission*, 265 N.C. 373, 144 S.E.2d 121 (1965)).

2. *Pake v. Morris*, 230 N.C. 424, 426, 53 S.E.2d 300, 301 (1949).

3. *Watts v. Pama Mfg. Co.*, 256 N.C. 611, 618, 245 S.E.2d 809, 814 (1962) ("[The] question is *not whether reasonable persons in plaintiff's or defendant's position* would regard the invasion as unreasonable, but whether reasonable persons generally, looking at the whole situation impartially and objectively, would consider it unreasonable") (emphasis added).

4. *Watts*, 256 N.C. at 618, 245 S.E.2d at 814.

805.30 PRIVATE NUISANCE—DAMAGES (REAL PROPERTY).

The (*state number*) issue reads:

"What amount is the plaintiff entitled to recover from the defendant for substantially and unreasonably interfering with the plaintiff's use and enjoyment of (*identify real property*)?"

If you have answered the (*state number*) issue "Yes" in favor of the plaintiff, the plaintiff is entitled to recover nominal damages even without proof of actual damages.[1] Nominal damages consist of some trivial amount such as one dollar in recognition of the technical damages incurred by the plaintiff.[2]

The plaintiff may also be entitled to recover actual damages. 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, the amount of actual damages proximately[3] caused by the nuisance of the defendant.

Proximate cause is a cause which in a natural and continuous sequence produces a person's [injury] [damage] and is a cause which a reasonable and prudent person could have foreseen would probably produce such [injury] [damage] or some similar injurious result.

There may be more than one proximate cause of [an injury] [damage]. Therefore, the plaintiff need not prove that the defendant's wrongful conduct was the sole proximate cause of the [injury] [damage]. The plaintiff must prove, by the greater weight of the evidence, only that the defendant's wrongful conduct was a proximate cause.

(Direct Damages. *Use where there is competent evidence of direct damages:*[4]

[Direct Damages-Fair Market Value. *Use where the plaintiff relies on the difference in fair market value formula to provide damages:* The plaintiff's actual damages equal the difference between the fair market value of the property immediately before the nuisance occurred and its fair market value immediately after the nuisance was removed.[5] The fair market value of any property is the amount which would be agreed upon as a fair price by an owner who wishes to sell, but is not compelled to do so, and a buyer who wishes to buy, but is not compelled to do so.[6] (Evidence of [estimates of the cost to repair] (and) [the actual cost of repairing] the damage to the (*name real property*) may be considered by you in determining the difference in fair market value before and after the nuisance occurred.)[7]]

[Direct Damages-Cost of Repair. *Use where damages measured by market value are impractical because there is no market by which the degree of damage to the property can be measured:*[8] The plaintiff's actual property damages are equal to the amount reasonably needed to [repair the damage to the (*identify real property*)][9] [replace the (*identify real property*) damaged][10], less [the salvage value of the [(*identify real property*)] [parts replaced]] [the accumulated depreciation[11] on the property replaced].[12]]

[Direct Damages-Intrinsic Value. *Use where damages measured by market value would not adequately compensate the plaintiff and repair or replacement would be impossible or economically wasteful*:[13] The plaintiff's actual damages equal the actual value of the (*identify real property*) immediately before it was damaged (less the salvage value, if any, that it had after its damage). The actual value of any property is its intrinsic value; that is, its reasonable value to its owner.[14] In determining the actual value of the (*identify real property*), you may consider:

[the original cost of (*labor and materials used in producing*) the (*identify real property*)]

[the age of the (*identify real property*)]

[the degree to which the (*identify real property*) has been used]

[the condition of the (*identify real property*) just before it was damaged]

[the uniqueness of the (*identify real property*)]

[the practicability of [repairing] [reconstructing] the (*identify real property*)]

[the cost of replacing the (*identify real property*) (taking into account its depreciation; that is, the degree to which it had been used up or worn out with age)]

[the insured value of the (*identify real property*)][15]

[the opinion of the plaintiff as to its value. You should not consider any fanciful, irrational or purely emotional value that (*identify real property*) may have had.[16]]

[the opinion of any experts as to its value]

[*state other appropriate factors supported by the evidence*[17]].)

(<u>Incidental Damages</u>. *Use where there is competent evidence of loss of use of the benefit of the property*: The plaintiff's actual property damages may also include compensation for the loss of use of (*identify real property*).[18] (Here give the applicable alternative statement (*give only one):)*

[<u>Repairs feasible at reasonable cost in reasonable time</u>. When (*identify real property*) damaged by the nuisance of another can be repaired at a

reasonable cost and within a reasonable time, the owner may recover for the loss of its use. The measure of such damages is the cost of renting similar (*identify real property*) for a reasonable repair period (whether or not the owner actually rented such a similar (*identify real property*).]

[Repairs not feasible at reasonable cost in reasonable time. When (*identify real property*) damaged by the nuisance of another cannot be repaired at a reasonable cost and within a reasonable time, and if a replacement (*identify real property*) is not immediately obtainable, the owner may recover for loss of use during the period of time reasonably necessary to acquire a replacement (*identify real property*) and put it into service. The measure of damages is the cost of renting a similar (*identify real property*) during the period of time it takes to locate a replacement (*identify real property*) and put it into service (whether or not the owner actually rents such temporary (*identify real property*).]

[Total destruction. When (*identify real property*) is totally destroyed or damaged by the nuisance of another and a replacement (*identify real property*) is not immediately obtainable, the owner may recover for loss of use during the period reasonably necessary to acquire temporary (*identify real property*). The measure of such damages is the cost of renting a temporary (*identify real property*) for the period of time reasonably necessary to replace the (*identify real property originally destroyed*) (whether or not the owner actually rented such a similar (*identify real property*)].]

[Owner elects to replace repairable property. When a (i*dentify real property*), damaged by the nuisance of another can be repaired at a reasonable cost and within a reasonable time, but the owner elects to replace it by acquiring a substitute (*identify real property*), the owner may recover for loss of use during the time reasonably required to make repairs or to acquire

the substitute, whichever is shorter. The measure of such damages is the cost of renting a similar (*identify real property*) during such period].])

(Consequential Damages. *Use where there is competent evidence of consequential damages:*

[Consequential Damages-Lost Net Revenues. *Do not use the following paragraph unless supported by the evidence:* If an owner proves with reasonable certainty the net revenues lost through inability to use the (*identify real property*), the owner may recover such net revenues lost during a reasonable period within which to make repairs.]

[Consequential Damages-Other. *Give such other consequential damage instruction as is supported by the evidence.*])

(Other Damages. *Give such further instruction as may be supported by the evidence*.)

Finally, as to this (*state number*) issue on which the plaintiff has the burden of proof, if you find, by the greater weight of the evidence, the amount of actual damages proximately caused by the nuisance of the defendant, then it would be your duty to write that amount in the blank space provided.

If, on the other hand, you fail to so find, then it would be your duty to write a nominal sum such as "One Dollar" in the blank space provided.

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1. *Phillips v. Haynes*, 244 N.C. App. 543, 543, 781 S.E.2d 350, 350 (2015).

2. *Wolfe v. Montgomery Ward & Co*., 211 N.C. 295, 296, 189 S.E. 772, 773 (1937).

3. In *Binder v. General Motors Acceptance Corp*., 222 N.C. 512, 514-15, 23 S.E.3d 894, 895 (1943), the Supreme Court, quoting *Conrad v. Shuford*, 174 N.C. 719, 94 S.E. 424, 425 (1917), said:

> "A wrongdoer is liable for all damages which are the proximate effect of his wrong, and not for those which are remote; 'that direct losses are necessarily proximate, and compensation, therefore, is always recoverable; that

consequential losses are proximate when the natural and probable effect of the wrong.'"

4. *Note Well*: Where the defendant's operation is an agricultural or forestry operation, there is a limit on the compensatory damages that may be awarded. *See* N.C. Gen. Stat. § 106-702 (limiting compensatory damages for both permanent and temporary nuisances caused by agricultural or forestry operations).

5. *Paris v. Carolina Portable Aggregates, Inc.*, 271 N.C. 471, 484, 157 S.E.2d 131, 141 (1967).

6. *Huff v. Thornton*, 23 N.C. App. 388, 394, 209 S.E.2d 401, 405 (1974), *aff'd*, 287 N.C. 1, 213 S.E.2d 198 (1975).

7. *Huff v. Thornton*, 213 S.E.2d at 205-06.

8. When the property cannot be valued by reference to a market, the measure of damages may properly be gauged by the cost of repair. *See In re Appeal of Amp*, 287 N.C. 547, 570-574, 215 S.E.2d 752, 766-769 (1975). Plaintiff's recovery for repair should be limited by the value of the property damaged. *Carolina Power & Light Co v. Paul*, 261 N.C. 710, 712, 136 S.E.2d 103, 105 (1964). However, where the repair or replacement does not provide a realistic measure of the plaintiff's loss (such as where the property cannot be repaired or replaced, or where it has primarily or exclusively intrinsic value), use the next paragraph.

9. If the property replaced needed repairs at the time it was destroyed, the measure of damages would be replacement cost less the reasonable cost of repairs. *Beaufort & Morehead R. Co. v. The Damyank*, 122 F.Supp. 82 (E.D.N.C. 1954) (railroad bridge over river damaged by ship).

10. If manufacturing materials with no market value are destroyed, the measure of damages should include the replacement cost of the raw materials. *In re Appeal of AMP*, *Inc.*, 287 N.C. at 570-74, 215 S.E.2d at 765-68.

11. No deduction for depreciation should be made unless the evidence would justify a finding that the plaintiff will eventually recapture the worth of the depreciation. *Carolina Power & Light Co.*, 261 N.C. at 712, 136 S.E.2d at 105; *In re Appeal of Amp, Inc.*, 287 N.C. at 570-74, 215 S.E.2d at 765-68.

12. *State v. Maynard*, 79 N.C. App. 451, 339 S.E.2d 666 (1986).

13. *William F. Freeman, Inc. v. Alderman Photo Co.*, 89 N.C. App. 73, 365 S.E.2d 183 (1988). Even though an item has no measurable market value when tortuously destroyed, it nonetheless may have intrinsic value to its owner, which is recoverable. *Id*.

14. *William F. Freeman, Inc. v. Alderman Photo Co.*, 89 N.C. App. 73, 365 S.E.2d 183.

15. *William F. Freeman, Inc.*, 89 N.C. App. at 77, 365 S.E.2d at 186.

16. *William F. Freeman, Inc.*, 89 N.C. App. at 77, 365, S.E.2d at 186; *Thomason*, 159 N.C. at 1024 ("damages which are merely imaginary or have no real or substantial existence, should not be allowed"). *Lee v. Bir*, 116 N.C. App. 584, 590-91, 449 S.E.2d 34, 36 (1994). *See also Blum v. Worley*, 121 N.C. App. 166, 169-70, 465 S.E.2d 16, 19 (1995).

17. Other factors could include the earnings generated by the property, the capitalized value of those earnings, the market value (where there is a market at some other place) and

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cost of transportation, the market value where there will be a market at some other time (such as for crops, for which cost of harvesting, etc. would also be a consideration). *See Freeman*, 89 N.C. App. at 77, 365 S.E.2d at 186; *Thomason v. Hackney & Moale Co.*, 159 N.C. 299, 74 S.E. 1022 (1912).

18. *Binder*, 222 N.C. at 514, 23 S.E.2d at 895.

805.55 DUTY OF OWNER TO LAWFUL VISITOR.

The (*state number*) issue reads:

"Was the plaintiff[1] [injured] [damaged] by the negligence of the defendant?"

(You will answer this issue only if you have answered the (*state number*) issue "Yes" in favor of the plaintiff. If you answered the (*state number*) issue "No" in favor of the defendant, you will not answer this issue but go on to the (*state next issue*).)[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 defendant was negligent and that such negligence was a proximate cause of the plaintiff's [injury] [damage].

Negligence refers to a person's failure to follow a duty of conduct imposed by law. The law requires every [owner][3] [person in possession][4] to use ordinary care to keep the premises in a reasonably safe condition for lawful visitors who use them in a reasonable and ordinary manner.[5] Ordinary care means that degree of care which a reasonable and prudent person would use under the same or similar circumstances to protect [himself] [herself] and others from [injury] [damage]. A person's failure to use ordinary care is negligence.

The plaintiff not only has the burden of proving negligence, but also that such negligence was a proximate cause of the [injury] [damage].

Proximate cause is a cause which in a natural and continuous sequence produces a person's [injury] [damage], and is a cause which a reasonable and prudent person could have foreseen would probably produce such [injury] [damage] or some similar injurious result.

There may be more than one proximate cause of [an injury] [damage]. Therefore, the plaintiff need not prove that the defendant's negligence was the sole proximate cause of the [injury] [damage]. The plaintiff must prove, by the greater weight of the evidence, only that the defendant's negligence was a proximate cause.

In this case, the plaintiff contends, and the defendant denies, that the defendant was negligent in one or more of the following ways:

(*Read all contentions of negligence supported by the evidence*.)

The plaintiff further contends, and the defendant denies, that the defendant's negligence was a proximate cause of the plaintiff's [injury] [damage].

I instruct you that negligence is not to be presumed from the mere fact of [injury] [damage].

(*Give law as to each contention of negligence included above. Set forth below are standard statements of law that may apply to given contentions of negligence. The jury should be charged only as to statements of law applicable to the contentions*.):

[An [owner] [person in possession] is required to give adequate warning to lawful visitors of any hidden or concealed dangerous condition about which the [owner] [person in possession] knows or, in the exercise of ordinary care, should have known. (A warning is adequate when, by placement, size and content, it would bring the existence of the dangerous condition to the attention of a reasonably prudent person.) However, an [owner] [person in possession] does not have to warn about concealed conditions of which that person has no knowledge and could not have learned by reasonable inspection and supervision.[6] An [owner] [person in possession] is held responsible for knowing of any condition which a reasonable inspection and supervision of the premises would reveal and is also responsible for knowing of any hidden or

concealed dangerous condition which that person’s own conduct (or that of agents or employees) has created.][7]

[A dangerous condition can be caused by a third party or some outside force rather than the [owner] [person in possession]. In such case, if the dangerous condition exists long enough for the [owner] [person in possession] to have discovered it through reasonable inspection or supervision, failure to use ordinary care to remedy the condition or to give adequate warning of it would be negligence.][8]

[The [owner] [person in possession] does not have to take precautions against unusual or out-of-the-ordinary use of the premises by lawful visitors.][9]

[The [owner] [person in possession] is not required to warn of obvious dangers or conditions, nor warn of dangerous conditions about which a lawful visitor has equal or superior knowledge.][10]

[The [owner] [person in possession] is not an insurer of a lawful visitor's safety.][11]

[Usually, the [owner] [person in possession] does not have a duty to protect lawful visitors from the criminal acts of others on the [owner’s] [person in possession’s] premises.[12] But when, in the exercise of reasonable care, the [owner] [person in possession] would have realized that criminal acts of others on the premises were foreseeable, the [owner] [person in possession] has a duty to provide adequate security measures to protect lawful visitors.[13] A breach of this duty is negligence. To determine whether criminal acts of others on the [owner’s] [person in possession’s] premises were foreseeable, you should consider the evidence, if any, of the amount of prior criminal activity, the type of that prior criminal activity and the location of that prior criminal activity with respect to the premises.[13]]

Finally, as to this (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 was negligent (in any one or more ways contended by the plaintiff) and that such negligence was a proximate cause of plaintiff's [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.

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1. The North Carolina Supreme Court has eliminated the distinction between invitees and licensees in premises liability cases. *Nelson v. Freeland*, 349 N.C. 615, 633, 507 S.E.2d 882, 893 (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." *Nelson*, 349 N.C. at 625, 507 S.E.2d at 892. The separate classification for trespassers has been retained. *Nelson*, 349 N.C. at 625, 507 S.E.2d at 892. The change in the common law rule, moreover, is retroactive as well as prospective. *Nelson*, 349 N.C. at 625, 507 S.E.2d at 892.

2. Give only where there is a preliminary issue as to whether the plaintiff was a lawful visitor or a trespasser. *See* N.C.P.I.—Civil 805.50 ("Status of Party—Lawful Visitor or Trespasser").

3. The landlord and rental agent may be liable for negligence in allowing a tenant to keep vicious dogs where a landlord retains control over the tenant's dogs. *See Holcomb v. Colonial Assocs., L.L.C.*, 358 N.C. 501, 508–9, 597 S.E.2d 710, 715 (2004).

4. The common law duties imposed upon an owner of land also apply to landlords notwithstanding the enactment of the Residential Rental Agreement Act, N.C.G.S. § 42-38, et. seq. *Prince v. Wright*, 141 N.C. App. 262, 270–1, 541 S.E.2d 191, 198 (2000). The duties legislated by the Residential Rental Agreement Act are in addition to the common law duties. *See* N.C.P.I.—Civil 805.71 ("Duty of Landlord to Tenant-Leased Premises"); N.C.P.I.—Civil 805.73 ("Duty of Landlord-Common Areas").

5. Note, however, that the common law rule is modified by N.C.G.S. § 38A-4 as to all causes of action arising after October 1, 1995, in instances where the landowner directly or indirectly invites or permits a person to use land without charge (§ 38A-2(1), (3)) for education (§ 38A-2(2)) or recreational (§ 38A-2(5)) purposes. This statute does not affect the doctrine of attractive nuisance, *see* N.C.P.I.-Civil 805.65A ("Duty of Owner to Child Trespasser—Attractive Nuisance"), nor does it abrogate the landowner's responsibility to inform direct lawful visitors of artificial or unusual hazards of which the owner is aware.

However, there is a narrow exception to the rule that an owner owes a duty of care to a lawful visitor. Where a landowner hires a contractor and the "landowner relinquishes control and possession of property to a contractor, the duty of care, and the concomitant liability for breach of that duty, are also relinquished and should shift to the independent contractor who is exercising control and possession." *McCorkle v. N. Point Chrysler Jeep, Inc.*, 208 N.C. App. 711, 715, 703 S.E.2d 750, 753 (2010). This exception extends only when the independent contractor, and not the landowner, is in control of the hazard or danger. *McCorkle,* 208 N.C. App. at 715, 703 S.E.2d at 753.

6. The doctrine of res ipsa loquitur does not apply in these cases. *Hedrick v. Tigniere*, 267 N.C. 62, 67, 147 S.E.2d 550, 554 (1966); *Morgan v. Great Atl. & Pac. Tea Co.*, 266 N.C.

221, 226, 145 S.E.2d 877, 881 (1966); *Spell v. Mech. Contractors,* 261 N.C. 589, 592, 135 S.E.2d 544, 547 (1964).

7. *Norwood v. Sherwin-Williams Co.*, 303 N.C. 462, 467, 279 S.E.2d 559, 562 (1981); *Long v. Methodist Home*, 281 N.C. 137, 139–40, 187 S.E.2d 718, 720 (1972).

8. *Long v. Methodist Home*, 281 N.C. 137, 140, 187 S.E.2d 718, 720 (1972); *Gaskill v. Great Atl. & Pac. Tea Co.*, 6 N.C. App. 690, 693, 171 S.E.2d 95, 97 (1969).

9. *Southern R. Co. v. ADM Milling Co.*, 58 N.C. App. 667, 675, 294 S.E.2d 750, 756 (1982); *Gaskill*, 6 N.C. App. at 694, 171 S.E.2d at 97.

10. *Long v. Methodist Home*, 281 N.C. 137, 139, 187 S.E.2d 718, 720 (1972).

NOTE WELL: According to North Carolina's "Baseball Rule," a baseball field operator is shielded from liability related to a "foul ball" injury, "even when a patron is struck in an unusual way by a batted ball, so long as the operator provides a screened section." Hobby v. City of Durham, 152 N.C. App. 234, 236–37, 569 S.E.2d 1, 2 (2002). The rule is predicated upon the notion that "[s]pectator[s], with ordinary knowledge of the game of baseball…accept[] the common hazards incident to the game" and otherwise share an equal awareness of potential injury with the field operator. Erickson v. Lexington Baseball Club, 233 N.C. 627, 629, 65 S.E.2d 140, 141 (1951). Despite the arguable changes to the American sporting landscape and popular culture, North Carolina courts have preserved the rule. Mills v. The Durham Bulls Baseball Club, Inc., 275 N.C. App. 618, 625, 854 S.E.2d 126, 132 (2020).

11. *Nelson v. Freeland*, 349 N.C. 615, 632, 507 S.E.2d 882, 892 (1998).

12. *See Tise v. Yates Constr. Co.*, 345 N.C. 456, 460, 480 S.E.2d 677, 680 (1997); *Stojanik v. R.E.A.C.H.*, 193 N.C. App. 585, 589, 668 S.E.2d 786, 789 (2008).

13. *See Foster v. Winston-Salem Joint Venture*, 303 N.C. 636, 642, 281 S.E.2d 36, 40 (1981).

13. *See Connelly v. Family Inns of Am., Inc.*, 141 N.C. App. 583, 588, 540 S.E.2d 38, 41 (2000).

805.67 DUTY OF CITY OR COUNTY TO USERS OF PUBLIC WAYS.

This issue reads:

"Was the plaintiff [injured] [damaged] by the negligence of the defendant?"

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 defendant was negligent and that such negligence was a proximate cause of plaintiff's [injury] [damage].

The law requires [cities] [counties] to keep their [streets] [sidewalks] [alleys] [bridges] [public ways] in proper repair, open for travel, and free from unnecessary obstructions.[1] This means that every [city] [county] has a duty to exercise ordinary care to maintain its [streets] [sidewalks] [alleys] [bridges] [(*name other public ways*)] in a reasonably safe condition for all who use them in a proper manner.[2] A breach of this duty is negligence.

In order to prevail on this issue, the plaintiff must prove, by the greater weight of the evidence, the following six things:

<u>First</u>, that (*name street, sidewalk, alley, bridge or other public way*) is a [street] [sidewalk] [alley] [bridge] [public way] which the [city] [county] is responsible for maintaining.

<u>Second</u>, that there was a dangerous condition on the [street] [sidewalk] [alley] [bridge] [public way]. The law does not require a [city] [county] to maintain the surfaces of its public ways in a perfectly smooth, even condition and free from every possible obstruction to mere convenient travel.[3] Slight unevenness, depressions, differences in grade, deviations in elevations and other immaterial obstructions or trivial defects which are not naturally dangerous will not render a [city] [county] liable for [injury] [damage] caused by these conditions.[4] The condition must be material or dangerous enough

that injury to travelers using its public way in a proper manner is reasonably foreseeable.[5]

Third, that the [city] [county] knew or, in the exercise of ordinary care, should have known of the existence of the dangerous condition.[6] Actual knowledge is not required. It is sufficient if the [city] [county], in the exercise of ordinary care, should have discovered the existence of the dangerous condition.

Fourth, that the [city] [county] knew or, in the exercise of ordinary care, should have known of the existence of the dangerous condition sufficiently in advance of the occurrence of plaintiff's [injury] [damage] to give the [city] [county] a reasonable opportunity to remedy it or to guard against [injury] [damage] from it.[7]

Fifth, that under the circumstances known or which, in the exercise of ordinary care, should have been known to it, the [city] [county] did not use ordinary care to repair the dangerous condition or to guard against [injury] [damage] from it.

Sixth, that the [city's] [county's] failure to use ordinary care under the circumstances was a proximate cause of plaintiff's [injury] [damage].[8] Proximate cause is a real cause- a cause without which the claimed [injury] [damage] would not have occurred, and one which a reasonably careful and prudent person could foresee would probably produce such [injury] [damage] or some similar injurious result.

There may be more than one proximate cause of [an injury] [damage]. Therefore, the plaintiff need not prove that the defendant's negligence was the *sole* proximate cause of the [injury] [damage]. The plaintiff must prove, by the greater weight of the evidence, only that the defendant's negligence was a proximate cause.

In this case, the plaintiff contends, and the defendant denies, that the defendant was negligent in one or more of the following respects:

(Read all contentions of negligence supported by the evidence.)

The plaintiff further contends, and the defendant denies, that defendant's negligence was a proximate cause of plaintiff's [injury] [damage].

I instruct you that negligence is not to be presumed from the mere fact of [injury] [damage].

Finally, as to this issue on which the plaintiff has the burden of proof, if you find, by the greater weight of the evidence, that the defendant was negligent and that such negligence was a proximate cause of the plaintiff's [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.

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1. "City" is interchangeable with the terms "town" and "village." *See* N.C.G.S. § 160A-1(2). The term public way includes all "public streets, sidewalks, alleys, bridges and other ways of public passage." N.C.G.S. § 160A-296(a). Thus, the duty of a municipality extends to places where public ingress and egress is permitted, such as certain public buildings. It does not include, however, any streets or bridges under the authority and control of the Board of Transportation. N.C.G.S. § 160A-297(a). *Matternes v. City of Winston-Salem*, 286 N.C. 1, 10, 209 S.E.2d 481, 486 (1974); *Shapiro v. Motor Co.*, 38 N.C. App. 658, 662, 248 S.E.2d 868, 870 (1978). *See generally*, Ferrell, *Civil Liability of North Carolina Cities and Towns for Personal Injury and Property Damage Arising from the Construction, Maintenance, and Repair of Public Streets*, 7 *Wake Forest L. Rev.* 143 (1971). Furthermore, the liability of community colleges and public school systems is curtailed by the doctrine of governmental immunity. *See* N.C.G.S. § 115D-24 and § 115C-524 regarding waiver of immunity. *See also*, Patti O. Harper, *Statutory Waiver of Municipal Immunity Upon Purchase of Liability Issuance in North Carolina and the Municipal Liability Crisis*, 4 *Campbell L. Rev.* 41 (1981) (discussing waiver of municipal immunity).

Unless immune from suit, the same standard may be applicable to county facilities. "The liability of a county for injuries sustained by a pedestrian, falling upon a public walk within its courthouse grounds, would be no more extensive than that of a city to a pedestrian falling under similar circumstances upon a public sidewalk owned and maintained by the city." *Cook v. County of Burke*, 272 N.C. 94, 96, 157 S.E.2d 611, 613(1967) (*per curiam*).

2. This is a positive duty. *Hunt v. High Point*, 226 N.C. 74, 76, 36 S.E.2d 694, 695 (1946); *Stancill v. Washington*, 29 N.C. App. 707, 710, 225 S.E.2d 834, 836 (1976). Liability is imposed upon a municipality, therefore, when it fails to exercise "ordinary care to maintain

its streets and sidewalks in a condition reasonably safe for those who use them in a proper manner." *Mosseller v. Asheville*, 267 N.C. 104, 108, 147 S.E.2d 558, 561 (1966) (quoting *Smith v. Hickory*, 252 N.C. 316, 318, 113 S.E.2d 557, 559 (1960)).

3. *Gower v. Raleigh*, 270 N.C. 149, 151, 153 S.E.2d 857, 859 (1967) (*per curiam*); *Waters v. Roanoke Rapids*, 270 N.C. 43, 48, 153 S.E.2d 783, 787 (1967); *Smith v. Hickory*, 252 N.C. 316, 318, 113 S.E.2d 557, 559 (1960); *Joyce v. High Point*, 30 N.C. App. 346, 350, 226 S.E.2d 856, 858 (1976). "A municipality is not an insurer of the safety of travellers on its streets and sidewalks." *Smith*, 252 N.C. at 318, 113 S.E.2d at 559. "The doctrine of *res ipsa loquitur* does not apply in actions against municipalities by reason of injuries to persons using its public streets [or sidewalks]." *Smith*, 252 N.C. at 318, 113 S.E.2d at 559.

4. *Waters v. Roanoke Rapids*, 270 N.C. 43, 48, 153 S.E.2d 783, 787 (1967); *Watkins v. Raleigh*, 214 N.C. 644, 647, 200 S.E. 424, 426 (1939); *Houston v. Monroe*, 213 N.C. 788, 790-91, 197 S.E. 571, 572 (1938).

5. *Smith v. Hickory*, 252 N.C. 316, 318, 113 S.E.2d 557, 559 (1960); *Rogers v. Asheville*, 14 N.C. App. 514, 517-18, 188 S.E.2d 656, 657-58 (1972).

6. It is not enough that the plaintiff shows a defect in the street or sidewalk and that the plaintiff was injured. The complaining party "must also show that the officers of the town or city knew, or by ordinary diligence, might have known of the defect, and the character of the defect was such that injuries to travellers using its street or sidewalk in a proper manner might reasonably be foreseen. Actual notice is not required. Notice of a dangerous condition in a street or sidewalk will be imputed to the town or city, if its officers should have discovered it in the exercise of due care." *Smith v. Hickory*, 252 N.C. 316, 318, 113 S.E.2d 557, 559 (1960). Actual notice is notice that "brings the knowledge of a fact directly home to the party." *Phillips v. N.C. DOT*, 200 N.C. App. 550, 558, 684 S.E.2d 725, 731 (2009) (quoting *State v. Poteat*, 163 N.C. App. 741, 746, 594 S.E.2d 253, 255-56 (2004)). Knowledge through constructive notice is established by either "direct evidence of the duration of the dangerous condition" or "circumstantial evidence . . . that the dangerous condition existed for some time." *Hicks v. KMD Inv. Sols., LLC*, 276 N.C. App. 78, 85, 855 S.E.2d 514, 520 (2021) (quoting *Thompson v. Wal-Mart Stores, Inc.*, 138 N.C. App. 651, 654, 547 S.E.2d 48, 50 (2000)).

7. *Waters v. Roanoke Rapids*, 270 N.C. 43, 48, 153 S.E.2d 783, 787–88 (1967); *Rogers v. Asheville*, 14 N.C. App. 514, 518, 188 S.E.2d 656, 658 (1972) (quoting *Waters*, 270 N.C. at 48, 153 S.E.2d at 787).

8. *Waters v. Roanoke Rapids*, 270 N.C. 43, 48, 153 S.E.2d 783, 787 (1967); *Mosseller v. Asheville*, 267 N.C. 104, 108, 147 S.E.2d 558, 561 (1966); *Rogers v. Asheville*, 14 N.C. App. 514, 518, 188 S.E.2d 656, 658 (1972) (quoting *Waters*, 270 N.C. at 48, 153 S.E.2d at 787).

805.71 DUTY OF LANDLORD TO RESIDENTIAL TENANT—RESIDENTIAL PREMISES AND COMMON AREAS.

NOTE WELL: Use this instruction only where the Residential Rental Agreement Act*, N.C.G.S. §§ 42-38, et seq., applies.*

This issue reads:

"Was the plaintiff [injured] [damaged] by the negligence of the defendant?"

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 defendant was negligent and that such negligence was a proximate cause of the plaintiff's [injury] [damage].

The Residential Rental Agreement Act imposes upon landlords a duty to exercise ordinary care to maintain their residential properties in a safe condition.[1] A violation of this duty is negligence.

In order to prevail on this issue, the plaintiff must prove, by the greater weight of the evidence, the following five things:

First, the plaintiff was a tenant under a rental agreement for a dwelling unit leased from the defendant.

Second, that an unsafe condition existed on the premises. [This includes not only the dwelling unit itself, but the amenities and common areas under the landlord's control and made available for the tenant's use.][2]

Third, that the defendant knew or, in the exercise of ordinary care, should have known of the existence of the unsafe condition. Landlords have a duty to make a reasonable inspection of their residential premises and are responsible for knowing what a reasonable inspection would reveal.[3]

Fourth, that the defendant failed to exercise ordinary care to remove or remedy the unsafe condition.[4] Landlords are required by law to

[comply with the current applicable building and housing codes to the extent required by such codes (*Read applicable code provisions*)][5]

[make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition][6]

[keep all common areas of the premises in a safe condition][7]

[maintain in good and safe working order all [electrical] [plumbing] [sanitary] [heating] [ventilating] [air conditioning] [appliances] [(*name other facility*)] supplied by or required to be supplied by the landlord, provided that notification of needed repairs has been given to the landlord in writing by the tenant, except in emergency situations].[8]

A landlord's failure to comply with [this requirement] [any of these requirements] may be considered by you as evidence of the landlord’s failure to use ordinary care to maintain the leased premises in a safe condition.[9]

Fifth, that such failure was a proximate cause of the plaintiff's [injury] [damage]. Proximate cause is a real cause- a cause without which the claimed [injury] [damage] would not have occurred, and one which a reasonably careful and prudent person could foresee would probably produce such [injury] [damage] or some similar injurious result. There may be more than one proximate cause of [an injury] [damage]. Therefore, the plaintiff need not prove that the defendant's negligence was the sole proximate cause of the [injury] [damage]. The plaintiff must prove, by the greater weight of the evidence, only that the defendant's negligence was a proximate cause.

In this case, the plaintiff contends, and the defendant denies, that the defendant was negligent in one or more of the following respects:

(Read all contentions of negligence supported by the evidence.)

The plaintiff further contends, and the defendant denies, that defendant's negligence was a proximate cause of plaintiff's [injury] [damage].

I instruct you that negligence is not to be presumed from the mere fact of [injury] [damage].

Finally, as to this issue on which the plaintiff has the burden of proof, if you find, by the greater weight of the evidence, that the defendant was negligent and that such negligence was a proximate cause of plaintiff's [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.

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1. *Bradley v. Wachovia Bank & Trust Co.*, 90 N.C. App. 581, 584 (1988); *Lenz v. Ridgewood Associates*, 55 N.C. App. 115, 117 (1981), *disc. rev. denied* 305 N.C. 300 (1982).

2. N.C.G.S. § 42-40(2).

3. The duty to keep the premises in a safe condition "implies the duty to make reasonable inspection and correct an unsafe condition which a reasonable inspection might reveal…" *Lenz v. Ridgewood Associates*, 55 N.C. App. 115, 121 (1981) *disc. rev. denied*, 305 N.C. 300 (1982).

4. This affirmative duty owed by the landlord to the tenant is not a duty to warn of unfit conditions but to correct unfit conditions. *Brooks v. Francis*, 57 N.C. App. 556, 559 (1982). Similarly, the landlord owes the duty of ordinary care to the tenant. Because the landlord owes the tenant the duty of ordinary care he is not, therefore, an insurer of the tenants' safety and may be held liable only for actionable negligence in maintaining the premises. *Cagle v. Robert Hall Clothes*, 9 N.C. App. 243, 245 (1970).

5. N.C.G.S. § 42-42(a)(1). Read applicable code provisions only if competent evidence has been admitted as to their existence and content.

6. N.C.G.S. § 42-42(a)(2).

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7. N.C.G.S. § 42-42(a)(3). *See Collingwood v. General Electric Real Estate Equities, Inc.*, 89 N.C. App. 656 (1988), *aff'd in part*, *rev'd in part*, 324 N.C. 63 (1989).

8. N.C.G.S. § 42-42(a)(4).

9. A failure to maintain the premises in a fit and habitable condition is evidence of negligence, not negligence *per se*. *O'Neal v. Kellett*, 55 N.C. App. 225, 228 (1981). Because the Act specifically states that a violation of the Act is not negligence *per se*, the legislature left intact established common-law standards of ordinary and reasonable care. *Brooks v. Francis*, 57 N.C. App. 556, 559-60 (1982); N.C.G.S. § 42-44(d).

Furthermore, the common law negligence instructions apply to a cause of action against a landlord for injuries caused by a tenant's dog; however, the general rule is that no such cause of action will lie as a "landlord has no duty to protect third parties from harm caused by a tenant's animal…." *Curlee v. Johnson*, 377 N.C. 97, 102, 856 S.E.2d 478, 481 (2021) (citing *Stephens v. Covington*, 232 N.C. App. 497, 500, 754 S.E.2d 253, 255 (2014)). An exception to the general rule is found when, "prior to the harm, the landlord (1) 'had knowledge that a tenant's dog posed a danger,' and (2) 'had control over the dangerous dog's presence on the property…" *Id.* If both of these elements are met, the property owner owes a duty of care, so the jury next should determine if the property owner is negligent by breaching that duty.

809.06 MEDICAL MALPRACTICE—CORPORATE OR ADMINISTRATIVE NEGLIGENCE BY HOSPITAL, NURSING HOME OR ADULT CARE HOME[1]

(Use for claims arising on or after 1 October 2011.)

The *(state number)* issue reads:

"Was the plaintiff [injured] [damaged] by the defendant's negligent performance of [corporate] [administrative] duties?"

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, two things: (1) that the defendant was negligent; and (2) that such negligence was a proximate cause of the plaintiff's [injury] [damage].

As to the first thing that the plaintiff must prove, negligence refers to the failure to follow a duty of conduct imposed by law. A [hospital] [nursing home] [adult care home] is under a duty to perform its corporate or administrative functions in accordance with the standards of practice among similar health care providers situated in the same or similar communities under the same or similar circumstances at the time of the conduct at issue.[2]

A [hospital's] [nursing home's] [adult care home's] violation of this duty of care is negligence.

In this case, the plaintiff contends, and the defendant denies, that the defendant did not perform its corporate or administrative functions related to the plaintiff's health care in accordance with the standards of practice among similar health care providers situated in the same or similar communities under the same or similar circumstances. For you to find that the defendant failed to meet this duty, the plaintiff must satisfy you, by the greater weight of the evidence, first, what the standards of practice for such administrative or corporate duties were among similar health care providers situated in the

same or similar communities under the same or similar circumstances at the time the defendant (*describe conduct at issue*, e.g., "hired the nurse" or "monitored the plaintiff's care"), and, second, that the defendant did not act in accordance with those standards of practice. In determining the standards of practice applicable to this contention,[3] you must weigh and consider the testimony of the witnesses who purport to have knowledge of those standards of practice and not your own ideas of the standards.

As to the second thing that the plaintiff must prove, the plaintiff further contends, and the defendant denies, that the defendant's negligence was a proximate cause of the plaintiff's [injury] [damage].

The plaintiff not only has the burden of proving negligence, but also that such negligence was a proximate cause of the [injury] [damage]. Proximate cause is a cause which in a natural and continuous sequence produces a person's [injury] [damage], and is a cause which a reasonable and prudent health care provider could have foreseen would probably produce such [injury] [damage] or some similar injurious result.

There may be more than one proximate cause of [an injury] [damage]. Therefore, the plaintiff need not prove that the defendant's negligence was the sole proximate cause of the [injury] [damage]. The plaintiff must prove, by the greater weight of the evidence, only that the defendant's negligence was a proximate cause. I instruct you that negligence is not to be presumed from the mere fact of [injury] [damage].

(Now, members of the jury, I have an additional instruction for you to consider in relation to the duty I have just described.)[4]

(*Duty to Attend.* A health care provider is not bound to render professional services to everyone who seeks care. However, when a health

care provider undertakes the care and treatment of a patient, (unless otherwise limited by contract,) the relationship cannot be terminated at the mere will of the health care provider. The relationship must continue until the treatment is no longer required, until it is dissolved by the consent of the parties or until notice is given which allows the patient a reasonable opportunity to engage the services of another health care provider.[5] The failure of the health care provider to use reasonable care and judgment in determining when the attendance may properly and safely be discontinued is negligence. Whether reasonable care and judgment has been used must be determined by comparison with the standards of practice of similar health care providers situated in the same or similar communities under the same or similar circumstances at the time the health care is rendered.)

Finally, as to this *(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 was negligent in any one or more of the ways contended by the plaintiff and that such negligence was a proximate cause of the plaintiff's [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.

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1. As amended in 2011, N.C. Gen. Stat. §§ 90-21.11(b) and 90-21.12(a) include as medical malpractice claims those corporate or administrative negligence claims against a hospital, nursing home licensed under Chapter 131E, or adult care home licensed under Chapter 131D which: (1) allege a breach of administrative or corporate duties to the patient including, but not limited to, allegations of negligent credentialing or negligent monitoring and supervision; and (2) arise from the same facts or circumstances as a medical malpractice claim under N.C. Gen. Stat. § 90-21.11(a). Previously, those claims were treated as "ordinary negligence" claims.

2. Among the common law duties previously imposed on hospitals are: the "duty to the patient to obey the instructions of a doctor, absent the instructions being obviously

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negligent or dangerous"; a "duty to make a reasonable effort to monitor and oversee the treatment prescribed and administered by doctors practicing at the hospital"; and a "duty not to institute policies which interfere with the doctor's medical judgment." *Muse v. Charter Hosp*., 117 N.C. App. 468, 474, 452 S.E.2d 589, 594 (citing *Burns v. Forsyth Cnty. Hosp*., 81 N.C. App. 556, 563, 344 S.E.2d 839, 845 (1986) and *Bost v. Riley*, 44 N.C. App. 638, 647, 262 S.E.2d 391, 396, discretionary review denied, 300 N.C. 194, 269 S.E.2d 621 (1980)), discretionary review denied, 340 N.C. 114, 455 S.E.2d 663 (1995); *Blanton v. Moses H. Cone Mem'l. Hosp*., 319 N.C. 372, 376, 354 S.E.2d 455, 458 (1987) (holding that a "hospital owes a duty of care to its patients to ascertain that a doctor is qualified to perform an operation before granting him the privilege to do so"); *id.* (noting "a duty to use reasonable care in the selection, inspection, and maintenance of equipment"); *id.* 319 N.C. at 377, 354 S.E.2d at 458 (recognizing "a duty to monitor on an ongoing basis the performance of physicians on its staff"). It may be proper to instruct the jury as to the existence of such duties, if applicable.

Cases in which these duties were recognized applied an "ordinary negligence" standard of "reasonable care" in determining the issue of negligence. In claims arising on or after 1 October 2011, however, pursuant to N.C. Gen. Stat. § 90-21.11(b), whether a defendant breached any duty must be determined by comparison with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities under the same or similar circumstances at the time the health care is rendered.

3. Rule 702(a) of the North Carolina Rules of Evidence requires that before an expert can testify "in the form of an opinion, or otherwise": (1) the testimony must be "based on sufficient facts or data"; (2) the testimony must be the product of "reliable principles and methods"; and (3) the witness have "applied the principles and method reliably to the facts of the case." *See also* N.C. R. Evid. 702(b) – (f) (setting forth the specific qualifications required of an expert witness testifying on the appropriate standard of health care). Further, Rule 702(h) of the North Carolina Rules of Evidence specifies that in a medical malpractice case based on alleged breach of administrative or corporate duties to the patient, a witness "shall not give expert testimony on the appropriate standard of care…unless the person has substantial knowledge, by virtue of his training and experience, about the standard of care among…medical facilities[ ] of the same type as the…medical facility[ ] whose actions or inactions are the subject of the testimony situated in the same or similar communities at the time of the alleged act giving rise to the cause of action."

4*. NOTE WELL: In* Wall v. Stout*, the court cautions that this instruction should not be used indiscriminately or without purpose. There must be evidence or contentions in the case which justify the use of this instruction.* See Wall, *310 N.C. at 197, 311 S.E.2d at 579.*

5. *See Galloway v. Lawrence*, 266 N.C. 245, 248, 145 S.E.2d 861, 864 (1965); *Groce v. Myers*, 224 N.C. 165, 171, 29 S.E.2d 553, 557 (1944); *Childers v. Frye*, 201 N.C. 42, 45, 158 S.E. 744, 746 (1931); *Nash v. Royster*, 189 N.C. 408, 413, 127 S.E. 356, 359 (1925).

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Preface.

Owners and keepers of domestic animals are liable for injury or damage proximately caused by their negligence in keeping or handling them.[1] Thus, the common law negligence instructions set out at N.C.P.I.—Civil 102.10 ("Negligence Issue—Burden of Proof") et seq. are sufficient to cover causes of action predicated directly on the negligence of an owner or a keeper of a domestic animal.[2]

In addition to common law negligence, six additional grounds for liability have been identified. One of these comes from common law and five are predicated upon (or derived from) statutes or ordinances. Accordingly, the "Animals" series consists of six instructions covering various liability situations other than common law negligence, including:

- The wrongful keeping of vicious domestic animals (N.C.P.I.—Civil 812.00 ("Animals—Common Law (Strict) Liability of Owner for Wrongfully Keeping Vicious Domestic Animals"));
- Wrongfully allowing a dog to run at large at night (N.C.P.I.—Civil 812.01 ("Animals—Liability of Owner Who Allows Dog to Run at Large at Night"));
- Allowing domestic livestock to run at large with the owner's knowledge and consent (N.C.P.I.—Civil 812.02 ("Animals—Common Law Liability of Owner Whose Domestic Livestock Run at Large with Owner's Knowledge and Consent"));
- Violation of a leash law or ordinance (N.C.P.I.—Civil 812.04 ("Animals—Owner's Negligence in Violation of Animal Control Ordinance"));

- Owning a dog which injures, kills or maims livestock or fowl (N.C.P.I.—Civil 812.05 ("Animals—Liability of Owner of Dog Which Injures, Kills or Maims Livestock or Fowl"));
- Failing to destroy immediately a dog bitten by a rabid dog (N.C.P.I.—Civil 812.06 ("Animals—Liability of Owner Who Fails to Destroy Dog Bitten by Mad Dog")); and
- Strict Liability for injury or damage caused by a "dangerous dog" (N.C.P.I.—Civil 812.07 ("Animals—Statutory (Strict) Liability of Owner of a Dangerous Dog")).

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1. *Williams v. Tysinger*, 328 N.C. 55, 59, 399 S.E.2d 108, 111 (1991); *Lloyd v. Bowen*, 170 N.C. 216, 221, 86 S.E. 797, 799 (1915); *Griner v. Smith*, 43 N.C. App. 400, 407, 259 S.E.2d 383, 388 (1979).

2. The common law negligence instructions likewise apply to a cause of action against a landlord for injuries caused by a tenant's dog; however, the general rule is that no such cause of action will lie as a "landlord has no duty to protect third parties from harm caused by a tenant's animal." *Curlee v. Johnson*, 377 N.C. 97, 102, 856 S.E.2d 478, 481 (2021) (citing *Stephens v. Covington*, 232 N.C. App. 497, 500, 754 S.E.2d 253, 255 (2014)). An exception to the general rule is found when, "prior to the harm, the landlord (1) 'had knowledge that a tenant's dog posed a danger,' and (2) 'had control over the dangerous dog's presence on the property." *Curlee*, 377 N.C. at 102, 856 S.E.2d at 481. If both of these elements are met, the property owner owes a duty of care, so the jury next should determine if the property owner is negligent by breaching that duty.

840.20 IMPLIED EASEMENT—USE OF PREDECESSOR COMMON OWNER.

The (*state number*) issue reads:

"Does the plaintiff[1] have an easement [of] [for] (*specify the nature of the easement*)[2] [on] [over] [across] [under] the land of the defendant?"[3]

(An easement is a right to make (a) specific use(s) of land owned by another.[4] One who has an easement does not own the land but has only the right to use the land for the purpose(s) of the easement.[5] The use of the easement must be reasonable. The owner of land burdened by an easement continues to have all of the rights of a landowner which are not inconsistent with the easement.)[6]

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,[7] four things:

First, that the parcel of land now owned by the plaintiff and the parcel of land now owned by the defendant were at one time owned by the same[8] [person] [entity], that is, that both parcels of land had a common owner.[9] (It is not necessary for either the plaintiff or the defendant to have been the earlier common owner.[10])

Second, that during the time of this ownership, the common owner of the two parcels of land used (*describe the easement claimed*) [on] [over] [across] [under] the land which is now owned by the defendant for the benefit of the land now owned by the plaintiff.

Third, that the common owner's use of the land now owned by the defendant for the benefit of the land now owned by the plaintiff occurred over so long a time and was so continuous and obvious as to indicate that the use was intended to be permanent.[11] That is, the conduct of the common owner must have been such as to create a reasonable belief that the use of the land was intended to continue permanently and that when the land now owned by the plaintiff was separated from the land now owned by the defendant, the

common owner intended to [grant] [retain][12] the continued right to use the land as it had been used.

And Fourth, that the existence of the easement claimed by the plaintiff is[13] [reasonably][14] [strictly][15] necessary to the beneficial enjoyment of the land owned by the plaintiff.

[A use is "reasonably necessary" when the plaintiff's full and comfortable enjoyment[16] of the land depends on it.][17]

[A use is "strictly necessary" when it is absolutely necessary to the plaintiff's full enjoyment[18] of the land.]

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 parcel of land now owned by the plaintiff and the parcel of land now owned by the defendant had an earlier common owner, that the common owner of the two parcels of land used (*describe the easement claimed*) [on] [over] [across] [under] the land which is now owned by the defendant for the benefit of the land now owned by the plaintiff, that the common owner's use of the land now owned by the defendant for the benefit of the land now owned by the plaintiff occurred over so long a time and was so continuous and obvious as to indicate that the use was intended to be permanent, and that the existence of the easement claimed by the plaintiff is [reasonably] [strictly] necessary to the beneficial enjoyment of the land owned by 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.

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1. In most cases the party claiming the easement will be the plaintiff but in some cases the easement will be claimed by the defendant. The name of the parties should be modified to fit the situation.

2. While the most common claim will be for a right of ingress and egress, some cases will involve claims for easements for drainage, *see, e.g., Lamb v. Lamb*, 177 N.C. 150, 152,

98 S.E. 307, 309 (1919), for the maintenance of a pond, *see, e.g., Thomas v. Morris*, 190 N.C. 244, 248, 129 S.E. 623, 625 (1925), or for other particular uses, *see e.g., Ferrell v. Durham Bank & Trust Co.*, 221 N.C. 432, 436, 20 S.E.2d 329, 332 (1942) (use of party wall).

It also will be necessary to tailor the issue and the mandate to identify the location of the claimed easement. In these cases there will be a history of use of the easement which, together with the pleadings, should serve to locate the claimed easement on the land of the alleged servient owner.

3. Another issue will be required where the statute of limitations is raised as a bar to the claim of implied easement. Whether a statute of limitations applies at all will depend on the nature of the action in which the claim of the existence of the easement is made. In a case in which the plaintiff brings suit to prevent the defendant from blocking a right of way, N.C. Gen. Stat. § 1-50(a)(3), the six year statute of limitations of actions "[f]or injury to any incorporeal hereditament," probably applies and begins to run when the right of way is blocked. If the action, however, is to quiet title to the easement or for a declaratory judgment that the easement exists, it is most likely that the action is not governed by any statute of limitations at all because there is no wrong and then no cause of action to begin the limitations period. *See generally Boyden v. Achenbach*, 79 N.C. 539, 541 (1878) (if a right of way is claimed as an incorporeal hereditament then six years is the statute of limitations).

4. *Builders Supplies Co. v. Gainey*, 282 N.C. 261, 266, 192 S.E.2d 449, 453 (1972).

5. *Thomas*, 190 N.C. at 248, 129 S.E. at 625.

6. *North Asheboro-Central Falls Sanitary Dist. v. Canoy*, 252 N.C. 749, 752, 114 S.E.2d 577, 580 (1960); *Nantahala Power & Light Co. v. Carringer*, 220 N.C. 57, 58, 16 S.E.2d 453, 454 (1941); *Ferrell v. Doub*, 160 N.C. App. 373, 377, 585 S.E.2d 456, 459 (2003).

7. *Dickinson v. Pake*, 284 N.C. 576, 580, 201 S.E.2d 897, 900 (1974); *Ferrell v. Doub*, 160 N.C. App. 373, 377, 585 S.E.2d 456, 459-60 (2003).

8. *Bradley v. Bradley*, 245 N.C. 483, 486, 96 S.E.2d 417, 420 (1957); *Dorman v. Wayah Valley Ranch, Inc.*, 6 N.C. App. 497, 501, 170 S.E.2d 509, 512 (1969). In *Potter v. Potter*, 251 N.C. 760, 764-65, 112 S.E.2d 569, 572-73 (1960) it was held that a tenancy in common was sufficient unity of ownership where the subsequent severance of the estates was through cross-conveyances by the tenants in common at different times.

9. In most cases, common ownership will be stipulated. In such event, the Court should instruct the jury that the parties have stipulated to the identity of a common owner. *See* N.C.P.I.—Civil 101.41 ("Stipulations"). In the second and third elements of this instruction, a personalized reference to the common owner should be used.

10. *See* the fact situations in *Barwick v. Rouse*, 245 N.C. 391, 391, 95 S.E.2d 869, 869 (1957); *Spruill v. Nixon*, 238 N.C. 523, 523, 78 S.E.2d 323, 323 (1953) and *Dorman*, 6 N.C. App. at 497, 170 S.E.2d at 509.

11. *Ferrell*, 160 N.C. App. at 377, 585 S.E.2d at 459-60; *Curd v. Winecoff*, 88 N.C. App. 720, 723, 364 S.E.2d 730, 732 (1988); *Bradley*, 245 N.C. at 486, 96 S.E.2d at 420; *Dorman*, 6 N.C. App. at 502, 170 S.E.2d at 512. *See also Tedder v. Alford*, 128 N.C. App. 27, 32-33, 493 S.E.2d 487, 490 (1997). *See also Barbour v. Pate*, 229 N.C. App. 1, 5-6, 748 S.E.2d 14, 17-18 (2013) (finding the proper scope of an easement implied by prior use to be the use of the land involved which gave rise to the quasi-easement at the time the land was divided given the probable expectations of the grantor and grantee that an existing use of part of the land would continue after the transfer).

12. When the case involves a claimed easement reserved by implication, the word "retain" should be used.

13. *See Knott v. Wa. Housing Auth.*, 70 N.C. App. 95, 98, 318 S.E.2d 861, 863 (1984).

14. *Bradley*, 245 N.C. App. at 487, 96 S.E.2d at 420 (holding that reasonable necessity means more than mere convenience). *McGee v. McGee*, 32 N.C. App. 726, 728, 233 S.E.2d 675, 676 (1977) states the test as being whether the use is reasonably necessary to the "full and fair" enjoyment of the property.

15. This alternate should be used if the claim is for an implied reservation of an easement. The law has drawn a distinction between the implied grant of an easement and the implied reservation of an easement. As to the former, the test is whether the easement was "reasonably necessary" to the enjoyment of the dominant parcel. *See Bradley*, 245 N.C. App. at 487, 96 S.E.2d at 420, and *McGee*, 32 N.C. App. at 728, 233 S.E.2d at 676. However, the Supreme Court's statement as to the test for an implied reservation follows the standard common law rule that such an easement was strictly necessary. *Goldstein v. Wachovia Bank & Trust Co.*, 241 N.C. 583, 588, 86 S.E. 2d 84, 87-88 (1955). (The language used by the court is that the necessity must have been "strict and imperious." The court expressly states that there is a "distinction" between an implied grant and an implied reservation.)

16. *See Black's Law Dictionary* (8th ed. 2004) (defining "enjoyment" as "[p]ossession and use, especially of rights or property," or "[t]he exercise of a right.")

17. In cases involving claimed rights of ingress and egress the existence of an alternative route does not preclude a jury determination of reasonable necessity. *See McGee*, 32 N.C. App. at 728, 233 S.E.2d at 676; *Dorman v. Wayah Valley Ranch, Inc.*, 6 N.C. App. 497, 501, 170 S.E.2d 509, 512 (1969).

18. *See Carolina Power & Light Co. v. Bowman*, 229 N.C. 682, 687-88, 51 S.E.2d 191, 195 (1949).

840.40 EASEMENT—REASONABLENESS OF SCOPE REQUIREMENT.

The (*state number*) issue reads:

"Is the scope of the plaintiff's use of the easement reasonable?"

On this issue, the burden of proof is on the plaintiff. This means that the plaintiff must prove that the use of the easement is reasonable in scope.[1]

The reasonable use and enjoyment of an easement is to be determined in light of the situation of the property at the time of the severance and the surrounding circumstances.[2]

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 use of the easement is reasonable in scope, then it would be your duty to answer the 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.

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1. *See Benson v. Prevost*, 277 N.C. App. 405, 413, 861 S.E.2d 343, 349 (2021). If the conveyance does not state the scope of the easement, then a reasonable use scope is implied. *Swaim v. Simpson*, 120 N.C. App. 863, 864, 463 S.E.2d 785, 786-87 (1995).

2. *Shingleton v. State*, 260 N.C. 451, 457, 133 S.E.2d 183, 187 (1963) (this is a question of fact for the jury to decide).

850.10 DEEDS—ACTION TO SET ASIDE[1]—MUTUAL MISTAKE OF FACT.

The (*state number*) issue reads:

"Did (*name person*) [execute and deliver] [accept] (*identify deed*) under a mutual mistake of fact?"

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

First, that (*name person*) [executed and delivered] [accepted] (*identify deed*) while mistakenly [believing] [assuming] that (*state past or existing fact[3] comprising the mistaken belief or assumption*).

Second, that but for (*name person*'s) mistaken [belief] [assumption], (*name person*) would not have [executed and delivered] [accepted] (*identify deed*).[4]

And Third, [defendant] [defendant's agent][5]

[had the same mistaken [belief] [assumption] as (*name person*)][6]

[knew or had reason to know that (*name person*) [executed and delivered] [accepted] the deed based upon a mistaken [belief] [assumption]] [caused (*name person*'s) mistaken [belief] [assumption]].[7]

Finally, as to the (*state number*) issue on which the plaintiff has the burden of proof, if you find by clear, strong and convincing evidence that (*name person*) [executed and delivered] [accepted] (*identify deed*) under a mutual mistake of fact, 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, it would be your duty to answer this issue "No" in favor of the defendant.

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1. In these types of cases, a decree setting aside the deed is not the only remedy. In many instances, the Court will reform the deed so that it conforms to the parties' original

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mutual intent. *See Janice D. Willis Revocable Tr. v. Willis*, 365 N.C. 454, 457, 722 S.E.2d 505, 507 (2012) (recognizing mutual mistake of the parties as one of the three circumstances in which reformation is an available remedy); *Maxwell v. Wayne Nat'l Bank*, 175 N.C. 180, 95 S.E. 147 (1918).

2. "The evidence presented to prove mutual mistake must be clear, cogent, and convincing, and the question of reformation on that basis is a matter to be determined by the fact finder." *Smith v. First Choice Servs.*, 158 N.C. App. 244, 250, 580 S.E.2d 743, 748 (2003). *See* NCPJI 101.11 ("Clear, Strong and Convincing Evidence"). "Although this Court will readily grant equitable relief in the nature of reformation or rescission on grounds of mutual mistake when the circumstances require such relief, we jealously guard the stability of real estate transactions and require clear and convincing proof to support the granting of this equitable relief in cases involving executed conveyances of land." *Marriott Fin. Servs., Inc. v. Capitol Funds, Inc.*, 288 N.C. 122, 139, 217 S.E.2d 551, 562 (1975). *See also Willis v. Willis*, 216 N.C. App. 1, 3–4, 714 S.E.2d 857, 859 (2011) ("[T]here is 'a strong presumption in favor of the correctness of the instrument as written and executed, for it must be assumed that the parties knew what they agreed and have chosen fit and proper words to express that agreement in its entirety.'") (quoting *Hice v. Hi-Mil, Inc.*, 301 N.C. 647, 651, 273 S.E.2d 268, 270 (1981)); *Inland Harbor Homeowners Ass'n v. St. Joseph's Marina, LLC*, 219 N.C. App. 348, 353-54, 724 S.E.2d 92, 97 (2012) (rejecting the plaintiff's request for reformation based on mutual mistake of fact when the plaintiff "failed to offer clear, cogent, and convincing evidence of [the defendant's] mistake").

3. The mistake must concern a past or existing fact. A mistaken belief or assumption as to a future performance or predicted future event does not qualify. *Opsahl v. Pinehurst, Inc.*, 81 N.C. App. 56, 62, 344 S.E.2d 68, 72 (1986).

4. "[T]he mistake must be of an existing or past fact which is material; it must be as to a fact which enters into and forms the basis of the contract, or in other words it must be of the essence of the agreement…and must be such that it animates and controls the conduct of the parties." *MacKay v. McIntosh*, 270 N.C. 69, 73, 153 S.E.2d 800, 804 (1967).

5. "A unilateral mistake, unaccompanied by fraud, imposition, undue influence or like oppressive circumstances, is not sufficient to avoid a contract or conveyance." *Marriott Fin. Servs., Inc. v. Capitol Funds, Inc.*, 288 N.C. 122, 136, 217 S.E.2d 551, 56 (1975); *see also Tarlton v. Keith,* 250 N.C. 298, 305, 108 S.E.2d 621, *625 (1959); Howell v. Waters,* 82 N.C. App. 481, 487, 347 S.E.2d 65, 69 (1986). A mistake of law, even if mutual, will not justify the setting aside of a deed. *Roberson v. Penland*, 260 N.C. 502, 505, 133 S.E.2d 206, 208 (1963); *Gerdes v. Shew*, 4 N.C. App. 144, 151-152, 166 S.E.2d 519, 525 (1969).

6. If a party's agent knows or has reason to know of the mistake, *Howell v. Waters,* 82 N.C. App. 481, 488, 347 S.E.2d 65, 69 (1986), or causes the mistake, the agent's state of mind or conduct is imputed to its principal, *MacKay v. McIntosh*, 270 N.C. 69, 72–3, 153 S.E.2d 800, 803 (1967).

7. *Howell v. Waters,* 82 N.C. App. 481, 488, 347 S.E.2d 65, 69 (1986).

850.25 DEEDS—ACTION TO SET ASIDE—FRAUD.[1, 2]

The (*state number*) issue reads:

"Was the [execution] [delivery] of (*identify deed*) by (*name grantor*) procured by fraud?"

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, six things:

First, that (*name grantor*) [made a false representation of] [concealed] a material fact.

(A statement of opinion, belief, recommendation, future prospects or a promise ordinarily is not a representation of fact.[3] However, a promise can be a false representation of fact if, at the time it is made, the person making the promise has no intention of carrying it out).[4]

(A concealment occurs when a person fails to disclose that which, under the circumstances, should be disclosed. A person has a duty to disclose all facts material to a transaction or event where that person [is a fiduciary][5] [has made a partial or incomplete representation][6] [is specifically questioned about them][7] [(*state any other situation where a duty to disclose is imposed by law*)]).

Second, that the [false representation] [concealment] was calculated to deceive. [A representation is calculated to deceive when the person who makes it knows it to be false, or makes it recklessly, without any knowledge of its truth or falsity, as a positive assertion.[8]] [A concealment is calculated to deceive when the person who makes it knows there is a duty to disclose, or is recklessly indifferent to a duty to disclose].

Third, that the [false representation was made][concealment was done] with the intent[9] to deceive.[10]

Fourth, that (*name grantor*) was, in fact, deceived by the [false representation] [concealment].

Fifth, that (*name grantor's*) reliance was reasonable. (*Name grantor's*) reliance would be reasonable if, under the same or similar circumstances, a reasonable person, in the exercise of ordinary care for his or her own welfare, [would have relied on the false representation] [would not have discovered the concealment].[11]

And Sixth, that (*name grantor*) [executed] [delivered] the (*identify deed*) as a result of (*name grantor's*) reliance on (*name person's*) [false representation] [concealment].[12] In deciding whether (*name grantor*) [executed] [delivered] the [identify deed] as a result of (*name grantor's*) reliance on (*name person's*) [false representation] [concealment], you may consider evidence of

[any weakness of mind of (*name grantor*)][13]

[any inadequacy of the [price][consideration] paid to (*name grantor*) for entering into the contract][14]

[(*state any other factor supported by the evidence*)].

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 (*name grantor's*) [execution] [delivery] of [*identify deed*] was procured by fraud, 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.

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1. *Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 374 S.E.2d 385 (1988); *Massey v. Duke Univ.*, 130 N.C. App. 461, 503 S.E.2d 155 (1998).

2. A decree setting aside the deed is not the only remedy, as fraud is one of the "three circumstances under which reformation could be available." *Janice D. Willis Revocable Trust*

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v. Willis, 365 N.C. 454, 457, 722 S.E.2d 505, 507 (2012) (citing *Crawford v. Willoughby*, 192 N.C. 269, 134 S.E. 494 (1926).

3. *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 255, 266 S.E.2d 610, 615 (1980), *overruled on other grounds by Myers & Chapman, Inc.*, 323 N.C. 559, 569, 374 S.E.2d 385, 392; *Ragsdale v. Kennedy*, 286 N.C. 130, 139, 209 S.E.2d 494, 500 (1974); *Myrtle Apartments, Inc. v. Lumbermen's Mut. Cas. Co.*, 258 N.C. 49, 52, 127 S.E.2d 759, 761 (1962).

4. *Britt v. Britt*, 320 N.C. 573, 579, 359 S.E.2d 467, 471 (1987), *overruled on other grounds by Myers & Chapman, Inc.*, 323 N.C. at 569, 374 S.E.2d at 392; *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 255, 266 S.E.2d 610, 616.

5. *Curl v. Key*, 311 N.C. 259, 264, 316 S.E.2d 272, 275 (1984); *Link v. Link*, 278 N.C. 181, 192, 179 S.E.2d 697, 704 (1971). Where there is no dispute as to whether a fiduciary relationship exists, a peremptory instruction may be given here. Otherwise, a separate issue should be submitted. *See* N.C.P.I. Civil—850.35 ("Deeds—Action to Set Aside—Constructive Fraud").

6. *Ragsdale v. Kennedy*, 286 N.C. 130, 139, 209 S.E.2d 494, 501 (1974)

7. *Johnson v. Owens*, 263 N.C. 754, 758, 140 S.E.2d 311, 314 (1965).

8. *Tarlton v. Keith*, 250 N.C. 298, 304, 108 S.E.2d 621, 624-625 (1959); *Atkinson v. Charlotte Builders, Inc.*, 232 N.C. 67, 68, 59 S.E.2d 1, 1-2 (1950).

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

10. *Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 568, 374 S.E.2d 385, 391 (1988).

11. *Fox v. S. Appliances, Inc.*, 264 N.C. 267, 271, 141 S.E.2d 522, 526 (1965); *Johnson v. Owens*, 263 N.C. 754, 758, 140 S.E.2d 311, 314 (1965).

12. Inadequacy of consideration alone, if it is shockingly insufficient, will support a finding of fraud without other evidence. *Wall v. Ruffin*, 261 N.C. 720, 723, 136 S.E.2d 116, 118 (1964); *Garris v. Scott*, 246 N.C. 568, 575, 99 S.E.2d 750, 755 (1957); *Carland v. Allison*, 221 N.C. 120, 122, 19 S.E.2d 245, 246 (1942); *see also* N.C.P.I.-Civil 850.30 ("Deeds-Action to Set Aside-Grossly Inadequate Consideration (Intrinsic Fraud)").

13. *Davis v. Davis*, 223 N.C. 36, 38, 25 S.E.2d 181, 182 (1943); *Lamb v. Perry*, 169 N.C. 436, 444, 86 S.E. 179, 183 (1915).

14. *McPhaul v. Walters*, 167 N.C. 182, 83 S.E. 321 (1914).

860.20 WILLS—ISSUE OF UNDUE INFLUENCE.

The (*state number*) issue reads:

"Was the execution of propounder's exhibit (*state number*) procured by undue influence?"[1]

You are to answer this issue only if you have answered issue(s) (*state number*) in favor of the propounder.

On this issue the burden of proof is on the caveator.[2] This means that the caveator must prove, by the greater weight of the evidence, that the execution of propounder's exhibit (*state number*) was procured by undue influence.

Undue influence occurs when a decedent's professed act is not the decedent's own but is, in fact, the act of another person exerting the influence.[3] Influence is undue when it causes the decedent to make a will which the decedent would not have otherwise made.[4] The undue influence must act upon the free will of the person at the time the person executes the will.[5]

The existence of undue influence is for you to determine from all the facts and circumstances in evidence.[6] You may consider, together with all the other relevant facts and circumstances:[7]

1. Old age and physical and mental weakness.
2. That the person signing the paper is in the home of the beneficiary and subject to the beneficiary's constant association and supervision.
3. That others have little or no opportunity to see the person.
4. That the will is different from and revokes a prior will.
5. That it is made in favor of one with whom there are no ties of blood.
6. That it disinherits the natural objects of the decedent's bounty.

7. That the beneficiary has procured its execution.

[(*state any other relevant factors supported by the evidence*)]

(Undue influence does not necessarily involve moral turpitude or even a bad or improper motive.)[8]

(Mere persuasion, without more, is not undue influence. A person may use fair argument and persuasion to induce another to execute a will in *his or her* favor.)[9]

(Influence gained by kindness and affection, without more, is not undue, even if it induces a person to make an unequal or unjust disposition of the decedent's property.)[10]

Finally, as to this issue on which the caveator has the burden of proof, if you find by the greater weight of the evidence that the execution of propounder's exhibit (*state number*) was procured by undue influence, then it would be your duty to answer this issue "Yes" in favor of the caveator.

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 propounder.

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1. When the will is procured by undue influence, the entire will is invalid. If undue influence has been exerted to procure only a part of the will, the part of the will not caused by undue influence may be held valid. However, when only a portion of the will is alleged to have been procured by undue influence, the court may submit an issue as to which legacy or devise was procured by undue influence and which portion of the document constitutes the will of the decedent. *See McDonald v. McLendon*, 173 N.C. 172, 177, 91 S.E. 1017, 1019 (1917); *Sumner v. Staton*, 151 N.C. 198, 204, 65 S.E. 902, 906 (1909).

2. *In re Simmons' Will*, 268 N.C. 278, 278, 150 S.E.2d 439, 440 (1966); *In the Matter of Will of Prince*, 109 N.C. App. 58, 61, 425 S.E.2d 711, 713 (1993). When the caveator contends that a fiduciary relationship existed between the propounder and the decedent, it may be necessary to submit an issue as to the existence of such fiduciary relationship. A fiduciary relationship exists where "there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Curl v. Key*, 311 N.C. 259, 264, 316 S.E.2d 272, 275 (1984); *see also McNeill v. McNeill*, 223 N.C. 178, 181, 25 S.E.2d 615, 616 (1943). For further definition and explanation of the fiduciary relationship, as well as a list of fiduciary relationships that exist as a matter of law, *see* N.C.P.I. 900.10 ("Definition of Fiduciary; Explanation of Fiduciary Relationship").

In those cases in which a fiduciary relationship is found to exist, the burden of proof shifts to the propounder to prove "that the will was the free and voluntary act of the testator". *McNeill v. McNeill*, 223 N.C. 178, 181, 25 S.E.2d 615, 617 (quoting *In re Will of Everett*, 153 N.C. 83, 68 S.E. 924, 925 (1910)); *see also In re Estate of Ferguson*, 135 N.C. App. 102, 106, 518 S.E.2d 796, 799 (1999) (citing *In re Will of Atkinson*, 225 N.C. 526, 530, 35 S.E.2d 638, 640 (1945)) ("When a fiduciary relationship exists between a propounder and testator, a presumption of undue influence arises and the propounder must rebut that presumption.")). In such cases the burden of proof paragraph and the mandate will need to be altered so as to reflect the shift in the burden of proof.

3. *In re Thompson's Will*, 248 N.C. 588, 593, 104 S.E.2d 280, 284 (1958). *In re Will of Dunn*, 129 N.C. App. 321, 328, 500 S.E.2d 99, 104 (1998) ("There are four general elements of undue influence: (1) a person who is subject to influence; (2) an opportunity to exert influence; (3) a disposition to exert influence; and (4) a result indicating undue influence.").

4. *In re Will of Jarvis*, 334 N.C. 140, 145, 430 S.E.2d 922, 925 (1993) (indicating that caveators failed to identify who allegedly asserted undue influence or how the will did not conform to testator's intent); *In re Craven's Will*, 169 N.C. 561, 568, 86 S.E. 587, 591, 594 (1915); *see also In re James Junior Phillips*, 251 N.C. App. 99, 112, 795 S.E.2d 273, 283 (2016) (quoting *In re Estate of Loftin*, 285 N.C. 717, 722, 208 S.E.2d 670, 674-75 (1974)) ("Undue influence is a fraudulent influence over the mind and will of another to the extent that the professed action is not freely done but is in truth the act of the one who procures the result.").

5. *Hardee v. Hardee*, 309 N.C. 753, 756, 309 S.E.2d 243, 245 (1983); *In re Will of Turnage*, 208 N.C. 130, 132, 179 S.E. 332, 333 (1935).

6. *NOTE WELL: Whether a specific factor exists, and whether any number of factors together is sufficient to demonstrate undue influence over a decedent's execution of a will, are material questions of fact.* See In re James Junior Phillips*, 251 N.C. App. at 112, 795 S.E.2d at 282 (quoting* In re Will of Smith*, 158 N.C. App. 722, 727, 582 S.E.2d 356, 360,* review denied*, 357 N.C. 506, 588 S.E.2d 474 (2003)).*

7. *In re Will of Andrews*, 299 N.C. 52, 55, 261 S.E.2d 198, 200 (1980) (stating seven "factors that are relevant on the issue of undue influence"). However, these factors are not exhaustive. *In re Will of Andrews*, 299 N.C. at 54–5 (citation omitted) ("It is impossible to set forth all the various combinations of facts and circumstances that are sufficient to make out a case of undue influence because the possibilities are as limitless as the imagination of the adroit and the cunning. The very nature of undue influence makes it impossible for the law to lay down tests to determine its existence with mathematical certainty.").

8. *In re Will of Turnage*, 208 N.C. 130, 132, 179 S.E. 332, 333 (1935).

9. *In re Frank's Will*, 231 N.C. 252, 260, 56 S.E.2d 668, 675 (1949).

10. *In re Frank's Will*, 231 N.C. 252, 260, 56 S.E.2d 668, 675 (1949).

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